

22nd September, 1994

MINUTES OF SPECIAL CONVOCATION

Thursday, 22nd September, 1994
9:30 a.m.

PRESENT:

The Treasurer (Paul S. A. Lamek), Blue, Brennan, Campbell Carter, Copeland, Cullity, Curtis, Elliott, Finkelstein, Graham, Howie, Manes, Moliner, S. O'Connor, Palmer, Richardson, Sealy, Thom, Topp and Weaver.

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IN PUBLIC

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The reporter was sworn.

Mr. Michael Brown, the Law Society's Senior Counsel-Discipline introduced the department's two new Discipline Counsel Kate Wootten and Georgette Gagnon. Mr. Brown also introduced Ms. Janet Leiper the new Pro Bono Duty Counsel.

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DISCIPLINE COMMITTEE

Re: Roger Patrick Peter COONEY - Toronto

The Secretary placed the matter before Convocation.

Ms. Curtis and Ms. Moliner did not participate.

Ms. Christina Budweth appeared for the Society and Mr. Charles Mark appeared for the solicitor. The solicitor was not present.

An adjournment was requested on consent to the next Discipline Convocation. The solicitor had filed a Notice of Disagreement and needed time to prepare documents for Convocation.

The adjournment was granted to the next Discipline Convocation on October 26th.

Counsel retired.

Re: George FLAK - Toronto

The Secretary placed the matter before Convocation.

Ms. Curtis and Ms. Graham did not participate.

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

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Ms. Budweth requested an adjournment on consent to the next Discipline Convocation as counsel for the solicitor had a conflict and was unable to proceed today.

An adjournment was granted to the next Discipline Convocation on October 26th.

Counsel retired.

Re: William Donald GRAY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Copeland and Thom and Ms. Graham did not participate.

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

Mr. Foster requested an adjournment on consent for 60 days. He advised that the solicitor had ordered transcripts and would be filing a Notice of Disagreement and would need time to prepare the documentation for Convocation.

An adjournment was granted to the November Special Convocation.

Counsel retired.

Re: Lee Edward WARD - Carleton Place

The Secretary placed the matter before Convocation.

Mr. Topp and Ms. Weaver did not participate.

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

Ms. Budweth requested an adjournment on consent. The solicitor had filed a Notice of Disagreement and needed time to obtain a transcript and prepare the documentation for Convocation.

An adjournment was granted to the November Discipline Convocation.

Counsel retired.

Re: Jeffrey Mark LEVY - Toronto

The Secretary placed the matter before Convocation.

Ms. Graham did not participate.

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

Ms. Budweth advised that further Complaints had been issued against the solicitor and both counsel requested an adjournment so that all matters could be dealt with together.

Convocation was advised that the solicitor was not practising.

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The matter was adjourned to October 26th to be spoken to.

Counsel retired.

Re: Raymond Vincent DONOHUE - Sarnia

The Secretary placed the matter before Convocation.

Messrs. Campbell and Thom and Ms. Moliner did not participate.

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

Mr. Foster advised that the solicitor was in the hospital and was unable to attend Convocation. An adjournment was requested on consent to the next Discipline Convocation.

The adjournment was granted to the next Discipline Convocation on October 26th peremptory to the solicitor.

Counsel retired.

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ADMISSIONS AND MEMBERSHIP COMMITTEE

Application for Readmission

Re: Michael Angelo SPENSIERI - Toronto

The Secretary placed the matter before Convocation.

Messrs. Carter and Cullity withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Spensieri appeared on his own behalf.

Mr. Spensieri made submissions asking Convocation to allow him to reattend before the original Admissions Committee panel to update his medical condition and arrive at sufficient controls to safeguard the public.

Counsel for the Society made submissions and advised Convocation that there were 3 options Convocation could take: (1) allow Mr. Spensieri to withdraw and start afresh (2) Convocation hear new evidence or (3) return the matter to the original committee.

Counsel, Mr. Spensieri, the reporter and the public withdrew.

It was moved by Ms. Weaver but failed for want of a seconder that the matter proceed today.

It was moved by Mr. Topp, seconded by Mr. Copeland that the matter go back to the original Committee to hear further evidence.

Carried

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

Counsel and Mr. Spensieri retired.

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DISCIPLINE COMMITTEE

Re: Ross HAINSWORTH - Edmonton

The Secretary placed the matter before Convocation.

Messrs. Copeland and Thom withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Frank Marrocco appeared for the solicitor who was present.

Mr. Cullity raised the issue of the prior involvement of John Laskin. Mr. Marrocco raised no objection to Mr. Cullity participating.

Submissions were made by Mr. Marrocco that the matter be heard by a new committee for further evidence and rescission of Convocation's acceptance of the Report. Reference was made to the solicitor's Affidavit sworn September 15th, 1994 which raised a defense to the charges and that Mr. Hainsworth was unrepresented before the Committee.

Submissions were made by counsel for the Society that the request not be granted and that the evidence being put forward did not meet the test of due diligence on the basis that it was available at the time of the hearing and could have been led by Mr. Hainsworth. Further, all the information in the Affidavit was in the material supplied to the Discipline Committee.

There were questions from the Bench.

Mr. Marrocco in reply asked Convocation not to accept the Report and return the matter back to the original Committee or a new committee for re-hearing to allow Mr. Hainsworth to testify and to examine the Law Society's witnesses.

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

It was moved by Mr. Finkelstein, seconded by Ms. Weaver that the matter go back for hearing de novo.

Lost

Convocation decided to admit the Affidavit for the purpose of determining the disposition of the matter. Counsel would be advised that the transcript submitted by Mr. Hainsworth was reviewed and did not indicate an error in principle on the part of the Committee and that the test of due diligence was not met. Convocation would give wide latitude to the defence to present evidence on the issue of penalty.

Mr. Finkelstein is to prepare Reasons for Convocation's decision.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the matter would proceed on the issue of penalty in November.

Counsel and solicitor retired.

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Convocation took a brief recess at 11:20 a.m. and resumed at 11:30 a.m.

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ADMISSIONS AND MEMBERSHIP COMMITTEE

Application for Readmission

Re: James Frederick Harris GRAY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Cullity, Finkelstein and Topp and Ms. Weaver withdrew for this matter.

Mr. Brown appeared for the Society and Mr. Gray appeared on his own behalf.

The Report of the Admissions Committee was filed as Exhibit 1.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE LAW SOCIETY ACT

AND IN THE MATTER OF JAMES FREDERICK HARRIS GRAY
of the City of Toronto

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

REASONS FOR DECISION

PANEL:

Mr. Neil Finkelstein	-	Chair
Mrs. Laura Legge, Q.C.		
Mr. S. Casey Hill		

APPEARANCES:

Mr. Michael Brown	-	for the Law Society
Ms. Janet Brooks		

The Applicant representing himself

DATE:

March 3, 1994

NATURE OF APPLICATION

James Frederick Harris Gray ("Mr. Gray") seeks readmission to the Law Society of Upper Canada ("the Society") pursuant to section 46 of the Law Society Act.

RESIGNATION

Mr. Gray suffered severe depression as the result of a loss of loved ones, misappropriated a significant amount of money, and by Order of Convocation dated October 22, 1992 was permitted to resign. In so ordering, Convocation acted upon the recommendation of a highly experienced Discipline Committee, chaired by J. James Wardlaw. The Reasons for Recommendation of the Discipline Committee read, in full, as follows:

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"The normal penalty for misappropriation of money is disbarment. The Committee has concluded, however, that such a penalty would not be just in the circumstances of this case. The Solicitor's actions have been largely caused by the depression over which he has no control. The Society has, in many instances, in the past, allowed a solicitor to resign if the misappropriation has been caused by a medical problem and there has been restitution. Your Committee recommends that Convocation adopt those precedents.

In making the joint submissions the Society did not ask that the Solicitor undertake not to seek readmission. Your Committee agrees that no such undertaking is required. We believe that he is fundamentally an honest and caring person. If he can demonstrate to a future Committee that he is cured, your Committee is of the view that, subject to requalification, there should be no problem with his reinstatement."

Permission to resign is a highly unusual penalty in cases of significant misappropriation of funds, and statements by a Discipline Committee to the effect that if the solicitor is cured, there should be no problem with his reinstatement are unusual as well. A copy of the Report and Decision of the Discipline Committee dated September 10, 1992 is attached hereto as Appendix A. We accept the Recommendation of the Discipline Committee for our purposes, and approach our task in accordance with its terms.

REASONS AND RECOMMENDATION

The Admissions Committee heard this matter on March 3, 1994, commencing with evidence from Mr. Gray himself. Mr. Gray has been attending consistently before Dr. Morris, a psychiatrist with whom he has an ongoing relationship. Dr. Morris has written reports in favour of Mr. Gray's reinstatement, and stated the following in his report to this Committee dated February 25, 1994:

"It would appear that Mr. Gray has all of the personal resources and support system necessary to function in his vocation of choice if he wishes. I would have no reservations recommending this gentleman's reinstatement as a lawyer."

Mr. Gray has an ongoing relationship with Dr. Morris, and is continuing to see him on a regular basis. Mr. Gray does not intend to "backslide", and the Committee is satisfied that Mr. Gray fully intends to keep up his efforts in this regard. Mr. Gray believes that he can return to the practice of law, and be beneficial to the community and his clients. He is aware that he became involved in a very serious matter, and shows considerable remorse. He anticipates dividing his time between community service and camping work on the one hand, and the practice of law on the other.

The Committee also heard the evidence of Dr. Glancy, a psychiatrist called by counsel for the Law Society, Dr. Glancy is eminent in his field and the Committee was impressed by his evidence.

Dr. Glancy interviewed Mr. Gray and his wife, administered two psychometric tests, and reviewed Mr. Gray's medical reports. The Law Society's instructions to Dr. Glancy were to assess whether Mr. Gray was still depressed, whether his grief (over the death of loved ones which caused the depression leading to the defalcations) was resolved, whether he appreciated what he did and showed remorse, and to provide comments on the probability of Mr. Gray offending in the future. According to Dr. Glancy, the Law Society made it very clear to him on at least two occasions that it had no vested interest in influencing his assessment in either direction.

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In his analysis of Mr. Gray's current state, Dr. Glancy said at page 8 of his Report dated February 21, 1994:

"The subject admitted to being generally 'as good as I've ever felt in memory'. He rated the severity of any depressive feelings as approximately 1 - 2 on a scale where '0' is not at [sic] depressed and '7' is an [sic] severe depression as is possible. Very few people endorse '0' when given this subjective scale. This would appear to be an honest indication of a resolved depressive illness. The subject appears optimistic, stating 'life is good now, I'm doing what I want when I want - I'm doing constructive things - I can't remember when I felt as good.' In particular, he is sleeping well, his appetite is hardy and he does not articulate any psychosomatic symptoms. He does not have any suicidal thoughts. The BDI score was '2'. This is well-established subjective rating scale for depression. This result should, of course, have a caveat that this is a subjective scale, that is, filled in by the subject himself and is clearly quite transparent. The result should therefore only be interpreted with caution in the forensic setting. However, he does not endorse pathological guilty, self-deprecating thoughts, decrease in memory attention or any other of the associated symptoms of severe depression. At the commencement of the interview, he appeared mildly suspicious and slightly brittle. I think upon discussion of some of the points of order noted in the introduction, he was able to relax somewhat and open up. At appropriate times during the interview, his eyes filled with tears, which was not surprising given the circumstances of the content of the discussion at that time.

There was no evidence of suicidal ideation. There was no evidence of delusions or hallucinations.

He did describe to me his current activities which includes writing, running a consulting business related to camp ground activities and running a private camp ground. It appears that he is able to modulate his workload assiduously and is careful to set limits for himself.

Dr. Glancy's conclusions in oral evidence were that Mr. Gray no longer suffers from major depressive episodes or post-traumatic stress disorder. Through psychotherapy, Mr. Gray is much better able to cope with problems. He can think about his feelings, and knows the value of going to a professional. Dr. Morris has been able to help Mr. Gray, and that augers well for a good prognosis.

Dr. Glancy's conclusions and recommendations in his Report, in full, are as follows:

"Conclusions and Recommendations

Mr. James Frederick Harris Gray is a 63 year old lawyer who was found guilty of professional misconduct by the Convocation of the Law Society of Upper Canada on October 22nd, 1992. The evidence of contemporaneous clinical assessments at that time which accepted by the Discipline Committee revealed that Mr. Gray suffered from depression, probably as a result of the sudden death of his 17 year old daughter in 1985. The Law Society therefore granted him permission to resign noting that 'if he can demonstrate to a future committee that he is cured... there should be no problem with his reinstatement.'

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In my opinion he suffered from chronic major depression over a number of years with an associated diagnosis of post-traumatic stress disorder. I should note that the current diagnostic classification does not allow us to specifically diagnose a chronic and complicated grief reaction but this clearly relates to the herein disorder. The above diagnoses also reflect his tendency to absorb himself in his work to an excess degree at times of stress resulting in what in many circles is referred to 'burnout'.

It is noted that his underlying personality predisposes him somewhat to the above disorders in that he has a tendency to deny his feelings, not sharing them with others or bring them into the open but rather sublimating them by increased activity, particularly regarding his work. This mechanism helped him avoid overwhelming affect-laden situation. Obsessive compulsive personality traits also predispose him to depression and pathological grief.

On the basis of my assessment, it would appear that the subject's symptoms of depression and post-traumatic stress disorder are substantially resolved.

Some concerns must exist around his underlying personality traits which made him vulnerable both to pathological grief, workaholism and burnout. It is also noted in Dr. Vachon's report, and I think reflected in some points of my report, that he has frequently expressed some betrayal by The Law Society and there is a passive aggressive edge both to his behaviour in his past and somewhat to his attitude at present. This in itself should not be excessively pathologized but is just worthy of note. In particular, I believe that in many single-handed practising lawyers, that this would be almost the rule rather than the exception. Nevertheless in this case, it has perhaps contributed to serious instances of professional misconduct and requires monitoring.

The subject has developed insight into his tendency to withdraw emotionally using work as a defence mechanism causing occupational stresses. He has been able to identify, delineate and share his feelings. This may help him to deal with future losses and stresses in a more adaptive manner. He also has a good therapeutic relationship with Dr. Morris.

I believe that the subject was quite strong on an understanding of the gravity of his misconduct. He enunciates this in clear and positive terms.

If the subject is granted readmission, I would suggest that the Society consider the following contingencies:

1. He continue to see Dr. Morris as indicated and Dr. Morris supply quarterly reports to The Law Society. The reports need be only brief.
2. The subject be assessed annually by an independent mutually agreed upon psychiatrist and a report be provided to The Law Society.

With an abundance of caution. I would recommend the following although these are not a sine qua non of readmission.

- (a) That the Society monitor the subject's workload and office procedures, perhaps on an intermittent basis;
- (b) That The Law Society monitor the subject's finances, perhaps on an intermittent basis.

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Probability of Recidivism

The subject's mental state at the time of the professional misconduct was clearly pathological. It can be understood as a reaction to a set of circumstances upon a predisposed personality. The subject has resolved his grief regarding the circumstances above and has some insight into his pathological manner in dealing with the stresses upon him. Despite the tinge of passive aggressive mentality that may have had a bearing on the original offenses, there is no evidence of any sort of antisocial personality disorder, psychopathy, alcohol or substance abuse or repetitive pattern of antisocial behaviours which would predict recidivism. The accused takes full responsibility for his behaviour and apparently sincerely expresses an appreciation of the gravity of his misconduct. I would therefore assert since his depression is cured, that with the monitoring and contingencies above, there should be a low risk of recidivism."

Mr. Gray accepted the four conditions laid out by Dr. Glancy for Mr. Gray's reinstatement. The Committee recommends readmission pursuant to those conditions modified as follows:

- (i) Mr. Gray should continue to see Dr. Morris, and Dr. Morris should supply quarterly reports to the Law Society. The reports need only be brief;
- (ii) Mr. Gray be assessed annually by an independent, mutually agreed upon psychiatrist and a report should be provided to the Law Society;
- (iii) The Law Society should monitor Mr. Gray's workload and office procedures at its discretion.;
- (iv) The Law Society monitor Mr. Gray's finances at its discretion; and
- (v) Mr. Gray must practice, should he choose to do so, in association with another lawyer.

DATED this 12th day of May, 1994

Neil Finkelstein

It was moved by Ms. Palmer, seconded by Ms. Elliott that the Report be adopted.

Submissions were made by Mr. Brown that the Committee had erred in principle in recommending readmission only 23 months after the misappropriation.

Convocation went in camera and after discussions of the evidence to be referred to, resumed in public.

Submissions were made by Mr. Gray in support of the Committee's recommendation.

There were questions from the Bench.

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Counsel, Mr. Gray, the reporter and the public withdrew.

The Palmer/Elliott motion that the Report be adopted was voted on and lost.

Mr. Manes is to prepare Reasons.

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

Counsel and Mr. Gray retired.

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

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CONVOCATION RECONVENED AT 2:00 P.m.

PRESENT:

The Treasurer, Blue, Bragagnolo, Brennan, Campbell, Carter, Cullity, Curtis, Elliott, Finkelstein, Graham, Lerner, Manes, Moliner, Murray, Palmer, S. O'Connor, Richardson, Thom, Topp and Weaver.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Re: Gerald Nicholas KUZAK - Windsor

The Secretary placed the matter before Convocation.

Ms. Curtis and Ms. Moliner withdrew for this matter.

Ms. Christina Budweth 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 2nd August, 1994, together with an Affidavit of Service sworn 9th September, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th August, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 15th September, 1994 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

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THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
Carole Curtis
Marie Moliner

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

Christina Budweth
for the Society

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

Not Represented
for the solicitor

Heard: November 30, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 16, 1993, Complaint D168/93 was issued against Gerald Nicholas Kuzak alleging that he was guilty of professional misconduct.

This matter was heard on November 30, 1993 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Carole Curtis and Marie Moliner. The Solicitor was in attendance at the hearing and represented himself. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D168/93

2. a) While acting for both the vendor, Mrs. Jina, and purchaser, Mr. Abou-dib, in a real estate transaction, he preferred the interests of the purchaser to those of the vendor, to the prejudice of the vendor.

Evidence

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

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"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D168/93 and is prepared to proceed with a hearing on this matter on November 30, 1993.

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 D168/93 and this Agreed Statement of Facts and admits the particular contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. BACKGROUND

4. The Solicitor was called to the Bar in 1975. He practises as a partner in a law firm in Windsor, Ontario.

5. Mrs. Marie Diane Jina, of Windsor, placed an advertisement in the May 28, 1990 Windsor Star to sell her residential property located at 3315 St. Patrick's Drive.

6. At the time, the property was also listed with a realtor for \$220,000.00 with an expected selling price of \$220,000.00. The Solicitor would testify that he had no knowledge of the listing at the times material to the complaint. The Society would offer no evidence in this regard.

7. Mrs. Jina had recently been divorced and had also been hospitalized on several occasions in or about this time as a result of stress from the divorce proceeding. The Solicitor had no knowledge of Mrs. Jina's mental state prior to the closing of the transaction which is the subject of this complaint.

8. Mrs. Jina was approached by Mr. Tim Dib, a licensed real estate broker in Windsor, who advised that he was interested in purchasing the property on behalf of his father, Alex Abou-dib. The fact that Mr. Dib was real estate broker was not known to Mrs. Jina at the time of the events which form the basis of this complaint.

9. The Agreement of Purchase and Sale dated May 30, 1990, was signed by Mr. Abou-dib and Mrs. Jina. The Agreement of Purchase and Sale indicates a purchase price of \$80,000.00 with no deposit. A copy of the Agreement of Purchase and Sale is attached as Exhibit 1 to this agreed statement of facts.

10. Mrs. Jina signed a mortgage agreement stipulating that the entire \$80,000.00 was to be paid to Mrs. Jina through a vendor take-back mortgage with a ten year term with an annual rate of interest of ten percent. The mortgage provided for the payment of the whole or any part of the unpaid balance at any time without notice or bonus. A copy of the mortgage agreement is attached as Exhibit 2 to this agreed statement of facts.

11. The transaction was scheduled to close on August 31, 1990.

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12. The Solicitor had been the solicitor for Mr. Dib's family for approximately eighteen (18) years. On Mr. Dib's suggestion, the Solicitor acted for both Mr. Abou-dib and Mrs. Jina on the transaction, although it was Mr. Dib who dealt exclusively with both Mrs. Jina and the Solicitor in making arrangements for closing.

13. The Solicitor had Mrs. Jina and Mr. Abou-dib execute an Acknowledgment that he was acting for both of them although he did not discuss the notation of the conflict or the implications of the conflict with them. A copy of the Acknowledgement is attached as Exhibit 3 to this agreed statement of facts. The Solicitor did suggest that Mrs. Jina seek independent counsel, she declined to do so.

14. In April, 1981, the Solicitor acted for Douglas and Phyllis Armstrong in the sale of the property to the Jina's for \$109,500. The Solicitor's evidence would be that he did not recall acting for the MacDonald's at the time he acted on the subsequent sale from Mrs. Jina to Mr. Dib. The Society would offer no evidence in this regard.

15. The transaction actually closed on June 8, 1990. A copy of the Deed/Transfer of Land and mortgage are attached as Exhibits 4 and 5 to this agreed statement of facts.

16. Throughout the entire period of the Solicitor's retainer he did not provide Mrs. Jina with any advice regarding the merits of the transaction or the implications of the terms of the vendor take back mortgage.

17. The parties apparently reached an oral agreement under the terms of which Mrs. Jina would continue to occupy the house.

18. During the week following the close of the transaction, Mrs. Jina was hospitalized suffering, essentially, from a nervous breakdown.

19. Mrs. Jina would testify that shortly after her admission to the hospital she telephoned the Solicitor to advise him that she had not properly understood the transaction and that she wished to reverse the transaction. The Solicitor replied "I'll help you". The Solicitor's evidence would be that he does not recall this conversation but he would not deny it took place.

20. Following her release from the hospital Mrs. Jina returned to her home and continued to live there until September, 1990, when she was asked to leave by Mr. Dib. Mrs. Jina in fact never vacated the premises for any length of time.

21. In or about that time, Mrs. Jina sought the assistance of the solicitor who had acted for her in her matrimonial matter, Peter Eberlie, seeking return of the property. Mr. Eberlie wrote to the Solicitor in November 1990, insisting that the Deed to the property be signed back to Mrs. Jina. A copy of Mr. Eberlie's November 14, 1990 letter to the Solicitor is attached as Exhibit 6 to this agreed statement of facts. The Solicitor's response dated November 16, 1990 is attached as Exhibit 7 to this agreed statement of facts.

22. The matter was not immediately resolved as Mr. Dib claimed that he had incurred expenses in improving the property.

23. The Solicitor continued to act for Mr. Dib during negotiations with Mr. Eberlie. He also continued to act after Mrs. Jina retained Julie Fodor in January, 1991. The Solicitor and Ms. Fodor discussed the matter on February 26, 1991 following which the Solicitor provided a list of "expenditures" incurred by Mr. Dib with respect to the property. In response to the Solicitor's February 26, 1991 letter Ms. Fodor wrote to the Solicitor by letter dated April 14, 1991, a copy of which is attached as Exhibit 8 to this agreed statement of facts.

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24. Mrs. Jina's new solicitor, Julie Fodor, reported this matter to the Society by letter dated April 25, 1991. In response to Ms. Fodor's letter of complaint, the Solicitor corresponded with the Society by a letter dated July 11, 1991, a copy of which is attached as Exhibit 9 to this agreed statement of facts.

25. The matter was eventually reported to the Society's Errors and Omissions Department and an adjuster assigned to intervene in the matter.

26. It was not until January 29, 1992, that the Solicitor advised Mr. Abou-dib that because of his involvement with the Law Society's Errors and Omissions Department, Mr. Dib should retain other counsel. A copy of the Solicitor's January 29, 1992 letter to Mr. Abou-dib is attached as Exhibit 10 to this agreed statement of facts.

27. The property was re-conveyed to Mrs. Jina in early 1992 and a payment was made by the Solicitor and Mr. Dib to Mrs. Jina in the amount of \$5,000.00. The Society is prepared to acknowledge that the Solicitor's efforts to settle this matter were instrumental in its resolution.

28. The Solicitor corresponded with the Society again by a letter dated April 13, 1992 in which he set out his position respecting the resolution of the matter. A copy of the Solicitor's April 13, 1992 letter is attached as Exhibit 11 to this agreed statement of facts.

29. The Solicitor now admits that the consideration for the transaction was woefully inadequate irrespective of the lack of deposit and circumstances of the vendor take back mortgage. The Solicitor acknowledges that in the face of the lack of a deposit and the vendor take back mortgage representing the entire purchase price the transaction he should have strongly advised Mrs. Jina not to complete the transaction, which he failed to do.

30. The Solicitor admits that he contravened the provisions of Rule 5, Commentary 13 by continuing to act against Mrs. Jina in negotiations respecting the reversal of the above noted transaction.

V. PRIOR DISCIPLINE

31. The Solicitor was reprimanded in committee on April 14, 1992 and required to pay the Society's costs in the amount of \$500 for his failure to reply to the Society. Copies of the complaints which form the subject of the reprimand are attached as Exhibit 12 and 13 to this agreed statement of facts.

VI. PENALTY

32. The parties will respectfully submit that this committee recommend to Convocation that the Solicitor be reprimanded in Convocation and be required to pay the Society's cost of \$1,500. payable forthwith.

DATED at Toronto this 29th day of November, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gerald Nicholas Kuzak be reprimanded in Convocation and that he pay the Society's costs of \$1,500.00, payable forthwith.

REASONS FOR RECOMMENDATION

The Solicitor acted for both purchaser and vendor, preferring the interests of the purchaser to those of the vendor to the vendor's prejudice.

While the parties executed an acknowledgement that he was acting for both parties, he did not discuss the notation of conflict or the implications of the conflict with them. The vendor declined the Solicitor's suggestion that she seek independent legal advice.

Unknown to the Solicitor, the vendor was going through a stressful divorce and had been hospitalized on several occasions as a result of stress. The purchaser, a real estate broker, was a long standing client of the Solicitor's.

The property, listed at \$229,000 sold for \$80,000 with an oral agreement that the vendor could continue to occupy the house. One week later, the vendor was hospitalized for a "nervous breakdown". While in the hospital, she called the Solicitor and advised him that she wanted to reverse the transaction as she had not properly understood it.

When the matter was not resolved, the vendor retained counsel who complained to the Law Society about the Solicitor's conduct. A year and a half later, through the Solicitor's cooperation, the property was reconveyed to the vendor. The Solicitor disbursed \$5,000 of his own funds to finalize the matter.

Principles of general deterrence require that the Solicitor be publicly reprimanded. A clear message must be sent to the profession that there are risks inherent in representing both parties in a real estate transaction. This Solicitor was fortunate. The vendor got her house back at the Solicitor's expense and did not suffer financial loss.

The Solicitor appeared contrite before us. He admitted the misconduct and, according to the counsel for the Society, was instrumental in resolving the complaint to the clients satisfaction. The Solicitor's record of prior discipline is limited to a reprimand in committee for failure to reply to the Law Society in 1992. For these reasons, we believe that the penalty recommended by this Committee adequately protects the public and will deter this Solicitor, and others, from similar conduct.

Gerald Nicholas Kuzak was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of August, 1994

Kenneth E. Howie,
Chair

It was moved by Mr. Brennan, seconded by Mr. Lerner that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Brennan, seconded by Mr. Bragagnolo that the Recommendation as to Penalty be adopted that is, that the solicitor be reprimanded and pay costs in the amount of \$1,000.

22nd September, 1994

Joint submissions were made in support of the recommended penalty.

The Recommendation as to Penalty was adopted.

The solicitor was reprimanded in Convocation.

Counsel and the solicitor retired.

Re: Wayne Douglas BERTHIN - Midland

The Secretary placed the matter before Convocation.

Mr. Brennan, Ms. Palmer and Ms. Graham withdrew for this matter.

Mr. Neil Perrier appeared for the Society and Ms. Janet Leiper as Duty Counsel appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 9th September, 1993, together with an Affidavit of Service sworn 18th October, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th September, 1993 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 22nd September, 1994 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

K. Julaine Palmer, Chair
Lloyd Brennan, Q.C.
Mrs. Netty Graham

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

Neil Perrier
for the Society

WAYNE DOUGLAS BERTHIN
of the Town
of Midland
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 9, 1992 and
May 26, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 14, 1992, Complaint D136/92 was issued against Wayne Douglas Berthin alleging that he was guilty of professional misconduct.

The matter was heard in public on December 9, 1992 and May 26, 1993 before this Committee composed of K. Julaine Palmer, Chair, Lloyd Brennan, Q.C. and Mrs. Netty Graham. Mr. Berthin attended the hearing unrepresented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D136/92

2. (a) While acting for a mortgagor, Karen McFadyen-Kolbe, on a mortgage refinancing, the Solicitor did prepare and register mortgage documents for a fifth mortgage held by his wife, Helen Berthin, that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.
2. (c) The Solicitor failed to disclose to a client, Frederick William Ardern, that his spouse, Mrs. Berthin, was receiving "placement fees" in relation to mortgage loans being made by Mr. Ardern to the Solicitor's other clients, those other clients being:
 - 1) McFadyen-Kolbe
 - 2) Byers
 - 3) Young
 - 4) Van Aller
 - 5) Corbeau
 - 6) Chiasson.
2. (d) While acting for a mortgagor, Timothy Byers, on a mortgage refinancing, he did prepare and register mortgage documents for a third mortgage held by Mrs. Berthin, that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.
2. (e) While acting for mortgagors, Edith McGruther, Deborah McGruther and Stephen Lee, on a real estate transaction, he did prepare and register mortgage documents for a third mortgage held by his wife that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.
2. (f) The Solicitor acted in a conflict of interest contrary to Rule 5, Commentary 13 of the Rules of Professional Conduct by taking mortgage enforcement proceedings against Edith McGruther, Deborah McGruther and Stephen Lee, when he had acted for these individuals on the same real estate transaction that gave rise to the mortgage enforcement proceedings.
2. (g) His wife, Helen Berthin, did borrow \$35,000 from a client, Frederick William Ardern, on or about September 7, 1990. Although the loan was secured by a second mortgage, the interests of the client were not fully protected by the equity in that property. Further, the client did not have independent legal representation. It is alleged that this is a breach of Rule 7, paragraph 2 of the Rules of Professional Conduct.
2. (h) The Solicitor guaranteed the mortgage loan from Mr. Ardern to his wife, contrary to Rule 23, paragraph 6.

REASONS FOR DECISION

This case involves Wayne Douglas Berthin of the Town of Midland. Mr. Berthin was called to the bar in 1985. He obtained a Bachelor of Applied Science from University of Waterloo in 1980, his LL.B. from University of Toronto in 1983, and an M.B.A. from York University in 1984. Mr. Berthin articulated with the Shell Canada law department. After practising for two years in Toronto, Mr. Berthin moved to the Town of Midland where he carries on a largely real estate and corporate practice.

At the hearing, Mr. Berthin admitted that because of his background, he had extensive knowledge of the manner of calculation of interest rates, more than the average lawyer. His wife was extensively involved at the time of these alleged offences in mortgage financing and he was her lawyer in these transactions at all times.

The case proceeded by way of an Agreed Statement of Fact. The Committee also heard testimony from the Solicitor and from Mr. Robert Walker, actuary. The Solicitor appeared on his own behalf.

The particulars of the complaint can be conveniently grouped as follows:

1. Particulars 2 a, d and e;
2. Particular 2 c,
3. Particular 2 f,
4. Particulars 2 g and h.

Particular 2 b was withdrawn by the Society.

The Agreed Statement of Facts reads as follows:

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D136/92 and is prepared to proceed with a hearing of this matter on December 9, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor admits the facts as hereinafter stated.

IV. FACTS

4. The Solicitor is a sole practitioner in the Midland/Penetanguishene area, and his practice is a general practice with an emphasis on real estate law and civil litigation.

Particulars 2(a), (b) and (c)(1)
McFadyen-Kolbe Refinancing

5. Ms. McFadyen-Kolbe was seeking to refinance a single family dwelling on property located outside of Collingwood. The property was approximately 70% complete when, in early 1990, a Notice of Sale was issued by the existing first mortgagee.

6. Ms. McFadyen-Kolbe approached a mortgage brokerage company known as Shelltree Investments Service ("Shelltree") seeking new first mortgage financing. At that time, Ms. McFadyen-Kolbe agreed to a per annum interest rate of 18%, a bonus on the mortgage of \$5,500 and a brokerage fee of \$3,125. The mortgage statement is contained at Document Book, Tab 1.

7. Shelltree contacted the Solicitor with respect to the investment on or about May 25, 1990. The Solicitor reviewed the proposal with his spouse, Helen Berthin, who proposed that if she could earn the \$5,500 fee in connection with the placement of the mortgage, she would be willing to make up any deficiency which might arise at the time of the close of the refinancing transaction and take a fifth mortgage as security. This arrangement was agreed to by Ms. McFadyen-Kolbe. (See paragraph 10 of the Affidavit of the Solicitor sworn June 3, 1991 at Document Book, Tab 2).

8. The Solicitor arranged the mortgage loan through another client, Mr. Frederick William Ardern, in the sum of \$115,000 (Document Book, Tab 3). The Solicitor states that he relies on the *Professional Standards Checklist Residential Real Estate Law, April, 1991* ("Real Estate Checklist", Document Book, Tab 4), Sections 8, 9, 11 and 12 as not recommending disclosure to his mortgagee client of fees paid by the mortgagor to his wife. Accordingly, the proposed payment of the \$5,500 placement fee by the mortgagor to Mrs. Berthin was not disclosed to the mortgagee, Mr. Ardern. Later when the Law Society became involved and recommended disclosure, the Solicitor immediately disclosed the particular to Mr. Ardern, who had no objection to same.

9. The Solicitor proceeded to act for Helen Berthin, Ms. McFadyen-Kolbe and her husband, and for Mr. Ardern with respect to the transaction (See Solicitor's Internal File Information Sheet, Document Book, Tab 5).

10. Prior to the close of the refinancing transaction, it was apparent there would be insufficient funds received from the proceeds of the first mortgage to satisfy all financial commitments. As a result, the Solicitor prepared a fifth mortgage in favour of his wife, Mrs. Berthin. The first and fifth mortgage transactions closed simultaneously. The terms of the fifth mortgage loan included that the principal loan amount in the sum of \$6,500 with interest at 28%, per annum, compounded monthly, for a monthly payment of \$151.67 (interest only). In addition, there was a lender's fee in the sum of \$900. (See McFadyen-Kolbe Trust Ledger at Document Book, Tab 6). Part of the funds which Mrs. Berthin used to advance the monies, were from the \$5,500 placement fee on the first mortgage. The said fifth mortgage was never fully repaid.

11. The transaction closed on June 1, 1990, at which time all mortgages and postponements with respect to the refinancing were registered (See Ardern Mortgage and Helen Berthin Mortgage at Document Book, Tabs 7 and 8, respectively). Total legal fees and disbursements on the fifth mortgage amounted to \$400, inclusive of a \$25 registration fee. The term of the mortgage was for one year. Total monthly interest payments over the year would amount to \$1,820. Thus, the costs of borrowing were \$900 plus \$400 plus \$1,820 for a total of \$3,120. The actual advance on the mortgage was the sum of \$6,500, out of which \$900 lender's fee and \$400 in legal fees and disbursements were paid for a net advance of \$5,200. The Society and the Solicitor will be leading evidence as to the effective rate of interest. The fifth mortgage was never repaid.

12. Ms. McFadyen-Kolbe's mortgage payments were insufficient to meet the interest requirements of the first and fifth mortgages. In fact, insufficient payments were received from her to meet the first mortgage payments.

13. The Solicitor acted on behalf of Mr. Ardern and prepared and served a Notice of Sale Under Mortgage on March 14, 1991. Soon thereafter the matter was referred to independent counsel. The house was subsequently sold under Power of Sale by Mr. Ardern.

Particulars 2(c)(2) and (d)
Byers Refinancing

14. Mr. Timothy John Byers was another individual who was referred to the Solicitor by Shelltree.

15. Mr. Byers' mortgage commitment with Shelltree called for a bonus of \$5,000 on the mortgage plus a separate mortgage broker's fee.

16. The first mortgage loan to Mr. Byers was from Mr. Ardern in the sum of \$135,000. The amount paid by Mr. Ardern into trust was the sum of \$135,000 (Document Book, Tab 9, lines 24-26). A \$5,000 bonus was paid to the Solicitor's spouse, Helen Berthin, (Trust Ledger, Helen Berthin, Document Book, Tab 10, lines 19-21) who, in turn, loaned the money to Mr. Byers. Helen Berthin's loan to Mr. Byers was secured by a third mortgage (Document Book, Tab 11) in the amount of \$6,400. Helen Berthin charged a lender's fee of \$680 (inclusive of a \$25 registration fee). Total legal fees and disbursements for the third mortgage were \$600. The term of the mortgage was one year, with interest, at a rate of 28% per annum, compounded and payable monthly. Payments were set at the rate of \$149.33 per month, interest only. Monthly interest payments for the year would total \$1,792. Thus, the cost of borrowing was \$680 plus \$600 plus \$1,792 for a total sum of \$3,072. The actual advance on the mortgage was \$6,400 out of which the lender's fee of \$680 and the legal fees and disbursements of \$600 were paid. The Society and the Solicitor will lead evidence with respect to the effective rate of interest. The principle sum of the third mortgage was never repaid.

17. The \$5,000 placement fee paid to the Solicitor's spouse was not disclosed to Mr. Ardern. The Solicitor states that he relies on the *Real Estate Checklist* as not recommending disclosure to his mortgagee client of the payment by the mortgagor of \$5,000 to Mrs. Berthin. Later when the Law Society became involved and recommended disclosure, the Solicitor immediately disclosed the particulars to Mr. Ardern, who had no objection to same.

Particular 2(c)(3-6)
Other "Placement Fees" Not Disclosed

18. There were other instances where a transaction was referred to the Solicitor by Shelltree that provided for a "bonus", wherein the bonus was paid to Mrs. Berthin for arranging a first mortgage placed with Frederick William Ardern. The other instances were as follows:

- | | | | |
|----|--------------------|---|----------------------------|
| a) | Young mortgage | - | placement fee \$2,500; |
| b) | Van Aller mortgage | - | placement fee \$3,500; |
| c) | Corbeau mortgage | - | placement fee \$1,000; and |
| d) | Chiasson mortgage | - | placement fee \$1,500. |

19. Accordingly, the Solicitor states that he relies on the *Real Estate Checklist* as not recommending disclosure to his mortgagee client of the fees paid by the mortgagors to Mrs. Berthin. Later when the Law Society became involved and recommended disclosure, the Solicitor immediately disclosed the particulars to Mr. Ardern, who had no objection to same.

Particulars 2(e) and (f)
McGruther Refinancing

20. Edith and Deborah McGruther were mother and daughter. They owned property at 47 North Orr Lake Road (the "47 Property"). Deborah McGruther and Stephen Lee were living together. They wanted to purchase a property located at 104 North Orr Lake Road (the "104 Property") and entered into an Agreement of Purchase and Sale on or about May 23, 1989. The purchase price was the sum of \$84,900, conditional upon financing. There were two existing mortgages registered on title to the 47 Property.

21. Ms. D. McGruther and Mr. Lee were referred to the Solicitor by Shelltree.

22. The financing for the purchase of the 104 Property was to be obtained through a series of mortgages registered against both the 104 and 47 Properties. The existing second mortgage against the 47 Property was to be paid off. A first mortgage would be registered against the 104 Property. Then, second and third mortgages would be registered against the 104 Property and collateralized against the 47 Property.

23. The Solicitor proceeded to act for Deborah McGruther and Mr. Lee on the purchase of the 104 Property; for Deborah and Edith McGruther on the mortgage financing transaction of the 47 Property; for the second mortgagee, Jean Clara Hanmer; and, for the third mortgagee, Mrs. Berthin.

24. The third mortgage to Mrs. Berthin was originally intended to be security for the \$5,000 loan and the lender's fee of \$1,000. It was later readjusted to \$8,000 with a lender's fee of \$1,600.

25. At that time, the Solicitor disclosed in writing to Deborah and Edith McGruther and Mr. Lee that in relation to Helen Berthin's third mortgage, he was willing to act for only the third mortgagee. His letter clearly sets out that the Solicitor was acting only for the third mortgagee. He recommended that they seek independent legal advice. It was further indicated that in the event that should it become necessary to take proceedings to enforce the mortgage he would be acting against them. The three mortgagors agreed to this in writing and signed the letter confirming that they had waived their right for independent legal advice.

26. The transaction closed on June 15, 1989. The Solicitor billed McGruthers/Lee for legal services rendered in closing the real estate and mortgage financing documents.

27. The third mortgage to Mrs. Berthin (Document Book, Tab 12) was for a face amount of \$8,000. The actual advance under the mortgage was \$8,000 out of which the lender's fee of \$1,600 was paid. The interest rate was 28% per annum calculated and payable monthly.

28. An actuarial review and report (Document Book, Tab 13) of this mortgage determines the effective annual interest rates to be 70.2% or 76.5% based on two possible perspectives. The third mortgage to the McGruthers was never repaid.

29. The McGruther mortgages went into default. The entire history of the enforcement proceedings is quite lengthy. The Solicitor did act on behalf of the third mortgagee, Helen Berthin, against the mortgagors in enforcing their remedies. An action for possession of the 47 Property was commenced on behalf of the third mortgagee, Mrs. Berthin. Later that action was amended to include a claim for relief of foreclosure (Document Book, Tab 14). Default judgment for foreclosure against owners of the 47 Property was obtained on August 23, 1990. A Notice of Sale in respect of the 104 Property under the second mortgage was prepared and served by the Solicitor.

30. Eventually the 104 Property was sold by Deborah McGruther and Stephen Lee with the consent of the mortgagees. The proceeds of sale were insufficient to cover the amounts owing under the second and third mortgages.

Particulars 2(g) and (h)
Ardern Loan to Mrs. Berthin

31. At the hearing of a motion brought by the McGruthers and Lee to set aside the default judgment the Solicitor appeared on behalf of Mrs. Berthin. The McGruthers were represented by another solicitor. The Solicitor and Helen Berthin desired to give the mortgagors a further opportunity to redeem provided legal action on prior mortgages could be forestalled. The parties entered into Minutes of Settlement (Document Book, Tab 15).

32. Under the terms of the settlement agreement, Helen Berthin agreed to give the mortgagors more time to redeem by her advancing funds so that the mortgagors could refinance the second mortgage and pay the arrears on the first mortgage. This settlement agreement was conditional upon Helen Berthin being able to raise \$35,000 required to restructure the prior financing in default.

33. For this purpose, Mrs. Berthin borrowed \$35,000 from the Solicitor's client, Mr. Ardern, and secured same by a second mortgage to Mr. Ardern on the 47 Property. The \$35,000 was received into the Solicitor's trust account on September 7, 1990 and transferred the same day to the credit of Mrs. Berthin upon registration of the second mortgage (See Trust Ledger Statement for Mr. Ardern dated September 7, 1990, line 22, Document Book, Tab 16; Mrs. Berthin, line 7, Document Book, Tab 17).

34. The \$35,000 loan was secured by a second mortgage against the 47 Property (Document Book, Tab 18). The Solicitor personally guaranteed the loan. Mr. Ardern had not required the guarantee as a pre-condition for the loan. There was an existing first mortgage registered against the Property in the sum of \$39,130.19 which had been assumed by Mrs. Berthin.

35. Helen Berthin had previously executed an Affidavit which was commissioned by the Solicitor in which she gave her opinion of the current market value of the 47 Property in July, 1990 (Document Book, Tab 19). The last sentence of paragraph 23 of the Affidavit said the following:

...I do not think that the current market value of the mother's property is more than \$70,000.00 as indicated by the only appraisal I have of the subject property and in my opinion its true value is probably somewhat lower, and closer to their purchase price of \$42,500.00.

36. By May of 1991 it became clear to Mrs. Berthin that the mortgagors were never going to redeem. Helen Berthin attempted to sell the property to recover her and Mr. Ardern's money. The property was listed for sale in May, 1991 at a listing price of \$89,000. The property was never sold, and Helen Berthin continues to own the property at this time.

37. It should also be noted from the Solicitor's reporting letter dated September 24, 1990 that the property was then insured for \$60,000 (Document Book, Tab 20). The only available appraisal of the property dated December 15, 1988 indicate a land value of \$35,000.

38. Mr. Ardern did not have independent legal representation with respect to this mortgage loan transaction. Mr. Ardern was advised in writing to seek independent legal advice. Mr. Ardern declined to do so and confirmed this in writing.

22nd September, 1994

39. The Solicitor fully disclosed that he was acting for his wife, the mortgagor, and, he did receive the written consent and instructions of Mr. Ardern to act despite the conflict of interest.

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

PARTICULARS 2(a), (d) and (e)

Acting on behalf of his wife, where mortgage rate violates S.347 of the Criminal Code

2. (a) While acting for a mortgagor, Karen McFadyen-Kolbe, on a mortgage refinancing, the Solicitor did prepare and register mortgage documents for a fifth mortgage held by his wife, Helen Berthin, that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.
- (d) While acting for a mortgagor, Timothy Byers, on a mortgage refinancing, he did prepare and register mortgage documents for a third mortgage held by Mrs. Berthin, that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.
- (e) While acting for mortgagors, Edith McGruther, Deborah McGruther and Stephen Lee, on a real estate transaction, he did prepare and register mortgage documents for a third mortgage held by his wife that provided for an interest rate in excess of the effective annual interest rate in section 347 of the Criminal Code.

With respect to these particulars, there are three sub-issues:

1. whether the effective rate of interest exceeds 60%;
2. what element of mens rea is required to satisfy the intent question;
3. whether it is professional misconduct to prepare and arrange mortgages that call for a rate of interest that violates s.347 of the Criminal Code.

1. EFFECTIVE RATE OF INTEREST

The Committee received the reports of Thomas J. Walker, F.C.I.A., consulting actuary. The Committee accepted Mr. Walker as an expert qualified to give actuarial evidence before the Committee. The Solicitor did not object.

The Committee accepts Mr. Walker's evidence that for any one loan transaction, there is only one effective annual rate of interest, for the loan transaction as originally defined. The Committee accepts that at inception, the costs to the borrower are equal to the yield to the lender and also equal the effective annual rate of interest.

At the hearing, the Solicitor testified as follows:

I think it is fair to say that Mr. Walker is the actuary, not I, and it is not my place to criticize or find fault with standard actuarial principals [sic], and if Mr. Walker says this is the rate calculated by standard actuarial principals, then I think we have to accept that that is the rate calculated by standard actuarial principals. (9.12.92, p.5).

In the case of the McGruther/Berthin third mortgage, the amount of the loan was \$8,000.00. A lender's fee of \$1,600.00 was deducted from the mortgage proceeds resulting in a net advance of \$6,400.00. The loan was advanced on June 15, 1989 and was to be repaid with equal monthly payments of \$186.67 with the first monthly payment due July 15, 1989 and the last monthly payment due June 15, 1990. The full principal balance of \$8,000.00 was repayable on June 15, 1990. The monthly amount of \$186.67 represented payments of interest only at the 28% p.a. rate calculated monthly, as stated in the mortgage. Out of the total legal fee account to the McGruthers of \$1,950.00 approximately \$200.00 could be said to be legal fees reasonably allocated to the third mortgage.

Mr. Walker's report of May 24, 1991 concluded as follows:

We certify that the Effective Annual Interest Rate under the mortgage from June 15, 1989 to June 15, 1990 was in excess of 60% per year. The Effective Annual Interest Rate assuming no legal fees was about 70.2%. The Effective Annual Interest Rate assuming \$200.00 in legal fees was about 76.5%.

His report was prepared and his opinion given in accordance with generally accepted actuarial principles and the Recommendations of the Canadian Institute of Actuaries.

The Committee accepts Mr. Walker's evidence as to the effective annual rate of interest in the McGruther/Berthin mortgage and finds that the effective annual rate of interest of the mortgage exceeds 60%.

Similarly, with respect to particular 2(d), the McFadyen-Kolbe/Berthin 5th mortgage, the Committee finds that the principal sum of the loan was \$6,500.00, with a lender's fee of \$900.00 and legal fees of \$375.00 leaving a net advance of \$5,225.00. The nominal rate of interest was 28% p.a. compounded monthly and payable interest only at \$151.67/month. The Committee accepts Mr. Walker's evidence that the effective annual interest rate of this transaction is 69.2%.

Similarly, with respect to the Byers/Berthin third mortgage, the Committee finds that the principal sum of the loan was \$6,400.00, with a lender's fee of \$680.00 and legal fees of \$575.00, leaving a net advance of \$5,145. The nominal rate of interest was 28% p.a. compounded monthly and payable \$149.33/month, interest only. The Committee accepts the evidence of Mr. Walker that the effective annual interest rate of this transaction is 72.3%.

2. MENS REA OF THE MISCONDUCT

The next sub-issue to be decided is what level of intent is necessary to satisfy the element of mens rea of this alleged misconduct. The text of s.347 of the Criminal Code is set out in the schedule to these reasons. The Committee has carefully considered the arguments of both the Solicitor and the Society in this regard and reviewed the decided cases listed below in the schedule. We find, following the Ontario Court of Appeal in R. v. McRobb (1986) 32 C.C.C. (3d) 479, that the required intent is the intent to enter into an agreement to receive interest at a criminal rate.

The Solicitor intended that his clients should enter into the agreements in question. In our view, it is not necessary that the Society prove that he knew the effective annual interest rate of the transactions was greater than 60%. In addition, there is no requirement from the Society to prove that the Solicitor knew that charging above 60% was unlawful. In any event, he has admitted he knew that. It is also no defence that the borrowers were willing to participate in the transactions in question. Specifically, this Solicitor did not enter into the agreements to receive interest at a criminal rate, but he drew the documents that permitted his clients to borrow at such rates where the lender was the Solicitor's spouse.

22nd September, 1994

The Solicitor denies that he knew the effective annual interest rate of the mortgages was in excess of 60% p.a. At the hearing, in fact, he produced a series of alternate calculations to support his view. He stated that he felt that the effective annual rate of interest was somewhere close to 48% p.a. He argued case law in this area was unclear.

However, we find this Solicitor is a sophisticated player in the field of real estate financing; he has an extensive financial background including a Master's Degree in Business Administration. He admitted that he has more financial knowledge than most Ontario solicitors. In our view the element of mens rea has been satisfied. We further find the Solicitor's testimony in this area lacking in credibility.

3. Whether it is professional misconduct to prepare and arrange mortgages that call for a rate of interest that violates s.347 of the Criminal Code

The next sub-issue to be considered is whether the fact of preparing a mortgage and acting on behalf of a lender or borrower in a situation where a criminal rate of interest is being charged is ipso facto professional misconduct. It is the Committee's view that we cannot disregard the fact that indirect financial benefit would have accrued to the Solicitor because the lender was the Solicitor's spouse. The Committee finds that in these three cases, the Solicitor breached both Rule 2 and Rule 5 in that he failed to serve his clients in a conscientious manner and at the same time his own family interests conflicted with the best interests of his clients. He has brought the integrity of the legal profession into disrepute in the eyes of the public.

PARTICULAR 2(c):

Placement fees (nondisclosure to Mr. Ardern), contrary to Rules 5 and 7

- (c) The Solicitor failed to disclose to a client, Frederick William Ardern, that his spouse, Mrs. Berthin, was receiving "placement fees" in relation to mortgage loans being made by Mr. Ardern to the Solicitor's other clients, those other clients being:

- 1) McFadyen-Kolbe
- 2) Byers
- 3) Young
- 4) Van Aller
- 5) Corbeau
- 6) Chaisson.

The Solicitor argues that the Society is seeking to impose upon him standards which developed in 1992, which, he claims were not the standards and procedures in place at the time of the alleged offences in 1990. His argument is that fees for services rendered to the lender and paid by the borrower are not the lender's concern. Later when he disclosed them at the suggestion of the Law Society, this particular lender had no objection, according to the Solicitor.

We disagree that we are holding the Solicitor to a higher standard than prevailed at the time of the alleged offences. In the Committee's view, the Solicitor has run afoul of the conflict of interest rule again in this situation. If he were only acting for the lender, Mr. Ardern, he would have disclosed any significant financial information to his client that was in his possession with respect to the transaction. Surely, the thousands of dollars in lender's fees paid by the borrowers as lender's fees for the third or fifth mortgages were relevant and impacted upon their ability to repay even the first mortgage.

22nd September, 1994

We believe the fact the Law Society did not formally adopt new disclosure requirements for the profession with respect to this area until after the events in question is a fact which is relevant to the question of penalty, not the question of whether the particular has been made out.

PARTICULAR 2(f)

Conflict of Interest in Acting Against Former Clients

- (f) The Solicitor acted in a conflict of interest contrary to Rule 5, Commentary 13 of the Rules of Professional Conduct by taking mortgage enforcement proceedings against Edith McGruther, Deborah McGruther and Stephen Lee, when he had acted for these individuals on the same real estate transaction that gave rise to the mortgage enforcement proceedings.

It is alleged that the Solicitor acted in a conflict of interest by taking mortgage enforcement proceedings against his former clients, Edith McGruther, Deborah McGruther and Stephen Lee, contrary to Rule 5, commentary 13. Prior to the closing of the series of mortgage and collateral mortgage transactions, the Solicitor had provided a letter to his clients, which they signed. The text of that letter reads as follows:

MCGR0903c & MCGT0903d
June 6, 1989

Deborah Margert McGruther, Stephen Lee
and Edith McGruther
General Delivery, Box 22
Elmvale, Ontario
LOL 1P0

Dear Ms McGruther, Mr. Lee and Ms. McGruther:

RE: MCGRUTHER/LEE mortgage to BERTHIN
Lot No. 25, Plan No. 1454
104 North Orr Lake Road, Township of Flos

RE: MCGRUTHER collateral mortgage to BERTHIN
Lot No. 24, Plan No. 858
Township of Flos, County of Simcoe

I confirm that I act for only the mortgagee, Helen Berthin, in connection with the above-noted transaction which is scheduled to close on June 15, 1989. As I regularly act for this mortgagee I am not in a position to also represent your interests as mortgagors.

In these circumstances I must recommend that you seek independent legal advice prior to proceeding with this transaction.

If you do not wish to incur the expense of another lawyer and you therefore choose to proceed on your own without independent legal advice, please be advised that in the event it should become necessary to take proceedings to enforce the mortgage, I will be acting for the mortgagee against you.

Yours very truly,

Signed
"Wayne Berthin"

22nd September, 1994

We hereby confirm that we have read the above letter and we confirm that we have waived our right to obtain independent legal advice and that we understand that Wayne Berthin is not our solicitor in this matter and that he represents Helen Berthin only.

DATED at the Township of Tine this 7th day of June, 1989.

Signed
"Deborah Margaret McGruther"

Signed

"Stephen Lee"

Signed
"Edith McGruther"

However, the Solicitor sent an account to these same clients in which part of his fee was charged for preparing the third and third collateral mortgage documents, searching title, attending on closing and reporting to the clients.

In the Committee's view it is not necessary to decide the question of whether the Solicitor acted for these clients in the third mortgage transaction; it is sufficient to violate the conflict of interest rule that in fact he acted for them "in the same or any related matter" (R 5, comm.13). The Solicitor admits that he took enforcement proceedings on behalf of his wife with respect to these clients. We find that the particular is made out.

PARTICULARS 2(g) and (h):

Conflict of Interest and Guaranteeing a Loan to a Client

- (g) His wife, Helen Berthin, did borrow \$35,000 from a client, Frederick William Ardern, on or about September 7, 1990. Although the loan was secured by a second mortgage, the interests of the client were not fully protected by the equity in that property. Further, the client did not have independent legal representation. It is alleged that this is a breach of Rule 7, paragraph 2 of the Rules of Professional Conduct.
- (h) The Solicitor guaranteed the mortgage loan from Mr. Ardern to his wife, contrary to Rule 23, paragraph 6.

The Solicitor's wife borrowed \$35,000 from his client, Mr. Ardern in an alleged breach of Rule 7(2). We find that although the loan was secured by a 2nd mortgage, the interests of the client may not have been fully protected by equity in the property. In any event, we find that the client did not have independent legal representation (not ILA) in this transaction contrary to the express wording of the Rule and accordingly, the Solicitor is found in breach in this particular as well.

The Solicitor guaranteed the mortgage contrary to Rule 23(6), which prohibits such guarantees where clients are involved as lenders. The Solicitor admits he signed the guarantee, but says the breach was in good faith and not intentional. The Committee finds this particular is made out.

DATED at Toronto this 23rd day of April, 1993.

RECOMMENDATION AS TO PENALTY

It is this Committee's recommendation that a penalty of a suspension of two months, plus payment of expenses of the investigation in the sum of \$11,000, forthwith, would be the appropriate disposition of this matter.

REASONS FOR RECOMMENDATION

The Committee seriously considered the joint submission put to us by counsel for the Law Society. The proposed penalty was a Reprimand in Convocation and payment of expenses in the sum of \$11,000, payable \$500.00 per month over 22 months, beginning July 1, 1993, with no interest.

The Committee rejected the joint submission on penalty because we believe it was founded upon an assumption which the Committee views as an error in principle.

Counsel for the Law Society submitted to us that the appropriate range of penalty in this case would be, at the least severe, a reprimand in Convocation and at the most severe, a suspension of three months' duration. The Committee accepted that a suspension, from one to three months, might be within the appropriate range of penalty. The Committee rejects entirely the submission that these offences fall within the realm of infractions for which a reprimand would be appropriate.

The Committee accepts that there are some mitigating factors in Mr. Berthin's case. (1) We accept that this is his first disciplinary appearance at the Law Society, but we note that at the time of these offences, he had only been at the bar for five or six years. (2) We accept that he has cooperated in the preparation of an agreed statement of facts for a substantial portion of the evidence in this hearing and was, according to Law Society counsel, and according to what we observed, very professional in his demeanour in responding to those responsible for the prosecution of this case. (3) We accept that when the erroneous nature of some of his practices was brought to his attention, he changed those practices, and we commend him for that.

The willingness and ability of Wayne Douglas Berthin to pay \$11,000 in expenses to the Society was submitted to us as "a weighty mitigating factor" in relation to penalty. This is the error in principle to which we referred above and the reason for which the Committee is unable to accept the joint submission as to penalty. In our view, a solicitor's willingness and ability to bear substantial costs should in no way be seen as a factor in support of recommendation of a penalty of reprimand versus a period of suspension. In the spectrum of severity of penalties, suspension, even for a short period is a graver penalty appropriate for more serious offences than those which merit reprimand.

Further, we reject any submission which, in the eyes of the public or of the profession, could raise the scintilla of a suggestion that a solicitor might "buy" a penalty of a reprimand in return for his willingness to pay substantial costs. The slightest suggestion of such an agreement is completely repugnant to us as benchers governing the legal profession in this province in the public interest.

22nd September, 1994

In this case, we have found the Solicitor committed multiple, serious breaches of professional conduct, some of which involved acting on behalf of his spouse to draft an agreement to receive interest at rates exceeding 60% p.a., contrary to the Criminal Code of Canada. We have found multiple, serious breaches of the conflict of interest rules and the rules against borrowing from clients and guaranteeing mortgages. These are serious matters, for which we considered a penalty of a suspension of three months to be highly appropriate. In the circumstances, however, we are prepared to recommend to Convocation the penalty set out above, in recognition of the mitigating factors we have accepted.

Wayne Douglas Berthin was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 18th day of April, 1985.

ALL OF WHICH is respectfully submitted

DATED this 9th day of September, 1993

K. Julaine Palmer
Chair

It was moved by Mr. Lerner, seconded by Ms. Elliott that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Elliott, seconded by Mr. Blue that the Recommendation as to Penalty be adopted that is, that the solicitor be suspended for 2 months and pay the Society's costs of \$11,000.

Joint submissions were made by counsel for the lesser penalty of a reprimand in Convocation and payment of the costs.

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

It was moved by Mr. Lerner but failed for want of a seconder that the solicitor be disbarred.

It was moved by Mr. Campbell, seconded by Mr. Manes that the matter be referred back to the Committee on the basis that having decided the recommended penalty they did not hear submissions from the solicitor.

Lost

The Recommendation as to Penalty was adopted.

It was moved by Mr. Topp, seconded by Mr. Finkelstein that the solicitor be reprimanded in Convocation and pay the costs of \$11,000.

Not Put

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

Convocation granted the solicitor's request to commence his suspension on November 1st, 1994.

22nd September, 1994

Mr. Campbell would prepare Reasons for the decision and Mr. Topp would prepare dissenting Reasons.

Counsel and the solicitor retired.

Re: Paul Douglas SQUIRES - Mississauga

The Secretary placed the matter before Convocation.

Ms. Susan Elliott and Ms. O'Connor withdrew for this matter.

Mr. Stephen Foster 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 24th May, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 2nd June, 1994 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

E. Susan Elliott, Chair
Shirley O'Connor
Stuart Thom, Q.C.

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

Stephen Foster
for the Society

PAUL DOUGLAS SQUIRES
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 11, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 10, 1993, Complaint D216/93 was issued, and on October 28, 1993, Complaint D285/93 was issued against Paul Douglas Squires alleging that he was guilty of professional misconduct.

The matter was heard in public on February 11, 1994 before this Committee composed of E. Susan Elliott, Chair, Shirley O'Connor, and Stuart Thom, Q.C. The Solicitor was not present nor was he represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D285/93

2. a) He failed to provide a reply to the Law Society regarding a complaint by Kenneth Lackner despite letters dated February 15, 1993 and May 25, 1993 and telephone messages left on April 19, 1993 and May 5, 1993.
- b) He failed to provide a reply to the Law Society regarding a complaint by Paul Huston despite letters dated March 5, 1993 and May 25, 1993 and a telephone message left on May 5, 1993.
- c) He failed to provide a reply to the Law Society regarding a complaint by Robert Martindale despite letters dated March 5, 1993 and May 25, 1993 and telephone messages left on April 19, 1992 and May 5, 1993.

Complaint D216/93

2. a) He failed to provide a reply to the Law Society regarding a complaint by Constantine Tsantis, despite letters dated February 9, 1993 and April 19, 1992 and telephone messages left on February 16, 1993, February 17, 1993 and March 30, 1993.

Evidence

1. The Solicitor's problems currently engaging the Society's attention began with a letter of complaint dated October 9, 1992 from Constantine Tsantis written on behalf of his client Bill Stratigeas; particular 2a), Complaint D216/93. Efforts to engage the Solicitor's attention to the matter are set out in the particular. The Solicitor did make one telephone call to the Society but personal contact was not established and Complaint D216/93 was issued in August, 1993.

2. By letter dated February 1, 1993 Kenneth Lackner, solicitor, wrote to the Society with complaints against the Solicitor on behalf of Lackner's clients Cesar & Ana Coria and Paul Huston; particulars a) and b) in complaint D285/93. Details of the efforts made by the Society to engage the Solicitor's attention to these matters are set out in the particulars. By letter dated April 6, 1993 the Solicitor advised the Society that "...his entire file [in the Huston matter] was in the hands of Insurance Adjusters ...". Personal contact was not established and the complaint was issued on October 28, 1993.

3. On February 22, 1993 the Society received a letter from Robert Martindale complaining with regard to the conduct of the Solicitor, who had acted for the purchaser of Mr. Martindale's house. Details of the efforts of the Society to engage the Solicitor's attention to this matter are set out in particular c) in Complaint D285/93. No response was received and this matter was incorporated in Complaint D285/93 issued on October 28, 1993.

4. The Committee was not informed regarding the present status of the foregoing complaints and makes no findings with regard to them.

22nd September, 1994

5. On the 3rd day of August 1993 at the instigation of the Audit and Investigation Department of the Society, for reasons which were not communicated to the Committee, an Order was made by the Ontario Court of Justice, General Division, effectively freezing the Solicitor's trust bank account and putting it under the control of the Court. By further Order made "on consent", but the Solicitor not being represented, the previous Order was varied to permit the Solicitor to operate a new trust account under strict limitations. Among other matters the Order permitted the Solicitor to deal with clients for the purpose of carrying on the practice of law.

6. By letter dated January 27, 1994 to the Solicitor, Counsel for the Audit and Investigation Department reviewed at length the relations between the Society and the Solicitor following the Court Orders. Among other matters it referred to the fact that by letter dated December 1, 1993 the Society had made a formal request to review the Solicitor's books and records, that a firm date of December 16, 1993 had been arranged for this review, but the Solicitor took the position that he would not be available on that date. The letter stated that all the documents the Solicitor was going to deliver had not been received and remarked that the writer had contacted the Solicitor by telephone and left messages requesting that the calls be returned, but this had not been done. The letter stated that the Society had been more than reasonable in accommodating requests for more time to reply.

7. Complaint D216/93 was duly served and scheduled to be heard on October 5, 1993. Counsel for the Society and the Solicitor had a telephone conversation on or before the scheduled date and agreed that the hearing would be adjourned to December 14. Complaint D285/93 dated October 28, 1993 was duly served returnable December 14, 1993.

8. By letter dated December 3, 1993 the Solicitor wrote to the Society as follows:

I wish to have the date for the hearing postponed from December 14 and 15, to January, 1994. I have been unable to retain counsel as of the date of this letter, despite efforts made. I intend to defend these matters, and wish to retain counsel to do so.

On the same date counsel for the Society replied as follows:

I will not oppose your request for an adjournment of this matter if you are agreeable to the following terms;

1. The matter will be adjourned to January 12, 1994.
2. The matter will be adjourned peremptory to yourself to proceed whether you have retained counsel or not.

By letter dated December 9, 1993 the Solicitor replied as follows:

I would be agreeable to the matter being peremptory to myself provided the hearing could be on or after January 31, 1994. I will be able to retain and properly instruct counsel by that date, but in any event will be prepared to proceed at that time.

By letter dated December 10th counsel for the Society replied as follows:

If January 12th is not agreeable to you then I suggest January 18, 1994.

By letter dated December 13, 1993 the Solicitor wrote as follows:

22nd September, 1994

Please be advised that I have tentatively retained counsel in this matter but that counsel is not available on January 12, 1994. Please advise me of your position.

A second letter dated the same day written on behalf of the Solicitor read:

...he will presume that January 18, 1994 is a date that his counsel is available.

9. The complaints came before a Committee on December 14th. The Solicitor was not present. Counsel for the Society spoke of the matter and the complaints were scheduled to proceed on January 18, 1994. Counsel for the Society wrote to the Solicitor on December 15th as follows:

I confirm that both these complaints have been scheduled to proceed on January 18 and 19, 1994.

10. An Agreed Statement of Facts was prepared and sent to the Solicitor. This was the subject of a telephone conversation on January 14, 1994 and by letter to the Society dated and faxed January 17th the Solicitor wrote at some length regarding the statement. In this letter he said:

I have not yet retained counsel. Upon reviewing the previous correspondence in this matter, I note that I agreed to this matter being peremptory to myself only after January 31, 1994...I wish to deal with these matters on February 15 or 16.

11. With regard to these statements by the Solicitor, for the record, speaks for itself. Counsel for the Society, by fax, wrote to the Solicitor on January 17th:

I will be opposing your request for an adjournment of the hearing of these matters and will be asking the Committee to proceed.

On that day the Solicitor and counsel for the Society spoke by telephone. The Solicitor stated that he would sign an Agreed Statement of Facts and it was arranged that the hearing of the complaints would be adjourned to February 1 and 2, 1994. Later that same day, a confirming letter was faxed to the Society in which the Solicitor said he would not be attending the hearing the following day.

12. On January 18th, the matter was adjourned to proceed on February 1, peremptory to the Solicitor. The Solicitor did not appear on that day but because counsel thought he might do so the following day, the matter was put forward to the following day. The Solicitor not appearing and not being represented, the matter was adjourned to proceed on a peremptory basis on February 11, 1994 and the Solicitor was so advised by letter dated February 3. That letter read:

The Society will take the position that the matter should proceed whether you are present or not.

13. On February 11, the matter came before your Committee. The Solicitor was not present, was not represented and no explanation was offered as to his absence. Counsel for the Society reported that on the previous day he had attempted to contact the Solicitor by telephone and had left messages regarding the forthcoming hearing at his home and office. The Solicitor's record as recited above was reviewed and your Committee decided that having regard to all the circumstances it would hear the complaints in the Solicitor's absence.

22nd September, 1994

14. Counsel for the Society presented evidence regarding the Solicitor's behaviour. Your Committee found the Solicitor to be guilty of professional misconduct in respect of all the particulars.

RECOMMENDATION AS TO PENALTY

Your Committee recommends that if the Solicitor does not appear in person before Convocation when this matter comes before it and provide a persuasive justification for his behaviour, he be disbarred. If he is able to explain his behaviour to the satisfaction of Convocation, then notwithstanding, he should be suspended for a period of six months and pay costs of \$3,000.

REASONS FOR RECOMMENDATION

The Solicitor repeatedly breached his duty under Commentary 3 of Rule 13 to reply promptly to communications from the Society. He would appear to have deliberately adopted and maintained over a lengthy period of time a policy of flouting the administrative requirements of the Society. The Society cannot perform its function of governing the profession in the interest of the public if it tolerates such conduct.

Paul Douglas Squires was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 24th day of May, 1994

Stuart Thom, Q.C.
(for the Committee)

It was moved by Mr. Lerner, seconded by Ms. Curtis that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Ms. Graham, seconded by Mr. Lerner that the Recommendation as to Penalty be adopted that is, that the solicitor be disbarred.

Counsel made submissions in support of the recommended penalty.

The Recommendation as to Penalty was adopted.

Counsel retired.

Re: Ernest Arthur DYCK - Toronto

The Secretary placed the matter before Convocation.

Ms. Richardson withdrew for this matter.

Ms. Christina Budweth appeared for the Society and the solicitor appeared on his own behalf.

22nd September, 1994

Convocation had before it the Report of the Discipline Committee dated 4th August, 1994, together with an Affidavit of Service sworn 9th September, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th August, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 22nd September, 1994 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C., Chair
Earl Levy, Q.C.
Nora Richardson

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

Christina Budweth
for the Society

ERNEST ARTHUR DYCK
of the City
of Toronto
a barrister and solicitor

John Struthers
for the solicitor

Heard: June 14, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 11, 1993, Complaint D206/93 was issued, on September 21, 1993, Complaint D264/93 was issued and on October 20, 1993, Complaint D293/93 was issued against Ernest Arthur Dyck alleging that he was guilty of professional misconduct.

The hearing was heard in public on June 14, 1994 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Earl Levy, Q.C. and Nora Richardson. Mr. Dyck attended the hearing and was represented by John Struthers. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D206/93

2. a) He failed to serve his clients, Lindsay Lock and Joanna French, in a conscientious, diligent and efficient manner by failing to keep them reasonably informed about the status of their litigation, failing to answer within a reasonable time communications requiring a reply and failing to make a prompt and complete interim report where one might reasonably be expected.
- b) He failed to provide a reply to the Law Society regarding a complaint by Lindsay Lock and Joanna French, despite letters dated March 18, 1993, April 19, 1993 and May 5, 1993, and a telephone message left on May 12, 1993.
- c) He failed to serve his client, Greg R. Rohland, in a conscientious, diligent and efficient manner by failing to make a prompt and complete interim report where one might reasonably be expected and by withholding information from Mr. Rohland about the position of the matter in order to cover up the fact of his neglect or mistake.
- d) He failed to provide a reply to the Law Society regarding a complaint by Greg R. Rohland despite letters dated March 30, 1993, May 3, 1993, and May 21, 1993, and a telephone message left on June 2, 1993.
- e) He failed to comply with his undertaking to the Law Society dated November 5, 1991 by failing to reply to letters from the Law Society within ten days of receipt and failing to respond to telephone messages left by the Law Society within three business days as set out in particulars (b) and (d).

Complaint D264/93

2. a) He failed to reply to the Law Society regarding a complaint by Eleanor Michael despite letters dated April 29 and June 7, 1993 and telephone requests on May 20, May 28 and June 1, 1993;
- b) He failed to comply with his Undertaking to the Law Society dated November 5, 1991 to reply to all communications from the Law Society; in the case of telephone communications (on May 20, 28 and June 1, 1993), within three business days of receipt and in case of written communications (on April 29 and June 7, 1993) within 10 days of receipt.

Complaint D293/93

2. a) He failed to co-operate with an investigation by the Law Society's insurer regarding a claim by Greg Rohland and Gregmen Construction despite letters dated July 27, 1993 and August 17, 1993.
- b) He failed to comply with his undertaking to the Law Society dated November 5, 1991 by failing to reply to written communications from the Law Society dated July 27, 1993 and August 17, 1993 regarding a claim of professional negligence made by Greg Rohland and Gregmen Construction within ten days of receipt.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D206/93, D264/93 and D293/93 and is prepared to proceed with a hearing of these matters on June 14 and 15, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D206/93, D264/93 and D293/93 and admits the particulars contained therein. The Solicitor also admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 19, 1985. He practices as a sole practitioner in Toronto.

Complaint D206/93

Particulars 2(a) and 2(b)

Failure to serve his clients Lindsay Lock and Joanne French;
and failure to reply to the Law Society

5. On or about May 9, 1988 Lindsay Lock and Joanne French retained the Solicitor, while he was an associate of the firm Tsubouchi & Parker, to act on their behalf regarding a claim against the Co-operators Insurance Company and their deceased father's estate. Their father, Edwin Lock, appeared to have been responsible for the motor vehicle accident on June 4, 1987 which resulted in the death of their mother, Peggy J. Lock. Ms. Lock and Ms. French provided the Solicitor with all the pertinent information regarding the motor vehicle accident and their mother's death.

6. On June 27, 1989 the Solicitor obtained instructions from both complainants to settle their claim, and on October 31, 1989, the firm of Tsubouchi & Parker received \$11,557.72 from the Co-operators Insurance Company in full settlement of their claim. The Solicitor did not advise Ms. Lock or Ms. French of the receipt of these funds at this time, but the funds were held in trust throughout. As infants were involved, the settlement required Court approval and the settlement with the insurer was expressly made conditional on this approval.

7. Neither Ms. Lock or Ms. French had any contact with the Solicitor until October, 1990 when the Solicitor notified them that he was continuing his practice as an associate of the firm Burstein, Greenglass & Hockman. At that time, they requested by letter, that the Solicitor advise them of the status of their claim. The Solicitor assured them that he was actively pursuing their claim.

8. Neither Ms. Lock or Ms. French received any further communication from the Solicitor until April of 1992. The Solicitor advised Ms. Lock and Ms. French to attend at the offices of Tsubouchi & Nichols to execute their affidavits in support of Judgement.

22nd September, 1994

9. On April 16, 1992, the Solicitor faxed to the offices of Tsubouchi & Nichols Ms. Locks and Ms. French's affidavits. With a fax cover sheet which stated:

Please have Joanna French execute the attached Affidavit and return the original to me by fax and ordinary mail. Your co-operation is much appreciated. In the event she has any questions during the execution, perhaps you can have your secretary call mine and advise of the time that she will be attending at your offices, so that I will arrange to be available by telephone.

Ernest.

10. On April 20, 1992, Ms. French and Ms. Lock attended at the offices of Tsubouchi & Nichols. Upon attending at Mr. Tsubouchi's office, he attended to their execution of the affidavits. Mr. Tsubouchi then forwarded the duly executed affidavits to the Solicitor.

11. Judgment was obtained on April 23, 1992 (Document Book, Tab 1) for \$11,557.72 broken down as follows:

- general damages in the amount of \$3,500 and pre-judgment interest in the amount of \$517.93 for a total of \$4,017.93 for each Joanna French and Lindsay Lock; and
- general damages in the amount of \$1,000 and pre-judgment interest in the amount of \$160.93 for a total of \$1,160.93 for each of the minor plaintiffs, Amanda French and Meredith French.

12. On April 28, 1992, he issued a cheque in the amount of \$11,557.72 to the Solicitor, in trust, pursuant to the Judgment. A copy of Tsubouchi & Parker's client ledger is contained at Document Book, Tab 2.

13. By letter dated August 7, 1992 (Document Book, Tab 3), Ms. Lock requested the Solicitor advise her as soon as possible of the status of her matter. No reply was received.

14. By letter dated February 25, 1993 (Document Book, Tab 4), Ms. Lock and Ms. French advised the Law Society that the Solicitor had failed to return their telephone calls regarding the status of their settlement funds. Ms. Lock and Ms. French sent a copy of their February 25, 1993 letter to the Solicitor.

15. By letter dated March 18, 1993 (Document Book, Tab 5), the Law Society forwarded to the Solicitor a copy of Ms. Lock and Ms. French's February 25, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

16. By letter dated April 19, 1993 (Document Book, Tab 6), the Law Society forwarded to the Solicitor a copy of its March 18, 1993 letter and Ms. Lock and Ms. French's February 25, 1993 letter. The Solicitor was requested to provide his written response within fourteen days. No reply was received.

17. By registered mail dated May 5, 1993 (Document Book, Tab 7), the Law Society reminded the Solicitor of his obligation to reply to the Law Society's communications. The Solicitor was advised that should he fail to provide a written response to the Society, within seven days, the matter would be referred to the Discipline Committee. No reply was received until September 1993 (see paragraph 20 below).

22nd September, 1994

18. A Law Society staff employee left a telephone message for the Solicitor at his office on May 12, 1993 requesting he return the call. The call was not returned. A copy of the Society's verbal transaction form dated May 12, 1993 is contained at Document Book, Tab 8.

19. In or about July, 1993 Joanna French and Lindsay Lock retained solicitor Paul Kupferstein to assist them in obtaining their final report and settlement funds. By letter dated July 6, 1993 (Document Book, Tab 9), Mr. Kupferstein advised the Solicitor of the aforementioned and requested the Solicitor forward to Ms. French and Ms. Lock, with a copy to himself, a report within seven days. No reply was received.

20. By letter dated September 24, 1993 (Document Book, Tab 10), the Solicitor advised Ms. Lock and Ms. French that he had written to them by letter dated May 29, 1992 which appeared not to have been received nor had it been returned to the Solicitor's office despite a return address on the envelopes. The Solicitor provided them with a copy of his account in the amount of \$2,919.77, a trust cheque in the amount of \$3,158.05 and his general account cheque for \$214.72 for interest lost on their settlement. The Solicitor apologized for the delay in finalizing this matter.

21. Ms. French received the Solicitor's September 24, 1993 letter the first week of October, 1993. Ms. Lock's September 24th letter was sent to her previous address despite her advice to the Solicitor's office of her new address.

22. The Solicitor replied to the Society by letter by letter dated September 24, 1993 (Document Book, Tab 11).

23. By letter dated October 12, 1993 (Document Book, Tab 12), Ms. Lock advised the Solicitor that it appeared her settlement funds had been forwarded to an incorrect address. Ms. Lock again provided the Solicitor with her correct address and requested the Solicitor forward her cheque by registered mail. No reply was received.

24. On November 24, 1993 the Solicitor wrote to Ms. Lock at her correct address and enclosed the settlement funds. (Document Book, Tab 13)

Complaint D206/93

Particular 2(c) and 2(d)

Failure to Serve his client, Greg R. Rohland; and

Failure to Reply to the Law Society

25. On June 17, 1992, The Toronto-Dominion Bank issued a Statement of Claim, court file no. 92cu-54810-CM (Document Book, Tab 14), against Gregory R. Rohland aka Greg Rohland. The Toronto-Dominion Bank claimed principal and interest in the sum of \$60,549.13, upon a TD Variable Rate Loan Note plus other relief. Mr. Rohland was served with the Statement of Claim on or about July 7, 1992.

26. Default Judgement was signed against Mr. Rohland on August 10, 1992 in the sum of \$61,387.22.

27. Mr. Rohland retained the Solicitor to defend the Toronto-Dominion Bank Action on or about August 20, 1992. On August 20 and 24, 1992, Mr. Rohland sent the Solicitor a number of documents relevant to the matter. The August 24, 1992 facsimile transmission contained a statement of facts respecting Mr. Rohland's attempts to defend himself against the claim by the Bank.

22nd September, 1994

28. By letter dated August 31, 1992 (Document Book, Tab 15) the Solicitor advised Mr. Rohland of his retainer requirements, provided Mr. Rohland with a retainer letter and requested Mr. Rohland provide him with instructions regarding a potential offer to settle. The executed retainer agreement was not returned to the Solicitor. The Solicitor does not suggest that Mr. Rohland's failure to return the executed agreement affected his obligation to Mr. Rohland.

29. By letter dated August 31, 1992 to Gail Carleton, solicitor for the Bank (Document Book, Tab 16), the Solicitor requested that the Bank consent to an order setting aside the default judgment.

30. By letter dated August 31, 1992 (Document Book, Tab 17), Mr. Rohland provided the Solicitor with a certified cheque in the amount of \$1,350.00 representing a monetary retainer and \$350.00 in payment of Bank's costs on setting aside the default judgment. The Solicitor cashed Mr. Rohland's \$1,350. cheque that same day (Document Book, Tab 18).

31. The Solicitor, in a faxed message to Ms. Carleton on September 2, 1992, requested a response to his August 31, 1992 letter. By letter dated September 28, 1992, (Tab 19, Document Book), Ms. Carleton replied to the Solicitor's August 31, 1992 letter.

32. Under cover of letter dated November 2, 1992, the Solicitor delivered \$350.00 in costs to the Bank. He also disclosed to Ms. Carleton the existence of another action. The bank responded by a facsimile transmission dated November 26, 1992 which demanded a defence no later than 5:00 p.m. on Friday, November 27, 1992. The Solicitor responded by fax dated November 30, 1992 which speaks for itself. All three documents referred to in this paragraph are attached collectively as Tab 20, Document Book.

33. On December 2, 1992, Mr. Rohland's previous solicitors delivered the pleadings in the prior actions but did not deliver the remainder of the file, claiming a solicitor's lien over unpaid fees. Copies of the Solicitor's fax of December 1, 1992 to Robert Staley as Fasken, Campbell, Godfrey as well as Mr. Staley's response of December 21, 1992 are found at Tab 21, Document Book.

34. On or about September 17, 1992, an employee of Park & Sell, a firm who had been retained by the Bank to attempt to realize that some of Mr. Rohland's assets, William Meanny, contacted the Solicitor regarding a settlement of the matter. Following discussions between Mr. Meanny and the Solicitor, the Solicitor faxed a letter addressed to the branch manager at the Toronto Dominion Bank in Mississauga, the branch at which the Rohland loan had originated to Mr. Meanny who then faxed the letter to the branch manager. A copy of the Solicitor's letter to Mr. Murphy is found at Tab 22 of the Document Book. By letter dated December 23, (Tab 23, Document Book) Ms. Carleton expressed her concern to the Solicitor at his having dealt directly with the Branch Manager.

35. Ms. Carleton returned the Bank's costs of \$350.00 to the Solicitor under cover of letter dated February 4, 1993.

36. The Solicitor did not take any other steps to set aside the Bank's judgment against Mr. Rohland nor did he advise Mr. Rohland of his failure to do so.

37. On March 2, 1993, Mr. Rohland was served with a Notice of Examination (Document Book, Tab 24). Upon receipt of the Notice of Examination, Mr. Rohland attempted, unsuccessfully, to speak with the Solicitor by telephone. Mr. Rohland forwarded to the Solicitor a copy of the Notice of Examination by facsimile transmission on March 2, 1993 (Document Book, Tab 22). The Examination had been set for March 29, 1993.

22nd September, 1994

38. Between March 3, 1993 and March 8, 1993, Mr. Rohland left four telephone messages for the Solicitor at his office requesting he return the calls. The calls were not returned.

39. By letter dated March 9, 1993, (Document Book, Tab 25), sent by facsimile transmission, Mr. Rohland requested the Solicitor contact him to advise as to what steps he had taken to protect his interests since December, 1992. No reply was received.

40. Since March 9, 1993, Mr. Rohland and Mr. Barker, another individual with Mr. Rohland's firm, have left, between them, approximately ten telephone messages requesting the Solicitor return the calls. The calls have not been returned.

41. By letter dated March 12, 1993 (Document Book, Tab 26), Mr. Rohland advised the Law Society of the Solicitor's apparent failure to defend him against the action by the TD Bank and the Solicitor's failure to reply to his communications requesting the status of his matter.

42. On or about March 18, 1993, Mr. Rohland retained E. Bruce Soloman to represent him regarding the action brought by the Toronto-Dominion Bank.

43. By letter dated March 30, 1993 (Document Book, Tab 27), the Law Society forwarded to the Solicitor a copy of Mr. Rohland's March 12, 1993 letter. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

44. By letter dated May 3, 1993 (Document Book, Tab 28), the Law Society forwarded to the Solicitor a copy of its March 30, 1993 letter and a copy of Mr. Rohland's March 12, 1993 letter. The Solicitor was requested to provide his written reply within fourteen days. No reply was received.

45. By registered mail dated May 21, 1993 (Document Book, Tab 29), the Law Society reminded the Solicitor of his obligation to reply to the Society. The Solicitor was advised that should he fail to provide a response within seven days, the matter would be referred to the Discipline Committee. No reply was received.

46. A Law Society staff employee left a telephone message for the Solicitor at his office on June 2, 1993 advising that should he failure to return the call by 5:00 p.m. on June 4, 1993, the matter would be referred to the Discipline Committee the following week. No reply was received. A copy of the Society's verbal transaction form dated June 2, 1993 is contained at Document Book, Tab 30.

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

48. The action brought by the Toronto-Dominion Bank against Mr. Rohland was settled on May 12, 1993 by Mr. Rohland's new counsel.

Complaint D264/93

Particular 2(a)

Failure to reply to the Society regarding a complaint by
Eleanor Michael

49. The Solicitor retained the firm of Eleanor Michael Personnel Inc. to provide him with secretarial support staff. As of April 8, 1993, the Solicitor's outstanding invoices with Eleanor Michael Personnel Inc. totalled \$175.48 dating back to May 4, 1992.

50. By letter dated April 8, 1993 (Document Book, Tab 31), Eleanor Michael Personnel Inc. advised the Law Society of the Solicitor's failure to pay the outstanding amount.

51. By letter dated April 29, 1993 (Document Book, Tab 32), the Law Society forwarded to the Solicitor a copy of Eleanor Michael Personnel Inc.'s April 8, 1993 letter. The Solicitor was requested to reply within two weeks. No reply was received.

52. A Law Society staff employee left telephone messages for the Solicitor at his office on May 20, 1993 and May 28, 1993 requesting he return the calls. The calls were not returned. A copy of the Society's verbal transaction form dated May 20, 1993 and May 28, 1993 is contained at Document Book, Tab 33.

53. A Law Society staff employee left a telephone message for the Solicitor at his office on June 1, 1993 requesting he reply by June 4, 1993. No reply was received. A copy of the Society's verbal transaction form dated June 1, 1993 is contained at Document Book, Tab 34.

54. By registered mail dated June 7, 1993 (Document Book, Tab 35), the Law Society forwarded to the Solicitor a copy of its April 29, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society and his undertaking to reply promptly to all communications from the Law Society. The Solicitor was advised that should he fail to provide a reply within seven days, the matter would be referred to the Discipline Committee. No reply was received.

55. The Solicitor has replied to the Society by letter dated April 30, 1994 (Tab 36, Document Book).

Compliant D293/93

Particular 2(a)

Failure to co-operate with investigation by the Society's Insurer

56. On or about March 16, 1993, the Complaints Department of the Law Society forwarded to the Society's insurer a copy of Mr. Rohland's letter dated March 12, 1993.

57. By letter dated April 8, 1993 (Document Book, Tab 37), the Society's insurer forwarded to the Solicitor a copy of Mr. Rohland's March 12, 1993 letter. The insurer advised the Solicitor that Chris Spencer had been appointed to investigate this matter. The Solicitor was requested to contact either the insurer or Mr. Spencer as soon as possible. No reply was received.

58. By letter dated April 26, 1993 (Document Book, Tab 38), sent by facsimile transmission and regular mail, James Ivers of Spencer & Smyth Insurance Adjusters Inc., advised the Solicitor that they had been retained by the Society's insurer to investigate the claim by Greg Rohland/Gregman Construction. The Solicitor was requested to arrange delivery of his file to Mr. Ivers, by courier, within ten days so that a complete review of the same could be made. No reply was received.

59. By letter dated May 26, 1993 (Document Book, Tab 39), Mr. Ivers forwarded to the Solicitor a copy of his April 26, 1993 letter. The Solicitor was requested to provide his file within fourteen days. No reply was received.

60. Mr. Ivers spoke with the Solicitor by telephone on July 15, 1993. The Solicitor advised Mr. Ivers he would deliver Mr. Rohland's file to him within the week. The file was not received.

61. Mr. Ivers left messages for the Solicitor at his office on July 16, 1993 and July 28, 1992 requesting he return the calls. The calls were not returned.

22nd September, 1994

62. By letter dated July 5, 1993 (Document Book, Tab 40), sent by facsimile transmission and regular mail, Mr. Ivers reminded the Solicitor of his obligation to cooperate in the insurer's investigation and the consequences should he not. Mr. Ivers advised the Solicitor that it was imperative that he contact him immediately upon receipt of this letter. No reply was received.

63. By letter dated July 27, 1993 (Document Book, Tab 41), sent by facsimile transmission and regular mail, Mr. Ivers confirmed with the Solicitor his unsuccessful attempts to obtain the Solicitor's file. The Solicitor was requested to deliver the file to Mr. Ivers, by courier, on July 28, 1993. The Solicitor was advised that should he fail to deliver the file on that day, he would recommend to the Society's insurer that coverage be denied due to his lack of cooperation. Mr. Ivers further stated that he would request that the insurer refer the matter of the Solicitor's non-cooperation to the Discipline Committee. No reply was received.

64. By letter dated August 17, 1993 (Document Book, Tab 42), Christopher Spencer advised the Solicitor that should he fail to fully co-operate with him, the matter would be referred to the Discipline Committee. No reply was received.

65. The Solicitor has not provided a reply to the Society nor has he provided an explanation for his failure to reply, he did; however, deliver the file to the adjuster by overnight courier on April 22, 1994.

COMPLAINT D205/93

Particular 2(e)

Complaint D264/93

Particular 2(b)

Complaint D293/93

Particular 2(b)

Failure to comply with his undertaking to the Law Society

66. The Solicitor undertook, in writing, on November 5, 1991 (Document Book, Tab 43) the following:

To reply promptly to all communications from the Law Society, in the case of telephone communications, within three business days of receipt of such communications, and in the case of written communications, within 10 days of receipt of such communications.

67. The Solicitor has failed to comply with his undertaking to the Law Society by failing to reply to telephone communications within three business days as undertaken in paragraphs 18, 22, 23, 46, 57, 60 and 61 of this agreed statement of facts.

68. The Solicitor has failed to comply with his undertaking to the Law Society by failing to reply to written communications within ten days of receipt as undertaken in paragraphs 15, 16, 17, 43, 44, 45, 51, 54, 57, 58, 59, 62, 63 and 64 of this agreed statement of facts.

IV. DISCIPLINE HISTORY

69. The Solicitor was reprimanded in Convocation on April 23, 1992 for failing to reply to the Society and breach of his undertaking dated November 5, 1991. He was ordered to pay the costs of the Society in the amount of \$1,500.00 and ordered to participate and cooperate with the Practice Review Program of the Professional Standards Department.

70. The Solicitor was reprimanded in Committee and ordered to pay the Society's costs of \$1,000.00 on August 18, 1992 as a result of his failure to reply to the Society and breach of his undertaking to the Law Society to reply.

71. The Solicitor was found guilty of professional misconduct on June 16, 1993 regarding his failures to reply to the Law Society, failure to serve clients, failure to honour financial obligations, breach of his undertaking dated November 5, 1991, and failure to satisfy an award of costs. The Solicitor was suspended by Order of Convocation on November 25, 1993 for a period of four months commencing December 20, 1993. The suspension, however, shall continue after that date indefinitely until credible psychiatric opinion has been provided to the Society that the Solicitor is able to be governed by the Society. A copy of the Report and Decision of the Discipline Committee, dated September 30, 1993 is found at Tab 44, Document Book.

DATED at Toronto this 14th day of June, 1994."

FINDING

The Committee is unanimously of the view, based on the Agreed Statement of Facts and the agreement of the Solicitor, that Professional Misconduct has been made out with respect to all of the particulars in respect of all of the complaints.

RECOMMENDATIONS AS TO PENALTY

The Committee recommends that:

1. There be a suspension from practice of the solicitor for a two month period running from April 29, 1994 to June 20, 1994.
2. The solicitor be required to submit to Practice Review.
3. The solicitor should be suspended indefinitely beyond June 20, 1994 until or unless the Law Society has been satisfied with respect to the appropriate response required with respect to the Rohland complaint.
4. The Committee reiterates the continuation of the indefinite suspension by Convocation pursuant to the report and decision of the Committee of September 30, 1993.

REASONS FOR RECOMMENDATION

In order to understand what may appear to be the unusual nature of these Recommendations as to Penalty, it is necessary to review first of all the Decision of the Discipline Committee, which was upheld by Convocation, the report being dated September 30, 1993 which is attached hereto.

It is clear that these complaints arise and are similar to the complaints which were covered by the Committee's report of September 30, 1993. The complaints arose during the period prior to the Committee's Decision of September 30, 1993. The submissions of the Law Society, which this Committee accepts, is to consider what the Committee in September 1993 would have done if these present complaints had been before the Committee at that time. The Society's submission was that in these circumstances the Committee might well have ordered a six month suspension as opposed to a four month suspension. Counsel for the Solicitor agreed in this submission, and the Committee is satisfied that, in terms of penalty, the two month suspension is appropriate.

22nd September, 1994

Again if the Committee adopts the requirements suggested by both Committees, because of the time when the complaints arose, it is reasonable to simply add two months to the suspension of four months ordered by Convocation. The four month suspension ended April 20, 1994, and therefore the two month suspension, it seemed realistic to suggest, should simply be extended for the additional two months from that date.

The Committee in September had expressed its concern about the possibility that the Solicitor was suffering from a psychiatric disorder. The solicitor, apparently as a result of the Committee's Decision, consulted a psychiatrist and has come under the care of Dr. Norman Doidge, an eminent Toronto psychiatrist practising at the Clarke Institute. Dr. Doidge's reports are attached because they contain the diagnosis of a recognized psychiatric disorder which the Committee is satisfied as least contributed to and helps to understand the misconduct of the Solicitor.

At this Committee Hearing, it was urged by Counsel for the Solicitor that the Committee should, either at the time of the Hearing or immediately thereafter, deal with the issue of the indefinite suspension and make the decision as to whether or not the Solicitor is now capable of practicing. The Law Society's position, through Ms. Budweth, was that while Dr. Doidge expressed optimism about prognosis, there is no final indication that the Solicitor is capable of practicing. The Committee is satisfied that that issue must be determined at a later date when both the Solicitor and the Society have an opportunity to consider such further investigation as they consider necessary leading hopefully to a further Hearing, at which time the issue of the capacity of the Solicitor to practice can be determined.

The Committee is fortified in this view by reason of the fact that as late as April 1994, after the Solicitor had been in treatment for some time (which is still continuing), the Solicitor had still not responded to all of the complaints.

This Committee does not wish, by these reasons for the recommendations, to express any opinion at this time about the capability of the Solicitor to practice, and simply reiterates that the indefinite suspension ordered in the Committee report of September 1993 should continue on terms set out in that report.

Ernest Arthur Dyck was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 19th day of April, 1985.

ALL OF WHICH is respectfully submitted

DATED this 4th day of August, 1994

Kenneth E. Howie,
Chair

It was moved by Mr. Cullity, seconded by Mr. Lerner that the Report be adopted.

There were no submissions and the Report was adopted.

22nd September, 1994

It was moved by Mr. Manes, seconded by Ms. Weaver that the Recommendation as to Penalty be adopted, that is, that the solicitor be suspended retroactive for 2 months running from April to June 1994 and continue thereafter until a credible psychiatric opinion was provided and the solicitor be required to participate in and co-operate with the Practice Review program of the Professional Standards Department and to implement the recommendations made by that department.

Submissions were made in support of the recommended penalty.

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

It was moved by Mr. Lerner but failed for want of a seconder that the solicitor be permitted to resign.

The Recommendation as to Penalty was adopted.

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

Counsel and solicitor retired.

Re: John Calvin BRACEWELL - Sarnia

The Secretary placed the matter before Convocation.

Messrs. Campbell and Cullity and Ms. O'Connor withdrew for this matter.

Mr. Stephen Foster appeared for the Society and Ms. Janet Leiper as Duty Counsel appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 13th April, 1994, together with an Affidavit of Service sworn 16th June, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 12th May, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 22nd September, 1994 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Colin L. Campbell, Q.C., Chair
Shirley O'Connor
Maurice C. Cullity, Q.C.

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

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

Stephen Foster
for the Society

Not Represented
for the solicitor

Heard: March 15, 1994

22nd September, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 14, 1993, Complaint D230/93 was issued against John Calvin Bracewell alleging that he was guilty of professional misconduct.

The matter was heard in public on March 15, 1994 before this Committee composed of Colin L. Campbell, Q.C., Chair, Maurice C. Cullity, Q.C., and Shirley O'Connor. The Solicitor was in attendance at the hearing and represented himself. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D230/93

2. a) From June 17, 1992 to December 9, 1992, he operated his general account transactions through that of his mixed trust account in contravention of Section 14 of Regulation 708 made under the Law Society Act;
- b) From August 5, 1992 until December 18, 1992, he permitted a client trust ledger account to be overdrawn and thus failed to maintain sufficient trust balances in his trust account contrary to section 14(12) of Regulation 708 made under the Law Society act.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D/93 and is prepared to proceed with a hearing of this matter on March 15, 1994.

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 D230/93 and admits the particulars contained therein. The Solicitor also admits that the particulars in the Complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

Background

4. The Solicitor was called to the Bar in 1989. He practises as a sole practitioner in Sarnia.

5. In December, 1992, the Law Society commenced an audit of the Solicitor's practise as a result of two cheques which the Solicitor remitted cheques to the Law Society in payment of his 1992 Errors and Omissions Fees. Both cheques were returned due to insufficient funds in the Solicitor's bank account.

6. The Solicitor informed the Law Society's auditor that he had a "computer crash" in February, 1991 and that he had lost his general account records. The trust account records were up to date, although the Solicitor had not made any hard copy print-outs since June 30, 1991.

7. The Solicitor had not filed his annual Form 2/Form 3 filing for the fiscal period ending April 30th 1991.

8. During the course of this audit the Solicitor updated his records and brought his annual Form 2/Form 3 filings up to date.

Particular a) - Operating Practise Through Trust Account

9. The Law Society's audit disclosed that the Solicitor had permitted earned fees to remain in his trust account contrary to section 14(7) of Regulation 708 pursuant to the Law Society Act. This was done to avoid creditors.

10. The Solicitor informed the Law Society's auditor that during the months of September and October, 1992 Revenue Canada had placed an attachment order on his general account due to arrears in payment of his income tax.

11. In fact, the attachment order by Revenue Canada had been placed on the Solicitor's general account on June 17, 1992 and was removed on December 9, 1992.

12. Once Revenue Canada had garnished the Solicitor's general law practice account, the Solicitor avoided transferring his earned fees from his trust account to his general account. The Solicitor began to use his trust account for personal transactions, thus placing his clients' monies at risk of garnishment by Revenue Canada.

13. The Solicitor stated to the Law Society's auditor that he did not know how to carry on business when an attachment was placed on his general account by Revenue Canada. The Solicitor admitted that he never contacted the Law Society for any advice in regard to this problem.

22nd September, 1994

14. Trust cheques were drawn to the Solicitor's daughter, Melody Bracewell, as well as his secretary, Samantha Sullivan, and used for office expenses and staff wages.

15. The attached schedule demonstrates a sampling of cheques drawn from trust to the offsetting fees:

Cheque Details Payee	Amount Client Ledger A/C	Fee Filling
Aug 28/92 - Melody Bracewell	\$500.00 - Sharp	Aug 26/92 - \$600.00
Sept. 2/92 - Melody Bracewell	\$107.00 - McMaster	Sept. 2/92 - \$107.00
Sept. 22/92 - Samantha Sullivan	\$800.00 - Webster	Sept 9/92 - \$7,784.30
Oct. 7/92 - Samantha Sullivan	\$500.00 - Bernier	Oct. 7/92 - \$535.00

Particular b) - Overdrawn Client Trust Ledger Account

16. The Solicitor failed to maintain sufficient trust balances in his trust account and failed to correct forthwith a trust shortage which existed, for over thirty days, contrary to section 14 (12) of Regulation 708 pursuant to the Law Society Act.

17. The Solicitor permitted a client's trust ledger account in the name of "LaForge" to be overdrawn between June 12, 1992 and September 9, 1992.

18. The overdrawn trust ledger account occurred due to a cheque from Mr. LaForge being returned due to insufficient funds following the disbursement of trust monies on behalf of Mr. LaForge's purchase transaction on June 12th 1992. Subsequent replacement cheques from Mr. LaForge were also returned for insufficient funds.

19. On August 13, 1992 the client trust account was overdrawn in the amount of \$3,460.43. The Solicitor made a cheque payable to his daughter, Melody Bracewell, in the amount of \$300.00 which was cashed and used for office expenses. This cheque was debited to the client ledger card of LaForge increasing the overdrawn amount to \$3,760.43.

20. The Solicitor replaced the shortage.

V. DISCIPLINE HISTORY

21. The Solicitor was reprimanded in Committee on March 16, 1993 for failure to file his Forms 2 and 3 for the fiscal year ended April 30, 1991.

DATED at Toronto this 15th day of March, 1994."

FINDING OF PROFESSIONAL MISCONDUCT

The Solicitor admits, and the Committee finds, that the particulars of the professional misconduct have been established. The Committee finds that during the relevant period the Solicitor operated his general account transactions through that of his mixed trust account, and also permitted a client trust ledger to be overdrawn during the stated period.

RECOMMENDATION AS TO PENALTY

The Committee accepts the joint submission of the Solicitor and the Society that the Solicitor be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

Both the Solicitor and the Law Society agreed to a joint submission as to penalty, namely that the Solicitor should be reprimanded in Convocation.

In doing so counsel for the Society indicated that he had no concerns with respect to the honesty or integrity of the individual Solicitor but felt the reprimand in Convocation was important to bring this matter to the attention of the profession.

The Solicitor concurred in this penalty and stated that he recognized the obligation to ensure that others not fall into the same unfortunate circumstance, and the best way to ensure this was to bring the issue to the attention of the profession. The Solicitor candidly admitted that he did not understand the manner of operation of a trust account in the face of a Garnishment Order from Revenue Canada. The Solicitor's statements regarding his personal and family problems in the relevant period were accepted both by the Society and the Committee. These were compounded by problems with his computer system.

There is a period of time when his practice literally came to a standstill and he did not have the funds to pay approximately \$2,000 owed to Revenue Canada.

The Solicitor also indicated in respect of particular (b) that there was a long term practice in Sarnia of not certifying cheques for trust for the clients. The Solicitor readily admitted that this was at his risk and his error in making payments out in anticipation of those cheques being valid.

Following deliberation the Committee was satisfied that the appropriate penalty would be to recommend a reprimand in Convocation. The Committee was satisfied both from the submissions of the Society and the Solicitor that there was no issue as to the Solicitor's honesty and integrity.

The Solicitor readily admits that it was open to him to seek assistance from the Society when it was not apparent to him what he should do in the circumstances.

While the Committee is mindful that the offence is a serious one with ramifications for the public's trust in the profession, nevertheless, in these circumstances, we are satisfied that with the Solicitor's willingness to have this matter brought to the attention of the profession in circumstances that will focus on his own individual default, that the appropriate penalty is a reprimand in Convocation, and we so recommend.

John Calvin Bracewell was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 28th day of March, 1989.

ALL OF WHICH is respectfully submitted

DATED this 13th day of April, 1994

Colin L. Campbell,
Chair

22nd September, 1994

It was moved by Ms. Graham, seconded by Ms. Weaver that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Brennan, seconded by Mr. Finkelstein that the Recommendation as to Penalty be adopted that is, that the solicitor be reprimanded in Convocation.

Submissions by both counsel were made in support of the recommended penalty.

The Recommendation as to Penalty was adopted.

Counsel and solicitor retired.

Re: Michael Gordon LEAR - Mississauga

The Secretary placed the matter before Convocation.

Ms. Curtis withdrew for this matter.

Ms. Budweth appeared for the Society and Ms. Leiper as Duty Counsel appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 19th June, 1994, together with an Affidavit of Service sworn 2nd August, 1994 by Ron Hoppie that he had effected service on the solicitor by registered mail on 29th June, 1994 (marked Exhibit 1). The Acknowledgement, Declaration and Consent signed by the solicitor on 19th July, 1994 was filed as Exhibit 2. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Earl Levy, Q.C. Chair
Hope Sealy
Carole Curtis

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

Christina M. Budweth
for the Society

MICHAEL GORDON LEAR
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: February 15, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 16, 1993, Complaint D169/93 was issued against Michael Gordon Lear alleging that he was guilty of professional misconduct.

The matter was heard in public on February 15, 1994 before this Committee composed of Earl Levy, Q.C., Chair, Hope Sealy and Carole Curtis. The Solicitor was present and was not represented. Christina M. Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D169/93

2. a) He engaged in professional misconduct by preparing and registering a mortgage which purported to secure a loan in the amount of \$300,000 from VIP Construction & Maintenance Company Inc. to Pinewood Home Construction Inc. when he knew that no such loan had been made;

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D169/93 and is prepared to proceed with a hearing of this matter on February 15 and 16, 1994.

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 D169/93 and this agreed statement of facts and admits Particular (a) contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor is 40 years of age. He was called to the bar in 1981 and presently practises as a partner in the firm Gardner/Cutler in Mississauga.
5. Messrs. John Vandyk and Walter Africh were, at times material to this complaint, the principles of Pinewood Home Construction Inc. During times relevant to this complaint, Messrs. Vandyk and Africh were in the process of winding down the business and severing their business relationship.

6. One of the principle assets of Pinewood was a property located at 2509 Mississauga Road, Mississauga.

7. On September 14, 1988, Mr. Africh registered a mortgage on title to the property in the amount of \$300,000 in favour of Royal Trust. Mr. Vandyk's position to the Solicitor was that this had been done without his consent. Mr. Africh denies this lack of authority. The Solicitor and the Society are agreed that the resolution of this factual issue is not material to the Complaint against the Solicitor.

8. Pinewood built a house on the Mississauga Road property and entered into an agreement of purchase and sale to sell the property and home situate thereon for \$775,000. A copy of the agreement of purchase and sale dated March 31, 1989, is attached as Exhibit 1 to this agreed statement of facts. The sale transaction was to close June 28, 1989.

9. As set out in paragraph 7, during the course of the winding up of Pinewood, a dispute arose between Messrs. Vandyk and Africh. Mr. Vandyk alleged Mr. Africh had registered the Royal Trust mortgage without his knowledge or consent. The funds advanced on the mortgage had not been deposited into Pinewood's corporate bank account although the monthly payments were being made by the company.

10. Mr. Vandyk contacted the Solicitor's predecessor firm, Donald A. Gardner & Associates, of which the Solicitor was an associate, in late April, 1989. He initially dealt with the Solicitor's associate, Donald Gardner. Mr. Gardner scheduled a meeting between Messrs. Vandyk and Africh and their respective solicitors for May 11, 1989. The meeting was cancelled by Mr. Africh. Thereafter, the Solicitor became involved in the dispute.

11. Mr. Vandyk requests that the Solicitor prepare and register, on title to 2509 Mississauga Road, a mortgage in the principal amount of \$300,000 in favour of VIP Construction & Maintenance Inc., a company owned and controlled by Mr. Vandyk. The purpose of the registration of the mortgage was to encumber the property and support Mr. Vandyk's position in his dispute with Mr. Africh. Under its terms the mortgage matured on June 26, 1989.

12. The Solicitor admits that the VIP mortgage did not represent any monies advanced or to be advanced and that it was being registered only to secure the position and amounts alleged to be owed by Pinewood to Mr. Vandyk. The Solicitor admits that he was fully aware of these facts throughout.

13. The Solicitor prepared the mortgage as instructed and registered it on May 23, 1989. He did not advise either counsel for Mr. Africh or counsel for the prospective purchasers of the registration of the mortgage at that time.

14. By letter of May 24, 1989 to Mr. Wheeler, counsel for Mr. Africh, the Solicitor took the position that Mr. Africh's encumbrance of the property with the Royal Trust mortgage was invalid because of Mr. Africh's failure to secure Mr. Vandyk's signature on the mortgage documents. A copy of the Solicitor's May 24, 1989 letter is attached as Exhibit 2 to this agreed statement of facts.

15. Mr. Wheeler responded by letter dated May 29, 1989, a copy of which is attached as Exhibit 3 to this agreed statement of facts.

16. Negotiations continued between the parties and on June 21, 1989, Mr. Africh's counsel provided an itemized accounting pertaining to 2509 Mississauga Road. A copy of Mr. Wheeler's letter of June 21, 1989 is attached as Exhibit 4 to this agreed statement of facts. The remainder of the funds at that time, after payout of the Royal Trust mortgage and real estate commissions etc. would have been \$423,139.46 and would have been sufficient to secure the amount in dispute between Messrs. Vandyk and Africh.

17. The Solicitor responded by letter dated June 21, 1989, a copy of which is attached as Exhibit 5 to this agreed statement of facts.

18. The Solicitor wrote to Mr. Wheeler again by letter dated June 23, 1989, a copy of which is attached as Exhibit 6 to this agreed statement of facts. A further letter of June 23, 1989, authored by the Solicitor, to Mr. Wheeler is attached as Exhibit 7 to this agreed statement of facts. Mr. Wheeler responded by a letter dated June 26, 1989, a copy of which is attached as Exhibit 8 to this agreed statement of facts.

19. By letter dated June 26, 1989 to Steven Kier, solicitor for the purchasers of 2509 Mississauga Road, the Solicitor first advised of the existence of the VIP mortgage. A copy of the Solicitor's letter is attached as Exhibit 9 to this agreed statement of facts. The Solicitor's June 26, 1989 letter to Mr. Kier was transmitted by facsimile transmission at 7:19 p.m. The Solicitor corresponded further with Mr. Kier on June 27, 1989 by letter, a copy of which is attached as Exhibit 10 to this agreed statement of facts.

20. The Solicitor also first advised Mr. Wheeler of the existence of the VIP mortgage by letter of June 26, 1989, also, transmitted after business hours, a copy of which is attached as Exhibit 11 to this agreed statement of facts.

21. The transaction did not close as scheduled. Messrs Vandyk and Africh were unable to come to terms for the resolution of matters between themselves; accordingly, Mr. Vandyk refused to execute the documentation required to complete the transaction including the transfer documents. There were some negotiations between Mr. Wheeler and Mr. Kier which contemplated a closing of the transaction on the basis of Mr. Wheeler's undertaking to discharge the VIP mortgage. There was considerable question as to whether or not this step could be undertaken without Mr. Vandyk's consent. Understandably, the purchasers were not prepared to complete the transaction without Mr. Vandyk's consent.

22. Eventually the property was resold to other purchasers. Pinewood suffered a loss of approximately \$100,000 on the subsequent sale.

23. Following the failure of the transaction to close, the Solicitor and Mr. Wheeler continued to correspond as evidenced by a letter dated July 13, 1989 from the Solicitor to Mr. Wheeler, a copy of which is attached as Exhibit 12 to this agreed statement of facts.

24. The Solicitor advised his client to discharge the VIP mortgage which advice was confirmed in a letter dated July 18, 1989, a copy of which is attached as Exhibit 13 to this agreed statement of facts.

25. Mr. Vandyk authorized the Solicitor to discharge the VIP mortgage on August 3, 1989. The mortgage was discharged on August 4, 1989.

V. DISCIPLINE HISTORY

26. A complaint was sworn against the Solicitor dated September 24, 1987 alleging that he had altered a survey and deleted certain copyright information and then failed to co-operate with the Law Society's investigation into the complaint. The matter was heard on December 14, 1987 and resulted in a finding of professional misconduct to a penalty of a reprimand in committee. A copy of the complaint of professional misconduct is attached as Exhibit 14 to this agreed statement of facts.

27. The Solicitor was subsequently subject of a further disciplinary hearing as a result of a complaint sworn on July 22, 1991, alleging that he had engaged in a conflict of interest and had failed to serve his clients. The matter was heard on December 11, 1991 and resulted in a finding of professional misconduct and a reprimand in committee. A copy of the complaint of professional misconduct is attached as Exhibit 15 to this agreed statement of facts.

VI PENALTY

28. The parties will jointly submit that the Solicitor be reprimanded in Convocation for his misconduct and be required to pay a portion of the costs of the Society in the amount of \$2,000 payable by post-dated cheques in the amount of \$400 each the first payment being due immediately upon the conclusion of this matter in Convocation.

DATED at Toronto this 11 day of February, 1994."

RECOMMENDATION AS TO PENALTY

The committee recommends that the Michael Gordon Lear be reprimanded in Convocation and further recommends the following regime:

- o Over the next five years, the Solicitor, at his expense, to attend two Continuing Legal Education programs a year, (programs involving full-day attendance). One of these programs each year to cover real estate;
- o The Solicitor to participate in the Practice Advisory program as required by the Law Society;
- o The Solicitor is not to practice as a sole practitioner;
- o The Solicitor to be supervised by Mr. Goldberg or Mr. Cutler, one of the partners in the firm with which he works, or a Solicitor agreed to by Ms. Budweth or her designate, as long as required by the Law Society;
- o The Solicitor to attend the ethics portion of the Bar Admission course this May or June; he will bear the costs of that attendance as assessed by the Faculty of the Bar Admission Course;
- o The Solicitor to pay the Law Society's cost in the amount of \$1,500.00, this amount to be paid over the next five years.

REASONS FOR RECOMMENDATION

The Solicitor was called to the Bar in 1981 and had worked in a small town practice which was economically marginal. The Solicitor is forty-one years old and married with two children. His income is currently the sole support of four dependants (his wife, his two children and his mother-in-law). He supports his wife's mother who lives with them. His wife was laid off work in 1992. Since October, 1993, the time he has been able to put into his practice has been limited because his wife had a catastrophic fall. He is spending much more time at home lately and is still taking his wife to physiotherapy twice a week. His wife and his wife's mother own the home they live in, and the mortgage is approximately \$1,000.00 a month. The Solicitor has received a deferral of his Law Society fees for 1993/94. He is currently subject to a Revenue Canada Garnishment. In the five months prior to appearing before the Committee he grossed an average of \$2,000.00 per month.

22nd September, 1994

While saying that he now understands the gravity and dishonesty of his actions, the Solicitor told the Committee that he had been acting on instructions from his firm's senior partner, Mr. Donald Gardner, and obeyed such instructions without exercising judgement or working out the ethical consequences of his action. There was evidence before the Committee that Mr. Gardner, no longer with the firm, did not have a good grasp of the law and ran a volume practice.

When the Committee met on March 17, 1994 to consider penalty, it heard testimony from both partners, Messrs. Lawrence Cutler and Jack Goldberg in the 3-lawyer firm in which the Solicitor is now employed. Both agreed that in his present firm the Solicitor showed a grasp of ethical issues and worked satisfactorily with some supervision and was honest.

However, the picture painted was one of a Solicitor working in a somewhat protected environment. This, together with a letter from the Director of the Practice Review Program and the Solicitor's previous Discipline record leaves the Committee with some concerns that the Solicitor still has problems recognizing issues of ethics and their fundamental importance in the practice of law.

It is with these facts in mind that the Committee declined to accept the joint submission concerning penalty. It lacked any remedial opportunities, and the terms for payment of expenses to the Society seemed as punitive to the Solicitor's family as to himself.

The Committee considered suspension but felt that this penalty was inappropriate. It is in the practice of law that the Solicitor will have the opportunity to gain better judgment, and improve his work methods. A suspension would not create an ability in the Solicitor to gain better judgment. In addition there are four people who are dependent on the Solicitor and they will be penalized by his suspension.

The Committee is of the view that the recommended penalty will protect the public, assist the Solicitor in developing his sense of judgment and impress on the Solicitor the importance of integrity of his work.

Michael Gordon Lear was called to the Bar and admitted as a Solicitor on the 9th day of April, 1931.

ALL OF WHICH is respectfully submitted

DATED this 19th day of June, 1994.

Earl Levy, Q.C.
Chair

It was moved by Mr. Blue, seconded by Mr. Brennan that the Report be adopted.

Ms. Budweth made brief submissions and asked that the Report be amended as follows:

Under the Agreed Statement of Facts:

- paragraph 11. - 1st line - delete the word "requests" and replace with the word "requested"; and

- paragraph 12. -last line - delete the word "award" and replace with the word "aware".

The Report was adopted.

It was moved by Ms. Palmer, seconded by Mr. Brennan that the Recommendation as to Penalty be adopted that is, that the solicitor be reprimanded, attend the Continuing Legal Education programs, participate in the Practice Advisory program, and to be supervised by one of the partners in the firm designated by the Secretary, to attend the Ethics program and pay costs of \$1,500 to be paid over the next 5 years.

Both counsel made submissions in support of the recommended penalty.

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

It was moved by Ms. Graham, seconded by Ms. Moliner that the solicitor be suspended for a period of 1 month plus conditions but without costs.

It was moved by Mr. Bragagnolo, seconded by Mr. Topp that the Society not attempt to recover the costs.

Carried

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

There were further submissions by Ms. Leiper.

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

The motion to suspend the solicitor for a period of 1 month with conditions and no costs was voted on and adopted.

Convocation granted the solicitor's request to commence his suspension on November 1st, 1994.

Counsel and solicitor retired.

Re: JAMES DOUGLAS LEITH ROSS - Toronto

The Secretary placed the matter before Convocation.

Ms. Budweth 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 4th August, 1994, together with an Affidavit of Service sworn 9th September, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 9th August, 1994 (marked Exhibit 1). The Affidavit of Service of David Munro was filed as Exhibit 2 and the Discipline History was filed as Exhibit 3. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

22nd September, 1994

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Kenneth E. Howie, Q.C. Chair
Earl Levy, Q.C.
Hope Sealy

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

Christina Budweth
for the Society

JAMES DOUGLAS LEITH ROSS
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: June 14, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 8, 1994 Complaint D14/94 was issued against James Douglas Leith Ross alleging that he was guilty of professional misconduct.

The hearing was heard in public on June 14, 1994 before this Committee composed of Kenneth E. Howie, Q.C., Chair, Earl Levy, Q.C. and Hope Sealy. The Solicitor was not present nor was he represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Compliant D14/94

2. a) He has failed to co-operate with the Law Society by not producing books and records pursuant to Section 18 of Regulation 708 of the Law Society Act
- b) He has breached and Order of Convocation that he suspend his practice for 1 month and thereafter until a committee of Convocation finds that he is capable to practise law, by continuing to practise during the period March 26th 1992 until present date.
- c) He attempted to mislead the Law Society when he claimed ignorance of his trust account and the activity therein.

22nd September, 1994

- d) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.
- e) The circumstances of particulars (a) to (d) above, he has demonstrated an inability to be governed by the Law Society.;

FINDING

By the actions described in this Complaint, by the Solicitor's failure to attend the Discipline hearing in June, despite all the efforts taken by the Society to advise him of the Hearing, and by his previous discipline history, the Solicitor has shown himself to be totally ungovernable by the Society.

RECOMMENDATION AS TO PENALTY

The Committee recommends that James Douglas Leith Ross be granted permission to resign, if he tenders his resignation within 5 days prior to the 1st date this matter is before Convocation, otherwise he be disbarred.

REASONS FOR RECOMMENDATION

Viva Voce evidence given by the Solicitor's Secretary bore out the Society's claim that the Solicitor continues to practice while under suspension and continues to operate his trust account in spite of assurances to the contrary given to the Society by the Solicitor.

The Solicitor showed his contempt for the discipline process and his governing body by his failure to attend at the Discipline Hearing in June in spite of the fact that he had been advised that the Society would be seeking as penalty, termination of his membership.

These actions, leave us in no doubt that the Solicitor has ceased to act responsibly, that he presents a danger to the public and is ungovernable. As such we have no hesitation in arriving at the penalty above.

James Douglas Leith Ross was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 27th day of June, 1957.

ALL OF WHICH is respectfully submitted

DATED this 4th day of August, 1994

Kenneth E. Howie,
Chair

There were no submissions and the Report was adopted.

22nd September, 1994

It was moved by Mr. Lerner, seconded by Mr. Finkelstein that the Recommendation as to Penalty be adopted that is, that the solicitor be disbarred.

Carried

Mr. Manes did not participate or vote.

Counsel retired.

Re: Leon Stanley WICKHAM - North York

The Secretary placed the matter before Convocation.

Mr. Carter, Ms. Moliner and Ms. Curtis withdrew for this matter.

Ms. Christina Budweth 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 17th June, 1994, together with an Affidavit of Service sworn 2nd August, 1994 by Ron Hopple that he had effected service on the solicitor by registered mail on 29th June, 1994 (marked Exhibit 1). The Notice of Intention was filed as Exhibit 2, the Notice of Disagreement filed as Exhibit 3 and the Affidavit of Service of Laurie Ormston as Exhibit 4. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert J. Carter, Q.C., Chair
Marie Moliner
Carole Curtis

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

Christina Budweth
for the Society

LEON STANLEY WICKHAM
of the City
of North York
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 15, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 6, 1993, Complaint D215/92 was issued, on April 21, 1993 Complaint D112/93 was issued, on June 23, 1993 Complaint D176/93 was issued and on August 26, 1993 Complaint D222/93 was issued against Leon S. Wickham, alleging that he was guilty of professional misconduct.

The matter was heard in public on December 15, 1993 before this Committee composed of Robert J. Carter, Q.C., Chair, Marie Moliner, and Carole Curtis. The Solicitor was in attendance at the hearing and represented himself. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D215/92

2. a) He failed to provide a reply to the Law Society regarding the ongoing investigation of a complaint by Household Trust despite letters dated August 14, 1992 and September 28, 1992 and telephone messages left on September 10, 1992, September 15, 1992 and September 22, 1992.
- b) He failed to serve his client, Household Trust, in a conscientious, diligent and efficient manner by failing to answer reasonable request from it for information.
- c) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act;

Complaint D112/93

2. a) He failed to produce to the Law Society for examination the complete books and records of his practice despite visits to his office on December 3, 1992, December 4, 1992 and March 29, 1993, letters dated February 26, 1993 and March 2, 1993, and telephone requests on February 18, 1992, February 25, 1992, February 26 1992 and March 1, 1993.

Complaint D176/93

2. d) He failed to serve his clients, Beverly McLaughlin, Deloris Akinshara and Shirley White in a conscientious, diligent and efficient manner by failing to:
 - i) answer their reasonable requests for information regarding the status of their matter.
 - ii) provide a prompt and complete report to them upon completion of their real estate and mortgage matter.
- e) He failed to provide a reply to the Law Society regarding the investigation of an ongoing complaint by Beverly McLaughlin, Deloris Akinshara and Shirley White, despite letters dated February 25, 1993 and April 14, 1993 and telephone messages left on March 11, 1993, March 25, 1993 and April 5, 1993.

22nd September, 1994

- f) He failed to serve his clients, Mr. and Mrs. Sewtage Singh, in a conscientious, diligent and efficient manner by failing to:
 - i) answer their reasonable requests for information regarding the status of their matter.
 - ii) provide a prompt and complete report to them upon completion of their real estate and mortgage matter.
- g) He failed to provide a reply to the Law Society regarding a complaint by Mr. and Mrs. Sewtage Singh despite letters dated February 17, 1993 and April 14, 1993 and telephone messages left on March 11, 1993 and March 25, 1993.
- h) He failed to provide a reply to the Law Society regarding a complaint by Bernard Schneider despite letters dated February 26, 1993 and April 14, 1993 and telephone messages left on March 25, 1993 and April 5, 1993.
- i) He failed to account to Mr. and Mrs. Singh for monies entrusted to him.

Complaint D222/93

- 2. a) He failed to take steps necessary to pursue an appeal of a conviction on a charge of assault on behalf of his client, Randolph De Mone.
- b) He failed to keep his client, Randolph De Mone, reasonably informed about his case and failed to respond to his requests for information.
- c) He failed to reply to the Law Society's ongoing investigation of a complaint by Randolph De Mone, despite letters dated January 27 and May 18, 1993, and telephone messages on May 5 and May 12, 1993.
- d) He failed to deliver, in a timely manner, the file of a client, Corrado Mallia to his new solicitor, Frank Mendocino.
- e) He failed to reply to a fellow solicitor, Frank Mendocino's correspondence dated March 10, 1993.
- f) He failed to provide a reply to the Law Society regarding a complaint by Frank Mendocino, despite letters dated March 5, April 29 and June 21, 1993 and a telephone request on June 7 and a telephone message on June 14, 1993.
- g) He failed to provide a reply to the Law Society regarding a complaint by Julie Wong of The Dominion Trust Company despite letters dated April 29 and June 7, 1993, and telephone requests on May 20, May 28 and June 1, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D215/92 and D112/93 and is prepared to proceed with a hearing of these matters on May 12, 1993.

11. IN PUBLIC/IN CAMERA

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

111. ADMISSIONS

3. The Solicitor has reviewed Complaints D215/92 and D112/93 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 8, 1987. He practices as a sole practitioner.

Complaint D215/92
Particular 2(a) and 2(b)

5. The Solicitor had acted for Household Trust, hereinafter referred to as "Household", from time to time during the period May, 1991 to July, 1991 to act on its behalf regarding a number of mortgage transactions.

6. By letter dated November 5, 1991 (Tab 1, Document Book) Household requested the Solicitor immediately provide reporting letters on the following matters:

Arnold Blackwood, 34 Grafton Avenue
- closed May 28/91
- (Household Realty)

Katherine Flynn, 54 Briscoe Street
- closed June 21/91
- (Household trust)

Phillis Campbell, 204 Vaughan Road
- closed July 18/91
- (Household trust)

Sybil Grant, 30 Futura Drive
- closed July 3/91
- (Household Trust)

Hyacinth Philips, 78 Pilkey Crescent
- closed July 11/91
- (Household Trust)

Hyacinth Philips, 78 Pilkey Crescent
- closed July 8, 1991
- (Household Trust)

22nd September, 1994

7. The Solicitor advised Household by telephone on November 6, 1991 that the reporting letters for the Blackwood, Grant and one other file would be forwarded by courier immediately. The Solicitor advised that the other three reporting letters would be forwarded by the weekend.

8. By letter dated November 27, 1991 (Tab 2, Document Book) Household forwarded to the Solicitor a copy of its November 5, 1991 letter. Household advised the Solicitor that despite their telephone conversation on November 6, 1991, only the Blackwood reporting letter was received. The Solicitor was advised that should the outstanding reporting letters not be received by December 5, 1991, the matter would be referred to the Law Society.

9. By letter dated January 16, 1992 (Tab 3, Document Book) Household acknowledged receipt of the signed Solicitor Certificates on the Campbell, Grant, Phillips and Phillips files. The Solicitor was advised that Household was still awaiting receipt of the remaining documentation on the Grant and the two Phillips mortgages. The solicitor was requested to forward the outstanding documentation. No reply was received.

10. By facsimile transmission on January 27, 1992 (Tab 4, Document Book) Household requested the Solicitor forward the following list of outstanding documents:

Sybil Grant	-	registered copy of charge
	-	insurance coverage
	-	tax certificate
	-	sheriff's certificate

Hyacinth Phillips 1st and 2nd	-	registered copy of charge
	-	tax certificate
	-	insurance coverage
	-	sheriff's certificate
	-	signed direction (2nd only)
	-	PLC agreement (2nd only)
	-	check signature form (2nd only)

Luke Tucker 1st and 2nd	-	tax certificate
	-	sheriff's certificate

Shirley White	-	Solicitor's certificate
	-	registered copy of charge
	-	insurance coverage
	-	tax certificate
	-	sheriff's certificate

The Solicitor was requested to provide the same immediately. No reply was received.

11. By letter dated February 28, 1992 (Tab 5, Document Book) Household forwarded to the Solicitor a copy of its January 27, 1992 letter. The Solicitor was requested to provide the required documents immediately.

12. By letter dated May 27, 1992 (Tab 6, Document Book) Household advised the Law Society of the Solicitor's failure to provide the required documentation on the aforementioned mortgages.

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13. A Law Society staff employee spoke with the Solicitor by telephone on June 16, 1992. The Solicitor was advised that a copy of Household's May 29th letter and supporting documentation would be forwarded to him by facsimile transmission that day (Tab 7, Document Book). The Solicitor was requested to provide his comments to the same. The documents were transmitted. The Solicitor failed to reply.

14. A Law Society staff employee left a telephone message for the Solicitor at his office on June 25, 1992 requesting that he return the call. The Solicitor returned the Society's telephone call on June 25, 1992 leaving a message for the staff employee. The Law Society employee left a telephone message for the Solicitor at his office on June 25, 1992 requesting he return the call. The call was not returned.

15. The same Law Society staff employee left a telephone message for the Solicitor at his office on June 29, 1992 requesting he return the call. The Solicitor returned the call and left a message for the staff employee that he would call again later that same day, between 3:00 p.m. and 3:30 p.m. The Solicitor did not return the call.

16. The Law Society employee left telephone messages for the Solicitor at his office on July 2, 1992 and July 3, 1992 requesting he return the calls. He failed to do so.

17. On July 6, 1992, the Solicitor's secretary, Diane, advised the Law Society, by telephone, that the Solicitor would return the call later that same afternoon. The Solicitor did not return the call.

18. The Law Society employee left a telephone message for the Solicitor at his office on July 7, 1992 requesting he return the call. The call was not returned.

19. By undated letter (Tab 8, Document Book) mailed in July, 1992 the Law Society forwarded to the Solicitor another copy of the Household's letter of complaint. The Solicitor was requested to provide his comments to the same, as well as, his confirmation that the outstanding documentation had been forwarded to Household, within seven days of the date of this letter. No reply was received.

20. The Law Society employee spoke with the Solicitor's secretary, Diane, by telephone on August 4, 1992. Diane advised that the Solicitor had been ill and that his response should be received by the Law Society by the end of the week. No reply was received.

21. The Law Society employee spoke with the solicitor's secretary, Diane, by telephone on August 11, 1992. Diane advised the Law Society that the Solicitor's reply was "on its way".

22. The Solicitor advised the Law Society, by letter dated August 7, 1992, transmitted by facsimile transmission on August 11, 1992 (Tab 9, Document Book) that he was in the process of reviewing Household's files and that he would forward the required documents or an explanation to Household, as soon as possible.

23. By letter dated August 7, 1992 (Tab 10, Document Book) received on August 12, 1992 by the Law Society, the Solicitor advised that he was away from his office for most of July, 1992 due to extreme fatigue caused by over work and stress. The Solicitor provided the Law Society with a note from his physician, Dr. Kenneth Dobbs, dated July 24, 1992 (Tab 11, Document Book) which recommended that the Solicitor reduce his workload by 50% - 70% over the next six to eight weeks.

22nd September, 1994

24. By letter dated August 14, 1992 (Tab 12, Document Book) the Law Society advised the Solicitor that a copy of his August 7, 1992 letter had been forwarded to Household. The Solicitor was requested to confirm with the Law Society, within three weeks of the date of this letter, that Household had been provided with the required documentation. No reply was received.

25. The Law Society employee left telephone messages for the Solicitor at his office on September 10, 1992 and September 15, 1992 requesting he return his calls. The calls were not returned.

26. The Law Society employee left a telephone message for the Solicitor at his office on September 22, 1992 advising that should a response to the Society's August 14, 1992 letter not be received by September 25, 1992 a registered letter would be sent. No reply was received.

27. By registered mail dated September 28, 1992 (Tab 13, Document Book) the Law Society forwarded to the Solicitor a copy of its August 14, 1992 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should a reply not be received within seven days of the date of this letter the matter would be referred to the Discipline Committee. No reply was received.

28. Conditional authorization for a formal complaint was granted on November 12, 1992.

29. A Law Society staff employee left a telephone message for the Solicitor at his office on November 17, 1992 requesting he return the call. The call was not returned.

30. By registered letter dated November 19, 1992 (Tab 14, Document Book) the Law Society advised the Solicitor that conditional authorization for a formal complaint was authorized on November 12, 1992. A copy of the Society's letters dated August 14, 1992 and September 28, 1991 were enclosed. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should a full and complete response not be received by November 27, 1992 a formal complaint would be issued against him.

31. By facsimile transmission on December 3, 1992 (Tab 15, Document Book) the Solicitor advised the Law Society that he would prefer to discuss his delay in responding to its November 19, 1992 letter in person. He further advised that he would respond to the Society's August 14, 1992 and September 28, 1992 letters by December 7, 1992.

32. A Law Society staff employee spoke to the Solicitor by telephone on December 3, 1992. The Solicitor advised that he was being attended to by a physician for "burn out" and had contacted LINK. The Solicitor advised that he had forwarded most of the required documents to Household, however, it appeared that Household did not receive the same. The Solicitor advised that he had then put the matter aside to be dealt with when he had the time. The Solicitor confirmed with the Society that he understood his obligation to reply to his governing body. The Solicitor advised that he would reply by December 7, 1992 or should he be unable to reply by that date, he would contact the Society by telephone.

33. The Solicitor's secretary, Diane, advised the Law Society by telephone on December 8, 1992 that the Solicitor did not attend at the office on December 7, 1992, and therefore, his reply was not sent. Diane advised that the reply would be forwarded that day. No reply was received.

34. Complaint D215/92 was issued against the Solicitor on January 6, 1993.

22nd September, 1994

35. A Law Society staff employee spoke with the Solicitor's secretary, Diane, by telephone on January 28, 1993. Diane advised that she was in receipt of several tapes that the Solicitor had dictated and that, "hopefully", his reply was on one of them. The Society provided Diane with its facsimile transmission number and requested she forward the Solicitor's reply as soon as it is typed.

36. By letter dated January 29, 1993 (Tab 16, Document Book) the Solicitor provided the Law Society with a copy of his letter to Household dated November 20, 1991 in which he represented he had enclosed the Solicitor's Certificate and relevant documentation regarding the Grant file. The Solicitor also provided a copy under cover of his letter dated December 6, 1991, to Household which he allegedly provided the Certificates and relevant documents for the Grant, Phillips/Powell, Walker/Wiggin and Eves/Fagan files. The Solicitor further advised that the report regarding the Phillips/Powell file had been forwarded to the Society's Audit Department on December 6, 1991. The Solicitor stated that, with respect to the White file, the report was prepared by someone outside his office and that his usual practice was to forward the report immediately to the mortgagee. The Solicitor advised that he was in the process of confirming the same and he would forward the report to Household should the same not have been previously sent. With respect to the Tucker file, the Solicitor advised that the same involved some litigation, which did not negatively effect the mortgage, but did effect the completion of the transaction. The Solicitor stated that he was attending to the matter and the required documents should be forwarded to Household under separate cover. The Solicitor advised the Society that he had ceased the practice of real estate law due to his absences from the office, and his inability to maintain a satisfactory level of service.

37. As of February 1, 1993, the Society's Audit department advised that they had not received any documents from the Solicitor regarding the Phillips/Powell file.

38. By letter dated February 25, 1993 (Tab 17, Document Book) the Law Society advised the Solicitor that it had contacted Household, and it was confirmed that the required documents for the Grant, Hyacinth and Phillips mortgage had been received. The Solicitor was advised that with respect to the White mortgage the Solicitor's certificate, tax or share certificate, insurance coverage and registered copy of Charge had not been received. With respect to the Tucker mortgage, the final report, tax certificate and share certificate had not been received. The Solicitor was requested to confirm within two weeks of the date of this letter that the aforementioned documents had been forwarded to Household. No reply has been received.

Particular 2(c)

39. The Solicitor's fiscal year end is December 31. The Solicitor did not file his form 2 or Form 3 within six months of the fiscal year ending December 31, 1991, as required by S.16(2) of Regulation 573 under The Law Society Act.

40. A Notice of Default in Annual Filing (Tab 18, Document Book) dated July 14, 1992 was forwarded to the Solicitor by the Law Society.

41. By registered letter dated August 14, 1992 (Tab 19, Document Book) the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not respond to this correspondence.

42. The late filing fee began to accrue on August 31, 1992.

43. By registered letter dated December 22, 1992 (Tab 20, Document Book) the Law Society advised the Solicitor that his name would go before Convocation on January 29, 1993 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on January 28, 1993. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file.

44. By letter dated January 15, 1993 (Tab 21, Document Book) the Law Society advised the Solicitor that his annual filing and late filing levy had not been received. The Solicitor was reminded that his name would go before Convocation on January 29, 1993 should payment not be received by January 28, 1993.

45. The Society Staff Trustee spoke to the Solicitor by telephone on January 29, 1993. The Solicitor advised that he was having the late filing fee delivered that day. The Solicitor further advised that his accountant was working on his filing and the same should be received by the Society in the "not too distant future". The Solicitor's late filing fee was received on January 29, 1993. Neither the Solicitor or his accountant have provided the Society with his filing.

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

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

Complaint D112/93

48. On December 3, 1992, a Law Society Examiner attended at the Solicitor's office to commence an examination of the Solicitor's books and records. The Solicitor was away from the office. A message was left with the Solicitor's secretary requesting the Solicitor contact the Society upon his return.

49. On December 3, 1992, the Solicitor contacted the Society by telephone. The Solicitor advised that his books and records were not in order. The Solicitor agreed to have the examination of his books and records commence of December 4, 1992.

50. On December 4, 1992, the Examiner attended at the Solicitor office to commence the examination of his books and records. The Solicitor did not produce his books and records. The Solicitor executed letter of instruction to set up co-signing controls. A copy of the Solicitor's letter of instruction to the Royal Bank of dated December 4, 1992 is contained at Tab 22 of the Document Book.

51. By letter dated December 4, 1992 (Tab 23, Document Book) the Law Society instructed the Solicitor's accountant, Neal Temple, to ensure that the Solicitor's books and records were brought into compliance with Regulation 573 of the Law Society Act as quickly as possible and to forward copies of the Solicitor's monthly trust bank reconciliations and listings of client trust liabilities to the Society. No reply was received.

22nd September, 1994

52. By letter dated December 4, 1992 (Tab 24, Document Book) to the Law Society, the Solicitor undertook to, in the future, deposit all trust money coming into his possession or control forthwith into the trust account in his name at the Royal Bank of Canada, Sheppard Centre Branch. The Solicitor further stated that he had read and understood that subsection 3 of section 14 of Regulation 573 included unearned fees and money received as advances for costs and expenses.

53. A Law Society staff employee left telephone messages for the Solicitor at his office on February 18, 1993, February 25, 1993 and February 26, 1993 requesting he return the calls. The calls were not returned.

54. By letter dated February 26, 1993 (Tab 25, Document Book) sent to the Solicitor by facsimile transmission and ordinary mail, the Law Society confirmed its conversation with Mr. Temple. The Solicitor was requested to forward, immediately, his monthly trust comparisons supported by copies of detailed trust bank reconciliations, trust listings and trust bank statements for the period from November, 1991 to date. The Solicitor was also requested to contact the Society's examiner to arrange an appointment to proceed with the examination of his books and records as soon as possible.

55. A Law Society staff employee spoke with the Solicitor by telephone on March 1, 1993. The Solicitor advised that he was in the process of reconciling his trust records. The Solicitor requested that the Society call his business consultant, Mike Ostreicher.

56. A Law Society staff employee spoke with the Solicitor's secretary by telephone on March 1, 1993. The Solicitor's secretary advised that they had not received the Society's facsimile transmission dated February 26, 1993. The Law Society forwarded to the Solicitor a copy of its February 26th letter by facsimile transmission that day.

57. A Law Society staff employee spoke with the Solicitor's secretary by telephone on March 2, 1993. The Solicitor's secretary confirmed receipt of the Society's facsimile transmission dated February 26th.

58. A Law Society staff employee spoke with Mr. Ostreicher by telephone on March 2, 1993. Mr. Ostreicher confirmed that the formal books and records of the Solicitor's practice had not been maintained and that they could not be produced for examination at that time. Mr. Ostreicher estimated another two weeks before they would be in order.

59. By letter dated March 2, 1993 (Tab 26, Document Book) sent by facsimile transmission and ordinary mail, the Law Society advised the Solicitor that it had spoken to Mr. Ostreicher. The Solicitor was requested to confirm the Society's understanding that he had not maintained any formal accounting records in connection with his practice and that he had not made any formal trust comparisons, as well as, that he had made no progress in bringing his books up to date since the Society's initial attendance at his office. The Solicitor was advised that should he fail to respond or produce adequate books and records for examination by March 29, 1993 an examiner would attend at his office on March 29, 1993.

60. On March 29, 1993, the Examiner attended at the Solicitor's office at 9:00 a.m. The Solicitor failed to attend. The Solicitor had left a message at the Law Society for the Examiner at 9:10 a.m. on March 29th, advising that he would be in court all day and that he was still in the process of bringing his books and records into compliance with Regulation 573 of the Law Society Act.

22nd September, 1994

61. By letter dated March 31, 1993 (Tab 27, Document Book) sent by facsimile transmission and ordinary mail, the Law Society advised that Solicitor that this matter was being referred to the Discipline Committee as a result of his failure to produce books and records for examination on March 29, 1993. The Solicitor was advised that Neal Temple and Howard Nightingale had been instructed to refrain from co-signing any trust cheques effective immediately (Tab 28, Document Book). The Solicitor was advised that no further disbursements are to be made from his existing trust account until such time as the Society was satisfied that he was maintaining sufficient books and records to meet the requirements set out in Regulation 573 and that sufficient trust funds were held on hand to meet his trust obligations. The Solicitor was advised that he could set up a new trust account but was requested to advise the Society should this be the case.

62. By letter dated March 31, 1993 (Tab 29, Document Book) sent by facsimile transmission, the Solicitor advised the Society that he wished to establish a new trust account and advised that he would contact the Examiner in the afternoon of April 1, 1993. The Solicitor did not call.

63. To date, the Solicitor had not produced to the Law Society the books and records of his practice for examination.

V. DISCIPLINE HISTORY

64. The Solicitor has no previous discipline record.

DATED at Toronto this 29th day of November, 1993."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D176/93.

11. 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.

1V. FACTS

3. The Solicitor was called to the Bar April 8, 1987. He practices as a sole practitioner.

Particulars 2 (d) and (e)

4. Beverley McLaughlin, Deloris Akinshara and Shirley White retained the Solicitor to represent them on the purchase of property municipally known as 332 Royal Salisbury Way, Brampton. The closing took place on August 31, 1991. A reporting letter was not received

5. By letter dated April 2, 1992 (Tab 1, Document Book), Ms. McLaughlin, Ms. Akinshara and Ms. White advised the solicitor of their numerous attempts to contact him by telephone and his failure to return their telephone calls. They requested the Solicitor provide them with a reporting letter and supporting documentation regarding the August 31st closing within fifteen days. They stated that this information was required by them in order to complete their income tax returns.

6. They were provided with some of the required information by telephone at the end of April, 1992. The Solicitor did not provide a reporting letter.

22nd September, 1994

7. On October 28, 1992, Ms. McLaughlin advised the Solicitor's secretary by telephone that she would be attending at the Solicitor's office to pick up the file on November 11, 1992. On November 9, 1992, Ms. McLaughlin again called the Solicitor's office to remind them that she would be attending at his office on November 11th to pick up the documents.

8. On November 11, 1992, Ms. McLaughlin attended at the Solicitor's office. The Solicitor was not at the office and the file was not available for her to pick up.

9. By letter dated November 24, 1992 (Tab 2, Document Book) Ms. McLaughlin, Ms. Akinshara and Ms. White advised the Law Society of the Solicitor's failure to report to them and his failure to answer their requests regarding the status of their matter.

10. By letter dated December 18, 1992 (Tab 3, Document Book), the Law Society forwarded to the Solicitor a copy the letter of complaint dated November 24, 1992. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

11. A Law Society staff employee left telephone messages for the Solicitor at his office on January 1, 1993 and January 11, 1993 (Tab 4, Document Book) requesting he return the call. The calls was not returned.

12. By registered mail dated January 19, 1993 (Tab 5, Document Book), the Law Society forwarded to the Solicitor a copy of its December 18, 1992 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he not provide a response within seven days, the matter would be referred to the Discipline Committee.

13. By letter dated January 29, 1993 (Tab 6, Document Book), the Solicitor advised the Law Society that the reporting letter had been prepared on October 8 1991 and it had been his understanding that his real estate clerk had forwarded copies of the essential documents and information to the clients. The Solicitor acknowledged receipt of Ms. White's telephone calls. He also stated that, from November, 1991 to April 1992, he went through several secretarial changes and communication was "not the best at my office". The Solicitor stated that he regretted the delay and inconvenience suffered by his clients. The Solicitor advised that he was in the process of reviewing and confirming the draft accounting documents and collating all the enclosures for delivery to this clients. He further advised that Ms. McLaughlin had attended at his office and picked up some of the documentation. The Solicitor stated that any promises made to Ms White regarding the pick-up of the file were made in anticipation of his having reviewed the material prior to her arrival. The Solicitor stated that he was unaware of Ms. White's attendance at his office and apologized to all three clients for the distress caused them. The Solicitor stated that he would telephone one of the clients, within one week, to set up a time for the report and supporting documentation to be picked-up. The Solicitor enclosed a copy of his reporting letter to the clients dated October 8, 1991 (Tab 7, Document Book).

14. By letter dated February 25, 1993 (Tab 8, Document Book), the Law Society requested the Solicitor confirm, within ten days from the date of this letter that all documentation referred to in the reporting letter had been forwarded to his clients. No reply was received.

15. A Law Society staff employee left a telephone message for the Solicitor at his office on March 11, 1993 (Tab 9, Document Book) requesting he return the call. The call was not returned.

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16. A Law Society staff employee left a telephone message for the Solicitor at his office on March 25, 1993 (Tab 10, Document Book) requesting his response by April 1, 1993. No reply was received.

17. By registered letter dated April 14, 1993 (Tab 11, Document Book), the Law Society forwarded to the Solicitor a copy of its February 25, 1993 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should a reply not be received within seven days from the date of this letter, the matter would be referred to the Discipline Committee. No reply has been received.

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

Particulars 2 (f), (g) and (i)

19. Sewtage and Madodri Singh retained the Solicitor regarding the purchase of property municipally known as 70 Valleyway Crescent, Maple and the sale of property of municipally known as 9 Province Trail, Etobicoke. The Solicitor advised the Singhs that they would receive the following documents approximately three weeks after the transactions closed on or about October, 1991:

- breakdown of receipts and payments regarding the transactions;
- transfer, survey, accounts and all other related documents;
- their duly executed Wills for which the Solicitor had been paid.

20. The Singhs retained another solicitor, Muneshwar Deopaul, to assist them in obtaining the excess funds from the closings.

21. By letter dated November 10, 1992 (Tab 12, Document Book), Mr. Deopaul advised the Solicitor that due to their inability to discuss this matter over the telephone, that he would take further action of his client's behalf should he fail to respond within a reasonable time. No reply was received.

22. By letter dated May 5, 1992 (Tab 13, Document Book), Mr. Deopaul, requested the Solicitor provide the Singhs with immediate payment of all monies owned them, being approximately \$3000. No reply was received.

23. By letter, received on January 25, 1993 (Tab 14, Document Book), Mr. and Mrs. Singh advised the Law Society of the Solicitor's failure to answer their and Mr. Deopaul's requests for information regarding the return of their funds, his failure to provide a report regarding the purchase and sale of lands, and his failure to provide them with an account.

24. By letter dated February 17, 1992 (Tab 15, Document Book), the Law Society forwarded to the Solicitor a copy of the Singh's letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

25. On March 11, 1993, a Law Society staff employee left a telephone message (Tab 16, Document Book) for the Solicitor at his office requesting he return the call. The call was not returned.

26. A Law Society staff employee left a telephone message for the Solicitor at his office on March 25, 1993 (Tab 17, Document Book) requesting that he provide his reply by April 1, 1992. No reply was received.

22nd September, 1994

27. A Law Society staff employee left a telephone message for the Solicitor at his office on April 5, 1993 (Tab 17, Document Book) in which he was advised that should he fail to provide a reply by April 7, 1993, a registered letter would be sent. No reply was received.

28. By registered letter dated April 14, 1993 (see Tab 11, Document Book), the Law Society forwarded to the Solicitor a copy of its February 17, 1993 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a reply within seven days from the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

29. By letter dated May 26, 1993 (Tab 19, Document Book), Mr. Singh forwarded to the Law Society a copy of the Solicitor's reporting letter dated October 15, 1992 and supporting documents, which he received on February 20, 1993.

30. To date, the Solicitor has not replied to the Society.

Particular 2(h)

31. By letter dated February 11, 1992 (Tab 20, Document Book), Baker, Schneider, Swartz advised the Solicitor that they had been retained by his client The Prudential Insurance Company of America, with respect to mortgage No. 3-087-186. The firm advised the Solicitor that despite Prudential's numerous requests he failed to forward to them the following documents:

- Solicitor's Final Report on Title;
- Duplicate Registered Charge/Mortgage;
- Survey
- All and other documentation as required under the Mortgage Commitment and Solicitors Direction.

The firm advised the Solicitor that should he fail to provide this information within five days of the date of this letter, their client would proceed with legal action. The firm forwarded a copy of its February 11, 1993 letter to the Law Society.

32. By letter dated February 26, 1993 (Tab 21, Document Book), the Law Society forwarded to the Solicitor a copy of Baker, Schneider, Swartz's letter dated February 11, 1993. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

33. A Law Society staff employee left a telephone message for the Solicitor at his office on March 25, 1993 requesting he provide a reply by April 1, 1993. No reply was received.

34. A Law Society staff employee left a telephone message for the Solicitor at his office on April 5, 1993 advising that should he fail to provide a reply by April 7, 1993, a registered letter would be sent. No reply was received.

35. By registered letter dated April 14, 1993 (see Tab 11, Document Book), the Law Society forwarded to the Solicitor a copy of its February 26, 1993 letter. The solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he fail to reply within seven days of the date of this letter, the matter would be referred to the Discipline Committee. No reply was received.

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

DATED at Toronto this 30th day of November, 1993".

22nd September, 1994

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D222/93.

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 Procedures Act.

IV. FACTS

3. The Solicitor was called to the Bar on April 8, 1987. He practices as a sole practitioner.

Particular 2 (a), (b) and (c) - Randolph De Mone, Client

4. In August 1991, Mr. Randolph De Mone retained the Solicitor to defend him against an assault charge.

5. On October 23, 1991, Mr. De Mone was found guilty.

6. Mr. De Mone was sentenced on November 25, 1991 to two years probation.

7. In May 1992, Mr. De Mone was contacted by an employee of the Solicitor and requested to bring in payment for the transcripts ordered for his appeal. Mr. De Mone paid \$421.40 for the transcripts.

8. By letter dated June 21, 1992, Mr. De Mone filed a complaint against the Solicitor with the Law Society (Tab 1, Document Book).

9. By letter dated July 9, 1992 (Tab 2, Document Book), the Law Society forwarded to the Solicitor a copy of Mr. De Mone's letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No response was received.

10. On September 18 and September 30, 1992 Law Society employees telephoned the Solicitor's office and left messages (Tab 3, Document Book) requesting that the Solicitor respond to the Society's July 9, 1992 letter. No response was received.

11. By registered mail dated September 30, 1992 (Tab 4, Document Book), the Law Society forwarded to the Solicitor a copy of its July 9, 1992 letter. The Solicitor was reminded of his obligation to reply to communications from the Society.

12. By letter dated October 7, 1992 (Tab 5, Document Book), the Solicitor responded to Mr. De Mone's letter of complaint.

13. The Solicitor advised that Mr. De Mone was present with him on October 23, 1991, when he requested the transcripts of his hearing. The Solicitor explained that he ordered the transcripts prior to completing the Notice of Appeal. The Solicitor explained that his reason for this was "because of the grounds of appeal... I intended to rely heavily upon the actual dialogue at trial and not merely on an error of law apparent on the face of the record".

14. The Solicitor advised that "due to an obvious lack of communication the transcripts were not prepared". By letter dated February 19, 1992 (Tab 6, Document Book), the Solicitor wrote to the Court Reporter and re-ordered the transcripts.

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15. The Solicitor advised that for some months prior to June 1992, he was suffering from extreme fatigue, stress and burn-out. The Solicitor advised that in July 1992, he sought medical treatment and effective July 24, 1992, he took 8 weeks of work.

16. Mr. De Mone was asked to provide his comments regarding the Solicitor's reply and did so by letter of November 16, 1992 (Tab 7, Document Book).

17. By letter dated January 27, 1993 (Tab 8, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. De Mone's November 16, 1992 letter and requesting his reply to the same within a period of three weeks. No response was received.

18. On May 5, 1993, a Law Society staff employee telephoned the Solicitor's office and left a message with his secretary requesting his response within seven days. No response was received.

19. On May 12, 1993, the Solicitor's secretary telephoned the Society and advised an employee of the Society that the Solicitor did not have a copy of the Society's January 29, 1993 letter.

20. By facsimile dated May 18, 1993 (Tab 9, Document Book), the Society forwarded to the Solicitor a copy of its January 29, 1993 letter. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No response was received.

21. The Solicitor did not file a Notice of Appeal on behalf of Mr. De Mone.

Particulars 2 (d), (e) and (f) - Frank Mendicino, L.L.B.

22. Mr. Mendicino was retained on a matrimonial case by Mr. Corrado Mallia, a former client of the Solicitor. On November 11, 1992 (Tab 10, Document Book), Mr. Mendicino forwarded to the Solicitor, by facsimile transmission, a direction (Tab 11, Document Book) executed by Mr. Mallia instructing him to release his file to Mr. Mendicino. Mr. Mendicino also requested that the Solicitor forward his account and return the funds which he held in trust on behalf of Mr. Mallia.

23. By letter dated February 1, 1993 (Tab 12, Document Book), Mr. Mendicino filed a complaint against the Solicitor with the Law Society.

24. On February 9, 1993, a Law Society staff employee telephoned the Solicitor's office and was advised by the Solicitor's secretary that Mr. Mallia's file had been forwarded to Mr. Mendicino. The Solicitor's secretary advised that an account and the balance of funds held in trust would be forwarded to Mr. Mendicino.

25. By letter to Mr. Mallia dated February 23, 1993 (Tab 13, Document Book), the Solicitor enclosed 2 cheques payable to Mr. Mallia, as well as his account in the amount of \$15,555.12.

26. By letter dated March 5, 1993, (Tab 14, Document Book), the Law Society forwarded to the Solicitor a copy of Mr. Mendicino's letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No response was received.

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27. By letter to the Solicitor dated March 10, 1993 (Tab 15, Document Book), Mr. Mendicino advised the Solicitor that he did not have Mr. Mallia's authorization to pay his account from funds representing the sale of the matrimonial home and demanded the return of same. Mr. Mendicino placed the Solicitor on notice that Mr. Mallia had instructed him to take out an appointment to have his account assessed. Mr. Mendicino requested that the Solicitor forward to him copies of his dockets and any notes to support the amount of time spent on Mr. Mallia's case. No response was received.

28. By letter to the Law Society dated March 25, 1993 (Tab 16, Document Book), Mr. Mendicino confirmed receipt of the Solicitor's February 23, 1993 letter to Mr. Mallia with enclosed cheques and account. Mr. Mendicino denied that the Solicitor had his client's authorization to deduct his fees and disbursements from the trust funds which he held from the proceeds from the sale of the matrimonial home.

29. By letter dated April 29, 1993 (Tab 17, Document Book), the Law Society reminded the Solicitor that his response was required to the Society's earlier letter of March 10, 1993. No response was received.

30. On June 7, 1993, a Law Society staff employee spoke with the Solicitor and was advised that he would respond to the Society by June 9, 1993. No response was received.

31. On June 14, 1993, a Law Society staff employee telephoned the Solicitor and left a message for him to return the call. No response was received.

32. By registered mail dated June 21, 1993 (Tab 18, Document Book), the Law Society forwarded to the Solicitor copies of its April 29 and March 5, 1993 letters. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days the matter would be referred to the Discipline Committee. No response was received.

Particular 2 (g) - The Dominion Trust Company, Client

33. By letter dated April 5, 1993 (Tab 19, Document Book), Ms. Julie Wong of The Dominion Trust Company filed a complaint against the Solicitor for his failure to respond to their letters requesting the closing documentation on 8 separate mortgage transactions in respect of which the Solicitor had acted on behalf of Dominion Trust.

34. Ms. Wong enclosed copies of The Dominion Trust's letters to the Solicitor of September 30, 1992 (Tab 20, Document Book), February 12, 1993 (Tab 21, Document Book), March 4, 1992 (Tab 22, 23, 24, 25, Document Book), March 5, 1993 (Tab 26, 27, Document Book), and March 31, 1993 (Tab 28, Document Book) requesting the documentation.

35. By letter dated April 29, 1993 (Tab 29, Document Book), the Law Society forwarded to the Solicitor a copy of Ms. Wong's letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No response was received.

36. On May 20, 1993, a Law Society staff employee telephoned the Solicitor's office and left a message (Tab 30, Document Book) for him to return the call. No response was received.

37. On May 28, 1993, a Law Society staff employee telephoned the Solicitor's office and left a message (Tab 31, Document Book) for the Solicitor to return the call. No response was received.

22nd September, 1994

38. On June 1, 1993 (Tab 31), a Law Society staff employee telephoned the Solicitor's office and left a message requesting his response by Friday June 4, 1993. No response was received.

39. By registered mail dated June 7, 1993 (Tab 32, Document Book), the Law Society forwarded to the Solicitor a copy of its April 29, 1993 letter. The Solicitor was reminded of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No response was received.

V. DISCIPLINE HISTORY

40. The Solicitor does not have a discipline history.

DATED at Toronto this 30th day of November, 1993"

In addition with respect to Complaint D222/93, particular 2(b), Randolph DeMona gave evidence and with respect to particular 2(d), Frank Mendocine gave evidence.

Based on the Agreed Statement of Facts and the evidence, the particulars on all complaints were found to be established.

RECOMMENDATION AS TO PENALTY

The majority of the Committee recommend that Leon Stanley Wickham be suspended for a period of three months from the January Convocation or until all the conditions set out here are fulfilled.

The conditions are:

1. That he produce all his books and records to a representative of the Law Society.
2. That he ensure that all the required filings with the Society be made on time.
3. That he provide written replies to all outstanding complaints that have been required of him by the Society.
4. That he not return to the practice of law until he supply the Society with written evidence from a medical practitioner acceptable to him and the Society that he is mentally and emotionally able to practice.
5. That when he returns to practice he is not to practice as a sole practitioner but as an employee or in partnership with a practising lawyer.
6. That after his return to practice he provide monthly reports of any trust funds he holds as a partner or employee.

In addition, we recommend that within two years he pay the costs of the Society set at \$6,000.00.

REASONS FOR RECOMMENDATION

Mr. Wickham gave evidence and in essence his evidence was that his practice started to disintegrate as did his professional and personal life. He was unable to cope and as the complaints and questions from the Law Society mounted so did his inability to respond. This is the only explanation for his total and continual disregard of the Law Society.

22nd September, 1994

His evidence was that he has realized his condition and given some time believes all their concerns can be satisfied.

The Society's position was that he was ungovernable and ought to be disbarred. One member of the Committee agreed. However, two members believed that a different result would be preferable.

There was no suggestion of dishonesty or misappropriation of client funds. We believed that it would be better for all concerned if the Solicitor provided adequate explanations to all the questions of both the Society and the clients. In order to do this he agreed to undertake not to practice as of 5:00 p.m., Friday, December 17, 1993 and devote all his efforts to answer all the queries of all the clients and of the Society.

Leon Stanley Wickham was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 8th day of April, 1987.

ALL OF WHICH is respectfully submitted

DATED this 24th day of May, 1994

Robert J. Carter,
Chair

It was moved by Mr. Brennan, seconded by Ms. Palmer that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Blue, seconded by Mr. Bragagnolo that the majority Recommendation as to Penalty be adopted that is, that the solicitor be suspended for a period of 3 months from the January 1994 Convocation or until the conditions were fulfilled and pay the costs of \$6,000.

Ms. Budweth made submissions in support of the dissenting recommendation of disbarment.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Brennan, seconded by Ms. Graham that the solicitor be disbarred.

Carried

The motion for the majority recommendation was not put.

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

Counsel retired.

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CONVOCATION ROSE AT 4:45 P.M.

Confirmed in Convocation this day of , 1994

Treasurer