

28th October, 1997

MINUTES OF DISCIPLINE CONVOCATION

Tuesday, 28th October, 1997
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Angeles, Arnup, Bobesich, Carey, Carpenter-Gunn, Carter, Cole, Crowe, DelZotto, Eberts, Gottlieb, MacKenzie, Millar, Puccini, Ross, Sealy, Stomp, Swaye, Wilson and Wright.
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The reporter was sworn.

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IN PUBLIC

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Ms. Lesley Cameron, Senior Counsel - Discipline introduced Mr. Raj Anand, Duty Counsel.

Re: Margaret Vera Rose PHELPS - Niagara Falls

The Secretary placed the matter before Convocation.

Mr. Crowe withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Law Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 6th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppe that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Nancy L. Backhouse, Chair
Marshall A. Crowe
Ronald D. Manes

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

Christina Budweth
for the Society

MARGARET V. R. PHELPS
of the Regional Municipality
of Niagara Falls
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 27, 1997

28th October, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 2, 1996 Complaint D172/96 was issued against Margaret Vera Rose Phelps alleging that she was guilty of professional misconduct.

The matter was heard in public on May 27, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Marshall A. Crowe and Ronald D. Manes. The Solicitor attended the hearing and represented herself. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D172/96

2. a) She failed to serve her client, Carmen MacDonald, in a conscientious, diligent and efficient manner by failing to follow instructions to pursue a claim for support on behalf of the said client;
- b) She misled her client, Carmen MacDonald, as to steps that had been taken on the client's behalf in matrimonial litigation and in particular:
 - i) advised the client that she was pursuing the case when she was not doing so;
 - ii) advised the client that the court date was May 12, 1993 when such was not the case;
 - iii) advised the client that an Order for Support had been obtained in her favour on May 12, 1993 when this had not been done;
 - iv) advised the client that she sent court order to the Family Support office;
- c) She fabricated a form of Order which she represented to her client, Carmen MacDonald, had been obtained on May 12, 1993 when no such Order had been obtained;
- d) She commissioned her client, Carmen MacDonald; Statements of Arrears dated March 4, 1994 and June 5 and 6, 1995 which she knew to be false; and
- e) She failed to reply to communications from the Law Society regarding complaints by Jeffrey Gordon and Frances MacDonald despite letters dated December 14, 1995, January 22 and March 21, 1996 and telephone calls on February 16 and 21, March 21 and April 2, 1996.

Evidence

Part of the evidence before the Committee consisted of 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 D172/96 and is prepared to proceed with a hearing of this matter on May 27, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D172/96 and this Agreed Statement of Facts and admits the facts as hereinafter set out. The Solicitor further admits that the particulars of the Complaint as supported by the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor is 35 years of age. Following her call to the Bar in 1988 she practised with four firms. During the period March 1992 to November 1992 she practised as an associate in the law firm, Gordon, Adams, Grenier & Phelps. The Solicitor was terminated by this firm on or about November 21, 1995. The Solicitor then began practising law as an associate in the law firm, Hoy & Phelps, located in Niagara Falls, on or about November 27, 1995. She ceased practise with Ms. Hoy, and in fact withdrew from the practice of law on or about early September 1996.

5. Carmen MacDonald retained solicitor Ronald Adams to represent her in a matrimonial dispute in or about August 1986. The retainer related to an existing notice of action issued as no. 710/86. A statement of claim in the matter was issued in September, 1986. During the period 1986 to April 1991, Ms. MacDonald's estranged husband voluntarily made support payments and negotiations regarding support, division of assets and other issues, continued without a settlement being reached.

6. The Solicitor joined Mr. Adams' firm as an associate in March of 1992. In April of 1992, Ms. MacDonald instructed Mr. Adams to seek an order for support as her husband had ceased making payments. Ms. MacDonald's file was then transferred to the Solicitor to conclude the support application on or about May 12, 1992. Ms. MacDonald was advised of the transfer and consented to the Solicitor acting on her behalf.

7. In or about July 1992, Ms. MacDonald's husband served a divorce petition. The petition was silent as to corollary relief. The Solicitor advised Ms. MacDonald not to contest the petition and stated that the corollary relief could be sought through the existing action. The divorce judgment was granted without contest. In speaking to Ms. Adams in or about this time the Solicitor advised that she was preparing a motion for corollary relief which would be ready in August 1992.

8. The motion for corollary relief was in fact prepared. A copy of the motion record is attached as Exhibit 1 to this Agreed Statement of Facts. In response to service of the motion record, counsel for Mr. MacDonald corresponded with the Solicitor by letter dated August 12, 1992, a copy of which is attached as Exhibit 2 to this Agreed Statement of Facts.

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9. Counsel for Mr. MacDonald prepared and served a responding motion record on or about August 28, 1992. As well, counsel for Mr. MacDonald served the Solicitor with a letter revoking all offers of settlement made to date. A copy of the responding motion record is attached as Exhibit 3 to this Agreed Statement of Facts.

10. In or about September, 1992, the Solicitor approved an order dismissing her client's motion for support with costs. The Solicitor may have told her client about this order. A copy of the order is attached as Exhibit 4 to this Agreed Statement of Facts.

11. During the period October 1992 to March 1993, Mr. MacDonald's solicitors wrote a number of letters to the Solicitor seeking further information from her in regard to various aspects of Mrs. MacDonald's financial situation. The Solicitor did not respond. Specifically, on October 24, 1993, counsel for Mr. MacDonald asked the Solicitor to make an Offer to Settle.

12. Counsel for Mr. MacDonald wrote to the Solicitor by letter dated March 31, 1993, in which they demanded responses to undertakings earlier given in the litigation. A copy of the demand letter is attached as Exhibit 5 to this Agreed Statement of Facts.

13. In the meantime, the Solicitor had advised the complainant by telephone on February 23, 1993, that a new court file number had been obtained and that a court date had been set for May 12, 1993. On May 12, 1993, the Solicitor advised the complainant that she had successfully obtained a court order for support and that the materials had been forwarded to the Family Support Office in Hamilton. The Solicitor provided Ms. MacDonald with what appeared to be a trued up copy of an order, a copy of which is attached as Exhibit 6 to this Agreed Statement of Facts. The Solicitor's information to Ms. MacDonald about a new action, a motion and order was all fabricated and completely false. No new action had been instituted and there had never been a motion or an order in regard to the issue of support.

14. In October 1993, Ms. MacDonald sent a packet of material including a further copy of the court order provided to her by the Solicitor to the Family Support Office.

15. By letter dated January 28, 1994, Ms. MacDonald was advised by the Court Office that a certified copy of the court order sought to be enforced must be provided to the court. As well, the court office sought a notarized statement of arrears. Ms. MacDonald advised the Solicitor of the communication from the court office.

16. On or about March 4, 1994, the Solicitor advised Ms. MacDonald that she had obtained a certified copy of the court order and sent it to the Family Support Office. The Solicitor prepared and had Ms. MacDonald swear a statement of arrears attesting to the fact that there existed \$12,000.00 in support arrears. A copy of the statement of arrears is attached as Exhibit 7 to this Agreed Statement of Facts.

17. In August of 1994, after being advised by the Family Support Office that they could not locate the documents purportedly sent to them by the Solicitor, Ms. MacDonald forwarded another copy of all material to that office.

18. On September 7, the Court Office communicated with Ms. MacDonald again by letter dated September 7, 1994, a copy of which is attached as Exhibit 8 to this Agreed Statement of Facts and which speaks for itself.

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19. On September 29, 1994, Ms. MacDonald's daughter forwarded a copy of the May 12 order to the Family Support Office. Further communication was received by Ms. MacDonald from the Family Support Office in October of 1994 in which she was again advised that a certified copy of the court order was required.

20. After discussing this matter with the Solicitor, Ms. MacDonald was advised that the Solicitor had obtained the original order from counsel for Mr. MacDonald and that it would be couriered to the Family Support Office. A subsequent visit by Ms. MacDonald's daughter to that office revealed that the order had not been received. This resulted in advice that the order had never been issued and entered, contained an incorrect file number and was deficient as to basic language in the order.

21. In March of 1995, after being advised of Ms. MacDonald's daughter's finding at the court office, Ms. MacDonald was advised by the Solicitor that matters had been corrected, that the order had been issued and entered and again forwarded to the Family Support Office. Shortly thereafter, Ms. MacDonald had occasion to meet Mr. Adams and advised him of the difficulty she had been having. Mr. Adams spoke to the Solicitor who assured him that matters were in hand.

22. During June and July of 1995, Ms. MacDonald's daughter attempted to obtain original copies of the purported court order and had numerous communications with the Solicitor and the Family Support Office to attempt to determine the status of the matter. In July of 1995, the Solicitor advised Mr. Adams that there was in fact a May 1993 order which had been properly issued but that the Family Support Plan was unwilling to enforce it. The Solicitor again assured Mr. Adams that everything would be completed shortly. At the end of July 1995, the Solicitor had Ms. MacDonald sign a new affidavit to assist in the enforcement proceedings. A copy of the affidavit is attached as Exhibit 9 to this Agreed Statement of Facts.

23. In early October 1995, the Solicitor advised Ms. MacDonald's daughter that a new court date had been set for November 1, 1995. Contact with the court revealed that Ms. MacDonald's name did not appear on any motion lists for that day.

24. In mid-November 1995, Ms. MacDonald asked Mr. Adams to reassume carriage of the file. During a meeting on November 20, 1995, the Solicitor admitted many of the acts of misconduct set out above. The Solicitor's employment with Gordon, Adams was terminated on November 21, 1995.

25. The Solicitor swore an affidavit on March 28, 1995 in support of Ms. MacDonald's application to revive the support application. A copy of the affidavit is attached as Exhibit 10 to this Agreed Statement of Facts.

26. The matter was brought to the attention of the Law Society by the firm of Gordon Adams. A copy of the letter of complaint was forwarded to the Solicitor by the Law Society under cover of letter dated December 14, 1995. The Solicitor did not respond to this letter, nor did she respond to a further letter of January 22, 1996 or a telephone call of February 16, 1996.

27. Law Society staff spoke with the Solicitor on February 21, 1996. The Solicitor advised she would reply to the Law Society by Wednesday or Thursday of the following week. No reply was received. During a further telephone conversation on March 21, 1996, a similar promise of a response was made by the Solicitor and none was received. A further letter was sent by the Law Society to the Solicitor on March 21, 1996, a copy of that letter is attached as Exhibit 11 to this Agreed Statement of Facts. In a follow-up telephone conversation with the Solicitor on April 2, 1996, the Solicitor was advised by a staff lawyer that given her failure to respond, steps would be taken to present the matter to the Chair and Vice-Chairs of Discipline.

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28. The Law Society's staff lawyer telephoned the Solicitor again May 15, 1996, in a final effort to obtain a response to the previous communications. The Solicitor advised the staff lawyer, as she had done a number of previous occasions that her response had been forwarded by mail "last week". The Solicitor's response was never received.

V. DISCIPLINE HISTORY

29. The Solicitor has no discipline history.

DATED at Toronto this 27th day of May, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended for a definite period of twelve months and indefinitely thereafter until she replies to the Law Society with respect to the particulars set out in paragraph 2(e) of the Complaint and in addition complies with the following:

1. Provides to the Law Society an opinion from a psychiatrist approved by the Law Society that she is mentally capable of resuming the practice of law;
2. Practises only as an employee of a solicitor approved by the Law Society for a minimum period of three years or for such other period as is recommended by her psychiatrist referred to in condition 1;
3. Provides to the Law Society an authorization to release the particulars of this disciplinary proceeding to any prospective employer with whom she proposes to practise under condition 2.

REASONS FOR RECOMMENDATION

There are a number of aggravating factors in the Solicitor's misconduct. It took place over an extended period of 2 1/2 years. The misconduct comprised a number of separate acts of misleading as set out in paragraphs 10, 13, 16, 20, 21, 22 and 23 of the Agreed Statement of Facts.

The Solicitor's client was a matrimonial client. She was 63 years of age when the Solicitor took over carriage of her file. The client had 7 children and a long term, traditional marriage during which she did not work outside the home. Her husband was a retired surgeon. The Solicitor prepared a falsified court order and presented it to the Family Support Office for enforcement. She prepared and had her client sign, two affidavits of purported arrears based on the falsified Court Order.

The Committee considered the following as mitigating circumstances: The Solicitor voluntarily removed herself from the practice of law once these matters came to light in 1995. She has attended and completed teachers college in an effort to make a new career for herself. She is living at home with her parents with no definite prospects of employment. She was relatively young when the misconduct began — a four-year lawyer. She had practised with four firms in a short period of time. By removing herself from the practice of law, the Solicitor has determined not to repeat the misconduct for which she expressed deep regret. The Solicitor co-operated with the Law Society in this complaint.

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It was the joint recommendation of the parties that there be a penalty of a definite suspension in the range of 1 to 12 months with the conditions imposed referred to above. Counsel for the Law Society recommended that the appropriate period of definite suspension be a four-month period.

The Committee considers the misconduct as extremely serious and considers it imperative that it be brought home to the profession that any incidents of misleading clients will be harshly dealt with in the interests of protecting the public. Under the circumstances, the Committee is of the view that the public will be protected if the joint recommendations as to penalty are accepted at the high end of the proposed range.

Margaret Phelps was called to the Bar on April 20, 1988.

ALL OF WHICH is respectfully submitted

DATED this 6th day of September, 1997

Nancy L. Backhouse, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a definite period of 12 months and indefinitely thereafter until she replies to the Law Society with respect to the particulars set out in paragraph 2(e) of the Complaint and complies with the conditions set out in the Report.

Counsel for the Society and the solicitor made submissions in support of the joint submissions made before the discipline hearing.

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

Carried

Re: Frank Arthur AULT - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Wilson and Crowe 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 September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (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 DISCIPLINE COMMITTEE

REPORT AND DECISION

Nancy L. Backhouse, Chair
Marshall A. Crowe
Ronald D. Manes

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

Christina Budweth
for the Society

FRANK ARTHUR AULT
of the City
of Ottawa
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 27, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 27, 1996 Complaint D297/96 was issued against Frank Arthur Ault alleging that he was guilty of professional misconduct.

The matter was heard in public on May 27, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Marshall A. Crowe and Ronald D. Manes. The Solicitor did not attend the hearing 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:

Complaint D297/96

2. a) On July 31, 1996 the Member was convicted of the criminal offence that he:
 - (i) Between the 1st day of September 1995 and the 31st day of January 1996, at the City of Ottawa in the Region of Ottawa-Carleton did by deceit, falsehood or other fraudulent means defraud Edith Lynn Sherwood, of a sum of money exceeding five thousand dollars, contrary to Section 380(1)(a) of the Criminal Code of Canada.
 - (ii) Between the 1st day of September 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud William Watkin of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.

- (iii) Between the 1st of September 1995 and the 31st January, 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Barry Cantor of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (iv) Between the 1st day of September 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Danny Cantor of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (v) Between the 1st day of September 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Morris Cantor and Benes Cantor of a sum of money exceeding \$5,000, contrary to Section 380 (1)(a) of the Criminal Code of Canada.
- (vi) Between the 1st of April 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Morris Cantor of a sum of money exceeding \$5,000 contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (vii) Between the 1st day of April 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Benes Cantor of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (viii) Between the 1st of November 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Stephen Kisber of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (ix) Between the 1st day of November 1994 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Timothy Walker of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.
- (x) Between the 1st of May 1995 and the 31st of January 1996, at the City of Ottawa in the said Region, did by deceit, falsehood, or other fraudulent means defraud Jacqueline Charbonneau of a sum of money exceeding \$5,000, contrary to Section 380(1)(a) of the Criminal Code of Canada.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D297/96 and is prepared to proceed with a hearing of this matter on March 4 & 5, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D297/96 and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor is 51 years of age. He was called to the Bar in 1975. Prior to his administrative suspension on December 31, 1995 for non-payment of his errors & omissions levy, he practised as a partner in the firm Tavel, Flannigan & Ault in Ottawa. During the period July 31, 1996 to present he has been incarcerated first in the Millhaven Institution and subsequently in the Pittsburgh Institute as a result of the conduct set out below.

5. In late 1989, the Solicitor was a member of the law firm of Gowling and Henderson in Ottawa. He, along with some members of the firm formed an investment company and became involved in a project in Hull, Quebec. The Solicitor was approached by a Mr. Gauthier and offered a half interest in a real estate project. In order to obtain funds to participate, the Solicitor offered his personal line of credit at the Canadian Imperial Bank of Commerce in the amount of \$250,000.00. He then borrowed another \$100,000.00 from the bank and through efforts which can only be described as loan transactions borrowed a further \$162,000.00 for a total of \$512,000.00 in debt. Effectively, the Solicitor went from an ordinary lawyer with three children to a real estate investor and speculator at the time coincident with the collapse of the real estate market.

6. Subsequently the Solicitor incorporated Lisgar Square Developments in an attempt to participate in real estate projects which were designed to extract himself from the calamitous debt which he had taken on. As a result, the Solicitor became involved in the series of transactions outlined below which formed the basis of his conviction on criminal charges as outlined in the Complaint.

7. Set out below is a summary of the Solicitor's conduct:

(1)

INVESTOR	PROPERTY	NET LOSS
Lynn Sherwood	393 Nelson Street, Ottawa	\$ 50,000
	338-344 Somerset Street, Ottawa	<u>\$ 50,000</u>
		\$100,000

(a) In September 1995, Mrs. Sherwood was approached by Sue Rochon, a legal secretary at the firm Tavel, Flannigan & Ault ("Tavel firm"). Ms. Rochon worked for the Solicitor. Mrs. Sherwood held mortgage investments and she was asked by Ms. Rochon whether she would like to invest in second mortgages, paying 11% interest. These mortgages, each in the amount of \$50,000, were to be on properties located at 393 Nelson and 338-344 Somerset, in the City of Ottawa. The properties were owned by Lisgar Square and by 1010245 Ontario Inc. (Lisgar Square Management Inc.) respectively. The Solicitor owned both these companies. Mrs. Sherwood was assured by Mrs. Rochon that the investment was secure.

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- (b) On September 14, 1995 Mrs. Sherwood issued two bank drafts each in the amount of \$50,000 payable to the Tavel firm. Mrs. Sherwood did not receive any documentation from the Solicitor or the Tavel firm concerning her investment. On November 16, 1995 Ms. Rochon contacted Mrs. Sherwood to advise her that her funds had not been invested as promised and that they were not secured by mortgages. Mrs. Sherwood was told that The Solicitor had been hospitalized. She was further told that he was being investigated by the Law Society.
- (c) Mrs. Sherwood retained a lawyer, Scott MacLean, to commence an action against Arthur Ault and the Tavel firm. Mr. McLean was able to determine that Mrs. Sherwood's funds had been deposited to the client trust account of Lisgar Square. Mrs. Sherwood also learned that a third mortgage on 338-344 Somerset Street had been drafted in her name, but not signed. Consequently, Mrs. Sherwood's \$100,000 investment was not secured by mortgages as had been promised.
- (d) Ms. Rochon was interviewed by the Ottawa Police and she stated that she had been the Solicitor's secretary. She further stated that the two bank drafts totalling \$100,000 provided by Mrs. Sherwood had been given to the Solicitor.

(2)

INVESTOR	PROPERTY	NET LOSS
William Watkin	34A & 40A MacLaren, Ottawa	\$25,000

- (a) Mr. Watkin stated to the Ottawa Police that in early August 1995 he was advised by his business partner Danny Cantor that John Tavel had offered to arrange a loan of \$100,000, which was to be secured by a second mortgage, paying 14%, on a property at 34A and 40A MacLaren Street in Ottawa. Mr. Tavel was acting on behalf of the borrower Lisgar Square (owned by Arthur Ault). The proposal was made to Mr. Watkin and to three other parties. Mr. Watkin met Mr. Tavel and declined the investment because it was felt that a second mortgage did not provide sufficient security. At that time, Mr. Tavel placed a telephone call after which he advised the potential investors that the first mortgagee would waive its first rank mortgage on the property.
- (b) On September 8, 1995 Mr. Watkin wrote a personal cheque in the amount of \$25,000 payable to the Tavel firm. This cheque was deposited in the Tavel firm's trust account. The other investors, each contributing \$25,000, included Danny Cantor, Barry Cantor and B & M Cantor Holdings. The Solicitor was the lawyer who reported to the investors. In a reporting letter from the Solicitor dated September 21, 1995, the investors were informed that they held a first mortgage on 34A and 40A MacLaren Street. The Solicitor also provided the investors with a personal guarantee form which he had signed.
- (c) In November 1995, a cheque drawn on the Solicitor's personal bank account payable to Mr. Watkin, representing interest on the mortgage, was returned as NSF.
- (d) A property search revealed that Mr. Watkin and the other three investors actually held a fifth mortgage on 34A & 40 A MacLaren Street instead of a first mortgage.

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(3)

INVESTOR	PROPERTY	NET LOSS
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Barry Cantor	34A & 40A MacLaren, Ottawa	\$25,000
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- (a) Mr. Barry Cantor related substantially the same facts to the police as Mr. Watkin. His investment was also \$25,000 and a cheque in this amount was issued on September 8, 1995 payable to the Tavel firm.

(4)

INVESTOR	PROPERTY	NET LOSS
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Danny Cantor	34A & 40A MacLaren, Ottawa	\$25,000
	694 Island Park Drive, Ottawa	<u>\$32,500</u>
		\$57,500

- (a) Mr. Danny Cantor related substantially the same facts to the police as Mr. Watkin and Mr. Barry Cantor, concerning the MacLaren property. Danny Cantor had invested \$25,000 and a cheque in this amount was issued on September 8, 1995 payable to the Tavel firm. Two subsequent interest payments from the Solicitor's personal bank account and from Lisgar Square's account were returned NSF.
- (b) Mr. Danny Cantor also informed the police that in July 1995 he was contacted by Mr. Tavel who advised him that his partner Arthur Ault was seeking to borrow \$65,000 on the security of a first mortgage on the Ault family residence on Island Park Drive in Ottawa. The property was owned by Susan Ault, the Solicitor's wife. The interest rate being offered was 14%. Mr. Cantor stated that because he had known Mr. Tavel for some time, he and B & M Cantor Holdings each advanced \$32,500, payable to the Tavel firm.
- (c) On September 21, 1995 the Solicitor discharged the Cantor mortgage on his Island Park property. Mr. Cantor informed the Police that he had no knowledge of the discharge and that the signature on the discharge was not his signature. The Solicitor has admitted to forging his wife's signature on both the mortgage and discharge documents.

(5)

INVESTOR	PROPERTY	NET LOSS
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B & M Cantor Holdings	34A & 40A MacLaren, Ottawa	\$25,000
	694 Island Park Drive, Ottawa	<u>\$32,500</u>
		\$57,500

- (a) Benes and Morris Cantor were interviewed by the police concerning their investment in the MacLaren Street property. They related substantially the same facts as Mr. Watkin, Mr. Barry Cantor and Mr. Danny Cantor. B & M Cantor Holdings Limited had invested \$25,000 and a cheque in this amount was issued on September 8, 1995 payable to the Tavel firm.
- (b) Benes and Morris Cantor were also interviewed concerning their investment in the Island Park Drive property. They stated that a cheque payable to the Tavel firm was issued on July 21, 1995, in the amount of \$32,500. As indicated earlier, the Cantor mortgage was discharged on September 21, 1995.

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(6)

INVESTOR	PROPERTY	NET LOSS
Benes Cantor	660 Hochelaga, Ottawa	\$40,000

- (a) The Ottawa Police interviewed Benes and Morris Cantor concerning their investment in a property located at 660 Hochelaga Street. The Cantors stated that they were approached by John Tavel in regards to borrowing \$130,000, which was to be secured by a first mortgage on 660 Hochelaga. This property was nominally owned by 746722 Ontario Limited. The Solicitor was the owner of this company. On April 3, 1995 B & M Holdings issued a cheque of \$80,000 to John Tavel in Trust. On that same date, Benes Cantor issued a personal cheque of \$50,000 to John Tavel in Trust.
- (b) A reporting letter sent on the Tavel firm's letterhead, signed by the Solicitor, was sent to Morris and Benes Cantor advising them that their investment was secured by a first (syndicated) mortgage. Morris Cantor acknowledged receiving \$90,000, thereby reducing the initial investment to \$40,000. A property search of this property revealed that the Morris and Benes Cantor mortgage was not a first mortgage but rather a third mortgage.

(7)

INVESTOR	PROPERTY	NET LOSS
Kisber & Co. Ltd.	660 Hochelaga, Ottawa 694 Island Park Drive, Ottawa	\$200,000

- (a) The Ottawa Police interviewed Mr Stephen Kisber, owner of Kisber & Co. Ltd. Mr. Kisber advised the Police that his investment had been arranged through the law firm Gibson & Augustine. As a result Kenneth Gibson was also interviewed. He informed the Police that he had represented Kisber & Co. Mr. Gibson stated that he had been approached by the Solicitor who was seeking to borrow \$200,000. The investment was to be secured by a third mortgage on a property at 660 Hochelaga and a first mortgage on 694 Island Park Drive. As stated earlier, the Solicitor, through his numbered company, owned the Hochelaga property. The Island Park Drive property was owned by Susan Ault.
- (b) A property search of the Hochelaga property revealed that the Kisber mortgage was not a third mortgage but rather a fourth mortgage.

Mr Gibson was informed by the Solicitor's lawyer in November 1995 that the Solicitor forged his wife's signature on the Island Park Drive mortgage. Consequently, Mr. Kisber did not hold a valid mortgage on the Island Park property.

(8)

INVESTOR	PROPERTY	NET LOSS
Roy Wilson Real Estate	694 Island Park Drive, Ottawa	\$50,000

- (a) The Ottawa police were not able to interview Mr. Wilson concerning his investment secured by a mortgage on the Island Park Drive property. As stated earlier, the police determined that the Solicitor had forged his wife's signature on the mortgage documents, including the discharge documents, relating to 694 Island Park Drive.

28th October, 1997

(9)

INVESTOR	PROPERTY	NET LOSS
Jacqueline Charbonneau	108 Royal Elm Private, Ottawa	\$153,000

- (a) The Ottawa Police interviewed Jacqueline Charbonneau and her lawyer Roger Barrette. Mrs. Charbonneau had purchased a home, located at 108 Royal Elm Private, from Lisgar Square. Mrs. Charbonneau had issued three cheques relating to the purchase. The first cheque, in the amount of \$16,750, was made payable to Lisgar Square. The second cheque, in the amount of \$158,233.15, was made payable to the Tavel firm. The third cheque, in the amount of \$250, was made payable to a sales person.
- (b) The Caisse Populaire Ste. Anne - Laurier D'Ottawa (Caisse Populaire) held a mortgage in the amount of \$153,000 on the property located at 108 Royal Elm Private. The Caisse Populaire did not receive any funds from the Solicitor with respect to the Charbonneau purchase, despite the fact that the Solicitor had received \$158,233.15 from the purchaser's lawyer. These funds are no longer in the firm's trust account. The Caisse Populaire has since commenced foreclosure proceedings against the property.

(10)

INVESTOR	PROPERTY	NET LOSS
Timothy Walker	106 Royal Elm Private, Ottawa	\$115,000

- (a) The circumstances surrounding the Walker matter are similar to the Charbonneau matter, except that in the Walker matter, the Caisse Populaire held a mortgage in the amount of \$115,000. This mortgage was never discharged by The Solicitor.

CRIMINAL CHARGES

8. A copy of the Indictments against the Solicitor are attached as Exhibit 1 to this agreed statement of facts. A copy of the Plea of Guilty and Sentencing Proceeding before His Honour Judge R.G. Bigelow is attached as Exhibit 2 to this agreed statement of facts. A copy of the summary of facts entered into evidence by the Crown is attached as Exhibit 3 to this agreed statement of facts, those facts are all admitted by the Solicitor.

9. The Law Society does not accept the characterization of the Solicitor as a "business promoter", "promoter/developer" as set out on page 6 of Exhibit 2 to this agreed statement of facts. The Solicitor admits that were it not for his position as a respected solicitor in a respected firm, he would not have been able to carry out the activities herein described and admits that it was his role as a barrister and solicitor that allowed him to do so.

V. DISCIPLINE HISTORY

10. The Solicitor does not have a past discipline history.

DATED at Toronto this 28th day of February, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Frank Arthur Ault be disbarred.

28th October, 1997

REASONS FOR RECOMMENDATION

The Solicitor, Frank Arthur Ault is fifty-one years of age and was called to the bar in 1975. Prior to his incarceration for the offenses that give rise to the complaints herein, the Solicitor had achieved a status in the profession that would be envied by most of his colleagues, especially in the Ottawa area in which he was well known for his professionalism. However, between September 1995 and January, 1996, according to the indictment, the Solicitor perpetrated several frauds on persons associated with his practice of law; the frauds consisting of falsifying prioritizations of mortgages such that persons would believe they were being given a certain priority on mortgages, whereas their priority was substantially less.

It appears from the materials that the Solicitor was substantially embarrassed by his financial position to the point that he faced bankruptcy, but rather than endure the bankruptcy, he perpetrated these frauds displaying what was obviously a misguided sense of judgment. Although the Solicitor was considered by his colleagues in the community as an honourable man, hard working and committed professionally, a devoted husband and family man at the core, he suffered from alcoholism and both physical and mental problems which no doubt affected his judgment. But, in reality, it was the crushing debt load that motivated his conduct.

We have before us materials filed on behalf of Mr. Ault which contain several character letters in which prominent members of the professional and local community testify to the Solicitor's worthiness as an individual. Their testimonials to the Solicitor are a tribute to him in the sense that they display a devotion to him, notwithstanding his conduct for which they all express shock.

The Law Society appears to be the last institutional rung in the Solicitor's fall from grace. Notwithstanding his prior exemplary character and the fact that these offenses and the complaints herein are, according to these testimonials, quite out of character, the Solicitor's conduct is egregious. The authorities are quite clear what the obligation of a Committee such as ours is in this situation and that is, notwithstanding the prior good character and the reasons for which the Solicitor misconducted himself, the nature of the conduct here is such that the Solicitor must be disbarred, and that is our recommendation.

Frank Arthur Ault was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 17th day of September, 1997

Ronald D. Manes, for the Committee

Ms. Budweth advised that she had received a letter from the solicitor stating that he would not be attending Convocation and that he accepted the recommended penalty of the Discipline Committee.

The letter dated October 6th, 1997 was filed as Exhibit 2.

There were no submissions.

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

Carried

28th October, 1997

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

It was moved by Mr. MacKenzie, seconded by Ms. Stomp that the solicitor be disbarred.

Carried

Re: Dennis Michael TOPP - North York

The Secretary placed the matter before Convocation.

Messrs. Wilson, Millar and Gottlieb withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 27th July, 1997, together with an Affidavit of Service sworn 21st August, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th August, 1997 (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 DISCIPLINE COMMITTEE

REPORT AND DECISION

Clayton C. Ruby, Chair
Gary L. Gottlieb, Q.C.
Abdul A. Chahbar

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

Christina Budweth
for the Society

DENNIS MICHAEL TOPP
of the City
of North York
a barrister and solicitor

Not Represented
for the solicitor

Heard: July 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 27, 1997 Complaint D191/97 was issued against Dennis Michael Topp alleging that he was guilty of professional misconduct.

The matter was heard in public on July 16, 1997 before this Committee composed of Clayton C. Ruby, Chair, Gary L. Gottlieb, Q.C. and Abdul Chahbar. The Solicitor did not attend the hearing, 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:

Complaint D191/97

2. a) He failed to provide a report to his client, Bank of Montreal, upon completion of the transaction;
- b) He failed to reply to further inquiries from the Law Society regarding a complaint by Cheryl Fortune of the Bank of Montreal despite letters dated August 20, 1996 and October 18, 1996 and telephone messages left on September 24 and 26, 1996;
- c) He failed to comply with his undertaking to the Law Society dated January 21, 1988 to respond promptly to any communication of the Law Society of Upper Canada as required by Rule 13, Commentary 3; and
- d) He has failed to produce the books and records of his practice despite numerous requests that he do so.

Jurisdiction of the Committee

We are satisfied that the Complaint in this matter was mailed to the Solicitor at his last known address in the records of the Society as indicated in the affidavit of Ronald Hoppie, sworn June 9, 1997. That mailing took place on June 4, 1997. It was not possible to make personal contact with the Solicitor because in a previous and unrelated contact with the Society, he had indicated: (1) that he had an unlisted phone number, and (2) that he was unwilling to give it to the Society's representative.

In this case as well, Ms. Budweth, acting as discipline counsel, wrote on June 26, 1997 to the Solicitor indicating that she had appeared before the Hearings Management Tribunal to set a date for the hearing and as she did not hear from him with respect to the set date, "This matter was scheduled, in your absence, to proceed on July 15 and 16, 1997". She enclosed a draft of an Agreed Statement of Facts and document book which constituted full disclosure of the Society's case.

Given the previous discipline history of the Solicitor which appears as part of the draft Agreed Statement of Facts, it would appear that the letter which contemplates that disbarment is a possibility in such proceedings, together with his prior experience at the Society, would alert him to the fact that this was a serious matter and that it would proceed in his absence.

Given this notice, we are satisfied that he has learned of this occasion and has chosen not to appear and we are satisfied to proceed in his absence.

Reasons of the Committee

The Solicitor was called to the Bar on March 21, 1975. As of April 30, 1995, the Solicitor was "retired or not working". On May 31, 1996, the Solicitor was suspended for non-payment of his Errors and Omissions levy and on November 22, 1996 he was reinstated and his status again changed to "retired or not working". Prior to changing his status to "retired or not working", the Solicitor practised as a sole practitioner.

28th October, 1997

Particular 2(a)

The Solicitor acted for the Bank of Montreal with respect to a mortgage transaction. The Solicitor provided a Final Report to the Bank of Montreal dated July 11, 1995, however the report was not signed. By letters dated October 10, November 7 and December 4, 1995 and January 5, 1996, the Bank of Montreal requested that the Solicitor provide a final report signed by the Solicitor. The Solicitor did not respond to the correspondence.

By letter dated March 19, 1996, Cheryl Fortune of the Bank of Montreal ("the Bank") made a complaint to the Law Society regarding the Solicitor's failure to provide a final reporting letter. Attached to the letter of complaint is a "History" of the communications made by the Bank.

Particular 2(b)

By letter dated April 19, 1996, the Law Society wrote to the Solicitor enclosing a copy of Ms. Fortune's letter dated March 19, 1996. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his comments within two weeks.

By registered mail dated June 5, 1996, the Solicitor was again reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee.

By letter dated June 24, 1996, the Solicitor advised the Law Society that a report had been sent to the Bank. The Solicitor further advised that the "real complaint" of the Bank was that the report had not been signed. The Solicitor advised that he told the Bank to return the original report to him to be signed, however, the Bank did not do so. The Solicitor stated that the offer was still available. The Solicitor indicated that he did not receive any of the reminder letters from the Bank as they were sent to him after his retirement. The Solicitor then suggested that the Law Society obtain the unsigned report from the Bank, send the same to the Solicitor and he would return it to the Law Society executed.

The Law Society obtained the Solicitor's unsigned report from the Bank. By letter dated August 20, 1996, the Law Society provided the unsigned report to the Solicitor and reminded him that he offered to execute the same. The Solicitor was asked to respond within two weeks. The Solicitor did not respond.

On September 24, 1996, the Law Society called the Solicitor's office and spoke with Bob Adourian. Mr. Adourian advised that the Solicitor attends at the office once a week to assist him. A message was left for the Solicitor to return the call. On September 26, 1996, the Law Society called the Solicitor's office and asked to speak with Mr. Adourian. Mr. Adourian was not in that day. The Law Society left a message for the Solicitor to return the call. The Solicitor did not return the calls.

By registered mail dated October 18, 1996, the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Solicitor did not respond.

28th October, 1997

To date, the Solicitor has not responded to the further inquiries from the Law Society regarding a complaint by Cheryl Fortune of the Bank of Montreal. The Solicitor has not provided an executed final report to the Bank of Montreal.

Particular 2(c)

The Solicitor failed to comply with his undertaking to the Law Society dated January 21, 1988 in that he did not respond to the Law Society's letters dated August 20 and October 18, 1996 and telephone messages of September 24 and 26, 1996.

Particular 2(d)

Anita McCann, an Examiner with the Law Society's Audit and Investigation Department, commenced an audit of the Solicitor's practice upon receipt of a complaint from clients, Christopher Bradley and Karen Ann Timm. On April 15, 1996, Ms. McCann attended at the Solicitor's home to discuss the complaint with him. The Solicitor advised Ms. McCann that he did not close the transaction as Robert Adourian, another lawyer, handled the Bradley matter. The Solicitor further advised that he returned several files to his clients and others were transferred to Mr. Adourian.

At that time, Ms. McCann also asked the Solicitor to produce trust accounting records to show that he did not practise law after April 30, 1995, the date he changed his status to "retired or not working" as stated in his letter to the Law Society dated April 26, 1995.

On June 28, 1996 the Solicitor provided Ms. McCann with some trust account records which disclosed activity in his trust account between May to December 1995.

The Solicitor in his letter to the Law Society dated June 30, 1995 advised that he was not employed and that he was not practising law. However, it is evident from the documents that the Solicitor was acting for Mr. Bradley and Ms. Timm with respect to their real estate transaction during the period when he was not entitled to practise.

On July 23, 1996, the Solicitor called the Law Society and advised that he would provide the Law Society with all source documents, being cancelled cheques, deposit slips and bank statements, for his trust account as of April 1995. The Solicitor advised that with respect to the Bradley transaction, the monies did not pass through his trust account. The Solicitor further advised that when he retired in April 1995 he thought he was obligated to complete ongoing matters but not to accept new files. He was not advised to the contrary until June 1995.

On August 2 and 9, 1996, Ms. McCann called the Solicitor and on each day left a message on his answering machine requesting him to provide the source documents relating to his trust account. The Solicitor was asked to return the calls. The Solicitor did not return the calls.

By letter dated August 9, 1996, the Solicitor was reminded of the previous communications from the Law Society concerning the production of the source documents. The Solicitor was asked to produce trust receipts and disbursement journals, client trust ledgers which relate to trust transactions, cancelled trust cheques and the trust deposit book for the period from April 1 to December 30, 1995. The Solicitor was also asked to produce the trust bank statements from the period from April 1 to October 31, 1995. The Solicitor did not respond to this letter.

28th October, 1997

By registered mail dated August 21, 1996, the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Solicitor did not respond.

On November 14, 1996, Ms. McCann attended at Wildwood Group, a company owned by the Solicitor's friend. The Solicitor advised that he worked at the company and that his primary duties included writing letters, speeches and new letters. The Solicitor further advised that he was not on the payroll. Ms. McCann inquired about his business card as it stated that he was "corporate counsel". The Solicitor advised that he did not offer legal advice but only acted as an "advisor/assistant".

Ms. McCann then inquired why the Solicitor did not respond to her requests for his books and records. The Solicitor immediately called his wife and asked her to put his records together pursuant to Ms. McCann's letter. The Solicitor stated that he had forgotten about her letter requesting his books and records.

To date, the Solicitor has not provided his books and records to the Law Society. Accordingly, the Complaint is found to be established in all particulars.

PENALTY

On December 4, 1990, the Solicitor was found guilty of professional misconduct for swearing false affidavits and deceiving clients. The Solicitor was reprimanded in Committee.

On July 11, 1995, the Solicitor was found guilty of professional misconduct for practising while under suspension. The Solicitor was reprimanded in Committee and provided an undertaking not to practise for six months and to deliver up files to the Society or another lawyer within seven days. The Solicitor was also ordered to pay costs in the sum of \$1,000.

It is clear from the material that the Solicitor, who may well view himself as retired, has not fully appreciated that his obligations to the Society have not ended. The matter of signing a report for the Bank of Montreal was the work of but a moment. He made it difficult, complex, and ultimately refused to assist in fulfilling his obligation and maintaining the honour of the profession.

The books and records, assuming him to have told the truth about his activities, were the work of a bare moment to produce because they would have existed and there would have been a nil balance. Far from being arduous, it was the lightest of all possible obligations to the Society.

28th October, 1997

But the Society has an obligation to the public to ensure that any member must be governable. The pattern of behaviour shown by this Solicitor who has a previous discipline record, and his activities vis-a-vis the Society and the Bank of Montreal in this case, show him to be ungovernable. The appropriate recommendation for us to make to Convocation for someone who is ungovernable is that he be disbarred. In this case, we add to that recommendation that if he replies as requested and produces the material sought by the Law Society before this matter appears before Convocation, then it would be appropriate for Convocation to exercise its discretion and substitute for a recommendation of disbarment, a recommendation that he be suspended for a period of three months. Otherwise, disbarment is the only alternative. In any event, we recommend that costs of \$1,750 be imposed, which is a modest estimate of what it cost the Society to get to this stage.

As the Solicitor did not choose to appear or communicate in any way with the Law Society, despite full notice of the allegations against him, we have no evidence of any economic hardship that might be caused to the Solicitor in the light of the order as to costs. If Convocation, upon hearing him, is satisfied that this order would cause hardship, then we would recommend to Convocation a re-examination of the costs order.

The object of these recommendations is simple. We want to give the Solicitor an opportunity to "square himself" with his Society, or in the alternative, to leave us in what regrettably must be the most ignominious manner possible.

ALL OF WHICH is respectfully submitted

DATED this 27th day of July, 1997

Clayton Ruby, Chair

Ms. Budweth made submissions as to the service of the Report advising that 3 letters were written to the solicitor with no reply.

The letters dated August 18th, September 15th and October 15th, 1997 were filed as Exhibit 2.

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

Carried

The recommended penalty of the Discipline Committee was that if the solicitor replies to the Society and produces his books and records that he be suspended for a period of 3 months failing which he be disbarred and further the solicitor pay costs in the amount of \$1,750.

Ms. Budweth made submissions in support of the solicitor being disbarred.

It was moved by Mr. Cole, seconded by Ms. Sealy that the solicitor be disbarred and pay costs in the amount of \$1,750.

Carried

28th October, 1997

Re: Moeen Mahmood JANJUA - Mississauga

The Secretary placed the matter before Convocation.

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

Convocation had before it the Report of the Discipline Committee dated 20th May, 1997, together with an Affidavit of Service sworn 28th May, 1997 by Ron Hopple that he had effected service on the solicitor by registered mail on 21st May, 1997 (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 DISCIPLINE COMMITTEE

REPORT AND DECISION

Robert C. Topp

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

Glenn Stuart
for the Society

MOEEN MAHMOOD JANJUA
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 12, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 23, 1996 Complaint D193/96 was issued against Moeen Mahmood Janjua alleging that he was guilty of professional misconduct.

The matter was heard in public on March 12, 1997 before Robert C. Topp sitting as a single bencher. The Solicitor did not attend the hearing, nor was he represented. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D193/96

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending November 30, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Finding of the Committee

The evidence establishes that the professional misconduct set out in paragraph 2(a) of Complaint D193/96 has been made out and that the Solicitor, in the fiscal year ending November 30th, 1995, has not filed the Form 3, albeit, he has filed the Form 2. Therefore, he is in default of the Regulation and I make a finding of misconduct on the allegation as set out.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Moeen Mahmood Janjua be suspended for a period of twenty-four months, to commence at the conclusion of any administrative suspension, and to continue indefinitely until he has brought all his filings up to date, and that he pay the Law Society's costs in the amount of \$3,500 payable prior to his resumption of practice.

REASONS FOR RECOMMENDATION

The penalty phase of the hearing is quite difficult because of the extended pattern of misconduct of the Solicitor over a number of years. The Society took the not unreasonable position that the termination of the Solicitor's membership in the Society is appropriate.

I am of the view that given the fact that during the time period in question for which he has been found to have committed misconduct, that where he filed the Form 2 and didn't file the Form 3, as his wife says, 'that may be an error', rather than an act of wilful misconduct. As a result I decline to accept the Society's invitation to make a recommendation on these facts that his membership in the Society be terminated, either by disbarment or by permission to resign. It may well be that the Society will choose to proceed, after giving him proper notice, in regard to the outstanding filings from April 30, 1994 forward. A different committee may view that matter differently than I, and it may be at that time that ungovernability may arise. I agree with the earlier committee that it appears that his pattern of conduct is very, very close to ungovernability, but as I have earlier held, the filing of the Form 2 and the explanation offered means that this is not the appropriate time to terminate his membership.

As to the matter of penalty, given his record, his clear pattern of failing to follow the rules, I recommend to Convocation that he be suspended for a period of twenty-four months, to commence at the end of any outstanding administrative suspension.

In addition to that, I recommend that the Solicitor be required to pay the Society's costs in the amount of \$3,500 to reflect the continuing costs to the members of the Bar in Ontario to attempt to get this member to perform his duties both to his profession and to the public. The Society can no longer tolerate this sort of conduct from this Solicitor. I therefore fix the costs at \$3,500 payable before he resumes practice in Ontario. Failing his payment of the costs, his suspension should remain outstanding indefinitely. The suspension should also continue beyond the twenty- four month period indefinitely if Mr. Janjua has not made the appropriate filings.

28th October, 1997

Moeen Mahmood Janjua was called to the Bar on April 8, 1976.

ALL OF WHICH is respectfully submitted

DATED this 20th day of May, 1997

Robert C. Topp

There were submissions by counsel as to the issue of service. Mr. Stuart advised that he had received a letter from the solicitor who was living in Uganda.

The letter from the solicitor dated June 25th, 1997 to Mr. Glenn Stuart was filed as Exhibit 2.

Counsel, the reporter and the public withdrew.

Convocation deliberated on the issue of the finding of professional misconduct.

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

Lost

Counsel, the reporter and the public were recalled and informed that the matter was dismissed as Convocation concluded the Report did not establish professional misconduct on the part of the solicitor.

Re: Paul Edward MALLON - Mississauga

The Secretary placed the matter before Convocation.

Messrs. Carey, Wilson, Millar and Swaye and Ms. Sealy withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 8th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

28th October, 1997

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Gerald A. Swaye, Q.C., Chair
Robert P. Armstrong, Q.C.
Hope Sealy

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

Glenn Stuart
for the Society

PAUL EDWARD MALLON
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: April 15, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Complaint D316/96 was issued on December 5, 1996 and Complaint D321/96 was issued on December 18, 1996 against Paul Edward Mallon alleging that he was guilty of professional misconduct.

The matter was heard in public on April 15, 1997 before this Committee composed of Gerald A. Swaye, Q.C., Chair, Robert P. Armstrong, Q.C. and Hope Sealy. The Solicitor was not in attendance nor was he represented. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D316/96

2. a) The Solicitor failed to produce his books and records to a representative of the Law Society for the purposes of an examination of those books and records in accordance with the regulation to the Law Society Act, despite numerous visits, meetings, telephone communications, and letters throughout the period from July 27, 1995 to September 16, 1996; and,
- b) The Solicitor breached an Order of Convocation that he suspend his practice for failure to pay the Errors and Omissions insurance levy, by continuing to practise during the period from January 26, 1996 to April 3, 1996.

Complaint D321/96

2. a) He failed to file with the Law Society within six months of the termination of his fiscal year ended January 3, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the Solicitor in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.
- b) He breached his undertaking, dated August 7, 1996, to the Law Society, in that he failed to make his filings for his fiscal year ended January 3, 1996, on or before September 30, 1996.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D321/96 and D316/96 and is prepared to proceed with a hearing of this matter on April 15-16, 1997.

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 D321/96 and D316/96 and this Agreed Statement of Facts and admits the particulars and supporting facts contained therein. The Solicitor admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

Complaint D316/96

- Particular 2(a) The Solicitor failed to produce his books and records to a representative of the Law Society for the purposes of an examination of those books and records in accordance with the regulation to the *Law Society Act*, despite numerous visits, meetings, telephone communications, and letters throughout the period from July 27, 1995 to September 16, 1996.
4. On July 27, 1995, a Law Society examiner ("the examiner") attended unannounced at the office address for the Solicitor according to the Society's records at the time. The Solicitor had moved from this location.
 5. On July 28, 1995, examiner attended unannounced at the Solicitor's new office address. Being advised that the Solicitor was on vacation, the examiner left her card and a message for the Solicitor to call her.
 6. On July 31, 1995, the examiner telephoned the Solicitor and confirmed to him her attendance at his office the previous Friday. She also advised him that an audit had been instructed. They agreed to schedule a meeting for August 9, 1995. Subsequently, the Society faxed the Solicitor a listing of the books and records that he would be required to produce for the examination (Document Book, Volume 1, Tab 1).

28th October, 1997

7. On August 9, 1995, the examiner attended at the Solicitor's office for the scheduled meeting. She was advised that the Solicitor had just left to attend an "emergency" hearing. Nonetheless, she met with the Solicitor's assistant to attempt to ascertain the status of his books and records, only to learn that nothing had been prepared for her review. She located some envelopes containing bank statements and returned cheques, a number of which had not been opened. As no further examination was possible due to the fact that the Solicitor's books appeared to be in arrears, the examiner left a letter (Document Book, Volume 1, Tab 2) for the Solicitor with a list of the books and records required and asked him to call to discuss the situation and to arrange a firm appointment.

8. In the afternoon of August 9, 1995, the examiner twice telephoned the Solicitor to follow up on her visit that morning. On both occasions, the Solicitor was not available and she left messages with his assistant advising that she would like to meet with the Solicitor as soon as possible.

9. On August 10, 1995, the examiner spoke with the Solicitor and advised him that it would be necessary to place co-signing requirements on his trust account if his books remained in arrears. The examiner made an appointment to meet the Solicitor on August 15, 1995, the first day on which he would be available. In the interim, the Solicitor would contact his accountant to obtain assistance in organizing his records for review on August 15th. The examiner's notes of this discussion are located at Tab 3 of the Document Book, Volume 1.

10. On August 14, 1995, the Solicitor left a message on the examiner's voice mail requesting a return call. After an exchange of messages, the examiner spoke with the Solicitor that afternoon. The Solicitor advised that he would be meeting his accountant the following afternoon and added that he could not locate the bank statements for April and May 1995 but had asked his bank to reproduce them. The examiner advised that they should keep their scheduled appointment, as she would be consulting her manager to determine if co-signing would be required. The examiner's notes of this discussion are located at Tab 4 of the Document Book, Volume 1.

11. On August 15, 1995, the examiner attended the Solicitor's office and completed the audit questionnaire with him. The Solicitor's books and records were in arrears from various times prior to December 1994. After a review of all matters, co-signing documentation was prepared.

12. On August 16, 1995, co-signing controls were placed on the Solicitor's trust bank account. The Solicitor was also given a letter, dated August 16, 1995 (Document Book, Volume 1, Tab 5), advising that the Society would consider seeking an Order under section 42 of the *Law Society Act*, if his books were not updated within 5 working days.

13. On August 18, 1995, the examiner telephoned the Solicitor to determine the status of his books and records. She left a message on his voice mail asking him to call and reminding him of the five working day deadline.

14. On August 21, 1995, the Solicitor called the examiner to advise her that he had met with his accountant who reviewed the available material and determined that he could have the necessary material ready within 30 days. The examiner advised the Solicitor that this was too long and, at a minimum, the trust comparisons were required sooner than that so she could assess the position of the trust account. The Solicitor indicated he would contact his accountant the next day to discuss a shorter time frame.

15. On August 22, 1995, the examiner telephoned the Solicitor and left a message requesting an update on his progress and reminding him that they had reached the five day deadline. She asked him to contact his accountant and advise her of the date to which the trust accounts were reconciled.

16. On August 23, 1995, the Solicitor left a voice mail message for the examiner indicating that his accountant had advised he would have the books for the outstanding 1994 annual filing completed within 30 days and the trust records completed within 7 to 10 days. He added that the accountant would send a confirming letter.

17. On August 25, 1995, the examiner returned a call from the Solicitor's accountant, Tony DeLuca. Mr. DeLuca asked what material the examiner required; the examiner advised Mr. DeLuca that up-to-date trust comparisons were needed as soon as possible. As Mr. DeLuca suggested that he needed a week to prepare this material, it was agreed that September 5, 1995 would be the target date.

18. Mr. DeLuca left a voice mail for the examiner on Friday, September 1, 1995, advising that some bank statements were missing, but that he was corresponding with the Solicitor to obtain same. He asked the examiner to return the call on Tuesday, September 5, 1995, when Mr. DeLuca would return to his office.

19. On September 5, 1995, the examiner telephoned Mr. DeLuca. Mr. DeLuca advised her that the Solicitor had asked his bank to provide the missing bank statements and cheques and that, if these items were received, trust comparisons could be completed by the end of the week.

20. On September 11, 1995, the examiner attempted to contact the Solicitor and left a message with his assistant for the Solicitor to call. The Solicitor and the examiner subsequently exchanged voice mail on September 12 and 13, 1996.

21. The Solicitor left the examiner a voice mail on September 14, 1995, advising that Mr. DeLuca was picking up some information that day but that they were still awaiting some missing bank statements. That same day the examiner contacted Mr. DeLuca who confirmed the information in the Solicitor's message. Mr. DeLuca estimated that the statements would be received in a week and that the information could be compiled in a few days thereafter.

22. On September 15, 1995, the examiner telephoned Mr. DeLuca and left a voice mail message requesting the date of the latest *balanced* trust comparison and the date to which the books were prepared.

23. On September 18, 1995, the examiner telephoned the Solicitor and was advised by his assistant that the Solicitor had gone to the bank to obtain missing statements and that she should call back.

24. On September 19, 1995, the examiner telephoned Mr. DeLuca who advised that he had worked on the books for January, February and March 1994 but had not yet completed them. He also indicated that he was awaiting a call from the Solicitor with respect to the missing statements. The same day, the Solicitor's assistant confirmed to the examiner that the statements had not yet been obtained but that the Solicitor was checking again that day. The examiner left a message asking the Solicitor to call her or Mr. DeLuca and offering to contact the bank directly.

25. On October 5, 1995, the examiner left a message for the Solicitor wherein she advised that she would contact the bank directly, if he wished, and that a section 42 Order would be sought if a specific date for the completion of the records was not provided that day.

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26. The examiner spoke to Mr. DeLuca later on October 5, 1995. Mr. DeLuca advised that he had all of the banking records for the Solicitor's trust account up to July 31, 1995, but he was still missing the bank statements for the general account for June and July, 1994. He confirmed that the postings and balancing were complete through December 1994. In response to a question from him, the examiner advised Mr. DeLuca that he should be reviewing the Solicitor's accounts which supported transfers from trust to general. She noted that if the Solicitor did not provide them to him, he would need to provide them to her.

27. The Solicitor contacted the examiner in the afternoon of October 5, 1995. The examiner advised him that she had spoken to Mr. DeLuca regarding the status of the books and that she would speak to her supervisor regarding the section 42 Order. The examiner subsequently left a message requesting a facsimile of the December 1994 trust bank statement, trust listing and trust reconciliation. The requested material was not provided at that time.

28. On October 25, 1995, the examiner telephoned the Solicitor and left a voice mail message requesting an update on the status of his books and records and an appointment to commence the audit. She asked him to return the call.

29. The following day, October 26, 1995, the Solicitor returned the examiner's telephone call. He advised that Mr. DeLuca was working on the records and was supposed to call the examiner that day. The Solicitor and the examiner agreed that she would call him if she did not hear from Mr. DeLuca that day.

30. As Mr. DeLuca did not call her, the examiner called the Solicitor on October 27, 1995. He advised her that he would contact Mr. DeLuca and ask him to call. The examiner and Mr. DeLuca exchanged messages later that day. Mr. DeLuca advised that he was working on the records and expected to be finished the following week; the examiner advised, in reply, that she required a definite date for completion.

31. On November 6, 1995, the examiner left a voice mail message for the Solicitor wherein she confirmed that she had heard from neither the Solicitor nor Mr. DeLuca since October 27th when she was assured that she would receive the books by week's end. She advised him that she would like to meet with him to review records and suggested either November 10 or 13, 1995.

32. As no response was received from the Solicitor, the examiner wrote to the Solicitor on November 10, 1995 (Document Book, Volume 1, Tab 6). In her letter, the examiner reviewed their recent communications and advised the Solicitor that whatever books and records had been completed had to be produced by November 17, 1995, or a report would be made to the Discipline Committee.

33. On November 16, 1995, the Solicitor advised the examiner by voice mail that Mr. DeLuca had advised that the books and records for 1994 were complete. He suggested that they meet on either November 21 or 22, 1995.

34. On November 20, 1995, the examiner called the Solicitor and left a message on his answering machine, confirming that she could meet with him and Mr. DeLuca on November 22, 1995. She suggested he confirm Mr. DeLuca's availability and call back.

35. The Solicitor left a voice mail for the examiner on November 21, 1995, indicating that Mr. DeLuca could not attend the following day. He suggested that the examiner call Mr. DeLuca to arrange a meeting. The examiner subsequently arranged with Mr. DeLuca to meet on November 27, 1995.

36. On November 27, 1995, the examiner met with Mr. DeLuca to review the state of the Solicitor's books and records. Mr. DeLuca reported a number of inadequacies in the books and records including the following:

- 1) the source documents were not detailed;
- 2) there were no client ledgers; and,
- 3) there were transfers from trust to general for which the Solicitor had not provided billings.

Mr. DeLuca was not prepared to provide the Solicitor's books to the examiner as he did not consider them to be complete and required more information from the Solicitor. The examiner and Mr. DeLuca agreed to meet again on December 11, 1995, at which time he anticipated that the material for December 1994 would be complete. Mr. DeLuca also advised that the Solicitor's current records were being entered on a PC Law Jr. program by the Solicitor's assistant; he noted that the Solicitor's assistant was not proficient in the use of this program. The examiner later summarized the substance of the November 27th meeting in a memorandum to file (Document Book, Volume 1, Tab 7).

37. On November 28, 1995, the examiner telephoned the Solicitor and left a message with his assistant. The examiner advised the Solicitor that she had met with Mr. DeLuca and would be meeting again on December 11, 1995, to review all of the 1994 books. She emphasized to the Solicitor that he must co-operate with Mr. DeLuca to enable him to conclude the records by that date.

38. The examiner and Mr. DeLuca did not meet on December 11, 1995.

39. The examiner called the Solicitor on December 19, 1995, to follow-up on his progress in updating his books and records. The Solicitor advised that Mr. DeLuca had requested more information which he expected to be able to deliver by end of week. He also indicated that he did not have any real estate clients and was not doing any work through his trust account, although he held trust funds for long-term litigation matters. The examiner's notes of this message are located at Tab 8 of the Document Book, Volume 1.

40. On January 8, 1996, the examiner telephoned Mr. DeLuca. Mr. DeLuca advised that he was still waiting for some material which the Solicitor was to have faxed to him last week. He agreed to follow-up that day with the Solicitor.

41. On January 9, 1996, the examiner telephoned the Solicitor and left a message with his assistant for him to call to set up an appointment.

42. On January 11, 1996, Mr. DeLuca confirmed that he had called the Solicitor three days prior as promised but had not yet received a reply. That same day, the examiner left a voice-mail message for the Solicitor confirming her discussions with Mr. DeLuca and asking that he call her to arrange a meeting. She also advised the Solicitor that, due to the length of time the matter had continued, if they had not set a firm meeting by January 19, 1996, she would report the matter to the Discipline Committee.

43. On January 12, 1996, the Solicitor left a voice-mail message for the examiner indicating that he was returning her call, but not responding to the substance of her last message. The examiner returned the call fifteen minutes later and left a voice-mail message indicating that she was in her office awaiting his call. The Solicitor did not respond that day.

44. On January 15, 1996, the Solicitor again left a voice-mail message for the examiner indicating that he was returning her call, but not responding to the substance of her last message. The examiner returned the call that afternoon and left a message with the Solicitor's assistant. The examiner advised that she required a meeting with the Solicitor and Mr. DeLuca at the Solicitor's office, preferably, on January 19, 1996; however, she would discuss alternative dates if Mr. DeLuca was not available at that time. She asked the Solicitor to call her.

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45. The Solicitor returned the examiner's call on January 17, 1996. The Solicitor and the examiner agreed to meet on the afternoon of January 19, 1996, at his office. The examiner indicated that she needed to see the books prepared by Mr. DeLuca as well as the Solicitor's current books. In that regard, she suggested that if Mr. DeLuca could not attend the meeting that he courier the books to the Solicitor.

46. On January 19, 1996, the Solicitor advised the examiner by voice mail that he had been unable to contact Mr. DeLuca to obtain the material for their meeting that afternoon. After an exchange of voice-mail between the three individuals, the examiner and the Solicitor agreed to re-schedule their meeting to January 25, 1996, to provide another opportunity for the Solicitor to obtain the accountant's materials. It was agreed that the re-scheduled meeting would take place whether the Solicitor received the material or not, so the examiner could review the Solicitor's current books.

47. On January 23, 1996, the Solicitor left a message for the examiner confirming their meeting and advising that Mr. DeLuca was faxing the material to him.

48. The Solicitor and the examiner met on January 25, 1996. Mr. DeLuca's reconstruction of the Solicitor's books for 1994 was not completed as Mr. DeLuca still required additional documents from the Solicitor. In addition, the books for none of the months in 1994 had been satisfactorily completed, and the books which had been completed showed the trust account to be overdrawn in excess of \$6,000. The examiner directed the Solicitor to correct the two large discrepancies identified by Mr. DeLuca and then to make a year-end correction, injecting his own funds to correct any deficiency. It was agreed that the Solicitor would meet with Mr. DeLuca the following week to provide the balance of the information and advise the examiner thereafter. The examiner's notes of the meeting, along with the material provided by Mr. DeLuca (including a memorandum outlining the material he required to complete the 1994 books) are located at Tab 9 of the Document Book, Volume 1.

49. On January 29, 1996, the examiner spoke with Mr. DeLuca and discussed the matters arising from her meeting with the Solicitor which needed to be addressed to complete the 1994 and 1995 books. The examiner advised that she wished to conclude this examination no later than the end of February 1996. The examiner's notes of this discussion are located at Tab 10 of the Document Book, Volume 1.

50. After the examiner left two messages for the Solicitor on January 31, 1996, inquiring as to his progress in following up on their meeting, the Solicitor telephoned the examiner on February 1, 1996. The Solicitor left a message indicating that he was meeting with Mr. DeLuca on February 5, 1996, and that Mr. DeLuca anticipated concluding the 1994 books, and beginning the 1995 books, shortly thereafter.

51. On February 7, 1996, Mr. DeLuca left a message for the examiner indicating that he was meeting the Solicitor the next day at which time the Solicitor had promised to provide the balance of the material to complete the 1994 books. After the 1994 materials were complete, the Solicitor's assistant was going to begin entering the 1995 information onto the Solicitor's PC Law Jr. program. The examiner's notes of this message are located at Tab 51 of the Document Book, Volume 1.

52. The Solicitor telephoned the examiner on February 26, 1996. He advised the examiner that a couple of small items were still outstanding; however, if they were not resolved by the end of the week, he and Mr. DeLuca intended to close the year and make a year-end adjustment. The Solicitor indicated that he would call Mr. DeLuca and then advise the examiner as to when the books would be complete.

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53. As the Solicitor had not contacted the examiner by March 4, 1996, the examiner sent the Solicitor a registered letter, dated March 4, 1996 (Document Book, Volume 1, Tab 11), to confirm that she had yet to receive his completed books for the 1994 fiscal year. She required that the completed books (the necessary books being specified in her letter) be ready for her review by no later than March 15, 1996.

54. On March 8, 1996, the Solicitor left a message for the examiner confirming his receipt of her letter and advising that he could not meet her deadline since he would be out of town until March 17, 1996; he indicated that Mr. DeLuca would call her.

55. On March 19, 1996, the examiner telephoned the Solicitor to follow-up on his previous message to her and request an update as to his progress. She left a message asking that the matter be concluded by the end of the month.

56. After exchanging messages with the examiner on March 20, 1996, the Solicitor left a message for the examiner on March 22, 1996, indicating that he had ordered a cheque from the bank to clarify one item and that the cheque would be available in a week or ten days, therefore permitting the books to be concluded by the end of the following week. He also asked the examiner to call him regarding \$1,000 in his trust account which a client wanted to have released.

57. On March 22, 1996, the examiner returned the Solicitor's call and left a message advising that the \$1,000 would remain frozen, along with his other trust funds, until his books and records were up-to-date and it was determined that no trust shortage existed. She asked him to call her to discuss whether he would need to open a new operating trust account, with her holding co-signing control, so he could deposit new settlement funds into trust.

58. After an exchange of voice mail messages on March 25 and 26, 1996, the Solicitor and the examiner arranged to meet on March 27, 1996, to open a new trust account for the Solicitor. The examiner's notes of these communications are located at Tabs 12 and 13 of the Document Book, Volume 1.

59. On March 27, 1996, the examiner attended at the Solicitor's office and, subsequently, at the Solicitor's bank with the Solicitor to open a new trust bank account with co-signing controls. However, because the examiner had learned that the Solicitor's membership had been suspended, she did not sign any trust cheques. The examiner's notes of meeting with the Solicitor, and her follow-up with respect to his status, are located at Tab 14 and 15 of the Document Book, Volume 1.

60. On April 1, 1996, the examiner telephoned the Solicitor. The Solicitor asked whether he was still suspended as he had sent a certified cheque to the Law Society for his outstanding insurance levy, but the cheque had not cleared his bank yet. The Solicitor indicated that he would arrange alternative payment that day. He also advised that he was trying to obtain material from the bank, but the bank purportedly could not locate the item in question. Consequently, Mr. DeLuca was to reconcile the books without the item, and the Solicitor would report on his progress. The examiner's notes of this discussion are located at Tab 16 of the Document Book, Volume 1.

61. On April 3, 1996, the Solicitor left a message for the examiner to advise that he had been reinstated and wanted to have the trust cheques co-signed the following day. The examiner responded with a message indicating that she would be available all day the following day but that she required a client ledger as well as the cheques to be co-signed.

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62. The Solicitor met with the examiner at the Law Society on April 4, 1996. The examiner co-signed the trust cheques and made an appointment for April 15th, and 16th if necessary, to start her audit of the Solicitor's files and whatever accounting records were available. The examiner's notes of this meeting are located at Tab 17 of the Document Book, Volume 1.

63. On April 15, 1996, the examiner attended at the Solicitor's office to review a number of his clients' files. Subsequently, by registered letter, dated April 17, 1996 (Document Book, Volume 1, Tab 18), the examiner advised the Solicitor that she had discovered evidence that he had been practising during his recent period of suspension, and that this and his failure to maintain adequate books and records during the period of her audit would be reported to the Chair of the Discipline Committee. The letter was signed for on April 18, 1996.

64. On April 30, 1996, the examiner left a message for the Solicitor wherein she asked him to advise her as to when she could expect a response to her letter of April 17, 1996, and what progress had been made with respect to completing his books for her review. She also advised that he was required to submit monthly trust reconciliations, bank statements and trust listings for his new operating trust account.

65. On June 4, 1996, the Law Society received a message from Mr. DeLuca. He indicated that he wished to speak with the examiner to whom the file had been reassigned, the original examiner having commenced a maternity leave in May 1996.

66. On June 12, 1996, the second examiner telephoned Mr. DeLuca. Mr. DeLuca advised that the Solicitor's annual filing for the fiscal year ending January 31, 1995, would be made June 13, 1996, despite numerous deficiencies, and that the filing for the January 31, 1996, year-end would be prepared soon. The second examiner confirmed that she would review the audit file and call him again to confirm the matters which needed to be addressed.

67. On June 27, 1996, the second examiner telephoned Mr. DeLuca. Mr. DeLuca's voice mail indicated that his office was closed until July 2, 1996. The second examiner left a message advising that she would be on vacation from July 2-17, 1996, but that she was calling regarding the Solicitor's books. She left a message for the Solicitor the same day to introduce herself and ask him to call her. The Solicitor did not reply to this message.

68. On July 25, 1996, the second examiner telephoned Mr. DeLuca. Mr. DeLuca advised that the Solicitor's January 1995 filing had been made but that Mr. DeLuca was still waiting for the Solicitor to send further information before he could complete the January 1996 filing. He confirmed that the Solicitor was aware of the information he required. The second examiner then called the Solicitor and left a message for him to call her.

69. On July 29, 1996, the Solicitor left the second examiner a message, returning her call but providing no other information. The second examiner responded by leaving a message for the Solicitor advising him of her discussion with Mr. DeLuca and asking him to call her regarding the production of his books and records. The Solicitor did not reply to this message.

70. On August 23, 1996, the second examiner telephoned the Solicitor at his last office number according to the Society's records. The receptionist advised her that the Solicitor was no longer at that telephone number or location, adding that he did not leave a forwarding telephone number or address, but provided his home telephone number. When the second examiner called the number provided there was no answer.

71. On September 16, 1996, the second examiner telephoned the Solicitor at his home telephone number and left a message on the answering machine asking him to return the call. The Solicitor did not respond to this message.

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72. The Solicitor has not communicated further with the Law Society with respect to the audit to date. In particular, he has not provided the Law Society with his books and records for the period from January 1994 to date for the purpose of examination by the Law Society.

Particular 2(b) The Solicitor breached an Order of Convocation that he suspend his practice for failure to pay the Errors & Omissions insurance levy, by continuing to practise during the period from January 26, 1996, to April 3, 1996.

73. On or about July 1, 1995 (Document Book, Volume 1, Tab 19), the Society forwarded to the Solicitor a Notice advising him that his Errors & Omissions Insurance Levy was due and payable for the period from July 1, 1995, to December 31, 1995. The Solicitor was further advised that payment was due on July 1, 1995, and requested payment no later than July 15, 1995. The Solicitor received this notice but did not respond.

74. On or about October 26, 1995 (Document Book, Volume 1, Tab 20), the Law Society forwarded to the Solicitor a Second and Final Notice advising him that his Errors & Omissions Insurance Levy was due and payable for the period from July 1, 1995 to December 1, 1995. The Final Notice again provided the Solicitor with the information regarding membership suspensions which was outlined in the First Notice and included the following admonition:

Note 2ND AND FINAL NOTICE. ANY BALANCE OWING MUST BE PAID BY
THE CLOSE OF BUSINESS ON NOVEMBER 15, 1995 TO AVOID
SUSPENSION.

The Solicitor received this notice but did not respond.

75. By letter dated January 29, 1996 (Document Book, Volume 1, Tab 21), the Solicitor was advised that, by Order of Convocation, his rights and privileges as a member of the Society were suspended effective January 26, 1996, as a result of his cheque in payment of the Errors & Omissions insurance levy being returned for insufficient funds.

76. On February 19, 1996, the law clerk in the Society's Department of Audit & Investigation telephoned the Solicitor regarding the suspension of his membership. The Solicitor stated to her that he had attended at his law office to prepare a cheque for the insurance levy which he intended to pay that afternoon.

77. The examiner provided the Solicitor with the Law Society's Guidelines for Suspended Members by facsimile, dated March 28, 1996 (Document Book, Volume 1, Tab 22). The examiner asked the Solicitor to ensure that he was acting within Guidelines until he could verify that his membership had been reinstated.

78. On April 3, 1996, the Solicitor paid the outstanding insurance levy, and his membership was reinstated consequently. The Society confirmed the Solicitor's reinstatement as of April 3, 1996, by letter, dated April 15, 1996 (Document Book, Volume 1, Tab 23).

79. On April 15, 1996, the examiner attended at the Solicitor's office to review a number of his clients' files. The examiner's review of the Solicitor's files disclosed that the Solicitor practised law throughout the period from January 26, 1996, to March 29, 1996, during which period his membership in the Society was suspended. The particulars of the evidence of the Solicitor's practice during his suspension are detailed in Appendix "A" to this Agreed Statement of Facts and the corresponding documents.

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80. By letter dated April 17, 1996 (Document Book, Volume 1, Tab 18), the examiner asked the Solicitor to respond to certain questions concerning the suspension of his membership and advised him that his continuing to practise when his membership had been suspended would be reported to the Discipline Committee.

Complaint D321/96

Particular 2(a) He failed to file with the Law Society within six months of the termination of his fiscal year ended January 3, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the Solicitor in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Particular 2(b) He breached his undertaking, dated August 7, 1996, to the Law Society, in that he failed to make his filings for his fiscal year ended January 3, 1996, on or before September 30, 1996.

81. As reflected by his Form 2 filing for his fiscal year ending January 3, 1995 (Document Book, Volume 1, Tab 24), the Solicitor's fiscal year end is January 3rd. On August 7, 1996, the Solicitor filed Forms 2 and 3 for the fiscal year ending January 3, 1995.

82. The Solicitor did not file his Forms 2 and Form 3 for the fiscal year ending January 3, 1996, within six months of the conclusion of the fiscal year, as required by s.16(2) of Regulation 708 under the *Law Society Act*.

83. Complaint D56/96 was issued on March 5, 1996, against the Solicitor with respect to his failure to file for the fiscal year ended January 3, 1995; the endorsed Complaint is located at Tab 25 of Volume 1 of the Document Book. That Complaint was withdrawn and converted to an invitation to attend after the Solicitor made the required filing for 1995 and gave a written undertaking (Document Book, Volume 1, Tab 26) which states, in part, as follows:

[i]N CONSIDERATION OF Complaint D56/96 being withdrawn and dealt with by way of an invitation to attend, I, Paul Edward Mallon hereby agree and undertake as follows:

1. To file with the Law Society on or before September 30, 1996, for the fiscal year ended January 3, 1996 a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by me in the form prescribed by the Rules pursuant to section 16(2) of the Regulation made pursuant to the Law Society Act; and

...

I ACKNOWLEDGE that any breach of this Acknowledgement and Undertaking may lead to further discipline proceedings, and I hereby consent to this document being introduced in evidence in those proceedings.

84. The Solicitor did not file his Forms 2 and 3 for the fiscal year ended January 3, 1996, on or before September 30, 1996.

85. To date, the Solicitor has not filed his Forms 2 and 3 for the fiscal year ended January 3, 1996.

V. PRIOR DISCIPLINE

86. A Complaint was issued on February 8, 1988, alleging that the Solicitor had failed to reply to Law Society communications. On March 9, 1988, the Complaint was withdrawn upon the Solicitor signing an Acknowledgement and Undertaking (Document Book, Volume 1, Tab 27), to reply promptly to Law Society communications.

87. A Complaint was issued on March 5, 1996, alleging that the Solicitor had failed to make his annual filings for the fiscal year ended January 3, 1995. On August 7, 1996, the Complaint was withdrawn and converted to an Invitation to Attend upon the Solicitor signing an Acknowledgement and Undertaking (Document Book, Volume 1, Tab 26) to make his filing for the year ended January 3, 1996, by September 30, 1996, and to file his fiscal year end reports in the future within the time prescribed by the Regulation.

DATED at Toronto this 14th day of April, 1997."

APPENDIX "A"

January 26, 1996 to April 3, 1996

Client	Date	Activity
Suparna Ghosh (continuing civil litigation matter)	February 7, 1996	The Solicitor wrote to this client, on his firm letterhead, enclosing a medical report for her review (Document Book, Volume 2, Tab 1)
	February 7, 1996	The Solicitor wrote, on his firm letterhead, to Adjusters Canada, insurers of one of the defendants, to request delivery of their Statement of Defence by February 21 1996. (Document Book, Volume 2, Tab 2)
	February 14, 1996	Borden & Elliot, solicitors for the same defendant, served a Statement of Defence and Crossclaim, and an Offer to Settle, on the Solicitor.
	February 19, 1996	The Solicitor wrote to this client, on his firm letterhead, enclosing copy of the letter from Borden & Elliot with enclosures. (Document Book, Volume 2, Tab 3)
	February 27, 1996	A memorandum to the Solicitor from his assistant detailed instructions received from this client by telephone (Document Book, Volume 2, Tab 4).

	March 5, 1996	The Solicitor commissioned an Affidavit of Service sworn by his assistant with respect to serving the Plaintiff's Affidavit of Documents. (Document Book, Volume 2, Tab 5)
	March 5, 1996	The Solicitor wrote to Borden & Elliot, on his firm letterhead, enclosing his client's Affidavit of Documents. (Document Book, Volume 2, Tab 6)
Salim Ajani (criminal defence)	February 14, 1996	The Solicitor wrote to this client, enclosing interim fee billing (which detailed legal services provided on January 4, 5, 15, and 24, and February 1, 8 and 9) and advising that, on February 8, 1996, this client's case was remanded to February 29, 1996. (Document Book, Volume 2, Tab 7)
	February 29, 1996	The Solicitor attended at Newmarket Court to speak to this matter.
	March 4, 1996	The Solicitor wrote to client enclosing interim fee billing (which detailed legal services provided on February 14, 19, 27, 28, and 29, 1996). (Document Book, Volume 2, Tab 8)
1115245 Ontario Inc. (civil litigation matter)	January 26, 1996	A facsimile was sent from Heller, Feldman, solicitors for plaintiff, to Howard Turk. A note from Mr. Turk to the Solicitor asked him to "deal with" the matter.
	January 29, 1996	The Solicitor filed a Notice of Change of Solicitors for Defendants and an Affidavit of Service with the Ontario Court (General Division) in this matter. (Document Book, Volume 2, Tab 9)
	January 30, 1996	A facsimile was sent to the Solicitor by Heller, Feldman enclosing Affidavit of Documents and Notice of Examination.
	February 5, 1996	The Solicitor wrote to this client, on his firm letterhead, enclosing material provided by Heller, Feldman and requesting documents from client for Affidavit of Documents. (Document Book, Volume 2, Tab 10)

	February 6, 1996	Heller, Feldman writes to the Solicitor to demand Affidavit of Documents.
	February 6, 1996	The Solicitor replied to Heller, Feldman on his firm letterhead. (Document Book, Volume 2, Tab 11)
	February 14, 1996	The Solicitor resent his February 5, 1996, letter, with enclosures, to this client, on his firm letterhead.
	February 19, 1996	Heller, Feldman wrote to the Solicitor and confirmed March 1, 1996, as the date for Examinations for Discovery.
	February 22, 1996	The Solicitor wrote to this client, on his firm letterhead, and confirmed March 1, 1996, as date for examinations. (Document Book, Volume 2, Tab 12)
	February 27, 1996	The Solicitor served this client's Affidavit of Documents on Heller, Feldman. (Document Book, Volume 2, Tab 13)
	February 29, 1996	Heller, Feldman wrote to the Solicitor regarding deficiencies in Affidavit of Documents.
	March 4, 1996	The Solicitor wrote to Heller, Feldman, on his firm letterhead, to advise of his position on their letter and sent copy to his client. (Document Book, Volume 2, Tab 14)
	March 25, 1996	A Motion Record from Heller, Feldman, returnable April 2, 1996, was served personally upon the Solicitor.
	March 26, 1996	The Solicitor wrote to this client, on his firm letterhead. (Document Book, Volume 2, Tab 15)
	March 26, 1996	The Solicitor wrote to Heller, Feldman, on his firm letterhead, to confirm that he was unavailable on April 2, 1996, as he was attending a pre-trial in Kingston. (Document Book, Volume 2, Tab 16)

	March 29, 1996	Heller, Feldman wrote to the Solicitor regarding adjournment of motion.
Cedarvale Woodworking Ltd. (continuing civil litigation matter)	February 15, 1996	The Solicitor wrote to George Eyre, solicitor for the defendants, enclosing draft Minutes of Settlement. (Document Book, Volume 2, Tab 17)
	February 15, 1996	The Solicitor wrote to this client enclosing interim fee billing and requesting a further retainer of \$1,500. (Document Book, Volume 2, Tab 18)
	February 23, 1996	Eyre wrote to the Solicitor to request a settlement cheque.
Hyacinth Harrison (new civil litigation matter)	January 30, 1996	The Solicitor wrote to Bell, Temple, solicitors for the defendant, on his firm letterhead, to provide answers to undertakings of this client, the plaintiff. (Document Book, Volume 2, Tab 19)
	February 6, 1996	The Solicitor served a Notice of Change of Solicitors on Bell, Temple and the previous solicitors for the plaintiff. The Solicitor commissioned the Affidavit of Service. (Document Book, Volume 2, Tab 20)
	February 8, 1996	The Solicitor filed his Notice of Change of Solicitors with the Court. (Document Book, Volume 2, Tab 21)
	March 18, 1996	The Solicitor wrote to this client, on his firm letterhead, to request instructions on motion returnable March 26, 1996. (Document Book, Volume 2, Tab 22)
	March 27, 1996	The Solicitor wrote to this client, on his firm letterhead, to advise of Order directing examination. (Document Book, Volume 2, Tab 23)

Syed Basith (continuing civil litigation matter)	January 9, 1996	The Solicitor wrote to this client, on his firm letterhead, advising that trial had been set for February 8, 1996.
	January 24, 1996	The Solicitor wrote to Beard, Winter, solicitors for defendant, on his firm letterhead, to advise that he had to attend another court in Newmarket on February 8, 1996, and ask for their consent to an adjournment of this trial to the next available date. (Document Book, Volume 2, Tab 24)
	January 30, 1996	The Solicitor wrote to Richmond Hill Small Claims Court, on his firm letterhead, regarding adjournment. (Document Book, Volume 2, Tab 25)
June Findlay (continuing civil litigation matter)	January 30, 1996	The Solicitor wrote to McCarthy Tetrault, solicitors for defendants, to confirm receipt of this clients' medical records. (Document Book, Volume 2, Tab 26)
	February 15, 1996	The Solicitor sent account to OLAP for disbursements for this client. (Document Book, Volume 2, Tab 27)
Lesley Charlebois (new civil litigation matter)	February 6, 1996	The Solicitor served Notice of Change of Solicitors on the solicitors for the defendants. The Solicitor commissioned the Affidavit of Service. (Document Book, Volume 2, Tab 28)
	February 14, 1996	The Solicitor wrote to Ontario Court (General Division) enclosing consent order dismissing action to be filed. (Document Book, Volume 2, Tab 29)
	March 8, 1996	The Solicitor wrote to Anderson, Sinclair, solicitors for defendants, on his firm letterhead, regarding order. (Document Book, Volume 2, Tab 30)
Tropic-Cal of Canada Ltd. (continuing civil litigation matter)	February 5, 1996	The Solicitor's fee billing of this date evidences legal services provided on January 29 and 30, 1996 (Document Book, Volume 2, Tab 31).

	March 8, 1996	The Solicitor wrote to Paroian, Raphael, solicitors for the defendant, on his firm letterhead, to advise that their client's settlement cheque was returned NSF. (Document Book, Volume 2, Tab 32)
	March 26, 1996	The Solicitor wrote to client enclosing fee billing. Account evidenced legal services provided on February 23, and March 8, 18, and 26, 1996. (Document Book, Volume 2, Tab 33)
Barry Bradbury (continuing civil litigation matter)	January 31, 1996	Hughes, Amys, solicitors for defendant, forwarded releases to the Solicitor.
	February 1, 1996	The Solicitor wrote to Hughes, Amys, on his firm letterhead, to advise that this client rescinded settlement reached in hearing held on January 31, 1996. (Document Book, Volume 2, Tab 34)
	February 7, 1996	Hughes, Amys responded to the Solicitor's February 1, 1996, letter and asked him to satisfy all undertakings given at January 31, 1996, hearing. (Document Book, Volume 2, Tab 35)
	February 12, 1996	The Solicitor wrote to this client, on his firm letterhead, requesting confirmation of proposed settlement terms. (Document Book, Volume 2, Tab 36)
	February 15, 1996	The Solicitor wrote to this client, on his firm letterhead, confirming meeting scheduled for March 7, 1996, and requesting instructions. (Document Book, Volume 2, Tab 37)
	February 19, 1996	The Solicitor wrote to Hughes, Amys, on his firm letterhead, with this client's offer to settle.
	February 23, 1996	Hughes, Amys wrote to the Solicitor asking him to produce his client for a medical examination.

	February 26, 1996	The Solicitor wrote to this client, on his firm letterhead, enclosing copy of February 23, 1996, letter from Hughes, Amys. (Document Book, Volume 2, Tab 39)
	February 27, 1996	Hughes, Amys wrote to the Solicitor to confirm adjournment of pre-hearing scheduled for March 7, 1996. (Document Book, Volume 2, Tab 40)
	February 29, 1996	The Solicitor's secretary prepared memorandum to the Solicitor advising of discussion with this client. (Document Book, Volume 2, Tab 41)
	March 4, 1996	The Solicitor wrote to the Ontario Insurance Commission, on his firm letterhead, regarding pre-hearing which was again proceeding on March 7, 1996. (Document Book, Volume 2, Tab 42)
	March 13, 1996	Hughes, Amys wrote to the Solicitor enclosing settlement funds for this client, which were payable to the Solicitor in trust. (Document Book, Volume 2, Tab 43)
	March 15, 1996	Hughes, Amys wrote to the Solicitor enclosing copy of consent.
	March 21, 1996	The Solicitor sent his fee billing to this client. The fee billing evidenced legal services being provided on January 30 and 31, February 1, 9, 14, 16, 23, 26 and 28, and March 1 and 7, 1996. (Document Book, Volume 2, Tab 44)

RECOMMENDATION AS TO PENALTY

The Committee recommends the following penalty:

1. The Solicitor be suspended for four months, following his administrative suspension and continuing indefinitely until the books and records of the Solicitor are produced, and all filings are brought up to date.
2. Upon resumption of practice the Solicitor enrol in the Practice Review Program.

REASONS FOR RECOMMENDATION

The Solicitor, Paul Edward Mallon entered into an Agreed Statement of Facts on the 14th day of April, 1997. We were advised by counsel for the Law Society that at that time the Solicitor was advised what penalty was being sought at the hearing on April 15, 1997, i.e., a four month suspension. The Solicitor chose not to attend the hearing before the Committee, although he had attended the day before with the Counsel for the Law Society, and was advised as to the penalty being sought.

The submissions made by the Counsel for the Law Society were as follows:

1. For two months the Solicitor practised while he was under suspension.
2. The Solicitor breached an undertaking to make his filings. This undertaking had been given in a prior discipline process which was ultimately dismissed against the Solicitor when he gave the undertaking to make his filings.
3. He entered into an agreed Statement of Facts.
4. He has made a partial production of his books and records.
5. The Solicitor may consider returning to the practice of law in the future.

The Committee was concerned with the fact that the member was suspended, effective January 26, 1996, by an Order of Convocation, because of his failure to pay his errors and omissions levy. During the period January 27, 1996 to April 3, 1996, notwithstanding that he was under suspension, there was ample evidence that he had been practising.

In regard to his prior discipline history, the Solicitor had given undertakings on at least two occasions, in 1988 and 1996, in regard to his filings. Regretfully, he breached his undertaking dated August 7, 1996, to the Law Society in that he failed to make his filings for the fiscal year ending January 3, 1996, on or before September 30th, 1996.

As of the date of this hearing the Solicitor has not filed his Forms 2 and 3 for the fiscal year ended January 3, 1996.

The Committee is recommending that, when and if the Solicitor chooses to practise law, he enter into the Practice Review Program. When the Examiner attended at the Solicitor's office for a meeting there were various envelopes, bank statements and returned cheques lying around, a number of which had not been opened. This indicated sloppiness in the management of a law office, and the Committee is of the view that the Solicitor could and should get help from the Practice Review Program upon re-commencing practice.

It was stated by the Counsel for the Law Society that the Solicitor is on the road to ungovernability. If another complaint had been issued against him, one might argue that he is on a bumpy road to ungovernability, but he has an opportunity to "pull back", and an opportunity not to be before Convocation again.

28th October, 1997

Presently, the Solicitor is under an administrative suspension. It is therefore our recommendation to Convocation that at the conclusion of the current administrative suspension the Solicitor be suspended for a period of four months and that this suspension continue indefinitely until the books and records of the Solicitor are produced, and all filings are brought up to date. In the Committee's view, there must be a real and substantial penalty for not complying with the obligation to produce books and records for the purpose of an audit in these circumstances, as well as the breach of undertaking and practising while under suspension.

The audit function of the Law Society is critically important for the purpose of maintaining the integrity of the profession, both internally and for the purposes of public perception.

Re: Costs

The Society indicated that the cost for investigation and attendances is in the total sum of approximately \$4,500.00. The Committee is making no award to the Society for costs.

Paul Edward Mallon was called to the Bar on April 14, 1978.

ALL OF WHICH is respectfully submitted

DATED this 8th day of September, 1997

Gerald A. Swaye, Q.C. Chair

Mr. Stuart advised that the solicitor was unable to attend Convocation as he was looking after his children.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 4 months following his administrative suspension and continue indefinitely until the books and records are produced and the filings are up to date and that upon resuming practice the solicitor enrol in the Practice Review Program.

Mr. Stuart made submissions in support of the recommended penalty.

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

Carried

The Treasurer was ineligible to sit for the next matter and withdrew from Convocation. Mr. Carey took the Chair.

Re: Walter WYSOCKY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Wilson and Carter withdrew for this matter.

Ms. Rhonda Cohen appeared on behalf of the Law Society. The solicitor appeared on his own behalf.

28th October, 1997

Convocation had before it the Report of the Discipline Committee dated 24th August, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th September, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Clayton C. Ruby

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

Rhonda Cohen
for the Society

WALTER WYSOCKY
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: July 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Walter Wysocky alleging that he was guilty of professional misconduct:

On December 2, 1992 Complaint D200/92 was issued and on September 10, 1993 Complaint D225/93 was issued. These Complaints were replaced by Complaints D200a/92 and D225a/93 respectively, issued on March 20, 1997.

Complaint D81/96 was issued on November 7, 1996, Complaint D324/96 on December 12, 1996 and Complaint D193/97 on May 9, 1997.

This Committee composed of Clayton C. Ruby, sitting as a single bencher, heard the matters on July 16, 1997 in public, with the exception of a Medical Report which was received *in camera*. The Solicitor attended the hearing and represented himself. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D200a/92

2. a) He failed to produce to the Law Society all of his complete books and records of his practice for examination.

Complaint D225a/93

2. a) He abused the court process while acting for March Prokipchuk and Eugene Begindza in a civil action in that he appeared before the court in connection with a motion for summary judgment without having prepared adequate material on which to argue the motion.
- b) He failed to serve his clients Mary Prokipchuk and Eugene Begindza in a conscientious, diligent and efficient manner in that he unreasonably delayed the progress of his clients' action by his failure to:
 - i) perfect an appeal from the respective Orders of Somers, J. dated May 30, 1991, and Hollingsworth, J. dated June 21, 1991, within a reasonable time, and;
 - ii) comply with directions from Borins, J. that the Solicitor not appear as solicitor of record on a motion in which the Solicitor filed affidavit materials sworn by him personally, thereby necessitating a further adjournment of the proceeding.
- c) He abused the court process while acting for Lidia and Bodham Ramaniw in that he filed a Writ of Seizure and Sale with the Sheriff contrary to the findings of German, J. at a hearing on October 5, 1992;
- d) He failed to comply with court Orders made against him personally in particular:
 - i) the Order of Borins, J. dated December 22, 1992, which required the Solicitor to pay costs fixed in the amount of \$1,000 payable forthwith;
 - ii) the Order of Wright, J. dated February 26, 1993, which required the Solicitor to pay costs fixed in the amount of \$1,200 payable forthwith.
- e) He failed to respond to the Law Society despite letters dated June 10, 1993, June 22, 1993, July 6, 1993 and telephone calls on July 5, 1993.
- f)
 - i) He failed to honour a financial obligation incurred in relation to his client, Ilona Kovacs, namely an account from Dr. David Y.K. Chan.
 - ii) He failed to provide a reply to the Society regarding a complaint by Dr. David Y.K. Chan despite letters dated April 6, May 10, June 14 and 24 and July 6, 1993, and telephone messages left on April 27 and May 7, 1993 and telephone conversations on May 3 and July 6, 1993.
- g)
 - i) He failed to honour a financial obligation incurred in relation to his client, Ilona Kovacs, namely an account from Dr. W.M. Franks.
 - ii) He failed to provide a reply to the Society regarding a complaint by Dr. W.M. Franks despite letters dated February 24, May 3, June 14 & 24 and July 6, 1993, and telephone messages left on March 16 & 25, April 2, 6 & 27 and telephone conversations on April 5, 13, 19 & 22, May 14 and July 6, 1993.

28th October, 1997

Complaint D81/96

2. a) In the course of his practice, the Solicitor wrote letters to the following solicitors which are inconsistent with the proper tone of a professional communication contrary to Rules 1 and 13 of the Rules of Professional Conduct.
 - i) to Michael Silver, letters dated May 31, 1991, June 11, 1991, June 21, 1991, February 21, 1993 and February 24, 1993;
 - ii) to Walter Burych, letter dated June 2, 1993;
 - iii) to Donald Arthurs, letters dated June 9, 1993 and July 20, 1993.
- b) While representing his client on a motion, during a recess in the hearing he made inappropriate comments to opposing counsel, David A. Fram.

Complaint D324/96

2. a) He failed to file with the Law Society within six months of the termination of his fiscal year ended December 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the Solicitor in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Complaint D193/97

2. a) He failed to reply to communications from the Law Society regarding his incomplete Filings for the year ended December 31, 1994, despite letters dated February 5, May 22, July 10 and September 5, 1996 and February 14, 1997, and telephone communications on October 7 and 16, and November 14, 1996 and March 18, 19 and 20, 1997.

Evidence

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

Re: Complaint D200a/92

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D200a/92 and is prepared to proceed with a hearing of this matter on March 18 and 19, 1997.

II. IN PUBLIC/IN CAMERA

2. It is the Law Society's position that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act. As of the date of this Agreed Statement of Facts, the Solicitor has not confirmed whether he will take the position that the proceeding be held in public or whether the Solicitor will bring a motion for an order that this proceeding be held in camera.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D200a/92 and the particulars contained therein. The Solicitor admits the facts as hereinafter set out. As at the date of this Agreed Statement of Facts, the Solicitor has not advised the Law Society whether he will admit professional misconduct in respect of these facts.

IV. FACTS

4. The Solicitor was called to the Bar on May 14, 1981. He practices as a sole practitioner.

Complaint D200a/92

Particular 2(a)

a) He failed to produce to the Law Society all of his complete books and records of his practice for examination.

5. During the period February 14, 1991 to July 12, 1991, the Law Society conducted an examination of the Solicitor's books and records. The examination disclosed a number of deficiencies in the Solicitor's books and records which deficiencies were reported to the Solicitor by letter following the examination. As well, by letter dated October 16, 1991, the Law Society described in detail the deficiencies in the Solicitor's books and records and required the Solicitor to (i) immediately implement certain procedures to comply with required books and record keeping, (ii) provide copies of certain documentation, including trust ledgers and the Solicitor's annual filings, and (iii) advise why certain procedures were not already in place (Document Book, Tab 1).

6. By letter dated December 16, 1991, the Law Society requested a reply to its letter dated October 16, 1991 (Document Book, Tab 2). The Solicitor did not reply.

7. By registered letter dated January 16, 1992, the Law Society forwarded to the Solicitor a copy of its letters dated October 16, 1991 and December 16, 1991. The Solicitor was advised that should his reply not be received by the Law Society within 15 days, the matter would be referred to the Discipline Committee (Document Book, Tab 3).

8. The Solicitor contacted the Law Society by telephone on January 20, 1992. The Solicitor advised that he would forward prepared trust comparisons for the month ended April 30, 1991. The Solicitor advised that he had been ill and was in the process of winding down his practice. He undertook to provide a letter to the Law Society which outlined scheduled meetings with his accountant in the first week of February and would further advise, after that date, when his accountant would have his books and records and annual filings completed.

9. By letter dated January 27, 1992 (Document Book, Tab 4), the Law Society confirmed its telephone conversation with the Solicitor on January 20, 1992. The Solicitor was requested to provide an immediate reply. The Solicitor responded by letter dated February 5, 1992. He stated that he was having difficulties receiving mail and banking statements and expected everything to be "in hand in the very near future". The Solicitor stated that he was "aiming for the middle/end of next week" (Document Book, Tab 5a). The Solicitor did not respond the following week.

10. The Solicitor wrote again to the Law Society by letter dated February 25, 1992. He undertook to complete and deliver outstanding filings on or about March 17 or 18, 1992 (Document Book, Tab 5b).

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11. In February 1992, a follow-up audit of the Solicitor's books and records was authorized by the Law Society.

12. By letter dated March 8, 1992, the Solicitor confirmed that he expected to be in a position to deliver his filings by March 19, 1992 (Document Book, Tab 5c). He delivered his filing, but did not address the list of audit deficiencies identified in the Law Society's letter of October 16, 1991.

13. A Law Society examiner attended at the Solicitor's office, unannounced, on June 2, 1992, to examine his books and records. The Solicitor was unavailable to meet with the examiner on June 2, 1992, and it was mutually agreed that the examination would be held in abeyance until June 12, 1992.

14. On June 8, 1992, the Solicitor contacted the Law Society to reschedule the examination of his books and records. It was mutually agreed that the examination would be held in abeyance until the first week of July 1992.

15. The Law Society examiner telephoned the Solicitor on June 26, 1992, to arrange an appointment for the examination to take place. The Solicitor advised that subsequent to his meeting with his accountant, he would return the examiner's call to arrange a date for the examination to proceed.

16. On June 29, 1992, the Law Society examiner left two telephone messages for the Solicitor on his office answering machine requesting that he return the calls. On June 30, 1992, the examiner called the Solicitor once again. The Solicitor was asked to agree to either July 3 or 6, 1992, to continue the examination of his books and records. The Solicitor undertook to call back the examiner in 15 minutes (Document Book, Tab 5d). He did not.

17. On July 2, 1992, the Solicitor contacted the Law Society examiner by telephone to arrange an appointment for the examination to proceed. The Solicitor advised that he was leaving the country and would be away until July 12, 1992.

18. By letter dated July 2, 1992, (Tab 5, Document Book) sent by facsimile transmission, the Law Society examiner confirmed the attempts made to arrange an appointment for the examination. The Solicitor was advised that should his books and records not be available for examination by July 13, 1992, the matter would be referred forthwith to the Discipline Committee. Upon receipt of said facsimile, the Solicitor immediately contacted Margot Devlin ("Ms. Devlin"), Manager of the Law Society's Examiner Programs, to enquire why the deadline was being imposed given that the Solicitor had advised the examiner that he would be out of the country until July 12, 1992. The Solicitor also sent a letter to Ms. Devlin dated July 19, 1992 (Tab 6, Document Book).

19. The Law Society examiner met with the Solicitor on July 13, 1992. The Solicitor advised that, at that time, he was unable to produce his books and records for the examination as they were located at both the Solicitor's office and his bookkeeper's home, and the Solicitor was unable to schedule a date for their examination (Document Book, Tab 6a).

20. The Law Society examiner spoke with the Solicitor by telephone on July 14, 1992. It was agreed that the examination of the Solicitor's books and records would take place on July 21, 1992, at his bookkeeper's premises. On July 20, 1992, the Solicitor attempted to confirm this appointment with the examiner. When he was unable to contact her, he sent a facsimile transmission to Ms. Devlin confirming the meeting scheduled for July 21, 1992 (Tab 7, Document Book).

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21. On July 21, 1992, the Law Society examiner attended at the office of the Solicitor's bookkeeper to commence the examination. The Solicitor made available insufficient accounting books and records, and failed to produce copies of fee billings for examination. At that meeting, the Solicitor was requested to produce selected client files.

22. On July 23, 1992, the Law Society examiner spoke with the Solicitor by telephone. The Solicitor advised that he was unable to set a date for the examination to continue but would return the call with a new date. The call was not returned.

23. The Law Society examiner left a telephone message for the Solicitor on his office answering machine on August 7, 1992, requesting he return the call.

24. The Law Society examiner left a follow-up message for the Solicitor on August 11, 1992. The Solicitor responded that day, leaving a telephone message advising that he would be out of the country for two weeks (Document Book, Tab 7a).

25. Upon his return, the Law Society examiner spoke with the Solicitor by telephone on September 2, 1992. A date of September 11, 1992, was agreed upon for the examination to continue.

26. On September 10, 1992, the Solicitor cancelled the appointment scheduled for September 11, 1992. It was agreed that the examination would be rescheduled for September 21, 1992.

27. By facsimile transmission dated September 20, 1992, the Solicitor cancelled the appointment scheduled for the following day. The Solicitor stated that he had left messages for the Law Society examiner on September 17, 1992, requesting that the examiner contact him in order that the meeting be rescheduled because he had been served with motion materials on September 17, 1992, returnable September 21, 1992. The Solicitor advised the examiner that he would call her the next day to reschedule (Tab 8, Document Book). He did not because he was in court.

28. The Law Society examiner left telephone messages for the Solicitor on his office answering machine on each of September 22, 23, 28 and 29, 1992. The Solicitor returned the Law Society's calls on September 29, 1992. He advised that he would be available on the afternoon of October 9, 1992, for the examination to continue.

29. On September 30, 1992, the Law Society examiner left a message on the Solicitor's office answering machine confirming their appointment for 1:00 p.m. on October 9, 1992.

30. On October 9, 1992, the Solicitor cancelled the appointment with the examiner.

31. On October 15 and 16, 1992, the Solicitor and the Law Society examiner exchanged telephone messages but were unable to speak to each other. The Law Society examiner stated in her telephone message that she would be available, anytime, all day, to attend at the Solicitor's office.

32. On October 22, 1992, the Law Society examiner left a message on the Solicitor's office telephone answering machine again advising that she was available, anytime, all day, to attend at the Solicitor's office. The Solicitor did not return the call.

33. On October 23, 1992, the Law Society examiner left a telephone message for the Solicitor at his office advising that she would attend at his office on October 27, 1992, to examine his books and records.

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34. The Solicitor left a telephone message for the Law Society examiner at the Society on October 26, 1992, advising that he would not be available on October 27, 1992, as he was required to attend on a motion.

35. On October 26, 1992, the Law Society examiner spoke with the Solicitor by telephone. It was agreed that the examination would be rescheduled for October 30, 1992.

36. On October 30, 1992, the Solicitor cancelled the examination. It was agreed that the examination be rescheduled for November 2, 1992.

37. On November 2, 1992, the Solicitor cancelled that appointment, and rescheduled the examination for November 5, 1992.

38. On November 3, 1992, the Solicitor requested, by way of telephone message, that the time of the appointment on November 5, 1992, be changed from 9:30 a.m. to 11:00 a.m. The examiner agreed to the appointment change.

39. On November 5, 1992, the Solicitor called the Law Society examiner at 10:07 a.m. to cancel the appointment scheduled for 11:00 a.m.

40. By letter dated November 5, 1992 (Tab 9, Document Book), the examiner requested that the Solicitor arrange to have his books, records and requested files delivered to the Law Society as he had been unable to reschedule a date for the examiner to re-attend at his office.

41. The Solicitor replied by facsimile transmission, dated November 9, 1992:

"... as concerns your request to deliver the files to your office, for the reasons earlier discussed, I am not overly anxious to do so in the first place owing to the sheer weight of some of the files and secondly, there would be obvious difficulties for me in not having current files at hand.

If I might prevail upon you for one last indulgence, the trial which was to have started today has been put back to next Monday and while I shall be out of the office for most of today, I shall have firm grasp of my timetable for this week tomorrow morning. Let us speak then and arrange a mutually convenient time to meet, failing which, I shall deliver the materials as requested notwithstanding the difficulties it might cause. (Apropos scheduling, would you consider an evening meeting?)"

(Tab 10, Document Book)

42. On November 11, 1992, the Solicitor left a telephone message for the Law Society examiner setting an appointment for November 17, 1992.

43. By letter dated November 13, 1992 (Tab 11, Document Book), sent by facsimile transmission, the examiner advised the Solicitor that due to the previous, numerous appointments the Solicitor had been unable to keep, the examiner would not reschedule with him to attend at his office. The Solicitor was requested to deliver to the Law Society the requested material.

44. On November 16, 1992, the Solicitor left a telephone message for the examiner cancelling the appointment scheduled for November 17, 1992. The Solicitor stated that he would respond by facsimile transmission and telephone regarding the setting of a new date for the examination.

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45. By facsimile transmission on November 22, 1992 (Tab 12, Document Book), the Solicitor advised that he would appreciate another opportunity to have the examination completed at his office. He suggested Thursday or Friday of that week.

46. That day, the Law Society examiner left a telephone message for the Solicitor at his office requesting that he either contact the Law Society by 5:00 p.m. that day to confirm an appointment on November 25, 1992, or by 5:00 p.m. the following day to confirm the date of November 27, 1992 (Tab 13, Document Book). The Solicitor did not return the call. The Solicitor states that he was involved in a personal injury action at the time.

47. The within Complaint was sworn on December 2, 1992.

48. On or before April 22, 1993, the Solicitor exchanged telephone messages with Mr. James Yakimovich, Director of the Law Society's Audit & Investigation Department. On April 22, 1993, the Solicitor met with Neil Perrier, Discipline Counsel, at the Law Society, in an attempt to resolve the outstanding matters. Mr. Perrier suggested that the Solicitor address his concerns directly to Mr. Yakimovich by fax. Mr. Perrier provided the facsimile number. The Solicitor wrote to Mr. Yakimovich that day to request particulars of the outstanding audit matters (Tab 14, Document Book).

49. By letter dated April 23, 1993 (Tab 15, Document Book), the examiner advised the Solicitor as follows:

"... Mr. Yakimovich had attempted, without success, on several occasions, to reach [him] by telephone to respond to your request for the particulars of the outstanding matters as they pertain to our examination of your books and records.

You will recall that we met on July 21, 1992 at your bookkeeper's premises, 23 Shorncliffe, at which time you produced insufficient books and records to complete the examination. Specifically, we were not able to complete the task of tracing entries to source information, i.e. files. You were given a list of the files required to complete the examination. To date, you have not produced any files for my examination."

The examiner enclosed a copy of her November 13, 1992, letter, which summarized the attempts to continue the examination, and a reminder list of the client files which the examiner wished to review. The Solicitor was advised that all of the his books and records as well as those files specified were required in order to clear up all of the outstanding matters as they pertained to the examination.

50. On April 26, 1993, the Solicitor confirmed receipt of the examiner's April 23, 1993 letter.

51. By letter dated May 10, 1993 (Tab 16, Document Book), the Law Society examiner wrote to the Solicitor referring to her letter of April 23, 1993, and asking that the Solicitor give some priority to resolving the matter without further delay.

52. By facsimile transmission dated May 19, 1993 (Tab 17, Document Book), the Solicitor wrote to the examiner acknowledging receipt of communications from the Law Society as well as "... the various telephone messages we have been leaving each other." The Solicitor advised that he was going overseas until May 31 and would call Mr. Yakimovich upon his return to finalize matters. The Solicitor further stated that in his view given that a number of "factual differences" had arisen between himself and the examiner, the Solicitor requested that another member of the audit and investigation department be assigned to complete the audit.

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53. By facsimile transmission dated June 17, 1993 (Tab 18, Document Book), the Solicitor wrote to the examiner again asking that the file be assigned to someone else in the audit department. The Solicitor contacted the examiner again on June 22, 1993, and stated his concern over what he characterized as the growth in the number of files demanded by the Law Society for the purpose of the audit examination. The examiner advised the Solicitor to address his concerns to Mr. Yakimovich directly (Tab 19, Document Book).

54. To accommodate the Solicitor's concerns, the file was assigned to another Investigation Auditor, Mr. Andrew Cawse. On June 28, 1993, at approximately 11:30 a.m., Mr. Cawse left a message on the Solicitor's answering machine to advise that he had been assigned carriage of the investigation file from Ms. Chow (the initial examiner) and that he would like to make arrangements to review the Solicitor's files. The Solicitor was requested to phone Mr. Cawse (Tab 20, Document Book). The call was not returned.

55. On June 29, 1993, Mr. Cawse made an unannounced visit to the Solicitor's office at 65 Queen Street West with the intent of reviewing the Solicitor's files and completing the audit investigation. Mr. Cawse was informed by the Solicitor's assistant that the Solicitor was in court and that the time of his return was not known. Mr. Cawse left his card and asked that the Solicitor call him upon his return (Tab 21, Document Book).

56. The Solicitor called Mr. Cawse later that morning. During their telephone conversation, the Solicitor advised that he could not meet with Mr. Cawse within the week as he was either in court, on holiday, moving offices, or the other days were "just not good". The Solicitor also informed Mr. Cawse that some of his files were at home and some were in storage but that he would be able to deliver "one file" (the "Olech File") on July 2, 1993. In response, Mr. Cawse offered to personally retrieve files from the Solicitor that day (June 29, 1993). The Solicitor refused, stating that he was "going out".

57. At twelve noon Mr. Cawse arrived at the Solicitor's office unannounced. The Solicitor left the office and insisted that Mr. Cawse leave as well. Consequently, the Solicitor did not provide any files at that time (Tab 22, Document Book).

58. On July 2, 1993, the Solicitor met with Mr. Cawse, at which time he informed Mr. Cawse that he had changed his mind and could not turn over the Olech file as it involved contentious issues in litigation. The Solicitor agreed to review the file with Mr. Cawse on July 5, 1993 (Tab 23, Document Book).

59. Mr. Cawse met with the Solicitor on July 5, 1993. At that time the Olech file was made available to Mr. Cawse for review in the Solicitor's offices. The Solicitor did not produce accounting records for review. There were discussions and a subsequent telephone conversation regarding the setting up of a further meeting. In addition, by letter dated July 5, 1993, the Solicitor requested that the Law Society provide a response outlining the basis for what he characterized as a "second audit" of his practice (Document Book, Tabs 24 and 25). He agreed to orally discuss the letter with Mr. Cawse.

60. By letter dated July 7, 1993 (Document Book, Tab 26), Mr. Cawse wrote to the Solicitor to request a final resolution of all outstanding matters related to the audit. The letter summarized the outstanding issues, and requested the Solicitor's reply by July 13, 1993, failing which the matter would be referred to the Discipline Committee. Mr. Cawse hand delivered his letter to the Solicitor on July 8, 1993. At that time he received from the Solicitor copies of some of the documentation requested, excluding certain financial information. The Solicitor undertook to drop that latter material off at the Law Society the following day (Document Book, Tab 26a).

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61. On July 9, 1993, the Solicitor dropped off at the Law Society certain bank books, statements and a two page accounting prepared by the Solicitor in respect of the "Olech" matter. The Solicitor did not produce what the Law Society considered to be necessary trust receipt and disbursement records detailing dates, sources and payees to and from the "Olech" accounts, and appropriate trust reconciliations. At the time, the Law Society was aware of five "Olech" accounts: 2 "trust" chequing accounts and 2 interest bearing accounts.

62. Throughout the period July 9, 1993 to August 9, 1993, the Law Society initiated a number of conversations with the Solicitor with a view to securing the requisite documentation and client files. On July 9, 1993, the Solicitor said that he would complete production of the "Olech" financial documentation by the following week. He did not. On July 14, 1993, the Solicitor promised to produce the outstanding documentation on July 22, 1993. He did not. On July 23, 1993, the Solicitor promised to produce the documentation on July 29, 1993. He did not. Ultimately, Mr. Cawse and the Solicitor agreed to meet on August 10, 1993. On August 9, 1993, the Solicitor contacted Mr. Cawse to cancel the meeting. When Mr. Cawse offered to retrieve the documentation from the Solicitor's office, the Solicitor said that he could not do so (Document Book, Tab 27).

63. A hearing of the within Complaint was set down to proceed before a Discipline Committee on September 14, 1993.

64. The Solicitor sought an adjournment of the hearing. On September 13, 1993, the Solicitor signed an Undertaking by which he undertook, *inter alia*, to meet with a representative of the Law Society's Audit and Investigation Department on Friday, September 17, 1993 and to produce all relevant books and records and to answer all relevant questions which may arise therefrom; and on or before September 17, 1993 to provide a complete written response to the Law Society's letter dated October 16, 1991 (Document Book, Tab 28).

65. On September 17, 1993, at 7:30 a.m. Mr. Cawse left a message for the Solicitor advising that he would attend at the Solicitor's office at 9:15 a.m. to review the books and records. When Mr. Cawse arrived the Solicitor advised that he was not prepared to meet until 11:30 a.m. It was agreed that Ms. Cawse would return at 1:30 p.m. Between 1:30 p.m. and 2:15 p.m., the Solicitor reiterated the history of the Law Society's attempts to audit his books and records. He suggested that the Law Society was conspiring against him and that he had responded appropriately to the Law Society's initial audit. At approximately 2:15 p.m. Mr. Cawse was given access to some of the Solicitor's accounts and files, excluding the "Olech" matter. At 4:00 p.m., the Solicitor advised that he had to leave and requested that the meeting be brought to a close, and Mr. Cawse was not able to complete his review. The Solicitor requested a written reply to his letter of July 5, 1993, concerning the Law Society's authority to audit the Solicitor's practice. A new meeting was set for September 23, 1993 (Tab 29, Document Book).

66. On September 22, 1993, the Solicitor left a message cancelling the meeting scheduled for September 23. He suggested a new date of October 1, 1993 (Tab 30, Document Book).

67. On September 16, 1993, the Solicitor wrote to Discipline Counsel, Mr. Perrier, to request a written response to his letter of July 5, 1993 (Tab 31, Document Book). On September 27, 1993, the Solicitor phoned the Law Society staff to discuss his history of the audit investigation (Tab 32, Document Book).

68. On the same day, Mr. Cawse telephoned the Solicitor to confirm their meeting scheduled for October 1, 1993 (Tab 33, Document Book).

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69. By letter dated September 28, 1993 (Tab 34, Document Book), Mr. Perrier wrote to the Solicitor in answer to the concerns raised in his letters of July 5 and September 16, 1993. Specifically in response to the Solicitor's concern that there had been "three audits of [his] practice since 1991", Mr. Perrier responded as follows:

"The three audits are really an extension of each other as no audit has been satisfactorily resolved since Ms. Marie Morley first initiated her audit in July 1991.

In a letter dated October 16, 1991, Ms. Margot Devlin set out the inadequacies found in Ms. Morley's audit. The letter detailed eighteen problems to be addressed and nine times requested that you provide a written response to inadequacies discussed. The Law Society sent you three requests for a response to this letter, but nothing was received. Correspondence on audit matters should not be confused with correspondence on annual filings, although we have attempted to ensure that overlapping issues are not duplicated.

We have not even received adequate verbal responses to the letter of October 16, 1991. One particular concern we addressed in the letter was the lack of appropriate trust reconciliations. ...

The numerous unresolved problems, your lack of appropriate response to these problems, your incorrect answers on your annual filings, your frequent suspensions, and the eight complaints against you open at that time, created a great deal of concern which initiated a follow-up audit.

Ms. Kay Chow of the Audit and Investigation Department therefore contacted you on June 2, 1992 to arrange for further audit activity. Your lack of response to her contacts is the subject of discipline proceedings. However, you finally granted her access to some of your practice books and records on July 21, 1992. Due to the absence of such records as client files, fee records and client ledger cards Ms. Chow was unable to complete her undertaking.

Over the course of the following year to July 5, 1993, the date of your letter, Ms. Chow and Mr. Cawse made fifteen attempts to obtain your records not provided to Ms. Chow on July 21, 1992. You did not comply with any of these requests for the information.

This lack of response, the effluxation of time, your incorrect response to Ms. Chow's Audit Questionnaire, and additional complaints made against you, made it imperative that a satisfactory audit of your practice finally be completed. This therefore gives rise to your perceived third audit."

70. On September 29, 1993, the Solicitor contacted the Law Society to cancel the October 1st meeting. An alternate date was not scheduled (Tab 35, Document Book). In October, 1993, the Solicitor retained Mr. John Laskin [as he then was] as counsel. Some time shortly thereafter there was a discussion between Mr. Cawse, Mr. Laskin and the Solicitor respecting the completion of the audit investigation (Tab 36, Document Book).

71. By letter dated October 18, 1993, a copy of which was sent to Mr. Laskin, the Law Society wrote to the Solicitor once again requesting certain documents and client files (Tab 37, Document Book).

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72. On November 10, 1993, Mr. Cawse phoned Mr. Laskin's office requesting an update on the Solicitor's efforts to comply with the letter of October 18, 1993 (Tab 38, Document Book). On November 12, 1993, Mr. Laskin replied to the Law Society to advise that the Solicitor was unhappy with the arrangements made regarding the review of the Solicitor's books and records, and that the Solicitor would be overseas for a week (Tab 39, Document Book).

73. On November 26, 1993, a further phone call was made to Mr. Laskin asking for an update of the Solicitor's efforts to produce books and records (Tab 40, Document Book).

74. By letter dated December 7, 1993, the Law Society wrote to Mr. Laskin requesting a status report regarding the Solicitor's efforts to comply with the audit investigation requirements (Tab 41, Document Book).

75. On December 15, 1993, Mr. Laskin informed Mr. Cawse that the Solicitor did not agree with the proposed plan that the books and records be audited at Mr. Laskin's office. He informed the Law Society that the Solicitor was not offering any other alternatives to that plan. Mr. Laskin suggested that the Law Society deal with the Solicitor directly (Tab 42, Document Book).

76. During the period December 14, 1993 to January 4, 1994, the Law Society made efforts to arrange a date to continue the audit of the Solicitor's books and records (Tab 43, Document Book). A date of January 14, 1994 was finally agreed to.

77. At the meeting of January 14, 1994, there were further discussions of the Olech file. The Solicitor agreed to prepare an accounting of Mrs. Olech's affairs. The Solicitor stated his trust records were unavailable because he had misunderstood what was required. The Solicitor stated that he would obtain his trust records from his bookkeeper for January 21, 1994 (Tab 44, Document Book). A partial accounting was subsequently prepared and provided to the Law Society by letter dated August 18, 1994 (Tab 45, Document Book).

78. The parties eventually agreed to meet to continue the examination on January 21, 1994.

79. On January 20, 1994, the Solicitor telephoned the Law Society to advise that his mother had passed away the previous day and that he would call on Monday to set up a replacement date for the January 21st meeting (Tab 46, Document Book).

80. On January 25, 1994, the Solicitor advised the Law Society that the date of January 28th might be available (Tab 47, Document Book).

81. On January 27, 1994, the Solicitor called the Law Society to advise that he would be unable to make the appointment scheduled for January 28th, but would attempt to call the Law Society later that afternoon. No further phone call was received by the Law Society on that day (Tab 48, Document Book).

82. On February 6, 1994, the Solicitor telephoned the Law Society to advise that he would be going on holiday until February 10th. He further indicated that he would not be able to meet his bookkeeper until the following week and therefore could only meet with the Law Society at the earliest February 18, 1994 (Tab 49, Document Book). On February 17, 1994, Mr. Cawse called the Solicitor to confirm a meeting for the following day.

83. On February 17, 1994, the Solicitor cancelled the February 18th meeting. He said that he would call to arrange a meeting for the following week (Tab 50, Document Book).

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84. On March 18, 1994, Mr. Cawse attended at the office all day to continue the examination.

85. By letter dated August 12, 1994, the Solicitor "formally and in writing" responded to Ms. Devlin's letter of inadequacies dated October 16, 1991 (Tab 51, Document Book).

86. With the exception of the "Olech" matter, the audit examination was concluded on August 15, 1994 and the Law Society was satisfied with the results of the audit.

87. The Solicitor produced the required "Olech" financial documentation in or about May, 1995.

V. DISCIPLINE HISTORY

88. The Solicitor has no previous discipline record.

DATED at Toronto this 12th day of March, 1997."

Re: Complaint D225a/93

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D225a/93 and is prepared to proceed with a hearing of this matter on March 18 and 19, 1997.

II. IN PUBLIC/IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act. As of the date of this Agreed Statement of Facts, the Solicitor has not yet confirmed whether he will take the position that the proceeding be held in public or whether the Solicitor will bring a motion for an order that this proceeding be held in camera.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D225a/93 and the particulars contained therein. The Solicitor admits the facts as hereinafter set out. As of the date of this Agreed Statement of Facts, the Solicitor has not advised the Law Society whether he will admit professional misconduct in respect of the facts.

IV. FACTS

Particulars 2(a), (b) and (d)(i)

- (a) He abused the court process while acting for Mary Prokipchuk and Eugene Begindza in a civil action in that he appeared before the court in connection with a motion for summary judgment without having prepared adequate material on which to argue the motion
- (b) He failed to serve his clients Mary Prokipchuk and Eugene Begindza in a conscientious, diligent and efficient manner in that he unreasonably delayed the progress of his clients' action by his failure to:

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- (i) perfect an appeal from the respective Orders of Somers, J. dated May 30, 1991, and Hollingsworth, J., dated June 21, 1991, within a reasonable time, and;
 - (ii) comply with directions from Borins, J. that the Solicitor not appear as solicitor of record on a motion in which the solicitor filed affidavit material sworn by the him personally, thereby necessitating a further adjournment of the proceeding.
- (d) He failed to comply with court Orders made against him personally in particular:
- (i) the Order of Borins, J. dated December 22, 1992, which required the Solicitor to pay costs fixed in the amount of \$1,000 payable forthwith.

Background

4. Mary Prokipchuk and Eugene Beginidza entered into an agreement of purchase and sale to purchase a certain condominium property from Strathshore Industrial Park Limited and Terry Kaufman, as vendors. A deposit was given. The Solicitor acted on the transaction.

5. On or about June 30, 1989, the purchase and sale transaction fell through and the vendors took the position that the purchasers' deposit had been forfeited.

6. Mary Prokipchuk and Eugene Beginidza instructed the Solicitor to commence an action against Strathshore Industrial Park Limited and Terry Kaufman (defendants) for, *inter alia*, specific performance of the agreement of purchase and sale. The defendants were represented by another solicitor, Mr. Michael Silver.

7. The statement of claim was issued on May 7, 1990.

8. On May 8, 1990, the plaintiffs brought an *ex parte* motion and obtained from Master Peppiat a certificate of pending litigation in respect of the subject property. The certificate was filed on June 8, 1990.

9. On July 11, 1990, the plaintiffs obtained partial default judgment as against the defendants for failure to serve and file a statement of defence.

10. On August 31, 1990, the defendants moved before Master Clark to set aside the default judgment on the grounds of alleged improper service of the statement of claim. Master Clark granted the motion and set aside the default judgment and any judgment signed against either of the defendants. On the issue of costs, Master Clark stated the following:

"As to costs, it is clear to me that this error of [Mr. Wysocky] in the manner of service or attempted service, was compounded by the defendants' solicitor who led Mr. Wysocky on as to service, in the negotiations that followed. Costs fixed at \$150 payable forthwith by the defendants to the plaintiffs." [emphasis added]

(Document Book, Tab 1)

- 11. Service of the statement of claim was validated as of August 31, 1990.
- 12. The statement of defence was filed on September 25, 1990.

13. On or about December 13, 1990, the defendants brought a motion, returnable on December 19, 1990, for an order setting aside the certificate of pending litigation which had been obtained by the plaintiffs on May 8, 1990. The defendants' motion was based, *inter alia*, on an alleged material non-disclosure of certain paragraphs in the agreement of purchase and sale by the Solicitor before Master Peppiatt. The Solicitor sought an adjournment to January 3, 1991, which adjournment was granted. On January 3, 1991, the Solicitor sought a further adjournment which was granted to January 11, 1991, peremptory to the Solicitor's clients on the following terms, *inter alia*: that the Solicitor's clients file certain materials and cross examine a defendant witness on or before January 8, 1991.

14. On January 11, 1991, the Court found that while the Solicitor had put the agreement of purchase and sale before Master Peppiatt, the Solicitor had not specifically brought certain paragraphs of the agreement to the Master's attention. The Court held that within the decided case law this was material non-disclosure. The Court also found that the plaintiffs had failed to prosecute their action with reasonable diligence. The Court therefore allowed the motion, set aside the certificate of pending litigation, ordered the defendants to pay into court the sum of \$40,000.00 to cover the plaintiffs' claim, and ordered the plaintiffs to pay costs to the defendants fixed in the amount of \$150.00:

"... Paragraph 15 and 31 of the Agreement of Purchase and Sale made as an Exhibit to the plaintiffs' affidavit on the Motion before Master Peppiatt, are highly material provisions to the exercise of Master Peppiatt's discretion and the plaintiffs are under an obligation to bring these paragraphs clearly to his attention by setting them out in the supporting affidavit. This agreement is twenty to thirty pages in length and without highlighting these paragraphs in some way it is unlikely that Master Peppiatt was aware of them. This is exactly the same case as in Cimaroli v. Pugliese ...

On this ground alone, I find the defendants entitled to a discharge, but in addition, I find the defendants entitled under section 116(6)(a)(iii) failure to prosecute this case with reasonable diligence. The deal fell apart in June 30, 1989 when defendants' solicitors informed of the forfeiture of the deposit to (illegible). This action was started May 7, 1990, 11 months later. After the Certificate of Pending Litigation was obtained in May, 1990, plaintiffs signed default judgment and this was finally set aside by Master Clark on August 31, 1990 and the Statement of Claim and the service of Statement of Claim was validated as of August 31, 1990 and defendants' Statement of Defence was due 20 days later. They filed the Statement of Defence and Counterclaim September 25, 1990. The plaintiffs did nothing effective to push this action along until December 13, 1990 when this Motion was commenced. I find the delay from September 25, 1990 until December 13, 1990 to be non-prosecution of a type sufficient to justify discharge and section 116(6)(a)(iii) especially in light of the delay between June '89 and May 7, 1990 was when the action was started."

(Document Book, Tab 2)

Motion for Summary Judgment

15. The Solicitor, for the plaintiffs, expressed his intention to bring on a motion for summary judgment in early February and March of 1991. The motion did not proceed until early April, 1991 because of ongoing settlement discussions as well as Mr. Silver's lack of availability.

16. The motion for summary judgment was eventually returnable on April 2, 1991. It was adjourned to May 6, 1991, at the "*request of the defendants and on consent of the plaintiffs*", and on May 6, 1991, the motion was again adjourned to May 30, 1991, "*at the request of the defendants, plaintiff consenting*" (Document Book, Tab 3).

17. The defendants' responding motion materials were served on the Solicitor on the afternoon of May 29, 1991.

18. On May 30, 1991, the motion was heard by Somers, J. . The Solicitor sought an adjournment of the motion to cross-examine the defendants on their affidavit filed in the responding materials. The adjournment was granted on terms. The endorsement of Somers, J. is as follows:

The record is woefully inadequate. Much of the material noted in the Notice of Motion is not before the Court. Nor has the applicant filed a factum as required by Rule 20.03. However, the applicant has asked for an adjournment which is opposed by the counsel for the defendant. I have agreed to adjourn the matter to June 21/91 which date I am advised is available on two conditions: 1) the applicant file an amended Record in the proper form; and 2) he pay the costs of the day forthwith fixed in the amount of \$500.00.

(Document Book, Tab 4)

19. The Solicitor's clients did not file an appeal of the costs portion of the Order of Somers, J. until June 27, 1991. The substantive clauses of the Order were not appealed (Document Book, Tab 5).

20. Meanwhile, on June 12, 1991, the Solicitor brought a motion for an order compelling the defendants' deponent to appear to be cross-examined. The motion was granted and cross-examinations took place.

21. On June 21, 1991, the Solicitor brought a further motion before Hollingworth, J. for an order requiring a further attendance of the defendants' deponent for the purposes of cross-examination. In response, the defendants brought a cross-motion to dismiss the plaintiffs' motion for summary judgment on the grounds that the plaintiffs had not yet satisfied the terms of the Order of Somers, J. (that the plaintiffs file an amended Record in the proper form, and pay costs fixed in the amount of \$500). Hollingworth, J. ordered that unless the plaintiffs satisfied the Order of Somers, J. on or before July 2, 1991, the plaintiffs' motion for summary judgment would be dismissed. The plaintiffs were also ordered to pay to the defendants the costs of the day fixed in the amount of \$500.00 payable forthwith. The plaintiffs' motion to compel the re-attendance of the defendants' deponent was adjourned to July 2, 1991 (Document Book, Tab 6).

22. The plaintiffs did not appeal the Order of Hollingworth, J. until 31 days after it was made (Document Book, Tab 7). Meanwhile, by letter dated June 27, 1991, the Solicitor wrote to Hollingworth, J. to set out his version of the events which lead to the Order of Somers, J., and his clients' position that they were not able to fulfill the conditions set by Somers, J. until such time as they had an opportunity to cross-examine the defendants' on their affidavit material. The Solicitor further stated that the defendants were not co-operating and were refusing to produce themselves for the purposes of cross-examination. The Solicitor requested that Hollingworth, J. amend his Order awarding \$500.00 costs to the defendants, and adjourn the plaintiffs' motion for summary judgment until cross-examinations had been completed (Document Book, Tab 8).

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23. On July 2, 1991, the parties returned before Hollingworth, J. By this time, the plaintiffs had filed their Notice of Appeal of the cost portion of the Order of Somers, J. dated May 30, 1991. In the circumstances, Hollingworth, J. adjourned both motions (the plaintiffs' motion to compel the defendants to appear for cross-examination, and the defendants cross-motion to dismiss the plaintiffs' motion for summary judgment) to the Weekly Court list on July 17, 1991 (Document Book, Tab 9).

24. Meanwhile, on July 8, 1991, the plaintiffs brought a motion before Master Sedgwick for an order requiring the re-attendance of the defendants' deponent for purposes of cross-examination. Master Sedgwick adjourned the motion on the grounds that six days earlier Hollingworth, J. had adjourned the motion to the Weekly Court list scheduled for July 17, 1991, thus the Solicitor's motion was not properly before the Master.

25. On July 17, 1991 the parties returned before Somers, J. sitting in Weekly Court. An order was made requiring the re-attendance of the defendants' deponent for purposes of cross-examination. The plaintiffs' motion for summary judgment was adjourned to July 30, 1991.

26. In mid-July 1991, the plaintiffs continued their cross-examination of the defendants' deponent.

27. On July 22, 1991, the plaintiffs filed a Notice of Appeal of the Order of Hollingworth, J. dated June 21, 1991 (see Document Book, Tab 7).

28. On July 30, 1991, the summary judgment motion was returned before Somers, J. The Solicitor argued that certain undertakings given by the defendants had not been fulfilled, and requested another adjournment so that a motion could be brought to compel answers to undertakings. Somers, J. granted an adjournment *sine die* to be brought back on four days notice provided that, on or before August 14, 1991, the plaintiffs launched and completed all interlocutory proceedings related to the examinations, and complied with Somers, J.'s Order dated May 30, 1991 (that the plaintiffs file an amended Record in the proper form, and pay costs fixed in the amount of \$500.00) failing which the defendants could move without notice to dismiss the summary judgment motion (Document Book, Tab 10).

29. On August 13, 1991, the plaintiffs brought a motion before Master Garfield to compel the defendant to provide certain answers to undertakings and to answer certain questions refused on cross-examination. The matter was not reached and adjourned *sine die*.

30. The following day, August 14, 1991, the Solicitor brought a motion before O'Leary, J. for an extension of the time in which to comply with the Order of Somers, J. dated July 30, 1991. O'Leary, J. granted a 15 day extension to August 29, 1991 (Document Book, Tab 11).

31. On August 19, 1991, the plaintiffs' motion regarding undertakings and refusals was heard before Master Garfield. Re-attendance of the defendants' deponent was ordered together with answers to certain undertakings and refusals (Document Book, Tab 12). The Solicitor states that the Order was not complied with.

32. On September 12, 1991, the defendants brought an *ex-parte* motion before Somers, J. to dismiss the plaintiffs' motion for summary judgment. The motion was granted:

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This motion is brought ex-parte pursuant to my earlier Order of July 30, 1991 which in turn refers back to my Order of May 30, 1991. On the earlier date I was dissatisfied with the condition of the material filed. There was no factum as required by Rule 20.03 nor was there an adequate record. Much of the relevant material was not included even though specified in the Notice of Motion. I granted an adjournment requested by the applicant on 2 conditions 1) that the material be completed and submitted in proper form and a factum filed, 2) that the costs of the day in the sum of \$500 be paid. I understand the applicant has appealed the cost portion of that Order.

The Motion for summary judgment came on before me on July 30, 1991. Again the applicant was seeking an adjournment which was strongly opposed. I ordered that the adjournment be allowed sine die on condition 1) that all interlocutory proceedings relating to the examination be completed by August 14, 1991 2) my earlier Order of May 30, 1991 be complied with. Failing this the Respondent could apply ex-parte for an order dismissing the Motion.

On the ex-parte Motion before me today I have reviewed all the material filed in support. I find that condition 1) has been completed with in that all such interlocutory proceedings have been completed, condition 2) has not been complied with however, in that (a) only something called a "preliminary factum" has been filed. It appears to include a Motion to amend the Statement of Claim and a Motion by way of appeal from an Order of Master Sandler of January 11, 1991 with the statement of the nature of the Motion. Also it deliberately omits any statement of facts on which the Respondent intends to reply because they "are not yet available" but are expected to be available when examinations are complete. As well the Record was not supplied in a bound booklet form as required by the Rules. In my view my 2 combined orders have not been complied with. I therefore dismiss the Motion for Summary Judgment.

There have been some eleven separate appearances in court arising out of this Motion for judgment together with a wealth of correspondence largely initiated by counsel for the Applicant who has seen fit to write to me and other judges about this case or to send up copies for inclusion in the court record. The applicant shall pay the costs of all of this, including the costs of this application which I hereby fix in the sum of \$8,000.00 payable forthwith. I am satisfied that all of these interlocutory manoeuvres were brought for the purpose of delay only and the costs of these proceedings are included in the above.

(Document Book, Tab 13)

33. The plaintiffs did not appeal the Order of Somers, J. dated September 12, 1991. The \$8,000.00 cost order was satisfied on June 11, 1993 (see below). The plaintiffs did not satisfy the \$500.00 cost order of July 30, 1991, until in or about November, 1993.

Defendants' Motion For Security for Costs

34. On May 20, 1992, the defendants brought a motion returnable before O'Connell, J. for an order either striking out the statement of claim or for security for costs. The plaintiffs sought and were granted an adjournment to May 22, 1992, peremptory to the plaintiffs (Document Book, Tab 14).

35. On May 22, 1992, the motion was returned before O'Connell, J. The plaintiffs sought a further adjournment. O'Connell, J. ordered that if the plaintiffs satisfied the \$8,000.00 cost Order of Somers, J. dated September 12, 1991, within 10 days (on or before June 1, 1992), the plaintiffs' application for an adjournment would be granted. However, if the plaintiffs did not satisfy the \$8,000.00 cost order on or before June 1, 1992, the defendants' motion for an order for security for costs would be granted.

36. On June 1, 1992, the plaintiffs satisfied the \$8,000.00 cost Order.

37. On June 16, 1992, the defendants served a Notice of Return of their motion to either strike out the statement of claim or for security for costs returnable July 31, 1992.

38. Meanwhile, on June 24, 1992, Ferrier, J. dismissed the plaintiffs' appeals from the respective cost Orders of Somers, J. dated May 30, 1991, and Hollingworth, J. dated June 21, 1991:

"There is no evidence whatsoever before me explaining the one year delay in perfecting the appeal. The plaintiff has had ample time to do so, including 10 days from the date notice of the defendants' motion was brought to plaintiffs' counsel's attention. This motion is dismissed and the appeal is dismissed. Costs fixed at \$500.00 payable forthwith to the defendants."

(Document Book, Tab 15)

39. The defendants' motion for security for costs was returned before Ferrier, J. on July 27, 1992. The Solicitor sought an adjournment which was granted to August 10, 1993, peremptory to the Solicitor's clients:

"Contested adjournment (adjournment sought by counsel for plaintiffs). This matter is adjourned to August 10/92. It is preemptory to the plaintiffs. Under no circumstances should a further adjournment be granted to the plaintiffs. Counsel for the plaintiffs indicates he is going to have to file an affidavit deposed to by himself and that Genest Murray may be retained. Even if new solicitors are retained, no further adjournment of this motion should be granted at the request of the plaintiff. Costs reserved to the judge hearing the motion."

(Document Book, Tab 16)

40. On July 28, 1992, the plaintiffs brought a motion to set aside the Order of Ferrier, J. dated July 24, 1992 (Document Book, Tab 17). The motion was dismissed.

41. On August 10, 1992, the defendants' motion for security for costs was returned before Montgomery, J. An Order was made that the plaintiffs forthwith pay security for costs fixed in the amount of \$9,600.00, plus costs of the day fixed in the amount of \$1,500.00:

"This is a motion for dismissal or for security for costs made under Rule 57. I am satisfied by the Reasons of Somers, J. dated 12 September, 1991 and of Ferrier, J. subsequently that this action has been delayed by the plaintiffs or their counsel inordinantly. There is no requirement in Rule 57 to show prejudice. To me prejudice is present by virtue of the proliferation of motions. The applications to the Divisional Court from the Order of Ferrier, J. to vary a costs order is pending."

The Court has been abused by the conduct of Mr. Wysocky in my view by constant delay. The plaintiff shall pay security for costs in the sum of \$9,600 into Court forthwith.

This is an order in the exercise of a judicial discretion. No appeal shall proceed in the action including that to the Divisional Court nor shall any other step be taken until payment in is made. Costs of this day fixed at \$1500 payable forthwith."

(Document Book, Tab 18)

42. The plaintiffs did not post security for costs.

43. On December 10, 1992, the defendants brought a motion before Borins, J. for an order striking out the statement of claim and releasing to the defendants the sum of \$40,000.00 which had been paid into Court pursuant to the Order of Master Sandler dated January 11, 1991. The Solicitor appeared for the plaintiffs and sought an adjournment of the motion to permit the plaintiffs to submit responding material. An adjournment was granted to 12:00 noon on December 21, 1992 (Document Book, Tab 19). Borins, J. warned the Solicitor not to return to court as counsel if he intended to rely on his own affidavit.

44. On December 22, 1992, the motion was returned before Borins, J. The Solicitor attended on the motion and requested a further adjournment. Borins, J. instructed the Solicitor to gown and speak to the matter. Borins, J. ordered the release of the said \$40,000.00 to the defendants, and costs were awarded against the Solicitor personally payable forthwith to the defendants fixed in the amount of \$1,000.00. The part of the motion seeking an order striking out the plaintiffs' action was adjourned *sine die*. The endorsement of Borins, J. is as follows:

"When Mr. Wysocky requested an adjournment on December 10, 1992 to enable responding materials to be filed he was warned that he would not be permitted to argue the motion if the responding materials consisted of his own affidavit. The responding materials consisted entirely of his own affidavit in response to this motion together with several affidavits which he swore in respect to earlier motions in this action. It is fundamental that in arguing a motion, counsel may not rely on his or her affidavit. Stated differently, except where the evidence is not in dispute the deponent of an affidavit must not be the lawyer who argues a motion or an application before the court.

I appreciate that I could have permitted Mr. Wysocky to argue in response to the defendants' motion without reliance on his own affidavit materials. However, in view of the fact that should the motion succeed, the result would be the dismissal of the plaintiffs' action I felt it would be unfair to the plaintiffs to proceed on this basis. Indeed, the history of this action suggest[s] that there is reason to believe that the plaintiffs may not have been well served by the manner in which Mr. Wysocky has conducted their case. This is apparent from the endorsements of the various judges and masters who have considered the various motions brought by the parties. I associate myself, in particular, with the endorsement of Montgomery, J.

This motion would have been heard today but for the adjournment which has been required by the failure of Mr. Wysocky to retain counsel. He could have avoided the problem, as well, had one or both of the plaintiffs provided an affidavit. The motion will, therefore, be adjourned to a date to be fixed by the Registrar.

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As a term of the adjournment there will be an order that there be payment out of court to the defendants of the amount of \$20,000.00 each paid into court on July 31, 1991, pursuant to the order of Master Sandler of January 11, 1991. Master Sandler had ordered that \$40,000.00 be paid into court as a condition of his order discharging the Certificate of Pending Litigation obtained by the plaintiffs. One of the reasons upon which the Master discharged the Certificate of Pending Litigation was that the plaintiffs had failed to prosecute their case with reasonable diligence. It is for this reason that I now order the monies be paid out of court.

The defendants are entitled to their costs of December 10, 1992 and of today. However, because the adjournment was caused by the conduct of Mr. Wysocky it would be unfair for the plaintiffs to have to pay the costs. Accordingly, the defendants are to have their costs fixed at \$1,000.00 payable forthwith by Mr. Wysocky. The conduct of Mr. Wysocky in conducting this litigation is such that it will be brought to the attention of the Law Society of Upper Canada.

In the result, the motion is adjourned to a date to be fixed by the Registrar. An order will go that \$40,000.00 be paid out of court to the defendants. Costs of \$1,000.00 to the defendants payable forthwith by Mr. Wysocky."

(Document Book, Tab 20)

45. On February 16, 1993, a motion for leave to appeal the Order of Borins, J. dated December 22, 1992, was filed on behalf of the Solicitor and his clients by Kenneth Prehogan ("Prehogan") of the law firm, Weir & Foulds. On February 17, 1993, the appeal was abandoned.

46. The Solicitor did not satisfy the cost order against him until November 1993.

47. At the initiative of the Solicitor, the plaintiffs were referred to Prehogan. A claim was made to the Lawyers' Professional Indemnity Company by the Solicitor's clients. The Solicitor was represented by the law firm, O'Donnell & Scott. The action ultimately settled. An order was made dismissing the plaintiffs' claim and counterclaim without costs (Document Book, Tab 21). In or about November, 1993, Minutes of Settlement were entered into which provided, *inter alia*, for the payment of \$60,000.00 to the plaintiffs and, \$10,000.00 to Mr. Silver's clients in full settlement of the costs owing to them (Document Book, Tab 22).

Particular 2(c) and (d)(ii)

- (c) He abused the court process while acting for Lidia and Bodham Ramaniw in that he filed a Writ of Seizure and Sale with the Sheriff contrary to the findings of German, J. at a hearing on October 5, 1992;
- (d) He failed to comply with court Orders made against him personally in particular:

- (ii) the Order of Wright, J. dated February 26, 1993, which required the Solicitor to pay costs fixed in the amount of \$1,200 payable forthwith.

48. The Solicitor was retained to represent the plaintiff purchasers, Lidia and Bodham Romaniw, in an unrelated action against the same defendant vendors, represented by Mr. Silver. The action arose out of an agreement of purchase and sale which did not close in respect of an industrial condominium unit. The plaintiff purchasers initiated an action to recover their deposit and for an accounting.

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49. The Solicitor brought a motion for summary judgment on behalf of the plaintiffs. The parties conducted cross-examinations on the respective affidavits filed on the motion. On July 17, 1991, the parties entered into Minutes of Settlement, pursuant to which the defendants were to pay to the plaintiffs the sum of \$8,500.00 and, among other things, provide all necessary accountings (Document Book, Tab 23).

50. On July 17, 1991, the terms of the Minutes of Settlement were adopted in a Judgment of Somers, J. (Document Book, Tab 24). The Judgment provided, *inter alia*, that in the event of default by the defendants, they must pay to the plaintiffs the sum of \$52,296.22 plus interest.

51. On October 5, 1992, the plaintiffs brought a motion to amend the default provisions of the Judgment of Somers, J. on the basis of alleged non-compliance on the part of the defendants (Document Book, Tab 24a). The motion was heard and dismissed by German, J.:

"I am satisfied that there has been compliance with the Judgment of M.J. Somers except for the taxes.
Order to go that this matter be referred to the Master.
Other than that the motion is dismissed.
Each party will bear their own costs."

(Document Book, Tab 25)

The Solicitor prepared and served a Notice of Appeal, but did not file same. Accordingly, no appeal was taken from the Order of German, J.

52. The outstanding tax matter was worth approximately \$15.00-\$20.00. The Solicitor did not refer the outstanding tax matter to a Master. Instead, he filed a Writ of Seizure with the Sheriff for the full amount of the claim (\$52,296.22) as if there had been a finding that the defendants had defaulted on the settlement terms.

53. On February 26, 1993, the defendants brought a motion before Wright, J. for an order requiring the Solicitor and the Sheriff to lift the Writ of Seizure and Sale. Wright, J. granted the motion:

In my view, Madame Justice Germans' Order of October 5, 1992 specifically orders that Somers, J.'s Judgment of July 17/91 had been complied with. No appeal has been taken from that Order. There was no right of the plaintiffs to file a Writ of Seizure and Sale since there was no default of the Judgment.
Order to go in terms of paragraph 1 of the Notice of Motion.
Although Mr. Wysocky advises me that the plaintiffs instructed him to file the Writ of Seizure and Sale there was no basis upon which the Writ should have been filed and Mr. Wysocky should so have advised his clients. Under Rule 57.07(2) I have given Mr. Wysocky a reasonable opportunity to make representations why he should not pay the costs personally. He has not satisfied me that his clients should have to ... in the result costs are fixed at \$1,200.00. His client should not have to bear the costs."

(Document Book, Tab 26)

54. The Solicitor filed a Notice of Appeal of the Order of Wright, J. to the Court of Appeal and served it on Mr. Silver on March 25, 1993. The Notice of Appeal and Affidavit of Service were filed with the Court on April 2, 1993. As at that date, the Order of Wright, J. was stayed pending the appeal.

55. On April 13, 1993, the Solicitor wrote to Mr. Silver, copied to Wright, J., to set out his version of the events (Document Book, Tab 27).

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56. The appeal was perfected on October 13, 1993 (Solicitor's Document Book, Tab 28).

57. The appeal was heard by the Court of Appeal on February 3, 1997, and dismissed without calling upon the responding party. Costs were neither sought nor ordered (Document Book, Tab 28a).

58. As at today's date, the Solicitor has not satisfied the cost order of Wright, J.

Particular 2(e)

(e) He failed to respond to the Law Society despite letters dated June 10, 1993, June 22, 1993, July 6, 1993 and telephone calls on July 5, 1993.

59. By letter dated February 24, 1993 (Document Book, Tab 29) to the Law Society, the Solicitor indicated that it was his understanding that Borins, J. would be contacting the Law Society with respect to the Solicitor's conduct in the *Prokipchuk et al.* action. The Solicitor requested the Law Society to advise whether His Honour had so referred the matter. The Solicitor was advised by the Law Society, by letter dated March 5, 1993, that it had no record of a complaint from Borins, J. (Document Book, Tab 30).

60. On June 10, 1993 (Document Book, Tab 31), the Law Society sent the Solicitor a letter enclosing copies of a letter dated December 24, 1992, from Borins, J. as well as purportedly enclosing Mr. Silver's response dated March 23, 1993.

61. The following is a chronology of the Law Society's attempts to obtain a reply to the letter of complaint of Borins, J. as well as a reply to Mr. Silver's response:

DATE	EVENT
June 10, 1993	A letter was sent to the Solicitor asking for his comments in regard to the concerns raised by the Law Society (Document Book, Tab 31).
June 17, 1993	The Solicitor faxed a letter to the Law Society advising that Mr. Silver's response was not enclosed with the endorsements and the Law Society's letter of June 10, 1993. The Solicitor stated that given the Law Society's letter he anticipated that he would have a great deal to say in response. The Solicitor further indicated that given the number of points raised in Mr. Silver's letter, the Solicitor would submit a comprehensive response in due course. The Solicitor requested that the Law Society advise if same was not appropriate (Document Book, Tab 32).
June 22, 1993	A further letter was sent to the Solicitor enclosing Mr. Silver's response to the Law Society. At this time the Solicitor's response was requested within two weeks from the date of this letter.
July 5, 1993	Telephone conversation with Solicitor, wherein Solicitor agreed to arrange a schedule in order to reply to various complaints before the Law Society. It was agreed at this time that a reply would be received in regard to this complaint matter by Monday, July 19, 1993.

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July 6, 1993 A letter was sent to the Solicitor confirming that he would respond to this matter by July 19, 1993 (Document Book, Tab 33).

July 12, 1993 The Solicitor called the Law Society and advised that his father had just been diagnosed as having cancer and he would therefore be a little late providing his response to the Law Society in regard to another unrelated complaint.

62. The within Complaint was sworn on September 10, 1993.

V. DISCIPLINE HISTORY

63. The Solicitor has no prior discipline record.

DATED at Toronto this 12th day of March, 1997."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D225a/93 and is prepared to proceed with a hearing of this matter on March 18 and 19, 1997.

II. IN PUBLIC/IN CAMERA

2. It is the Law Society's position that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act. As of the date of this Agreed Statement of Facts, the Solicitor has not yet confirmed whether he will take the position that the proceeding be held in public or whether the Solicitor will bring a motion for an order that this proceeding be held in camera.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D225a/93 and the particulars contained therein. The Solicitor admits the facts as hereinafter set out. As at the date of this Agreed Statement of Facts, the Solicitor has not yet advised the Law Society whether he will admit professional misconduct in respect of these facts.

IV. FACTS

Particular 2(f)

(i) He failed to honour a financial obligation incurred in relation to his client, Ilona Kovacs, namely an account from Dr. David Y.K. Chan.

(ii) He failed to provide a reply to the Society regarding a complaint by Dr. David Y.K. Chan despite letters dated April 6, May 10, June 14 and 24 and July 6, 1993, and telephone messages left on April 27 and May 7, 1993 and telephone conversations on May 3 and July 6, 1993.

3. In March of 1991, the Solicitor was retained on a Legal Aid Certificate by Ilona Kovacs regarding a personal injury accident that occurred on December 13, 1984.

4. Ms. Kovacs' medical doctor was Dr. Chan. In March, 1991, the Solicitor requested that Dr. Chan provide a medical report concerning Ms. Kovacs' condition.

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5. The report was forwarded to the Solicitor by letter dated April 1, 1991.
6. Dr. Chan also attended at court to give evidence.
7. Throughout the period April, 1991, to April, 1992, Dr. Chan forwarded to the Solicitor invoices for the medical reports and his court attendance.
8. The Solicitor did not remit payment.
9. In July, 1992, the Solicitor promised Dr. Chan that he would receive payment in August, 1992. Payment did not occur.
10. After August, 1992, Dr. Chan's secretary left several messages for the Solicitor at his office. The messages were not answered.
11. On October 7, 1992, Dr. Chan wrote to the Solicitor enclosing further copies of the invoices, summarizing his attempts to contact the Solicitor, and requesting payment of the outstanding accounts (Document Book, Tab 1). The Solicitor did not reply.
12. On November 12, 1992, Dr. Chan's secretary spoke with the Solicitor who advised that he would call Legal Aid and get back to the Doctor the same day. The Solicitor did not contact Dr. Chan as stated.
13. On November 17, 1992 Dr. Chan sent a registered letter to the Solicitor requesting payment within five working days of the then total outstanding debt of \$3,493.64 (Document Book, Tab 2). The Solicitor did not respond.
14. By letter dated December 1, 1992, Dr. Chan complained to the Law Society (Document Book, Tab 3).
15. By letter dated January 7, 1993 to the Solicitor the Law Society enclosed a copy of Dr. Chan's letter of complaint dated December 1, 1992. The Solicitor was asked to respond to the Law Society in writing on or before January 21, 1993. The Solicitor did not respond (Document Book, Tab 4).
16. On each of January 27 and February 3, 1993, a Law Society representative left a message at the Solicitor's office requesting a response to Dr. Chan's complaint. The Solicitor did not respond (Document Book, Tab 5)
17. By registered letter dated February 9, 1993, the Law Society confirmed the Solicitor's failure to respond to Dr. Chan's complaint, and further advised the Solicitor that if the Law Society did not receive his written response within seven days the matter would be referred to the Chair of the Discipline Committee for further instructions. The registered letter was received by the Solicitor on or about February 26, 1993 (Document Book, Tab 6).
18. On February 10, 1993, the Solicitor contacted the Law Society by phone to advise that he would have his reply to the Law Society on or about February 17, 1993 (Document Book, Tab 7).
19. On February 18, 1993, a Law Society representative contacted the Solicitor to confirm that his reply to the Law Society had not yet been received and was late. The Law Society representative advised the Solicitor that if his reply was not received forthwith the matter would be presented to the Chair of the Discipline Committee for the authorization of a complaint (Document Book, Tab 8).
20. By a second registered letter dated February 22, 1993, the Law Society confirmed with the Solicitor that he would deliver his written reply by the end of that business day, and further if this was not done the matter would be referred to the Chair of the Discipline Committee (Document Book, Tab 9).

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21. The Solicitor replied directly to Dr. Chan by letter dated February 22, 1993. He apologized for the delay and inconvenience he had caused and enclosed a partial payment in the sum of \$1,525.00, being the total amount approved by Legal Aid at that time. The Solicitor explained that the medical disbursements were significantly reduced by Legal Aid, but that it was his understanding that approval for higher amounts would be considered at the time of final billing (Document Book, Tab 10).

22. By letter dated April 6, 1993, the Law Society inquired of the Solicitor whether he had prepared a final billing to Legal Aid, including a request for payment in respect of Dr. Chan's account (Document Book, Tab 11). The Solicitor did not respond.

23. On April 27, 1993 a Law Society representative left a telephone message for the Solicitor at his office. The Solicitor did not reply (Document Book, Tab 12).

24. On May 3, 1993 a Law Society representative advised the Solicitor by telephone that the matter would be referred to the Discipline Committee if the Solicitor's reply was not received in a timely fashion (Document Book, Tab 12).

25. The Solicitor left a message with the Law Society on May 7, 1993. He advised that he would call back the following Monday as he was occupied closing a deal (Document Book, Tab 13).

26. By third registered letter dated May 10, 1993, the Law Society confirmed its attempts to elicit a reply from the Solicitor and the Solicitor's failure to co-operate. The Law Society advised the Solicitor that if a reply was not received within seven days the matter would be referred to the Discipline Committee. The registered letter was received by the Solicitor on May 19, 1995 (Document Book, Tab 14).

27. The Solicitor wrote to the Law Society by letter dated May 19, 1993. He stated that he was unable to provide a full reply at that time as he was leaving the country. He undertook to provide his reply upon his return on May 31, 1993 (Document Book, Tab 15).

28. By letter dated June 14, 1993 to the Solicitor the Law Society wrote as follows:

"I acknowledge receipt of your facsimile of May 19th, 1993.

You seem to have taken exception to my comments about a pattern emerging for your failing to reply promptly to communications from the Law Society. In order to understand my statement, I would like to point out to you that in six of my complaint investigations against you, you failed to respon[d] to my initial letter and telephone inquiries which resulted in a registered letter being sent to you. Ms. Goodfield has advised me that she has also had difficulty in obtaining a response from you on the Cooper and Prowse complaints. I also understand that a formal complaint has been issued against you for your failure to respond to the Downey complaint.

With respect to Dr. Chan's and Dr. Franks' complaints, I remind you that in your letter of February 22nd, 1993, you wrote that your final account would be submitted to Legal Aid by the weekend. Since April, I have written letters and telephoned you requesting that you confirm that you have attended to this matter. I have allowed you many opportunities to complete this matter. In your facsimile of May 19th, 1993, you apologized if I was of the view that your response was incomplete and advised that you will be out

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of the country until May 31st, and would attend to this matter upon your return. I have still not heard from you.

Dr. Chan and Dr. Franks have recounted the numerous conversations which they had with you throughout 1992 in which you advised that you would follow up this matter with Legal Aid. I recently spoke with a representative at Legal Aid and was advised that two cheques had been issued to you, one on May 8th, 1992, in the amount of \$16,000.00 for fees and disbursements. You provided me with a copy of your disbursement account which you claimed that Legal Aid reduced. Please confirm whether or not you submitted Dr. Franks' and Dr. Chan's accounts to Legal Aid, and if the May 8th cheque was to cover these costs. If so, I have some difficulty in understanding why it would take one year to release these funds or in the event that the funds were not to pay for the Doctors accounts, why it is now one year later and you have still not submitted your final account to Legal Aid. I cannot accept that this is "an unfortunate and unavoidable delay". Please confirm that your final account has been forwarded to Legal Aid.

You forwarded a cheque in the amount of \$1,525.00 to Dr. Chan, which you claimed was for the amount already approved by Legal Aid. In my review of the hand written notations on your disbursement account, I calculated Dr. Chan's account to total \$1,825.00. Please advise how you came to your amount and whose notations are on the disbursement account. I would also appreciate if you would respond to Dr. Chan's requests for the originals of his clinical notes.

In order to avoid any future misunderstandings, I would like to advise you that this will be my final letter requesting this information from you. In the event that you did not respond to the points which I have raised or if you fail to respond within a period of 10 days from the date of this letter, I will refer this matter to the Chair of the Discipline Committee for instructions. I trust that I have clarified my position with you."

(Document Book, Tab 16)

29. The Solicitor responded by letter received June 18, 1993. He advised that he anticipated being in a position to conclude the matter by the end of the week.

30. By registered letter dated June 24, 1993 the Law Society wrote as follows:

"This will acknowledge receipt of your facsimile of June 17th, 1993, received by the Law Society on June 18th, 1993.

While you have responded within the prescribed timeframe, you have failed to respond to the issues which I raised in my letter to you of June 14th, 1993. You have also failed to provide a further reply as you mentioned you would in your facsimile. As a result, I will be referring this matter to the Chair of the Discipline Committee at the next authorization meeting. In the event that you should have any comments to offer, you are welcome to forward them to my attention."

(Document Book, Tab 17)

The Solicitor did not reply.

31. On July 6, 1993 the Solicitor left a telephone message at the Law Society indicating that he would provide his written reply by July 26, 1993. This was confirmed in a letter of the same date (Document Book, Tab 18). The Solicitor did not reply as promised.

32. The within Complaint was sworn on September 10, 1993.

33. On August 17, 1994, the Solicitor spoke with Dr. Chan with respect to the outstanding account then in excess of \$3,000.00. Dr. Chan agreed to accept payment of \$2,000.00 in full satisfaction of his outstanding account and a cheque in the amount of \$2,000.00 was forwarded to Dr. Chan that day (Document Book, Tab 19). The outstanding principal amount owing to Dr. Chan was then \$1,161.25. The Solicitor advised that in the event Legal Aid paid any amount greater than that received by Dr. Chan, the difference would be forwarded to him.

34. As at today's date, the Solicitor has not made further payment to Dr. Chan.

35. As at today's date, the Solicitor has not provided a substantive reply to the Law Society in respect of its investigation of the complaint by Dr. David Chan.

Particular 2(g)

- (i) He failed to honour a financial obligation incurred in relation to his client, Ilona Kovacs, namely an account from Dr. W.M. Franks
- (ii) He failed to provide a reply to the Society regarding a complaint by Dr. W.M. Franks despite letter dated February 24, May 3, June 14 & 24 and July 6, 1993, and telephone messages left on March 16 & 25, April 2, 6 & 27 and telephone conversations on April 5, 13, 19 & 22, May 14 and July 6, 1993.

36. On May 14, 1991, the Solicitor wrote to Dr. W.M. Franks, Director of the Neurological Rehabilitation Programme at West Park Hospital, requesting his assistance in the preparation of an Assessment Report of his client, Ms. Ilona Kovacs (Document Book, Tab 20).

37. Dr. Franks prepared and forwarded a report dated May 24, 1991, together with an invoice to the Solicitor in the amount of \$1,100.00 (Document Book, Tab 21).

38. In January, 1992, Dr. Franks attended on two court appearances and further invoiced the Solicitor in the sum of \$2,700.00 (Document Book, Tab 22).

39. The Solicitor did not satisfy Dr. Franks' accounts.

40. On January 4, 1993, Dr. Franks sent the Solicitor a reminder of his still unpaid accounts (Document Book, Tab 23). The Solicitor did not reply.

41. Dr. Franks complained to the Law Society by letter dated January 5, 1993, copied to the Solicitor (Document Book, Tab 24).

42. The Solicitor responded directly to Dr. Franks by letter dated February 22, 1993. The Solicitor apologized for the delay and inconvenience he had caused. The Solicitor advised Dr. Franks that the medical disbursements had been reduced significantly by Legal Aid and enclosed a partial payment in the amount of \$850.00, being the total amount approved by Legal Aid at that time (Document Book, Tab 25). The Solicitor stated that he would submit his final account by "this weekend", being the end of February, 1993.

43. By letter dated February 25, 1993 the Law Society requested that the Solicitor confirm that he had forwarded his final account to Legal Aid, including his request for payment of Dr. Franks account (Document Book, Tab 26). The Solicitor did not respond.

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44. On each of March 16, 25 and April 2 and 5, 1993, a Law Society representative left a telephone message for the Solicitor requesting that he return the call. On April 5, 1993 the Solicitor advised that the Law Society could expect to receive his response by April 13, 1993 (Document Book, Tabs 27).

45. On April 13, 1993 the Solicitor, by telephone, advised the Law Society that it could expect to receive his reply by April 15, 1993 (Document Book, Tab 27).

46. On April 19, 1993 a representative of the Law Society contacted the Solicitor by telephone to confirm that his reply had not yet been received. The Solicitor advised that he would deliver his reply by April 21, 1993 (Document Book, Tab 27).

47. On April 22, 1993 the Solicitor contacted the Law Society by telephone to advise that he was searching for the relevant files and would deliver his reply by the end of the day (Document Book, Tab 27).

48. On April 27, 1993 a Law Society representative left a message for the Solicitor to return the call. The Solicitor did not respond (Document Book, Tab 28).

49. By registered letter dated May 3, 1993, the Law Society confirmed its efforts to secure a reply from the Solicitor and his failure to co-operate. The Law Society advised the Solicitor that if his response was not received within seven days the matter would be referred to the Chair of the Discipline Committee for further instructions. The registered letter was received by the Solicitor on May 13, 1993 (Document Book, Tab 29).

50. On May 14, 1993, the Solicitor contacted the Law Society by telephone to request an extension of the time to deliver his reply (Document Book, Tab 30).

His request was followed by a letter dated May 19, 1993, in which he indicated that he was unable to reply because he was leaving the country. The Solicitor undertook to reply following his return on May 31, 1993 (Document Book, Tab 31).

51. By letter dated June 14, 1993 the Law Society requested the Solicitor's response within 10 days (see Document book, Tab 16, supra).

52. The Solicitor responded by letter received June 18, 1993. He advised that he anticipated being in a position to conclude the matter by the end of the week (Document Book, Tab 32).

53. By letter dated June 24, 1993 the Law Society wrote to the Solicitor to confirm that the matter was to be referred to the Discipline Committee for authorization of a complaint. The Solicitor was invited to offer any further comments he might have (see paragraph 30, supra). The Solicitor did not reply.

54. By letter dated July 6, 1993 the Law Society confirmed an agreement reached with the Solicitor on the previous day to reply to various communications from the Law Society pursuant to a specific timetable. The complaint from Dr. Franks was to be replied to by Monday, July 26, 1993 (see Document Book, Tab 18). The Solicitor did not reply as agreed.

55. In or about August 1993, Dr. Franks confirmed for that the balance then outstanding and owing to him from the Solicitor was \$3,380.00 (Document Book, Tab 33).

28th October, 1997

56. On August 17, 1994, the Solicitor spoke with Dr. Franks regarding the outstanding account. Dr. Franks agreed to accept the payment of \$2,000.00 in full satisfaction of his outstanding account, and a cheque in the amount of \$2,000.00 was forwarded to Dr. Franks that day. The principal amount owing to Dr. Franks was \$3,800.00. The Solicitor has paid Dr. Franks a total of \$2,850.00. The Solicitor advised that in the event Legal Aid paid any amount greater than that received by Dr. Franks, the difference would be forwarded to him (Document Book, Tab 34).

57. As at today's date, the Solicitor has not made further payment to Dr. Franks.

58. As of today's date, the Solicitor has not provided a reply to the Law Society's investigation of the complaint by Dr. Franks.

V. DISCIPLINE HISTORY

59. The Solicitor has no prior discipline record.

DATED at Toronto this 7th day of March, 1997."

Re: Complaint D81/96

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D81/96 and is prepared to proceed with a hearing of this matter on March 18 and 19, 1997.

II. IN PUBLIC/IN CAMERA

2. It is the Law Society's position that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act. As of the date of this Agreed Statement of Facts, the Solicitor has not yet confirmed whether he will take the position that the proceeding be held in public or whether the Solicitor will bring a motion for an order that this proceeding be held in camera.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D81/96 and the particulars contained therein. The Solicitor admits the facts as hereinafter set out. As at the date of this Agreed Statement of Facts, the Solicitor has not yet advised the Law Society whether he will admit professional misconduct in respect of these facts.

IV. FACTS

Particular 2(a)

In the course of his practice, the Solicitor wrote letters to the following solicitors which are inconsistent with the proper tone of a professional communication contrary to Rules 1 and 13 of the Rules of Professional Conduct:

- (i) to Michael Silver, letters dated May 31, 1991, June 11, 1991, June 21, 1991, February 21, 1993 and February 24, 1993;

28th October, 1997

4. The Solicitor and Mr. Michael Silver each represented opposite sides in a certain real estate action. The Solicitor's clients (plaintiffs) brought a motion for summary judgment which was adjourned, among other reasons, to allow the parties an opportunity to file appropriate materials and to cross-examine on affidavits sworn on the motion. Following the adjournment, by letter dated May 31, 1991, the Solicitor wrote to Mr. Silver as follows:

"You will excuse me for saying so, but I do not have a great deal of faith in the veracity of the claim made that [Mr. Silver's client] will be out of the country from the 7th to the 13th. It is far too convenient to suit my tastes. As usual, all that you are doing is trying to increase the burden to be borne by my clients. ...

...

If it appears that I do not extend to you the "courtesy" amongst counsel of assuming truthfulness, I believe that I have good grounds for proceeding in this manner. I have no intention of going through an itemized inventory of "incidents" in your conduct throughout this proceeding, which I feel to have been shameful (there are other more appropriate fora for this). Suffice it to say that your performance yesterday morning was such as to convince me that whatever regard you may otherwise have for simple, yet vital, virtues in our profession such as Honour, Honesty and Integrity, you are more than ready, willing and able to sacrifice the same for the sake of "winning". [emphasis added]

(Document Book, Tab 1)

5. One of the issues which was raised at the outset of the litigation was Mr. Silver's retainer and, more particularly, his authority to accept service of materials on behalf of his client (the defendant). Within this context, by letter dated June 11, 1991, the Solicitor wrote to Mr. Silver as follows:

"In my view, by your willful conduct and passive, if you will, obstruction, you have ensured that these two matters are inextricably bound together and I fully intend that they should be heard and decided together. Time is most definitely of the essence, so I have no further intention of playing peek-a-boo or hide-and-go-seek with [Mr. Silver's clients] or playing about with further attempts at service, etc. It has cost my clients and me more than enough in cost and aggravation already. You and your clients' conduct will be placed before the Court and it will decide whether and when service was effective, whether or not you signed the back of the service copies properly or at all.

I realize that you "have no instructions" in this or any other regard, so I'll not waste the transmission costs for the affidavit materials. If you do by some miracle receive instructions from your "out-of-town client", and/or wish to admit to at least some limited authority, please let me know." [emphasis added]

(Document Book, Tab 2)

6. Shortly thereafter, by letter dated June 21, 1991, the Solicitor wrote to Mr. Silver as follows:

... I can only say that you are either willfully and purposefully obtuse or you have taken leave of your senses. I have no other explanation.

28th October, 1997

... I have told you before and I shall tell you again, you cannot suck and blow at the same time (contrary to your allegation of impropriety, to the best of my knowledge, the foregoing phrase has been in common currency for at least the last three decades and is found offensive only by those less-than-pure of thought.) To use another phrase that you may, perhaps understand better, "you cannot have it both ways". Either you are or not the solicitors of record and up until last night, you were not.

You cannot and I shall not permit you to send me anymore of this mindless drivel about violations of the rules of professional conduct. We'll let the Law Society figure the whole thing out.

[emphasis added]

(Document Book, Tab 3)

7. Two years later, in or about February 1993, within the context of an appeal of an issue which had been determined in the action, the Solicitor wrote to Mr. Silver as follows:

"First, during our telephone conversation, you professed ignorance of the non-filing of the notice [of appeal]. On the one hand, a simple telephone call to the Registrar of the Court or to me could have saved all of us time and effort. While the latter course does not appear to fit with your *motis operandi* it would nonetheless be a required step from a professional perspective (and we shall not even commence any discussion as to decency or courtesy).

...

My second major concern centres on the motion materials themselves. Again you have your secretary swear the supporting affidavit and again it is at best and to be as charitable as possible, and attempt to mislead the Court. ...

Quite frankly, Mr. Silver, your motion is little more than a gratuitous cheap shot at me personally. It is appreciated that you are "feeling your oats" as they say, following the Prokipchuk debacle and that you believe that you are playing "hard ball for keeps". You should bear in mind, however, the old wisdom that in the event you decide you wish to kick a man when he is down, you had better make sure he does not get up."

The Solicitor's letter was copied to his clients.

(Document Book, Tab 4)

8. The Solicitor further wrote to Mr. Silver by letter dated February 24, 1993:

... I have no particular desire nor do I intend to commence a debate with you: if you cannot appreciate that your materials are hopelessly compromised, far be it from me to seek to educate you.

...

Mr. Silver, you know my position concerning the quality of the materials you have consistently placed before the Courts. This is just the latest example of the total disregard if not disdain you seem to have for the practice of law in an honest and honourable manner. Before you decide that you really do wish to proceed on Friday, kindly refer to Rule 10 of the *Rules of Professional Conduct* and in particular, note 2 thereto. Unless I receive a notice of abandonment by 2:00 p.m. this afternoon, I shall proceed on the basis that you intend to press ahead notwithstanding.

28th October, 1997

The Solicitor's letter was copied to his clients.

(Document Book, Tab 5)

Particular 2(a)

In the course of his practice, the Solicitor wrote letters to the following solicitors which are inconsistent with the proper tone of a professional communication contrary to Rules 1 and 13 of the Rules of Professional Conduct:

(ii) to Walter Burych, letter dated June 2, 1993;

9. The Solicitor represented an elderly woman confined to a hospital, Ms. Annie Olech. It was alleged by hospital staff that Ms. Olech had expressed her wish that the Solicitor no longer act for her and that instead, she wished to be represented by a fellow solicitor, Mr. Walter Burych. The Solicitor and Mr. Burych engaged in considerable correspondence regarding Ms. Olech's desires and intentions. It is within this context that Mr. Burych wrote to the Solicitor by letter dated June 1, 1993 as follows:

"As we advised you on several earlier occasions, a "proper resolution" of this matter would be achieved simply by your providing us with all of the requested information, accounting, documentation and keys so that we can get on with this matter. What can be so difficult about that? We do not need to meet to discuss an orderly transfer of the file.

We are interested only in serving and advancing Ms. Olech's best interests (from whom we take our instructions) and not yours. Please ensure that all future communication with our offices is in writing so as to avoid any misunderstandings. This will confirm that we did not receive the requested files, documentation, information and keys yesterday as demanded in our letter to you dated May 20, 1993."

(Document Book, Tab 6)

10. The Solicitor responded to Mr. Burych by letter dated June 2, 1993: "Permit me to say, without seeking to be overly belligerent, that it strikes me that the only interests being served by your conduct to date have been your own and those of the hospital staff. I cannot imagine that the course you have followed over the last while has been in accordance with any instructions you may have received from Mrs. Olech.

Quite frankly, this is the most bizarre situation I have ever encountered. Given the steps taken by the hospital staff to block my access to my client (who remains so until she advises me to the contrary), I have no way of verifying what exactly Mrs. Olech has been told or what her intentions really are. I do know that there has been a great deal of misinformation imparted by the staff. More fundamentally, however, I know that first on her list of priorities is her return home, which I note has not been accomplished despite full opportunity to do so and despite the alleged "expertise" of you and your social worker wife in such situations. Again, this leads to my questioning exactly what motivations are at work here.

28th October, 1997

Had the hospital staff not vetoed my proposal to Don Arthurs months ago, for reasons as yet unclear and unexplained to me beyond the assertion that "they simply do not like me", I would respectfully suggest that all that should have been done would have been done by now. Instead, we are continuing this unnecessary and wasteful imbroglio which serves no useful purpose as far as an old and by now surely totally confused person is concerned. Shame!"

(Document Book, Tab 7) Particular 2(a)

In the course of his practice, the Solicitor wrote letters to the following solicitors which are inconsistent with the proper tone of a professional communication contrary to Rules 1 and 13 of the Rules of Professional Conduct:

(iii) to Donald Arthurs, letters dated June 9, 1993 and July 20, 1993.

11. On behalf of the Hospital, by letter dated March 26, 1993, Mr. Don Arthurs of the law firm, Cassels, Brock and Blackwell, complained to the Law Society about the Solicitor's conduct (Document Book, Tab 8).

12. By letter dated June 9, 1993 the Solicitor responded to Mr. Arthurs directly:

"Since it would appear that I have no choice in the matter, I am responding to your letter to the Law Society dated March 26th, which I understand from my conversation with you, was written at the behest of and at the direction of your client, the Riverdale Hospital. For the record, I think that it may have been appropriate for you to indicate that you are on a perpetual retainer with that institution and that you take direction from the senior staff there. I can only presume that this was a matter of inadvertent oversight.

To the extent that it might make any difference, I note, also for the record, that your letter was written during my absence from the country, which had been communicated to you, at the same time as the request that you contact me on my return in order that we could finalize a workable solution to this dilemma, which had for the most part been discussed and agreed upon. Most convenient that your client should have vetoed the arrangement and instructed you to contact the Law Society whilst I was away. No?

As you know from our telephone conversation immediately after my receipt of a copy of your letter, I am very disappointed that you would lend your firm's and more importantly, your own name to this fit of pique, to put it mildly, masquerading as a complaint to the Law Society of misconduct on my part. For the record, I deny having done anything other than seeking to advance the interests of my client, Mrs. Olech. Your clients have sought to intimidate me through "officialdom" and their powers inherent in that status. That having failed, presumably in an attempt to have me "go away", they instructed you to complain to the Society, and you followed instructions. Correct?

Quite frankly, if this is not an abuse of process, nothing is.

..."

13. Mr. Arthurs responded by letter dated June 9, 1993:

28th October, 1997

This is a response to your letter of today. I resent your allegations that I have not been upfront in my dealings with the Law Society or yourself. I am not on a perpetual retainer with The Riverdale Hospital. My firm acts for the Hospital from time to time and are generally regarded as their solicitors. I happen to be on the Board of Governors of the Hospital for which I receive no compensation. The complaint that I directed to the Law Society was initiated by me after discussions with the staff at the Hospital. We were concerned that you were unnecessarily clinging to this matter and your reluctance to permit Hospital staff to view Mr[s]. Olech's home and your refusal to pay Mrs. Olech's bills at the Hospital gave concern over your handling of her financial matters. I deny that you ever offered to permit me to look at the books and records on a confidential basis.

I can assure you that The Riverdale Hospital staff have always understood from Mrs. Olech that she did not want to deal with you and your mother. Your efforts to force yourself and your mother on Mrs. Olech and your refusal to permit Hospital staff to enter Mrs. Olech's home to assess it as the main reasons for my complaint. My main concern was your use of her funds and this was brought to a head when you sent a cheque for \$6,370.13 to me which was drawn on your trust account and not on any account set up for Mrs. Olech. At that point I was concerned that you were not distinguishing her money from your money.

I can tell you that I met with Mrs. Olech and she indicated to me that she did not want you to be her solicitor.

The decision to contact the Law Society was my decision after discussions with my client.

The staff of Riverdale have wanted to send Mrs. Olech home for some time. The Hospital is currently undergoing renovations and it has been necessary to reduce the number of patients. I can assure you that Riverdale does not view Mrs. Olech as a perpetual guest.

As far as I am concerned, Mr. Burych is a well meaning, well intentioned and sincere solicitor who has been retained by Mrs. Olech to carry out her wishes and the only reason reasons he is unable to do so is because of your refusal to exit.

Insofar as your comments are concerned, let me respond to each of them.

1. The complaint was initiated by me based on my discussions with our client.
2. I am not aware that I omitted relevant correspondence or notations of discussions.
3. I deny that you offered to open the books and records on a confidential basis.
4. I recall the attempt to involve Community Trust. I understood that you were going to pursue this. I do not know what came of your efforts. I certainly did not refuse the offer.
5. Our client requested that you and your mother not attend on Mrs. Olech as that was her wish. You and your mother always seemed to find a way to visit despite these instructions.

28th October, 1997

I return to the start and ask again, why are you clinging to this? Please let Mr. Burych do his job and return Mrs. Olech to her home. At that point you and your mother will have no difficulty visiting Mrs. Olech as often as you like.

(Document Book, Tab 9)

14. The Solicitor responded to Mr. Arthurs by letter dated July 20, 1993:

...
Given the quantity to "bovine waste matter" being flung my way, you can wonder why I do not just walk away as you have suggested? ...
...To my mind, the course [Mr. Burych] has chosen benefits no-one other than himself. While you may view Mr. Burych in a favourable light, the record seems to indicate him to be more an opportunistic harpy than anything else. ... The only persons I can see as having benefitted from Burych's actions to date are hospital staff who have found someone to champion their cause, and Burych himself, who presumably is billing Mrs. Olech for his prose."

(Document Book, Tab 10)

Particular 2(b)

While representing his client on a motion, during a recess in the hearing he made inappropriate comments to opposing counsel, David A. Fram.

15. In or about February 1994, Mr. Fram complained to the Law Society about the Solicitor's conduct immediately prior to the hearing of a motion in which the two represented parties opposite in interest. Litigation commenced when Mr. Fram's former client retained the Solicitor to act for him in respect of an aborted real estate transaction. The Solicitor requested of Mr. Fram that he deliver the client file. Mr. Fram responded with a claim for a solicitor's lien which was the subject of the motion to be heard on the day in question. By letter dated February 10, 1994, to the Law Society, Mr. Fram stated that prior to the motion, while he was organizing documents which he intended to submit to the Court, Mr. Wysocky stood immediately next to where he was seated and spoke the following words to him in a threatening manner:

"look shit for brains if you bring those materials to the attention of the Court I will bring you up before the Law Society on charges".

Mr. Fram further stated:

"I took exception to Mr. Wysocky's comments and advised him of this. I further advised him that I would draw his comments to the attention of the Court.
After the conclusion of the hearing I did indeed draw Mr. Wysocky's comments to the attention of the Court. Mr. Wysocky then advised the Court that he had apologized to me and Mr. Wysocky then, after some prompting by the Court, apologized to the Court also for this behaviour. During his apology Mr. Wysocky advised the Court that such a thing had never happened before and would never happen again. ...
Nonetheless, Mr. Wysocky's conduct is outrageous. I personally felt a strong sense of physical threat in Mr. Wysocky's conduct and actions. When he spoke the above words he was leaning forward over me and was almost spitting the words out. He was obviously very close to losing control of himself."

(Document Book, Tab 11)

16. By letter dated May 1, 1994 to the Law Society, the Solicitor responded to Mr. Fram's complaint as follows:

28th October, 1997

"...

I come now to the second of Fram's letters, dated February 10th, 1994. As I indicated to you in one of our telephone conversations, I readily admit that I employed that particular epithet in speaking to Fram. Like every other member of the litigation bar, I have very often thought that or similar things about an opponent being difficult or unreasonable. It is, however, the one time in over thirteen years that such a thought was ever translated into language.

I will not argue provocation, truth, accuracy of description or justification. The fact is that anyone pretending to any degree of civilization should not employ such a phrase in any social context, in anger or otherwise. I simply should not have said it. Period. End of quotation. I was sorry the moment that the words left my lips and I would have taken them back had I the opportunity. I apologised immediately and I apologise to him again, in writing. I very sincerely regret the incident, which was a momentary lapse.

I should indicate, by way of explanation and not justification since there can be none, that that particular day was extraordinarily trying for me....

I happened to stand next to him and noticed that he was preparing to tender to the judge copies of various endorsements, &c. from the *Prokipchuk* and *Romaniw* matters. Mr. Fram knows or certainly ought to know that what he was proposing to do was grossly improper, hence my advice to him, improperly phrased, though it may have been, that he would be reported.

...

The words complained of by Fram were not uttered in a threatening manner, rather with a great deal of emotion and anger at the outrage he was intent on perpetrating. What he took to be a threat was in fact a promise, which I have now fulfilled. Looking at the substance of the "threat", it is to report him to the Society and I can see no menace to his corporal integrity therein. Quite frankly, Fram is weaving this thing out of whole cloth in an effort to discredit me with the Society for his own perceived advantage, a manoeuvre which I keenly resent and which is nothing more or less than an attempt to abuse the complaints process for an improper purpose.

..."

(Document Book, Tab 12)

17. By letter dated December 22, 1994, the Law Society acknowledged the Solicitor's explanation for his misconduct as follows:

"I have read your detailed letter dated May 1, 1994. I note on page eleven of your letter that you admit to making such a statement, but that you were sorry the moment the statement was made, and apologized immediately and again to Mr. Fram in writing. I have advised Mr. Fram that the Society will not be proceeding at this time with respect to this aspect of the complaint. However, a permanent of this matter will be made. In the event it appears that a pattern of such conduct is evident, further action may be taken at some future date."

(Document Book, Tab 13)

18. Six months later, within the context of an investigation by the Law Society of mutual complaints by the Solicitor and Mr. Fram, the Solicitor commented on Mr. Fram as follows:

28th October, 1997

"Whilst I am sorely tempted to do so, I shall refrain from making any comment as to the content of [Mr. Fram's] letter giving any indication as to the content of Mr. Fram's cranium, my characterization of which he had earlier complained of. It remains, nonetheless, that this sort of pettiness and mean-spiritedness appears to be standard repertoire for Mr. Fram, at least insofar as my dealings with him have indicated."

(Document Book, Tab 14)

V. DISCIPLINE HISTORY

The Solicitor has no prior discipline record.

DATED at Toronto this 7th day of March, 1997."

Re: Complaint D324/96

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D324/96 and is prepared to proceed with a hearing of this matter on March 18 and 19, 1997.

II. IN PUBLIC/IN CAMERA

2. It is the Law Society's position 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 D225/93 and the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 14, 1981. He practises as a sole practitioner.

Particular 2(a) He failed to file with the Law Society within six months of the termination of his fiscal year ended December 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the Solicitor in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

5. The Solicitor's fiscal year end is December 31. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending December 31, 1994, as required by section 16(2) of Regulation 708 under the Law Society Act.

6. By letter dated July 9, 1996, the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised that the last filing received from him was for the period ended December 31, 1994. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's letter dated July 9, 1996, is attached as Exhibit "A" to this Agreed Statement of Facts.

28th October, 1997

7. By registered mail, dated August 9, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter immediate attention. The Law Society's registered letter, dated August 9, 1996, was signed for on August 13, 1996. A copy of the Law Society's registered letter and Acknowledgment of receipt of registered item card is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

8. On or about October 16, 1996, the Solicitor contacted the Law Society from Ukraine. A Law Society representative advised the Solicitor that his matter was scheduled to be considered by the Chair and Vice-Chairs of the Discipline Committee on November 26, 1996, should the required filings not be made by that date. The Solicitor advised that he understood and would send a facsimile transmission to confirm same. The Solicitor further advised the Law Society representative of the following:

- (a) he would be returning to Canada on November 4, 1996;
- (b) he would make the required filings as soon as he returned; and
- (c) he would also complete his December 31, 1994 filing upon his return.

A copy of the Law Society's handwritten telephone transaction record dated October 16, 1996, is attached as Exhibit "C" to this Agreed Statement of Facts.

9. The within Complaint was sworn on December 12, 1996.

10. To date, the Solicitor has not provided his outstanding filing.

V. DISCIPLINE HISTORY

11. The Solicitor has no prior discipline record.

DATED at Toronto this 7th day of March, 1997."

Re: Complaint D193/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D193/97 and is prepared to proceed with a hearing of this matter on a date to be set.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D193/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 14, 1981. He practises as a sole practitioner.

28th October, 1997

Particular 2a) He failed to reply to communications from the Law Society regarding his incomplete Filings for the year ended December 31, 1994, despite letters dated February 5, May 22, July 10 and September 5, 1996 and February 14, 1997, and telephone communications on October 7 and 16, and November 14, 1996 and March 18, 19 and 20, 1997.

5. On February 1, 1996, the Solicitor provided his Forms 2 and 3 for the fiscal year ended December 31, 1994. The filing was incomplete. Accordingly, by letter dated February 5, 1996 (Tab 1, Document Book), the Law Society advised the Solicitor of the following items missing from his filing:

- a. a copy of the listing of trust obligations which the accountant was to attach to the Form 3;
- b. a copy of the reconciliation of the trust bank account which the accountant was to attach to the Form 3;
- c. a copy of the trust bank statement(s) which the accountant was to attach to the Form 3.

6. On February 13, 1996, the Solicitor's accountant called the Law Society and advised that he would deliver the required documentation soon (Tab 1, Document Book). He did not.

7. By letters dated May 22, July 10 and September 5, 1996 (Tabs 2-4, Document Book), the Law Society wrote to the Solicitor requesting his response to the Law Society's letters. The Solicitor did not reply.

8. On October 7, 1996, the Law Society called the Solicitor and left a message for him to return the call. The Law Society was advised that the Solicitor would be out of the office until November 4, 1996. On October 16, 1996, the Solicitor called the Law Society and advised that he would look into the matter. On November 14, 1996, the Solicitor called and advised that the material would be delivered soon (Tab 4, Document Book).

9. By regular and registered mail dated February 14, 1997 (Tab 6, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Discipline Committee. The Law Society's letter sent by regular mail was returned "moved" and the registered mail was returned "unclaimed".

10. On March 18, 1997, the Law Society called the Solicitor and left a message advising that this matter was being referred to the Discipline Committee. The Solicitor returned the call that day and advised that he would deliver the required information by the end of the week. On March 19, 1997, the Law Society called the Solicitor and left a message advising that if the information was not received by the end of the day, the matter would be referred to the Discipline Committee (Tab 7, Document Book).

11. On March 19, 1997, the Solicitor returned the call and requested that copies of the Law Society's letters be faxed to him. The letters were faxed to the Solicitor on March 20, 1997 (Tabs 8 & 9, Document Book).

12. To date, the Solicitor has not responded to the Law Society regarding his incomplete filings.

V. PRIOR DISCIPLINE

13. The Solicitor has no prior discipline record.

DATED at Toronto, this 24th day of June, 1997"

RECOMMENDATION AS TO PENALTY

The Committee recommends that Walter Wysocky be suspended for a period of three months commencing August 1, 1997 and thereafter indefinitely until he has complied with the following:

1. He provide psychiatric evidence satisfactory to the Society that he is fit to practise law;
2. He file the requisite forms to the satisfaction of the Law Society of Upper Canada for each of the years 1994, 1995 and 1996;
3. Prior to returning to the practice of law, he apply for admission to the Practice Review Programme and that when he re-engages in the practice of law he enroll in that programme and comply with its recommendations;
4. He enter into an undertaking which will govern his future relations with the Law Society of Upper Canada.

REASONS FOR RECOMMENDATION

In any case like this where a bright, ordinarily competent and sincere solicitor presents such a litany of different and serious offences, one invariably is driven to ask the question, "Why?" And that question, weighed together with the seriousness and diversity of the offences, gives in my view the key to understanding the appropriate disposition of this case.

Mr. Wysocky has no discipline history. This particular resolution is the product of a joint submission which, through various members of the Law Society, has been some five years in negotiating and has gone through three separate pre-hearings. The public interest and Mr. Wysocky's interests, if possible, must be balanced and the maximum weight given to both of them.

Mr. Wysocky is now co-operative with the Law Society and has assisted in bringing these matters to a resolution. I have spent a good deal of time on the matter both in my office during pre-hearing and in the course of this hearing. I am satisfied that he is an honourable man who has tried in his professional life to act properly. I am satisfied that there is a reasonable prospect that he will never again be before the Law Society of Upper Canada, the subject matter of a complaint.

The record of professional misconduct which he now has would ordinarily belie this conclusion. I have appended to these reasons an *in camera* report, exhibit 19, which I have relied upon in deciding to accept the joint submission of the Law Society of Upper Canada and Mr. Wysocky. It is the key to understanding this judgement.

Were it not for these extenuating circumstances which now show signs of being under control, this would be a case where disbarment would be a real alternative that required consideration. Fortunately, I am in a position where I can accept the joint submission of the following recommendation to Convocation, namely, that he be suspended for three months commencing August 1, 1997 and thereafter, suspended indefinitely until:

1. He provide psychiatric evidence satisfactory to the Law Society that he is fit to practise law;
2. He file the requisite forms to the satisfaction of the Law Society for each of the years 1994, 1995 and 1996;

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3. Prior to returning to the practice of law, he apply for admission to the Practice Review Programme, and when he re-engages in the practice of law, he enroll in that programme and comply with its recommendations;
4. He enter into an undertaking (which has already been done, dated June 24, 1997), which will govern his future relations with the Law Society of Upper Canada.

I am particularly pleased when it is possible for the Law Society to take a career which shows promise and has shown in the past, evidence of commitment and diligence, but which is at risk of being destroyed, and work with the solicitor to enable him to have the future he deserves.

Walter Wysocky was called to the Bar on May 14, 1981.

ALL OF WHICH is respectfully submitted

DATED this 24th day of August, 1997

Clayton C. Ruby

There were no submissions on the Report.

It was moved by Ms. Ross, seconded by Ms. Carpenter-Gunn that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 months commencing August 1st, 1997 and thereafter indefinitely until he has complied with the conditions set out in the Report.

Both counsel and the solicitor made submissions in support of the joint submissions made before the Discipline Committee.

Ms. Cohen advised that the filings had not been completed.

It was moved by Ms. Ross, seconded by Ms. Sealy that the recommended penalty be adopted and that the solicitor be suspended commencing August 1st, 1997.

Carried

It was noted that the material presented in camera would remain in camera.

The Treasurer returned to Convocation.

Re: Leo MUZZATTI - Windsor

The Secretary placed the matter before Convocation.

Messrs. Millar and Bobesich withdrew for this matter.

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

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Convocation had before it the Report of the Discipline Committee dated 3rd September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

W. Niels Ortved

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

Rhonda Cohen
for the Society

LEO MUZZATTI
of the City
of Windsor
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 6 and 26, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 3, 1997 Complaint D147/97 was issued against Leo Muzzatti alleging that he was guilty of professional misconduct.

The matter was heard in public on August 6 and 26, 1997 before this Committee composed of W. Niels Ortved sitting as a single Bencher. The Solicitor did not attend the hearing, nor was he represented. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D147/97

2. a) He failed to honour a financial obligation, in that he breached an order of a Discipline Committee that he pay expenses in the amount of \$600 pursuant to section 40 of the Law Society Act, contrary to Rules 1, 11 and 13 of the Rules of Professional Conduct; and,
- b) He failed to reply to communications from the Law Society arising out of the conduct of an audit of the solicitor's books and records, contrary to Rule 13 of the Rules of Professional Conduct.

THE FACTS

The evidence on the issue of the Complaint alleging professional misconduct was contained in an Agreed Statement of Facts filed as Exhibit 7.

In short, regarding particular 2(a), on November 28, 1995 the Solicitor was found guilty of professional misconduct for failing to reply to communications from the Law Society contrary to Rule 13 of the Rules of Professional Conduct. A Discipline Committee ordered that the Solicitor be reprimanded in Committee and, within 30 days thereof, pay the Law Society's expenses under Section 40 of the Law Society Act fixed in the amount of \$600. On no fewer than four occasions thereafter, the Solicitor was reminded of the outstanding cost order, the last reminder of which, dated November 18, 1996, put the Solicitor on notice that failure to comply would result in a referral to Discipline. As of August 26, 1997, at the time of the hearing, the Solicitor had not satisfied the outstanding cost order.

Regarding particular 2(b), in October, 1994 and June, 1995, the Law Society conducted an audit of the Solicitor's books and records authorized under Regulation 708 of the Law Society Act. On June 5, 1995 the Law Society reported to the Solicitor on deficiencies found in his books and records. The Solicitor was requested to rectify the deficiencies forthwith and executed an Acknowledgement agreeing to do so. Subsequently, the Solicitor was requested to produce to the Law Society trust comparisons for the months ended July 30 to December 31, 1996. On no fewer than four occasions thereafter the Solicitor was reminded of his obligation to respond, the last reminder of which, dated December 4, 1996, put the Solicitor on notice that continued failure to respond would result in a referral to Discipline. As of August 26, 1996, at the time of the hearing, the Solicitor had not produced the material requested by the Law Society.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Leo Muzzatti:

- (i) be suspended for a period of one month provided that he satisfies the outstanding cost order and provide the materials requested by the Law Society by the close of business on September 2, 1997; or,
- (ii) be suspended for a period of three months in the event that the outstanding cost order and the materials requested by the Law Society are not received by September 2, 1997 but have been received by the date that this matter is considered in Convocation; or
- (iii) in the event that the outstanding cost order and the materials requested by the Law Society have not been received by the date that this matter is considered in Convocation, be suspended until such are received and that he be suspended for a further period of three months following his compliance.

REASONS FOR RECOMMENDATION

Service of the Complaint was effected by Registered Mail acknowledged as received on June 13, 1997. Numerous attempts were made to contact the Solicitor in subsequent weeks as appears from the Service Brief filed as Exhibit 2. On August 6, 1997, the date fixed for the hearing to commence, the Law Society received a letter from the Solicitor sent by facsimile

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transmission requesting an adjournment. As this letter, which was filed as Exhibit 3, takes on some importance, a copy is attached herewith as Appendix 1. The matter was adjourned as requested to commence August 26, 1997.

On the date of the hearing the Solicitor did not appear. However, in the interim, he had sent a letter to the Law Society by facsimile transmission on August 22, 1997. In this letter, which was filed as Exhibit 6, a copy of which is attached herewith as Appendix 2, the Solicitor indicated, inter alia, that he had forwarded his cheque in payment of the outstanding cost order together with the material requested by the Law Society by courier on that date. Nothing had been received by the Law Society at the time of the hearing. In the absence of any participation by the solicitor in the hearing and his failure to provide any explanation for the conduct complained of, the allegation of professional misconduct is established.

On the issue of penalty, the evidence was that the Solicitor has a discipline history as follows:

- (i) on February 7, 1995 the Solicitor was found guilty of professional misconduct for failing to file his Forms pursuant to Regulation 708 under the Law Society Act. The Solicitor was reprimanded in Committee and ordered to pay costs fixed in the amount of \$150. The costs were paid on November 20, 1995; and,
- (ii) On November 28, 1995 the Solicitor was found guilty of professional misconduct for failing to reply to communications from the Law Society contrary to Rule 13 of the Rules of Professional Conduct. The Solicitor was reprimanded in Committee and ordered to pay costs fixed in the amount of \$600 within 30 days. The costs ordered are the subject of one of the particulars of the instant discipline proceeding and remain unpaid at the time of the hearing.

The Solicitor's conduct as disclosed by the evidence raises a serious concern. He has a prior discipline history having been convicted of professional misconduct on two prior occasions. In the context of the particulars before this Committee, he has ignored multiple requests for compliance in one respect being the result of a previous finding of misconduct. He did not appear in answer to the Complaint nor did he offer an explanation for his failure to appear. He has given no explanation for the allegations of which he stands charged. Furthermore, he wrote to the Law Society on August 6, 1997 to request a postponement as he expected to be in a position to reply within a period of two weeks, and on August 22, 1997 he wrote to say that he had forwarded the material in question by courier which, to the contrary, had not been received by the time of the hearing some four days later.

One has to be concerned that the Solicitor is ungovernable. I am not prepared to make such a finding, but I am disturbed by the Solicitor's attitude as reflected in the record. Simply stated, it is unacceptable to ignore the Law Society's requests for almost two years and to fail to honour commitments as confirmed in the Solicitor's own correspondence.

The function of the Law Society is of critical importance to the maintenance of the integrity of the profession. This is a serious case of failure to comply aggravated by repeated failure to respond in that regard.

In all of the circumstances, therefore, I recommend that Leo Muzzatti:

- (i) be suspended for a period of one month provided that he satisfies the outstanding cost order and provide the materials requested by the Law Society by the close of business on September 2, 1997; or,

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- (ii) be suspended for a period of three months in the event that the outstanding cost order and the materials requested by the Law Society are not received by September 2, 1997 but have been received by the date that this matter is considered in Convocation; or,
- (iii) in the event that the outstanding cost order and the materials requested by the Law Society have not been received by the date that this matter is considered in Convocation, be suspended until received and that he be suspended for a further period of three months following his compliance.

Leo Muzzatti was called to the Bar on April 18, 1995.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of September, 1997

W. Niels Ortved

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month provided that he satisfies the outstanding cost order and provides the requested material to the Society by September 2nd, 1997 and if the material is not provided by the time Convocation hears the matter the solicitor is to be suspended for a period of 3 months or be suspended indefinitely until the material is received and be suspended for a further period of 3 months following his compliance.

Ms. Cohen advised that the costs had been paid and the material provided to the Society.

The solicitor requested that his suspension commence January 1998 so that he could finalize a number of outstanding client matters.

There were questions from the Bench.

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

It was moved by Mr. Wilson, seconded by Ms. Sealy that the solicitor be suspended for a period of 1 month commencing January 1st, 1998.

Carried

It was moved by Mr. Cole, seconded by Mr. DelZotto that the solicitor be reprimanded in Convocation.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 1 month commencing January 1st, 1998.

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Re: Donald Isamu KIMURA - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar, Wilson and Gottlieb withdrew for this matter.

Ms. Budweth appeared for the Society. Mr. Anand, Duty Counsel appeared for the solicitor who was present.

Mr. Anand requested on behalf of the solicitor that the matter be adjourned for 90 days. He advised that the solicitor had brought a cheque in the amount of \$8,000 toward restitution and had been in touch with the auditors at the Society regarding the accounting of the monies. Mr. Anand further advised that the solicitor was not practising law.

Counsel for the Society was not opposed to the adjournment.

It was moved by Mr. MacKenzie, seconded by Mr. DelZotto that the matter be adjourned to the next Convocation in January, 1998 peremptory to enable the solicitor to come up with further funds and further that he give his undertaking not to practice.

Carried

Re: Richard Alexander SUTTON - Toronto

The Secretary placed the matter before Convocation.

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

Ms. Cowie appeared for the Society and the solicitor was present and assisted by Mr. Anand.

Mr. Anand on behalf of the solicitor requested an adjournment of 1 month in order to present evidence in mitigation relating to medical and character evidence which was not before the Discipline Committee. He advised that the solicitor would give an undertaking not to practice.

The Society did not oppose the adjournment.

It was moved by Mr. MacKenzie, seconded by Mr. Gottlieb that the matter go before the Convocation Management Tribunal on November 10th for directions.

Carried

Re: Clifford Paul MOSS - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar and Crowe withdrew for this matter.

Ms. Cowie appeared for the Society and Mr. Edward White appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 24th June, 1997, together with an Affidavit of Service sworn 21st July, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 11th July, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

28th October, 1997

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Nancy L. Backhouse, Chair
Marshall A. Crowe
Ronald D. Manes

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

Georgette Gagnon
for the Society

CLIFFORD PAUL MOSS
of the City
of Toronto
a barrister and solicitor

Edward White
for the solicitor

Heard: May 27, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Clifford Paul Moss alleging that he was guilty of professional misconduct: Complaint D250/96 issued on October 18, 1996, Complaint D279/96 issued on November 7, 1996, Complaint D308/96 issued on November 26, 1996, Complaint D342/96 issued on December 16, 1996 and Complaint D143/97 issued on March 26, 1997.

The matters were heard in public on May 27, 1997 before this panel composed of Nancy Backhouse, Chair, Ronald Manes and Marshall Crowe. The Solicitor attended the hearing and was represented by Edward White. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D250/96

2. a) He failed to pay costs ordered by Convocation on February 22, 1996 in the amount of \$750.00 by March 5, 1996 despite letters dated May 22, 1996, June 18, 1996 and July 26, 1996 and a telephone message left on July 26, 1996; and
- b) He failed to reply to correspondence from the Law Society respecting costs ordered by Convocation on February 22, 1996, despite letters dated May 22, 1996, June 18, 1996 and July 26, 1996.

Complaint D279/96

2. a) He failed to reply to communications from the Law Society regarding inadequacies disclosed during a review of his books and records which concluded on November 3, 1995 despite letters dated January 12, 1996, February 14, 1996 and April 22, 1996 and telephone requests on February 21, 1996 and March 18, 1996.

Complaint D308/96

2. a) He failed to reply to the Law Society regarding a complaint by Terry Steyn despite letters dated June 5, 1996, June 28, 1996 and August 23, 1996 and telephone messages left on June 17, 1996, June 19, 1996, June 21, 1996, August 9, 1996 and August 21, 1996;
- b) He failed to reply to the Law Society regarding a complaint by J.C. Lee of Scotiabank despite letters dated June 28, 1996 and August 2, 1996 and telephone messages left on June 11, 1996, June 13, 1996, June 17, 1996, June 19, 1996, June 21, 1996, July 22, 1996 and August 1, 1996;
- c) He failed to reply to the Law Society regarding a complaint by Marvin Geist despite letters dated July 4, 1996 and August 23, 1996 and telephone messages left on August 9, 1996 and August 21, 1996.

Complaint D342/96

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Complaint D143/97

2. a) He failed to reply to the Law Society despite letters dated November 6, 1996 and December 5, 1996, and telephone messages left on November 27, 1996 and November 29, 1996.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D250/96, D279/96, D308/96, D342/96 and D143/97 and is prepared to proceed with a hearing of these matters on May 27 and 28, 1997.

II. IN PUBLIC/IN CAMERA

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

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III. ADMISSIONS

3. The Solicitor has reviewed Complaints D250/96, D279/96, D308/96, D342/96 and D143/97 with his solicitor, Edward White, and admits the particulars contained therein and the facts as hereinafter set out. The Solicitor further admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 31, 1989. He practised as a sole practitioner. He was administratively suspended on November 1, 1996 for non-payment of his annual fees and was reinstated on April 1, 1997.[sic]

Complaint D250/96

Particular 2(a) He failed to pay costs ordered by Convocation on February 22, 1996 in the amount of \$750.00 by March 5, 1996, despite letters dated May 22, 1996, June 18, 1996 and July 26, 1996 and a telephone message left on July 26 1996.

Particular 2(b) He failed to reply to correspondence from the Law Society respecting costs ordered by Convocation on February 22, 1996, despite letters dated May 22, 1996, June 18, 1996 and July 26, 1996.

5. On October 1, 1995, the Solicitor was found guilty of professional misconduct respecting the following matters:

Complaint D42/95

2(a) He failed to serve his client, Cara Fischer, in a conscientious, diligent and efficient manner in that:

- (i) he failed to provide her with a report on the closing of her real estate purchase;
- (ii) he failed to account for monies entrusted to him by her.

2(b) He failed to reply to the Law Society regarding a complaint by Cara Fischer despite letters dated November 23, 1994 and December 20, 1994 and telephone messages left on December 15, 1994 and December 19, 1994.

2(c) He failed to provide a final report to his client, The Toronto Dominion Bank, on a mortgage transaction, which occurred on or about April 14, 1994, despite letters dated July 25, 1994 and August 4, 1994, and telephone calls on July 28, 1994, July 29, 1994, August 3, 1994, September 1, 1994 and September 8, 1994.

2(d) He failed to reply to the Law Society regarding a complaint by Ms. A. Caughlin of the Toronto Dominion Bank despite letters dated November 14, 1994 and January 16, 1995, a telephone conversation on October 11, 1994 and telephone messages left on October 24, 1994, October 25, 1994, October 31, 1994 and January 13, 1995.

Complaint D88/95

2(a) He failed to reply to the Law Society regarding a complaint by Brian Robinson despite letters dated February 9, 1995 and March 8, 1995 and telephone messages left on March 2, 1995 and March 6, 1995.

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The Discipline Committee recommended that the Solicitor be Reprimanded in Convocation, pay the Law Society's costs in the amount of \$750.00, over four months, and enroll and participate in the Law Society's Practice Review Programme.

6. On February 22, 1996, Convocation ordered the Solicitor be Reprimanded in Convocation and pay the Law Society's costs in the amount of \$750.00. to be paid on or before March 5, 1996. A copy of the Order of Convocation is attached as Exhibit 1 to this Agreed Statement of Facts.

7. By letter dated May 22, 1996, the Law Society reminded the Solicitor of the Order of Convocation, dated February 22, 1996. The Solicitor was asked to forward payment of the costs within two weeks of the date of the letter. A copy of the Law Society's May 22, 1996 letter is attached as Exhibit 2 to this Agreed Statement of Facts. No reply was received.

8. By letter dated June 18, 1996, the Law Society forwarded to the Solicitor a copy of its May 22, 1996 letter. The Solicitor was advised that his failure to respond may result in the matter being referred to Discipline Committee for authorization of a formal complaint. A copy of the Law Society's June 18, 1996 letter is attached as Exhibit 3 to this Agreed Statement of Facts. No reply was received.

9. A Law Society staff employee left a telephone message for the Solicitor on his office answering machine on July 26, 1996 requesting he return the call. A copy of the Law Society's handwritten telephone transaction form, and typed transcription, is attached as Exhibit 4 to this Agreed Statement of Facts. The call was not returned by the Solicitor.

10 By registered mail dated July 26, 1996, the Law Society forwarded to the Solicitor a copy of its May 22, 1996 and June 18, 1996 letters. The Solicitor was advised that costs had been awarded against him in accordance with section 40 of the Law Society Act. The Solicitor was reminded of his obligation to promptly reply to communications from the Law Society. The Solicitor was requested to contact the Law Society should he be unable to pay the \$750. as a payment programme could be arranged. The Solicitor was advised should he fail to contact the Law Society by August 19, 1996, the matter would be referred to the Discipline Committee for authorization of a formal complaint. The Law Society's July 26, 1996 letter was signed for and delivered on July 29, 1996. A copy of the Law Society's July 26, 1996 letter and acknowledgement of receipt of a registered item card are attached as Exhibit 5 to this Agreed Statement of Facts. No reply was received.

11. The Solicitor paid the Law Society's costs in the amount of \$750.00 on April 3, 1997.

Complaint D279/96

Particular 2(a) He failed to reply to communications from the Law Society regarding inadequacies disclosed during a review of his books and records which concluded on November 3, 1995 despite letters dated January 12, 1996, February 14, 1996 and April 22, 1996 and telephone requests on February 21, 1996 and March 18, 1996.

12. On November 3, 1995, the Law Society completed an audit of the Solicitor's books and records. By letter dated January 12, 1996, attached as Exhibit 6, the Society wrote to the Solicitor regarding inadequacies in his books and records disclosed by the audit and requested a response. No response was received.

28th October, 1997

13. By letter dated February 14, 1996, attached as Exhibit 7, the Society again wrote to the Solicitor and requested a response to its earlier correspondence. No response was received from the Solicitor.

14. On February 21, 1996, the Solicitor telephoned the Society and indicated by telephone message that he was working on a response to the Society's letter. He also indicated he had a question and asked the Society to call him, leaving a number. That same day an employee of the Law Society called the telephone number and left a voice mail message indicating she was returning the Solicitor's telephone call and asking him to call her. A copy of the handwritten and transcribed telephone message is attached as Exhibit 8.

15. The Solicitor did not return the telephone call and, on March 18, 1996, the Society telephoned the Solicitor and left a message asking him to contact the Law Society. A copy of the handwritten and transcribed telephone message is attached as Exhibit 9. No response was received from the Solicitor.

16. By registered letter dated April 22, 1996, attached as Exhibit 10, the Society wrote to the Solicitor enclosing copies of its correspondence of January 12, 1996 and February 14, 1996 and requiring his written response by April 29, 1996. The acknowledgement of receipt of this letter was signed on April 24, 1996. A copy of the acknowledgement of receipt card is attached as Exhibit 11.

17. To date the Solicitor has not replied or communicated with the Law Society regarding inadequacies disclosed during the Law Society's review of his books and records.

Complaint D308/96

Particular 2(a) He failed to reply to the Law Society regarding a complaint by Terry Steyn despite letters dated June 5, 1996, June 28, 1996 and August 23, 1996 and telephone messages left on June 17, 1996, June 19, 1996, June 21, 1996, August 9, 1996 and August 21, 1996;

Particular 2(d) He failed to report to his client, Terry Steyn, regarding his real estate purchase despite numerous requests that he do so.

18. In the fall of 1995, the Solicitor was retained by Terry Steyn to act on his behalf in a real estate purchase. On October 28, 1995, Mr. Steyn and his wife signed the necessary documentation for the purchase and provided the Solicitor with a certified cheque in the amount of \$14,285.00 as the Solicitor had requested. On October 30, 1995, the real estate transaction closed. The Solicitor assured Mr. Steyn on that date that his statement of account and documents would be forthcoming. No statement or documents were received by Mr. Steyn.

19. On November 28, 1995, Mr. Steyn telephoned the Solicitor and left a message for him to call. No response was received by Mr. Steyn.

20. On January 15, 1996, Mr. Steyn sent a facsimile transmission to the Solicitor requesting his documents. A copy of this facsimile transmission is attached as Exhibit 12. No response was received. On January 31, 1996, March 4, 1996, and March 13, 1996, Mr. Steyn telephoned the Solicitor's office and left messages for the Solicitor to call him. The Solicitor did not return any of these telephone calls.

21. On March 15, 1996, Mr. Steyn telephoned the Solicitor who promised to send out the account and documents in the near future and apologized for the delay. No account or documents were received by Mr. Steyn.

28th October, 1997

22. On April 3, 1996, Mr. Steyn sent the Solicitor a facsimile transmission again requesting the documents and final statement of account by April 12, 1996. A copy of this facsimile transmission is attached as Exhibit 13. No documents or statement of account were received by Mr. Steyn.

23. By letter dated April 16, 1996, attached at Exhibit 14, Mr. Steyn complained to the Law Society regarding the Solicitor's conduct.

24. On April 25, 1996, an employee of the Law Society contacted the Solicitor by telephone. The Solicitor indicated that he thought the reporting letter had gone out but was not certain and promised to look into the matter and get back to the Society. No further communication was received from the Solicitor. A copy of the handwritten and transcribed telephone transaction is attached as Exhibit 15.

25. On May 9, 1996, an employee of the Law Society telephoned the Solicitor and received a message that no one was at his office that day. On May 10, 1996, the employee again called the solicitor's office and left a message for him to return the call. A copy of the handwritten and transcribed telephone message is attached as Exhibit 16. The Solicitor did not respond.

26. On May 15, 1996, an employee of the Society telephoned the Solicitor's office and left a message asking him to return her call. A copy of the handwritten and transcribed telephone message is attached as Exhibit 17.

27. On May 17, 1996, the Solicitor returned the Society's telephone call and indicated he had been ill all week. He further informed the Society that he believed that all the documents had been sent and that he would pull the file and call on Tuesday. On May 23, 1996, an employee of the Society called the Solicitor and left a message asking him to return her phone call. On May 27, 1996, the employee again telephoned the Solicitor and asked him to return her telephone call. On May 29, 1996, the Solicitor returned the Society's calls and indicated that he had the file at home and would call her the next day. He apologized for not getting back to her earlier. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 18. The Solicitor did not respond further to the Society.

28. By letter dated June 5, 1996, attached as Exhibit 19, the Society wrote to the Solicitor noting his lack of response and asking him to respond. No response was received from the Solicitor.

29. On June 17, 1996, an employee of the Society telephoned the Solicitor and left a message asking him to return her call. On June 19, 1996, the employee again telephoned the Solicitor and asked him to return her call. On June 21, 1996, the employee again telephoned the solicitor and asked him to return her call. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 20. The Solicitor did not respond to any of these telephone calls.

30. By letter dated June 28, 1996, attached as Exhibit 21, the Society wrote to the Solicitor requiring his response within days. No response was received.

31. On August 9, 1996, an employee of the Law Society telephoned the Solicitor and left a message asking him to return her call. On August 21, 1996, the employee again called the Solicitor and again left a message asking him to return her call. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 22. The Solicitor did not respond.

32. By registered letter dated August 23, 1996, the Law Society wrote to the Solicitor requiring his response within 7 days. No response was received. The acknowledgement of receipt card for this letter was signed on August 26, 1996. A copy of the letter and acknowledgement of receipt card is attached as Exhibit 23.

33. To date, the Solicitor has not provided the requested documents and statement of account to his client, Mr. Terry Steyn, nor has he responded to Law Society regarding Mr. Steyn's complaint.

Particular 2(b) He failed to reply to the Law Society regarding a complaint by J.C. Lee of Scotiabank despite letters dated June 28, 1996 and August 2, 1996 and telephone messages left on June 11, 1996, June 13, 1996, June 17, 1996, June 19, 1996, June 21, 1996, July 22, 1996.

Particular 2(e) He failed to report to his client, Scotiabank, regarding a mortgage transaction wherein they advanced monies on January 23, 1996, despite numerous requests that he do so.

34. In January, 1996, the Solicitor acted for Scotiabank in the placement of a mortgage on a property in Don Mills. The mortgage was advanced on January 23, 1996. The Solicitor failed to forward to Scotiabank his final report, estoppel, and charge of mortgage terms.

35. By letter dated March 18, 1996, attached as Exhibit 24, J.C. Lee, Manager of Scotiabank, wrote to the Solicitor requiring the forwarding of the documents. The Solicitor did not respond to this correspondence.

36. By letter dated April 10, 1996, attached as Exhibit 25, J.C. Lee of Scotiabank again wrote to the Solicitor requiring he forward the documents. No response was received to this correspondence.

37. By letter dated May 14, 1996, copy of which is attached as Exhibit 26, J.C. Lee of Scotiabank wrote to the Law Society complaining about the conduct of the Solicitor.

38. On June 11, 1996, an employee of the Law Society telephoned the Solicitor and left a message for him to return her call. On June 13, 1996, the employee again telephoned the Solicitor and left a message for him to return her call. A copy of the handwritten and transcribed telephone messages are attached as Exhibit 27. The Solicitor did not respond.

39. On June 17, 1996, an employee of the Law Society telephoned the Solicitor and left a message asking him to return her call. On June 19, 1996 the employee again telephoned the Solicitor and left a message asking him to return her call. On June 21, 1996, the employee again telephoned the Solicitor and left a message asking him to return her call. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 28. The Solicitor did not respond to any of these telephone calls.

40. By letter dated June 28, 1996, attached as Exhibit 29, the Law Society wrote to the Solicitor requiring his response within seven days. The Solicitor did not respond.

41. On July 22, 1996, an employee of the Law Society telephoned the Solicitor and left a message for him to return her call. On August 1, 1996, the employee again telephoned the Solicitor and left a message asking that he return her call. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 30. The Solicitor did not respond.

28th October, 1997

42. By registered letter dated August 7, 1996, the Law Society wrote to the Solicitor, requiring his response within 7 days. This letter was signed for and delivered on August 8, 1996. A copy of the letter is attached as Exhibit 31. No response was received from the Solicitor.

43. To date, the Solicitor has not provided the required documentation to Scotiabank and has failed to respond to the Law Society regarding Scotiabank's complaint.

Particular 2(c) He failed to reply to the Law Society regarding a complaint by Marvin Geist despite letters dated July 4, 1996 and August 23, 1996 and telephone messages left on August 9, 1996 and August 21, 1996.

Particular 2(f) He failed to fulfill his Undertaking given on August 1, 1996 to provide a discharge of a mortgage registered on a property municipally known as 18 Gooch Park Drive, Innisfil.

44. During the summer of 1995, the Solicitor was acting for the vendor in a real estate transaction. Marvin Geist was acting for the purchaser. The transaction closed on August 1, 1995, and on that date the Solicitor provided to the purchaser and to Marvin Geist his personal Undertaking to obtain and register a proper form of discharge of the existing charge/mortgage. A copy of this Undertaking is attached as Exhibit 32.

45. Despite numerous telephone calls and a facsimile transmission on November 27, 1995 from Mr. Geist to the Solicitor, the Solicitor did not fulfill the Undertaking. By letter dated January 4, 1996, attached as Exhibit 33, Mr. Geist wrote to the Solicitor requiring that he respond within 30 days. The Solicitor did not respond.

46. By letter dated June 25, 1996, attached as Exhibit 34, Mr. Geist again wrote to the Solicitor, informing him that the Undertaking remained unfulfilled and that the matter would be reported to the Law Society. The Solicitor did not respond.

47. By letter dated July 4, 1996, attached as Exhibit 35, the Law Society wrote to the Solicitor concerning the complaint of Mr. Geist and requiring his response within two weeks. The Solicitor did not respond.

48. On August 9, 1996, an employee of the Law Society telephoned the Solicitor and left a message asking that he return her call. On August 21, 1996, the employee again telephoned the Solicitor and left a message asking that he return her call. A copy of the handwritten and transcribed telephone messages is attached as Exhibit 36. The Solicitor did not return the telephone calls.

49. By registered letter dated August 23, 1996, the Law Society wrote to the Solicitor requiring him to respond within 7 days. This letter was signed for and delivered on August 26, 1996. A copy of the letter and the acknowledgement of receipt card is attached as Exhibit 37. The Solicitor did not respond.

50. To date, the Solicitor has not fulfilled his Undertaking and failed to respond to the Law Society regarding Marvin Geist's complaint.

28th October, 1997

Complaint D342/96

Particular 2 (a) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 (2) of Regulation 708 made pursuant to the Law Society Act;

51. The Solicitor's year end is December 31. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending December 31, 1995, as required by S.16(2) of Regulation 708 under the Law Society Act.

52. By letter dated July 9, 1996 the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended December 31, 1994. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's letter of July 9, 1996 is attached as Exhibit 38 to this Agreed Statement of Facts.

53. By registered mail, dated August 9, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken August 9, 1996 letter was signed for and delivered on August 12, 1996. A copy of the Law Society's August 9, 1996 letter and acknowledgement of receipt of a registered item card is attached as Exhibit 39 to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

54. A Law Society staff employee telephoned the Solicitor and left a message on his voice mail to return the telephone call on November 11, 1996.

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

Complaint D143/97

Particular 2(a) He failed to reply to the Law Society despite letters dated November 6, 1996 and December 5, 1996, and telephone messages left on November 27, 1996 and November 29, 1996.

56. In or about 1993, the Solicitor was retained by Ivanka Vukovic to pursue a wrongful dismissal claim on her behalf.

57. By letter dated October 17, 1996, attached as Exhibit 40 to this Agreed Statement of Facts, Ms. Vukovic wrote to the Society complaining that Solicitor had taken no action on her case, had not returned her telephone calls, and was refusing to transfer her file to her new lawyer.

58. By letter dated November 6, 1996, attached as Exhibit 41, the Society wrote to the Solicitor enclosing a copy of Ms. Vukovic's complaint and requesting his comments within fourteen days.

59. The Solicitor did not reply to the Law Society's letter.

28th October, 1997

60. On November 27, 1996 a staff member of the Society telephoned the Solicitor and left a detailed message on his voice mail asking him to call her back with a specific date when the Society could expect his response. On November 29, 1996, a staff member of the Society telephoned the Solicitor and left a message on his voice mail asking him to return her telephone call. A copy of the telephone transaction record of both telephone calls and typed transcription thereof is attached as Exhibit 42.

61. The Solicitor did not return the telephone calls from the Law Society.

62. By letter dated December 5, 1996, the Society wrote to the Solicitor by registered mail, requiring him to respond within seven days. According to the acknowledgment of receipt of registered item card, the letter was received by the Solicitor's office on December 9, 1996. A copy of the letter and the acknowledgment of receipt of registered item card is attached as Exhibit 43.

63. The Solicitor did not reply to the Law Society's letter of December 5, 1996.

64. To date, the Solicitor has not responded to the Law Society regarding the complaint of Ivanka Vukovic.

V. DISCIPLINE HISTORY

65. On March 14, 1995, the Solicitor was reprimanded in Committee and ordered to pay \$200.00 in costs for failing to file with respect to his fiscal year ending November 1993.

66. On February 22, 1996, the Solicitor was reprimand in Convocation and ordered to pay costs of \$750.00 with respect to offences of fail to reply, fail to serve clients and fail to report to clients.

DATED at Toronto this 27th day of May, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Clifford Paul Moss be suspended for a period of three months definite and indefinitely thereafter until he has made the requisite filings and produced his books and records to the Society.

REASONS FOR RECOMMENDATION

The Solicitor has practised as a sole practitioner since his call to the bar in 1989.

In 1995, the Solicitor was reprimanded in Committee and ordered to pay costs with respect to failing to file in the fiscal year ending November of 1993.

In February 1996, the Solicitor was reprimanded in Convocation and ordered to pay costs of \$750 with respect to the offences of failing to reply and failing to serve clients, and failing to report to clients.

The Solicitor now stands charged and has been convicted of professional misconduct arising out of several counts, including the type of offences for which he has already been disciplined; such as failure to file, failure to respond and failure to serve clients.

28th October, 1997

We have been advised that the Solicitor has now replied or responded to all matters subject to complaint leaving the failure to file set out in paragraphs 51 to 55 of the Agreed Statement of Facts, being D342/96, and failure to respond in paragraphs 11 to 17 of the Agreed Statement of Facts, being D279/96 regarding inadequacies in his books and records, as being all that is presently outstanding against the Solicitor.

Mr. White has explained to us on behalf of his client mitigating circumstances regarding a confluence of events in the Solicitor's personal and professional life that he advocates should provide some mitigation. It is obvious to us that Mr. White had some influence on the Solicitor, given the compliance ultimately with the Society's several requests which became the subject matter of complaint, notwithstanding that that compliance was only obtained at the eleventh hour.

The Solicitor stands at the brink of a finding of ungovernability, and we have no doubt that had it not been for counsel's intervention - that is, both the defence counsel and Law Society's counsel - the penalty might well have been more severe than that which we are going to recommend to Convocation.

Whether such conduct is as a result of procrastination, as Mr. White advocates, or whether it is by attitude or inclination as the Law Society advocates, the effect on the public is precisely the same.

We are deeply concerned by the conduct, not only because of the Solicitor's discipline record for like conduct and what that portends in terms of the Solicitor's future; but we are also concerned about the lack of respect for the processes of the Law Society and the determinations of Convocation.

In the former regard, the Solicitor has continued to fail to reply to the Law Society on innumerable occasions set out in the Complaints, notwithstanding the fact that that is precisely the kind of conduct for which he has been disciplined.

The Solicitor has failed or refused to participate in the Practice Review Program, notwithstanding that that was recommended by a previous Committee. Although Mr. White has suggested that we make Practice Review mandatory in the Solicitor's case, we are not inclined to do so. That review can only be effective if the solicitor volunteers for it and such does not appear to be the case here, nor is it the function of a Discipline Committee to impose Practice Review which is supposed to be a rehabilitative process, not a punitive one.

In the latter regard with respect to orders of Convocation, the Solicitor was ordered to pay \$750 in costs at Convocation, yet the Solicitor neglected or refused to do so until approximately a year and a half after it was so imposed, at which time the payment was finally made (April, 1997). We can well understand if the Solicitor cannot afford to make the payment of a fine, but a responsible solicitor in those circumstances, one who is compliant with his or her Law Society would make arrangements to pay that fine such that it could be paid over time. In our experience, the Law Society is most sensitive to those requests. No such request was made here.

This Solicitor is a sole practitioner, and we are sensitive to the fact that sole practitioners, in some respects, can suffer greatly under the crush of their administrative - let alone professional responsibilities.

28th October, 1997

Mr. White advocates a one month suspension on the Solicitor and, amongst his other submissions, suggested that the Solicitor finds himself in a Catch 22 situation, should the suspension exceed one month. We appreciate that Catch 22 situation in the sense that a suspension of a solicitor, in this Solicitor's circumstances, may have an added deleterious effect on his or her practice. However, it must be recognized that there are sole practitioners throughout this province who may well share the Solicitor's personal or professional challenges; sole practitioners who respond to their Law Society, sole practitioners who file with their Law Society and sole practitioners who are sensitive to the processes of the Law Society and Convocation to the point that they respect and obey those processes, which is their professional responsibility to do.

In this case, as a result we must have regard not only to the effect of the suspension on the Solicitor, but the message that we must send to similarly situated solicitors and that is that the Law Society cannot tolerate such conduct.

Accordingly, we are going to recommend a three month suspension and thereafter indefinitely until the Solicitor addresses the inadequacies and makes the filings that are the subject matter of Complaints D279/96 and D342/96 respectively. It remains to be seen whether the Solicitor's compliance, albeit late compliance, trends away from ungovernability.

Clifford Paul Moss was called to the Bar on March 31, 1989.

ALL OF WHICH is respectfully submitted

DATED this 24th day of June, 1997

Ronald D. Manes, for the Committee

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 months definite and indefinitely thereafter until he made the requisite filings and produced his books and records.

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

Carried

Re: Frank Andrew THERIAULT - Kitchener

The Secretary placed the matter before Convocation.

Messrs. Millar and Wilson, Ms. Sealy, Ms. Stomp, Ms. Angeles and Ms. Carpenter-Gunn withdrew for this matter.

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

28th October, 1997

Convocation had before it the Report of the Discipline Committee dated 17th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1) together with the Report of the Discipline Committee dated 15th August, 1997, together with an Affidavit of Service sworn 21st August, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th August, 1997 (marked Exhibit 2). Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Tamara K. Stomp, Chair
Nora Angeles
Kim A. Carpenter-Gunn

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

Elizabeth Cowie
for the Society

FRANK ANDREW THERIAULT
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: September 17, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 24, 1996 Complaint D149/96 was issued against Frank Andrew Theriault alleging that he was guilty of professional misconduct.

The matter was heard in public on September 17, 1996 before this Committee composed of Tamara K. Stomp, Chair, Nora Angeles and Kim A. Carpenter-Gunn. The Solicitor did not attend the hearing, nor was he represented. Elizabeth Cowie appeared on behalf of the Law Society.

DECISION

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

Complaint D149/96

2. a) he failed to serve his client, Donna Langer, in a conscientious, diligent and efficient manner in that he:
 - i) failed to file a Statement of Claim in his client's matrimonial matter as ordered by the court;
 - ii) failed to keep his client reasonably informed of the status of her action;

28th October, 1997

- b) he misled his client, Donna Langer, with respect to the status of her matrimonial matter in that he advised that her action had been placed on the trial list when, in fact, he had not filed the Statement of Claim or placed the matter on the trial list;
- c) he failed to serve his client, Wayne Schlievert, in a conscientious, diligent and efficient manner in that he:
 - i) failed to return his client's telephone calls;
 - ii) unreasonably delayed in advancing his client's matter as instructed; and
- d) he misled his client, Wayne Schlievert, in that he advised his client that he had advanced the matter and reached a settlement through a court proceeding when, in fact, such proceeding had not been instituted, advanced or settled.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D149/96 and is prepared to proceed with a hearing of this matter on September 17 and 18, 1996.

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 D149/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars, supported by the facts hereinafter set out, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 29, 1987. He practised as a sole practitioner in the Regional Municipality of Waterloo until he was administratively suspended on December 31, 1995 for non-payment of his annual fees. He remains administratively suspended at this time.

Particular 2(a)

The Solicitor failed to serve his client, Donna Langer, in a conscientious, diligent and efficient manner in that he:

- i) failed to file a Statement of Claim in his client's matrimonial matter as ordered by the court;
- ii) failed to keep his client reasonably informed of the status of her action;

Particular 2(b)

The Solicitor misled his client, Donna Langer, with respect to the status of her matrimonial matter in that he advised that her action had been placed on the trial list when, in fact, he had not filed the Statement of Claim or placed the matter on the trial list.

5. In or about March of 1991, the Solicitor was retained by Donna Langer to represent her with respect to a matrimonial matter. The Solicitor's retainer was by way of a Legal Aid Certificate.

6. The Solicitor did work on the file and, in January of 1993, the matter was ordered on for trial by the Judge.

7. Under the applicable Rules, the Solicitor had 20 days after the Judge's Order to file a Statement of Claim. He did not do so. He did communicate with the solicitor for Ms. Langer's husband, who assured him he would accept late service of the Statement of Claim. Despite this assurance, the Solicitor took no action to prepare, serve or file a Statement of Claim as required by the Judge's Order.

8. The Solicitor failed to inform his client, Donna Langer, of the status of her action.

9. In mid-1993, Ms. Langer contacted the Solicitor and enquired as to the state of her matter. The Solicitor informed Ms. Langer that the matter had been placed on a trial list. This was not true. The Solicitor had taken no steps to file a Statement of Claim or to place the matter on a trial list.

10. Thereafter, Ms. Langer called the Solicitor on a number of occasions to obtain updates on her matter, and on each occasion the Solicitor informed her that the matter was "moving up the list". As the matter was not even on a trial list, this statement was untrue. Eventually, the Solicitor informed Ms. Langer that the matter had been set for a court date of January 23, 1995. He asked her to come into his office that morning for a briefing before the court appearance in the afternoon.

11. On January 23, 1995, the Solicitor informed Ms. Langer that he had done no work on her file for the previous two years, that he had not served or filed a Statement of Claim, that the matter had never been placed on a trial list, and that he had lied to her when he had told her the matter had been listed for trial and was moving up the trial list.

12. On January 23, 1995, the Solicitor confirmed his conversation with Ms. Langer by letter to Ms. Langer, which reads in part as follows:

This correspondence will confirm my telephone conversation with you of the morning of January 23, 1995. At that time, I indicated to you that we were not on the trial list with regard to your matrimonial matter. I also admitted to you that I had lied to you approximately 18 months ago when I told you that we were on the trial list, and gradually moving up that list.

At that time, I felt that I had to lie to you, as I had not forwarded a Statement of Claim to Mr. Sherman. Once the Judge ordered the matter to go to trial back in January of 1993, the next step was for me to file a Statement of Claim. For some reason, I simply did not do it. Technically, I had 20 days after the Judge's Order to file a Statement of Claim, however Mr. Langer's lawyer, Mr. Sherman, continually assured me that he would accept late service of the Statement of Claim. Your file was on my desk, and I always intend to "get around" to doing the Statement of Claim, and something else would always see to come up.

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Finally, after about 6 months you contacted me, asking me when the matter would be heard. Knowing that I was at fault for considerably delaying your matter, and not wanting to admit that I had not given your file proper attention, I lied to you and told you that the matter was on the trial list.

As we discussed on the telephone, that lie "snowballed", as you would call from time to time asking for updates, and I continually told you that the matter was "moving up the list".

I do not know why I continued to lie to you; I suppose I just did not know what else to do. I should have admitted much earlier than this as to what I did, but I suppose that I simply did not have the courage to do so. I simply continued to lie, hoping that I could figure out some way to rectify the situation. I never could figure out how to do so, so the lie got bigger and bigger, and worse and worse.

[.....]

Before closing, I wish to apologize to you for what I have done to you over the past year and a half. If you choose not to accept the apology, I will certainly understand, as what I have done to you has been absolutely terrible. No apology on my behalf is going to undo what you have gone through since this deception was started.

[.....]

I look forward to speaking with you in the near future and although it may sound like a hollow offer at this point, I wish to do whatever possible to undo what I have done to this point.

A copy of this letter is attached hereto as Exhibit 1 to this Agreed Statement of Facts.

13. Ms. Langer retained new counsel, C. Richard Buck, who attempted to negotiate a settlement with the Solicitor. These negotiations were not successful due to the Solicitor's straitened financial circumstances.

14. By letter dated April 10, 1995, which was received by the Society on May 11, 1995, Ms. Langer complained to the Society about the Solicitor's conduct. A copy of this letter is attached hereto as Exhibit 2 to this Agreed Statement of Facts.

15. Consequently, Ms. Lisa Steinberg, Staff Lawyer in the Complaints Department of the Society, wrote to the Solicitor requesting his comments on the complaint lodged by Ms. Langer. A copy of this letter is attached hereto as Exhibit 3 to this Agreed Statement of Facts.

16. By letter dated July 27, 1995, and received by the Society that same date, the Solicitor responded to the correspondence from the Society. The Solicitor admitted that his correspondence to Ms. Langer of January 23, 1995 accurately set out the situation. A copy of this letter is attached hereto as Exhibit 4 to this Agreed Statement of Facts.

Particular 2(c)

The Solicitor failed to serve his client, Wayne Schlievert, in a conscientious, diligent and efficient manner in that he:

- (i) failed to return his client's telephone calls;

28th October, 1997

- (ii) unreasonably delayed in advancing his client's matter as instructed.

Particular 2(d)

The Solicitor misled his client, Wayne Schlievert, in that he advised his client that he had advanced the matter and reached a settlement through a court proceeding when, in fact, such proceeding had not been instituted, advanced or settled.

17. On April 12, 1994, Mr. Wayne Schlievert attended at the offices of the Solicitor and retained him with respect to ending child support payments for three children of his former marriage. Two of those children were married and had children of their own and the third had reached the age of eighteen.

18. On April 27, 1994, Mr. Schlievert met with the Solicitor and filled out financial statements. He also paid the Solicitor a retainer of \$400.00 by two post-dated cheques.

19. Thereafter, Mr. Schlievert did not hear from the Solicitor, and he and his common-law wife called the Solicitor's office on numerous occasions, leaving messages for the Solicitor to call. The Solicitor did not return the telephone calls. Mr. Schlievert noted in particular calls on June 30, 1994, July 14, 1994 and July 28, 1994.

20. As Mr. Schlievert and his common-law wife had made plans to marry in September, 1994, by August, 1994, when he had still not heard from the Solicitor, he became quite distressed. Consequently, he telephoned the Solicitor's office every day for a period of two weeks. He received no response from the Solicitor. As a result, he cancelled his wedding plans.

21. Thereafter, Mr. Schlievert and his common-law wife called and visited the Solicitor's office a number of times, but were unable to make contact with the Solicitor. They finally did contact the Solicitor at his home, at which time he promised to resolve the matter immediately but indicated he required Mr. Schlievert's ex-wife's address. That was provided to him. He then promised Mr. Schlievert he would serve the necessary papers and go to court.

22. In April, 1995, the Solicitor contacted Mr. Schlievert and informed him that he had been to Court and the matter was settled. In fact, the Solicitor had never instituted, advanced or settled any such proceeding.

23. The Solicitor also contacted Mr. Floyd Lytle of the Canadian Imperial Bank of Commerce and informed him that the matter had been settled in Court and that Mr. Schlievert would no longer be having child support payments garnished from his wages.

24. On June 14, 1995, Mr. Schlievert's common-law wife attended at the Court House in Kitchener and discovered, contrary to the Solicitor's statements, that there was no record of any Court action initiated by the Solicitor on behalf of Mr. Schlievert.

25. Mr. Schlievert then retained a new lawyer, James W. Wiegand, who was able to resolve the matter to Mr. Schlievert's satisfaction within 48 hours of his retainer. That resolution is detailed in a letter from James Wiegand to the Society, a copy of which is attached hereto as Exhibit 5 to this Agreed Statement of Facts.

26. By an undated letter received at the Society on July 4, 1995, Mr. Schlievert complained to the Society about the conduct of the Solicitor. A copy of this letter is attached hereto as Exhibit 6 to this Agreed Statement of Facts.

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27. By letter dated July 26, 1995, the Society requested the Solicitor respond to the complaint. A copy of this letter is attached hereto as Exhibit 7 to this Agreed Statement of Facts.

28. By letter dated October 18, 1995, the Solicitor responded to the Society's query. He indicated that the complaint set out in the correspondence from Mr. Schlievert was accurate. The Solicitor further stated:

All I can say, is that I had always intended on dealing with matter, however, for one reason or another, Mr. Schlievert's would always be "temporarily" put aside. When he or his common-law spouse would call, I would indicate that I would get to the matter as soon as possible. For various reasons, I was always "putting out other fires", and finally, when Mr. Schlievert became more persistent I told him that I had a Court date when in fact I didn't. I had intended on bringing the matter before the Court on that date, however, I simply never got around to preparing and filing the materials. Matters snowballed from there.

I know that the foregoing is not a proper explanation, and in no way excuses my behaviour, however, I know of no other way to explain myself. I am certain that the explanation will not be accepted by Mr. Schlievert, nor would I expect it to be. For what it is worth, I do apologize to him for my actions (or lack thereof).

A copy of this letter is attached hereto as Exhibit 8 to this Agreed Statement of Facts.

29. A copy of the Solicitor's response was forwarded to Mr. Schlievert who, by letter dated December 22, 1995, indicated he was not satisfied with the Solicitor's apology, and further that he had incurred an expense of \$3,000.00 in unnecessary child support payments due to the Solicitor's inaction. A copy of this letter is attached hereto as Exhibit 9 to this Agreed Statement of Facts.

V. DISCIPLINE HISTORY

30. Complaint D372/95 was sworn on November 27, 1995 against the Solicitor for failure to file Forms 2/3. The Discipline Committee recommended the penalty of a reprimand in Convocation if his filings are made, and if his filings are not made, a one month definite suspension and month to month indefinite thereafter until his filings are made. The matter is currently pending Convocation.

DATED at Toronto this 9th day of September, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Frank Andrew Theriault be suspended for a period of six months and pay Law Society costs in the amount of \$400.

REASONS FOR RECOMMENDATION

Mr. Theriault was not present at the hearing nor represented by counsel. He supplied a letter dated September 16, 1996, and received by the Law Society on September 17, 1996, in his own handwriting in which he indicated that he was not going to be in attendance. He did not request an adjournment and in fact, Ms. Cowie for the Society advised us that his response to her information as to the penalty she would be requesting was as follows: "I have no difficulty with either aspect of penalty".

It is an aggravating factor that two clients suffered losses which can be expressed, not only in monetary terms, but obviously in other ways, i.e. the frustration and concern for the fact that their matters were not dealt with appropriately. Both cases not only resulted in failing to report to the client, but also in failing to file or to issue the appropriate process to further the client's particular interest.

In the first cases, there is a quantifiable suffering of loss of support payments to the client. In the second case, there is also a quantifiable loss in the amount of \$3,000 in child support that was paid when it was clearly not due and there was a delay in the ability of the client to get married again.

The aggravating factors are that the Member not only failed to act on behalf of his clients to issue process and to report appropriately, but he also lied to his clients about the work that he had done. To his credit, he did confess that he had lied and that he had failed to do the work and this is evidenced by letters to the clients that are written in what I would describe as a remorseful tone. The letters both set out that the Member was fully disclosing what had happened and he also advised in the letters how to remedy the situation, including making a complaint to the Law Society.

Although the Member was co-operative with the Law Society once the investigation commenced, there has been no restitution to the clients.

The Member was called to the Bar in 1987 and ceased practising in 1995. By his own letter, he informs us that as a result of closing his practice, he is \$40,000 in debt and he advises that he is now working in a commissioned position obviously for the purpose of supporting himself and paying off his debts.

We therefore do not think that the penalty of a six month suspension is outside the range for this type of behaviour, especially considering it deals with two separate incidents and a lengthy period during which the Member carried on the charade with respect to both clients, and in all the circumstances, \$400 in costs is reasonable.

Frank Andrew Theriault was called to the Bar on May 29, 1987.

ALL OF WHICH is respectfully submitted

DATED this 15th day of August, 1997

Tamara K. Stomp, Chair

28th October, 1997

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Helene Puccini, Chair

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

Georgette Gagnon
for the Society

FRANK ANDREW THERIAULT
of the City
of Kitchener
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 13, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 27, 1995, Complaint D372/95 was issued against Frank Andrew Theriault alleging that he was guilty of professional misconduct.

The matter was heard in public on March 13, 1996 before a single Benchers panel composed of Helene Puccini, Chair. The Solicitor was not present and was not represented by counsel. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D372/95

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending December 31, 1994, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

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 D372/95 and is prepared to proceed with a hearing of this matter on March 13, 1996.

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 D372/95 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 29, 1987. He practised as a sole practitioner until his suspension on December 31, 1995 as a result of his failure to pay his annual fee.

5. The Solicitor's fiscal year end is December 31st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending December 31, 1994, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. A Notice of Default in Annual Filing, dated July 7, 1995 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated August 16, 1995. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings to a maximum of \$1,500.00. The Solicitor was advised that once the fee remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on August 23, 1995. A copy of the Society's Second Notice and Acknowledgement of receipt of a registered item is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

8. The late filing fee began to accrue on September 1, 1995.

9. By letter dated September 13, 1995 the Solicitor undertook to file his Forms by October 15, 1995. The Solicitor advised that the reason for his delay in filing was due to his outstanding account with his accountant of approximately \$250.00. The Solicitor indicated that his accountant also required a retainer of \$1,000.00 in order to begin preparation of his 1994 filing. The Solicitor stated that he was hopeful that he would be able to retain his current accountant or another accountant in order that his filing may be prepared by October 15, 1995. A copy of the Solicitor's September 13, 1995 letter is attached as Exhibit "C" to this Agreed Statement of Facts.

10. A Law Society staff employee left a telephone message for the Solicitor at his office on November 2, 1995 requesting he return the call. A copy of the Law Society's handwritten telephone transaction form, dated November 2, 1995 is attached as Exhibit "D" to this Agreed Statement of Facts. The call was not returned.

28th October, 1997

11. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated December 27, 1995. The Solicitor was advised that his name would go before Convocation on January 26, 1996 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on January 25, 1996. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. The Society's Third Notice was signed for and delivered on January 5, 1996. A copy of the Society's Third Notice and Acknowledgement of receipt of a registered item card is attached as Exhibit "E" to this Agreed Statement of Facts.

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

V. DISCIPLINE HISTORY

13. The Solicitor does not have a discipline history.

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

RECOMMENDATION AS TO PENALTY

It is recommended that Frank Andrew Theriault be reprimanded in Convocation if his filings are completed by the date of Convocation, failing which he be suspended for a period of one month at the conclusion of his administrative suspension, and indefinitely thereafter until the filings are completed.

REASONS FOR RECOMMENDATION

A reprimand in Convocation seems an appropriate deterrent in the circumstances, if filings are completed by the date of Convocation. Should this not occur, then a suspension is deemed necessary in order to protect the public pending the Solicitor fulfilling the Society's filing requirements.

Frank Andrew Theriault was called to the Bar on May 29, 1987.

ALL OF WHICH is respectfully submitted

DATED this 17th day of April, 1997

Helene Puccini, Chair

Ms. Cowie advised that the solicitor would not be participating in the process.

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

Carried

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

Carried

28th October, 1997

The recommended penalty of the Discipline Committee in the April Report was that the solicitor be reprimanded in Convocation if his filings are completed failing which he be suspended for a period of 1 month at the conclusion of his administrative suspension and indefinitely thereafter until the filings are completed.

The recommended penalty of the Discipline Committee in the August Report was that the solicitor be suspended for a period of 6 months and pay costs in the amount of \$400.

Ms. Cowie advised the filings had not been completed and made submissions in support of a suspension period of 6 months.

It was moved by Mr. MacKenzie, seconded by Ms. Ross that the solicitor be suspended for a period of 6 months at the conclusion of his administrative suspension and indefinitely thereafter until the filings were completed and further to pay costs in the amount of \$400.

Carried

Re: William Sutherland MATHERS - Kincardine

The Secretary placed the matter before Convocation.

Messrs. Millar and Wilson withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 17th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hopple that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Robert C. Topp

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

Rhonda Cohen
for the Society

WILLIAM SUTHERLAND MATHERS
of the Town
of Kincardine
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 13, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 4, 1997 Complaint D204/97 was issued against William Sutherland Mathers alleging that he was guilty of professional misconduct.

The matter was heard in public on August 13, 1997 before Robert C. Topp sitting as a single Benchers. The Solicitor attended the hearing and represented himself. Rhonda Cohen appeared for the Law Society.

DECISION

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

Complaint D204/97

2. a) He failed to produce to the Law Society the books and records of his practice despite requests that he do so; and
- b) During the period December 31, 1995 to April 18, 1996, he engaged in the practice of law while suspended for non-payment of his Errors and Omissions Levy.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D204/97 and is prepared to proceed with a hearing of this matter on August 13, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D204/97 and this agreed statement of facts and admits the particulars contained in Complaint D204/97. The Solicitor also admits that the facts alleged in the Complaint supported by the facts set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1986. He is a sole practitioner.

Particular 2(a) He failed to produce to the Law Society, the books and records of his practice despite requests that he do so.

28th October, 1997

5. An audit of the Solicitor's books and records was authorized under Regulation 708 under the *Law Society Act*. The Law Society examiner attended at the Solicitor's office on March 27, April 19 and June 20, 1996. The Solicitor's books and records were incomplete. The examiner requested that the Solicitor produce his trust bank statement as of March 31, 1996, and fee billings to support the following amounts transferred from various client trust ledger cards to a miscellaneous trust ledger card:

Date of Transfer	Amount
September 15, 1995	\$4,242.95
October 5, 1995	2,825.60
November 2, 1995	5,363.34
February 19, 1996	6,126.97
TOTAL	\$18,556.86

(Document Book, Tab 3)

The Solicitor did not provide the documentation requested.

6. Throughout the period March to November 1996, the Law Society examiner made several attempts to obtain from the Solicitor the required documentation. The Solicitor did not respond:

DATE	EVENT	RESULT
March 27, 1996	Conversation with Solicitor and bookkeeper as to producing fee billings. (Document Book, Tab 1)	Solicitor and bookkeeper said they would provide the requested material.
April 19, 1996	Conversation with Solicitor and bookkeeper reminding them of the previous request. (Document Book, Tab 2)	Solicitor and bookkeeper said they would provide the requested material.
June 20, 1996	Telephone conversation with Solicitor and his bookkeeper, requesting the above mentioned documentation. (Document Book, Tab 3)	Solicitor and bookkeeper said they would provide the requested material.
June 22, 1996	Fax received from Solicitor attaching May 1996 trust comparison. Comment by bookkeeper on fax cover sheet "I haven't had time to photocopy all the info you require - I'll start back into it when I work again - July 2, 1996". (Document Book, Tab 4)	Received nothing further from the Solicitor.
September 3, 1996	Telephone call to Solicitor's office. Number is out of service. (Document Book, Tab 5)	
September 4, 1996	Telephone call to Solicitor's home. Left message on his answering machine. (Document Book, Tab 6)	No response.
October 1, 1996	Telephone call to Solicitor's home. Left a message on his answering machine. (Document Book, Tab 7)	No response.
October 2, 1996	Attempted to fax a letter of request to Solicitor. His fax machine was not turned on. (Document Book, Tab 8)	
October 24, 1996	Sent a letter of request to the Solicitor by Registered Mail. (Document Book, Tab 9)	
November 14, 1996	Registered letter dated October 24, 1996 to the Solicitor was returned marked "Unclaimed". (Document Book, Tab 10)	

7. As at today's date, the Solicitor has neither responded to the efforts of the Law Society examiner nor has he produced the required documentation for audit.

28th October, 1997

Particular 2(b) During the period December 31, 1995 to April 18, 1996, he engaged in the practise of law while suspended for non-payment of his Errors and Omissions Levy.

8. By First Notice dated July 1, 1995, the Solicitor was notified by the Law Society that his Errors and Omissions Insurance levy for the six-month period July 1, 1995 to December 31, 1995 was due and payable on or before January 1, 1996. The accompanying Explanatory Note advised the Solicitor that, pursuant to section 36 *Law Society Act*, if the Solicitor failed to pay the levy on or before four months after January 1, 1996, Convocation may order the Solicitor suspended for such period of time and on such terms as it considers proper in the circumstances (Document Book, Tab 11). The Solicitor did not respond or remit payment.

9. By Second and Final Notice dated October 26, 1995, the Solicitor was reminded that his Errors and Omissions Insurance levy was due. The Solicitor was asked to satisfy the levy on or before November 15, 1995 to avoid suspension (Document Book, Tab 12). The Solicitor did not respond or remit payment.

10. By registered letter dated January 5, 1996, the Solicitor was notified by the Law Society that, by order of Convocation, the Solicitor's rights and privileges as a member of the Law Society had been suspended effective December 31, 1995, for failure to satisfy his Errors and Omissions Insurance levy (Document Book, Tab 13). The Law Society's registered letter was signed for on January 15, 1996 (Document Book, Tab 14). The Solicitor did not respond in a timely manner.

11. The Solicitor satisfied his outstanding Errors and Omissions Insurance levy and his membership was reinstated effective April 18, 1996.

12. Throughout the period December 31, 1995 to April 18, 1996, however, the Solicitor practised law while under suspension. The following chart describes the Solicitor's practice during the period of suspension:

Client	Date	Activity
Hodgson - Mortgage (Document Book, Tabs 15-20)	January 3, 1996	Letter from Solicitor to Miller Insurance
	January 3, 1996	Letter from Solicitor to Hepcoe Credit Union
	January 3, 1996	Letter from Solicitor to Township of Huron enclosing cheque for \$32.10
	January 3, 1996	Letter from Solicitor to Ontario Hydro enclosing cheque for \$26.75
	January 12, 1996	Reporting letter to Hepcoe Credit Union
	January 12, 1996	Registered Mortgage for \$97,000.00
McClory - Sale (Document Book, Tabs 21-29)	January 2, 1996	Undertaking given by Solicitor to Crawford Mill & Davies
	January 4, 1996	Letter from Solicitor to solicitor for mortgagee
	January 4, 1996	Letter from Solicitor to solicitor for purchaser
	January 4, 1996	Letter from Solicitor to Ontario Legal Aid
	January 4, 1996	Letter from Solicitor to Ontario Legal Aid
	January 5, 1996	Letter from Ontario Legal Aid to Solicitor
	January 8, 1996	Letter from Solicitor to Realty World enclosing cheque for \$2,998.90
	January 8, 1996	Letter from Solicitor to Investors Group enclosing cheque for \$42,005.69
	January 8, 1996	Reporting letter from Solicitor to client on sale of 78 Queen St., Ripley, enclosing cheque for \$600.00, trust statement and fee billing
McKay - Transfer (Document Book, Tabs 30-32)	January 24, 1996	Letter from Solicitor to McKay
	January 26, 1996	Letter from Solicitor to Revenue Canada

Client	Date	Activity
	February 15, 1996	Reporting letter to Client on the transfer of 10 Lake St., Tiverton
Leslie - Family Law (Document Book, Tabs 33-35)	January 19, 1996	Letter from Solicitor to Ontario Legal Aid
	January 25, 1996	Letter from Ontario Legal Aid to Solicitor
	February 23, 1996	Letter from Ontario Legal Aid to Solicitor and copy of Solicitor's account
Anson - Sale (Document Book, Tabs 36-39)	January 5, 1996	Requisition letter from Wilson to Solicitor
	January 10, 1996	Letter from Solicitor to Wilson
	January 16, 1996	Undertaking from Solicitor to Wilson
	February 8, 1996	Reporting letter to Anson on the sale of RR#1, Tiverton, enclosing trust statement and fee billing
Gervais - Mortgage (Document Book, Tabs 40-44)	February 14, 1996	Letter from Solicitor to Ontario Hydro enclosing cheque for \$26.75
	February 14, 1996	Letter from Solicitor to Hepcoe Credit Union
	February 16, 1996	Reporting letter to client enclosing trust statement, fee billing and cheque for \$34,582.19
	February 16, 1996	Reporting letter to Hepcoe Credit Union
	February 16, 1996	Mortgage for \$125,000.00 with Hepcoe Credit Union
Madwid - Sale (Document Book, Tab 45-48)	January 19, 1996	Letter of requisitions to Solicitor from Mahood
	February 20, 1996	Letter from Solicitor to Mahood replying to requisitions
	February 20, 1996	Letter from Solicitor to Madwid
	March 1, 1996	Reporting letter to Madwid enclosing trust statement and fee billing

Client	Date	Activity
McCall - Ball Family Law Matter (Document Book, Tab 49)	January 15, 1996	Telephone call to Dr. Seim
	January 16, 1996	Reviewed medical report of Dr. Seim
	February 6, 1996	Telephone calls to and from client
	February 19, 1996	Received motion and affidavit
	February 20, 1996	Received phone message
	February 22, 1996	Attended motion which was adjourned
	March 19, 1996	Call received from court office
	March 20, 1996	Reviewed tax consequences of support
	March 21, 1996	Prepared for and attended motion in regard to support
	March 22, 1996	Called court office
	March 25, 1996	Attended court for adjourned and to issue order
	April 4, 1996	Attended court for another adjournment
	April 17, 1996	Attended Legal Aid settlement conference
Goodfellow - Family Law (Document Book, Tab 50)	January 6, 1996	Dictated letter to clients
	January 31, 1996	Discussed case with Children's Lawyer
	February 1, 1996	Attended pre-trial. Met with clients
	February 5, 1996	Letter to Children's Aid Society and to clients
	February 20, 1996	Called Children's Lawyer
	February 22, 1996	Meeting with clients
	February 28, 1996	Telephoned Children's Aid Society
	March 3, 1996	Telephoned Children's Aid Society Telephoned Children's Lawyer
	March 7, 1996	Met with Children's Lawyer Attended adjournment
	March 11, 1996	Met with clients

Client	Date	Activity
	April 4, 1996	Attended court to review issue of access
	April 16, 1996	Letter to clients and Children's Aid Society
Peat - Family Law Matter (Document Book, Tab 51)	January 16, 1996	Telephone call from client
	January 18, 1996	Met with client
	January 22, 1996	Attended pre-trial. Met with client
	January 29, 1996	Letter to client. Met with client
	February 12, 1996	Call to client. Call from client. Call from Children's Aid Society
	February 14, 1996	Report to client. Report to Legal Aid. Call to client
	February 19, 1996	Call from client. Call to client
	February 20, 1996	Call from Children's Aid Society
	February 21, 1996	Call to client. Call from client
	February 23, 1996	Call to Children's Aid Society
	March 7, 1996	Attended motion which was adjourned
	March 8, 1996	Attended motion by Children's Aid Society
	March 15, 1996	Call from client
	March 20, 1996	Attended motion
	March 22, 1996	Call from Children's Aid Society
	April 10, 1996	Call client. Attended court
	April 15, 1996	Receive and review motion materials and affidavit
	April 18, 1996	Attended motion, etc.

V. DISCIPLINE HISTORY

13. None

DATED at Toronto this 12th day of August, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends the following penalty:

1. With respect to particular 2(b) that the Solicitor be suspended for a period of two months;
2. With respect to particular 2(a) that the Solicitor be reprimanded in Convocation if he has provided the books and records required, to the satisfaction of the Society, by the time this matter reaches Convocation, failing which, that he be suspended for a period of thirty days concurrent with the two months suspension and continuing indefinitely until the books and records have been produced.

REASONS FOR RECOMMENDATION

In regard to penalty I have considered the submissions of the Society which in my view were both fair and compassionate. I have also heard the submissions of the Solicitor who, it is to be noted, had met with the Law Society, had executed an Agreed Statement of Facts and thereby saved us from what could have been a lengthy hearing.

I have also heard from the Solicitor about his personal circumstances, the fact of his separation, the fact that he has sole financial responsibility for three teenagers and the fact that he has recently been involved in a bankruptcy.

As set out in the cases, the principle of generally a one for one period of suspension is, in the normal course, an appropriate disposition. However, on these facts, I find that the Solicitor has mitigated his misconduct through his co-operation and his personal circumstances, and therefore it is appropriate to depart from the normal disposition of such cases.

Post March 18th, he continued to practise wherein he did Legal Aid work for clients who were not able to (in a short period of time) retain other counsel. I note that the Solicitor has informed me that the Legal Aid Plan has taken the position that because he acted at a time when he was 'under suspension', that they are not required to pay him for the professional services that he rendered and have declined to do so. I am informed by the Solicitor that he has suffered a loss of approximately \$17,000.

As a result, in regard to the allegation of practising under suspension, I respectfully decline the opportunity to impose a one for one penalty and rather, I accept the submission of the Solicitor that a two month suspension is appropriate because anything longer would result in a tremendous hardship to him and his young children and would be the end of his career. It is not an appropriate case, in my view, to impose a penalty which would end his career and more particularly, given the co-operation that he recently has demonstrated.

Therefore, in the allegation of practising under suspension, I recommend to Convocation that the Solicitor be suspended for a period of sixty (60) days and that suspension should take place at the October 23, 1997 Convocation as the Solicitor will make the necessary arrangements to order his practice in such a fashion as to not inconvenience clients.

28th October, 1997

The other matter that is outstanding is that of the non-production of financial records set out in paragraph 2(a) of the Complaint. The Solicitor to date has not produced the financial records and has explained that they are in the possession of his trustee in bankruptcy. He understands that they must be produced and he is optimistic that they can be produced.

The non-production of those records is troubling, but that may have to be dealt with at a different point in time by a differently composed committee.

In penalty in that matter, I recommend to Convocation that if the Solicitor has satisfactorily produced the books and records as required by the Law Society by the time this matter reaches Convocation, that he be reprimanded in Convocation. If the Solicitor fails to produce the books and records, it is recommended that he be suspended for thirty days (concurrent with the two month suspension) and thereafter indefinitely until such time as the books and records have been completely provided to the satisfaction of the Society.

In conclusion, I have considered both the Laan and MacGregor decisions and have, after hearing the submissions, consciously chosen to depart from the general principle based on the factors that I find to be mitigating regarding the allegation of practising under suspension.

I specifically find therefore, a suspension of 108 days is not required on these facts, rather 60 days is appropriate.

I have also considered the issue of costs, it seems to me that the impecunious position of the Solicitor makes it impossible to make an award of costs against him because not only would it punish him, it would also punish his children and they appear to have been enough at this point in time without any further financial pressure being brought upon the children.

I am not unmindful of the effect of even a two month suspension and therefore, even though I was not asked to impose costs by the Law Society's counsel, I have considered same and declined to do so because it is not appropriate. I am appreciative of the very appropriate and compassionate fashion in which the Solicitor has been treated by Ms. Cohen in both her submissions and in resolving this matter and I hope that the Solicitor will soon be able to bring himself into compliance and get on with the rest of his life.

William Sutherland Mathers was called to the Bar on April 17, 1986.

ALL OF WHICH is respectfully submitted

DATED this 17th day of September, 1997

Robert C. Topp

There were no submissions.

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

Carried

28th October, 1997

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 months with respect to particular 2(b) and with respect to particular 2(a) the solicitor be reprimanded in Convocation if he provided the books and records required to the satisfaction of the Society failing which he be suspended for a period of 30 days concurrent with the 2 months suspension and continue indefinitely until the books and records are produced.

Ms. Cohen advised that the books and records had not been provided and made submissions in support of a 2 month suspension.

The solicitor requested the suspension commence November 1st, 1997.

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

It was moved by Ms. Sealy, seconded by Mr. Wright that the solicitor be suspended for a period of 2 months and thereafter indefinitely until his books and records are produced.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 2 months commencing November 1st, 1997 and thereafter indefinitely until his books and records are produced.

Re: Thomas Michel HICKS - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar, Wilson and Crowe withdrew for this matter.

Ms. Cohen 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 6th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (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 DISCIPLINE COMMITTEE

REPORT AND DECISION

Nancy L. Backhouse, Chair
Marshall A. Crowe
Ronald D. Manes

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

THOMAS MICHEL HICKS
of the City
of Toronto
a barrister and solicitor

Rhonda Cohen
for the Society

Not Represented
for the solicitor

Heard: May 27, 1997

28th October, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Thomas Michel Hicks alleging that he was guilty of professional misconduct: Complaint D334/96 was issued on December 11, 1996 and Complaint D302/96 on December 18, 1996. This Complaint was withdrawn and replaced by Complaint D302a/96 issued on April 1, 1997.

The matter was heard in public on May 27, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Marshall A. Crowe and Ronald D. Manes. The Solicitor attended the hearing and represented himself. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D302a/96

2. a) He breached an Order of Convocation that he suspend his practice of law for failure to pay his Annual Membership Fee, by practising law during the period November 1, 1994 to December 3, 1994; and
- b) He breached an Order of Convocation that he suspend his practice of law for failure to pay his Annual Membership Fee, by practising law during the period June 28, 1996 to July 29, 1996.

Complaint D334/96

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended November 30, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Evidence

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

Re: Complaint D302a/96

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D302a/96 and is prepared to proceed with a hearing of this matter on February 12, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D302a/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars supported by the facts hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on June 22, 1990. At present, the Solicitor is suspended for non-payment of his annual fee.

Particular 2(a) He breached an Order of Convocation that he suspend his practice of law for failure to pay his Annual Membership Fee, by practising law during the period November 1, 1994 to December 3, 1994.

5. By First Notice dated June 10, 1994, the Solicitor was notified by the Law Society that his Annual Membership Fee for 1994/1995 was due and payable on or before July 1, 1994. The accompanying Explanatory Notes advised the Solicitor that, pursuant to Section 36 of the Law Society Act, if the Solicitor failed to pay the fee on or before Tuesday, November 1, 1994, his rights and privileges as a member of the Law Society would be suspended (Document Book, Tab 1). The Solicitor did not remit payment.

6. By Second and Final Notice dated September 26, 1994, the Solicitor was reminded by the Law Society that his Annual Membership Fee for 1994/1995 had been due and payable as at July 1, 1994 (Document Book, Tab 2). The Solicitor did not remit payment.

7. The Solicitor left the firm Fitzsimmons, McFarlane & Harpur on October 31, 1994. The firm had been responsible for paying his fees and the Solicitor states that he assumed that the outstanding fees had been paid. The Solicitor did not immediately advise the Law Society that he had left the above-noted firm.

8. By registered letter dated November 2, 1996, the Solicitor was notified by the Law Society that by Order of Convocation, the Solicitor's rights and privileges as a member of the Law Society were suspended effective November 1, 1994, for failure to satisfy his Annual Membership Fee. On November 7, 1994, the registered letter was signed for by a member of the Solicitor's previous firm (Document Book, Tab 3). The letter was not delivered to the Solicitor until November 10, 1994.

9. On or about November 29, 1994, a Law Society representative contacted the Solicitor to determine whether he was practising law while his membership was suspended. The Solicitor's secretary answered "Thomas Hicks' office". The Solicitor confirmed that he had received the Law Society's letter advising of his suspension on November 10, 1994, and that he expected to be able to pay the outstanding membership fee either by the end of that week or the beginning of the following week. The Solicitor was reminded that his office could not answer the phone "Thomas Hicks' office" during his suspension (Document Book, Tab 4).

10. On or about December 2, 1994, the Solicitor delivered payment of the outstanding Annual Membership fee and was reinstated, effective December 3, 1994.

28th October, 1997

11. In or about August, 1996, Marie Morley, an Examiner with the Law Society's Audit and Investigation Department, conducted an audit of the Solicitor's practice. During her audit, Ms. Morley discovered that the Solicitor had practised law while under suspension:

<u>Client</u>	<u>Date</u>	<u>Activity</u>
GMAC and 7 & Laidlaw	November 10, 1994	By facsimile transmission the Solicitor wrote to Rolph Piehler, solicitor, regarding client matter (Document Book, Tab 6)

<u>Client</u>	<u>Date</u>	<u>Activity</u>
Litowitz	December 2, 1994	The Solicitor conducted a conversation with opposite counsel regarding a client matter (Document Book, Tab 7).

12. On or about October 29, 1996, the Law Society received from the Solicitor a completed questionnaire entitled "Re: Annual fees suspension November 1st, 1994 to December 3rd, 1994". In it the Solicitor confirmed receipt of the Law Society's notices and stated that he had not practised law while suspended (Document Book, Tab 5). The Solicitor's statement was incorrect.

13. By letter dated January 28, 1997, the Solicitor sought to explain his actions to Discipline Counsel. He stated that when he participated in the above-noted conversation on December 2, 1994, he believed he had been reinstated because the conversation took place on the day he delivered to the Law Society a cheque to satisfy his outstanding annual fee. The Law Society's files indicate that the Solicitor's cheque was post-dated to December 5, 1994. The Solicitor's cheque was ultimately returned "N.S.F.". In the result, the Solicitor was again suspended effective January 27, 1995 (Document Book, Tab 7A).

Particular 2(b) He breached an Order of Convocation that he suspend his practice of law for failure to pay his Annual Membership Fee, by practising law during the period June 28, 1996 to July 29, 1996.

14. By First Notice dated December 4, 1995, the Solicitor was notified by the Law Society that his Annual Membership Fee for 1995/1996 was due and payable on or before January 1, 1996. The Explanatory Note further advised that if payment was not made by Wednesday, May 1, 1996, the Solicitor's rights and privileges would be suspended (Document Book, Tab 8). The Solicitor did not remit payment.

15. By Second and Final Notice dated March 15, 1996, the Solicitor was notified by the Law Society that his Annual Membership Fee for 1995/1996 had been due and payable as at January 1, 1996 (Document Book, Tab 9).

28th October, 1997

16. On May 1, 1996, the Solicitor contacted Ms. Debbie Mosaheb, the Administrator of the Law Society's Special Payment Plans. He requested a deferral of his payment obligation and agreed to deliver to Ms. Mosaheb a cheque payable to the Law Society dated May 1, 1996. The Solicitor, however, requested that his cheque not be negotiated until at least May 30, 1996. Ms. Mosaheb agreed to the extension. However, after May 30, 1996, the Law Society attempted to negotiate the Solicitor's cheque, and it was returned marked "insufficient funds".

17. On June 26, 1996, Ms. Mosaheb contacted the Solicitor by telephone. He explained that his cheque dated May 31, 1996 to the Law Society had been returned "N.S.F." because a \$5,000 cheque from a client had also been returned "N.S.F.". The Solicitor advised that he had been trying to cover the outstanding fees but was having difficulty obtaining payment of fees from his clients. The Solicitor asked for a further extension and indicated that he would be away on holiday until July 15, 1996. The Solicitor confirmed this conversation by letter (Document Book, Tab 9A).

18. Ms. Mosaheb consulted with her superior and a decision was made to give the Solicitor a further extension to 5:00 p.m. on June 28, 1996. This extension was communicated to the Solicitor on June 26, 1996, in a telephone conversation with Ms. Mosaheb. Notwithstanding the extension, the Solicitor did not make the requisite payment.

19. By registered letter dated June 28, 1996, the Law Society advised the Solicitor that by Order of Convocation, his rights and privileges as a member of the Law Society had been suspended effective June 28, 1996, for failure to satisfy his Annual Membership Fee. The registered letter was signed for on July 7, 1996 (Document Book, Tab 10).

20. By letter dated July 24, 1996, the Solicitor wrote to the trial co-ordinator to request an adjournment of a matter on the grounds that the Solicitor was suspended from practice (Document Book, Tab 10A).

21. The Solicitor was reinstated on July 29, 1996 (Document Book, Tab 11).

22. During the period June 28, 1996 to July 29, 1996, Marie Morley, an Examiner with the Law Society's Audit and Investigation Department, conducted an audit of the Solicitor's practice. Ms. Morley discovered that the Solicitor had practised law while under suspension as follows:

28th October, 1997

<u>Client</u>	<u>Date</u>	<u>Activity</u>
Hall/Bath purchase	July 17, 1996	The Solicitor received a facsimile transmission from his client acknowledging a telephone conversation and providing information required to close a house purchase Document Book, Tab 12).
	July 23, 1996	The Solicitor received a letter from the law firm, Capo, Sgro, DiLena, Hemsworth & Mendicino, solicitors for a vendor regarding the closing date of July 25, 1996 (Document Book, Tab 13).
	July 25, 1996	Direction re: title is executed by the Solicitor's clients (Document Book, Tab 14). The Solicitor commissioned an Affidavit attached to the Transfer/Deed of Land (Document Book, Tab 15).
	July 26, 1996	The Solicitor received a facsimile transmission from the vendor's solicitor advising that closing is extended to July 29, 1996 (Document Book, Tab 16).

28th October, 1997

23. In respect of the letter at Tab 12, the Solicitor states that he provided documents to his clients prior to the date of his suspension and the documents were signed immediately before closing on July 29, 1996. The Solicitor states that the letter at Tab 12 received from his client was in response to information the Solicitor had requested prior to the date of his suspension. The Solicitor further states that the transaction referred to above was scheduled to close on July 25, 1996, and that the extension given by counsel opposite (at Document Book, Tab 16) was in reply to the Solicitor's request for an extension because he was suspended and unable to practice.

24. The Solicitor admits and acknowledges that he executed the Land Transfer Tax Affidavit on July 25, 1996 when he knew he was suspended

(Document Book, Tab 15).

25. The Solicitor also practised under suspension as follows:

<u>Client</u>	<u>Date</u>	<u>Activity</u>
Michael Kane	June 28, 1996	<p>The Solicitor sent a facsimile transmission to his client's employer regarding holdback of funds and releasing the employer from said obligation (Document Book, Tab 17)..</p> <p>The Solicitor sent facsimile transmissions to the Pre-Trial Co-ordinator and Duty Counsel advising that he was unable to attend court on July 28, 1996 due to a scheduling conflict (Document Book, Tab 18).</p>

26. In respect of the letter dated July 28, 1996 (Tab 18) the Solicitor states that he wrote this letter advising that he was unable to attend Court because he was suspended. The Solicitor states that it was his understanding that sending this letter did not constitute practising law. The Solicitor now understands that during any period when he is suspended he is not entitled to use letterhead in which he is held out as to be a practising solicitor.

28th October, 1997

27. The Solicitor also practised law while under suspension as follows:

<u>Client</u>	<u>Date</u>	<u>Activity</u>
Button/Stevens purchase	July 15, 1996	The Solicitor sent a Requisition Letter to the solicitors for the vendor on a real estate transaction for which the Solicitor was acting for the purchaser (Document Book, Tab 19). The Solicitor received a letter from a mortgage company confirming the Solicitor's retainer (Document Book, Tab 20).
	July 22, 1996	The Solicitor received a letter from the vendor's solicitor in furtherance of the transaction (Document Book, Tab 21).
	July 24, 1996	The Solicitor received a letter from the vendor's solicitor in furtherance of the transaction (Document Book, Tab 22).
	July 28, 1996	The Solicitor reported on title to the mortgage company (Document Book, Tab 23).

28. The Solicitor states that he arrived back from holiday on July 15, 1996 and immediately returned to his office and sent out the requisition letter at Tab 19 of the Document Book. The Solicitor further states that he checked his mail to see if he had been suspended and did not find a notice letter so he faxed out the requisition letter. The Solicitor states that, the following day, his secretary gave to him the notice letter which she had kept separate. The Solicitor acknowledges that, in the circumstances, he ought not to have sent out correspondence in the course of his practice without first inquiring directly of the Law Society whether he had been suspended. The Solicitor further acknowledges that he sent out the letter at Tab 23 of the Document Book with full knowledge that he was suspended at the time, but did so because he was concerned that his clients would otherwise be compromised by his suspension, and he was prepared to bear the costs of his actions rather than have his clients do so. The Solicitor further advises that at about the time that he sent the letter at Tab 23 (dated July 28, 1996) he had been communicating with the Law Society in order to agree on a payment plan. The Solicitor was reinstated on July 29, 1996.

28th October, 1997

29. On or about October 29, 1996, the Law Society received from the Solicitor a completed questionnaire entitled "Re: Annual fees suspension June 28th, 1996 to July 29th, 1996" (Document Book, Tab 24).

Administrative Suspensions

30. The Solicitor has been administratively suspended for failure to pay his Errors and Omissions Insurance Levy during each of the following periods:

- (i) November 23, 1990 to December 4, 1990;
- (ii) May 24, 1991 to June 11, 1991;
- (iii) November 29, 1991 to December 20, 1991; and
- (iv) November 2, 1992 to January 22, 1993.

31. The Solicitor has been administratively suspended for failure to pay his Annual Membership Fee during each of the following periods:

- (i) December 1, 1992 to January 22, 1993;
- (ii) November 1, 1994 to December 3, 1994;
- (iii) January 27, 1995 to February 1, 1995;
- (iv) June 28, 1996 to July 29, 1996; and
- (v) November 1, 1996 to present.

32. At present, the Solicitor remains suspended for failure to pay his annual fee.

V. DISCIPLINE HISTORY

33. On November 28, 1995, the Solicitor was found to have committed professional misconduct and Reprimanded in Committee for failing to reply to the Law Society regarding investigations of three discrete Complaints against the Solicitor.

DATED at Toronto, Ontario, this 27th day of May, 1997."

Re: Complaint D334/96

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D334/96 and is prepared to proceed with a hearing of this matter on May 27, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D334/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars supported by the facts hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on June 22, 1990. At present, the Solicitor is suspended for non-payment of his annual fee.

28th October, 1997

Particular 2(a) He failed to file with the Society within six months of the termination of his fiscal year ended November 30, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

5. The Solicitor's fiscal year end is November 30th. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending November 30, 1995, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. By letter dated June 10, 1996 the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended November 30, 1994. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's June 10, 1996 letter is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, dated July 12, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. The Law Society's July 12, 1996 letter was signed for and delivered on July 16, 1996. A copy of the Law Society's July 12, 1996 letter and Acknowledgement of receipt of a registered item card is attached as Exhibit "B" to this Agreed Statement of Facts.

8. The Solicitor advised the Law Society by telephone, on July 24, 1996, he would forward his Form 2 certificate now and would forward his Form 3 in a couple of days. The Solicitor advised he required a couple of days to have the Form 3 signed. A copy of the Law Society's handwritten Telephone Transaction form, dated July 24, 1996 is attached as Exhibit "c" to this Agreed Statement of Facts.

9. The Solicitor did not file a Form 3 as promised.

10. A Law Society staff employee spoke with the Solicitor by telephone on October 11, 1996. The Solicitor advised he did not have the funds to retain an accountant. The Solicitor advised he would attempt to retain an accountant and would advise the Law Society of his progress by October 22, 1996. A copy of the Law Society's handwritten note, dated October 11, 1996 is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not return the call.

11. To date the Solicitor has not provided the outstanding filings.

Administrative Suspensions

12. The Solicitor has been administratively suspended for failure to pay his Errors and Omissions Insurance levy during each of the following periods:

- (i) November 23, 1990 to December 4, 1990;
- (ii) May 24, 1991 to June 11, 1991;
- (iii) November 29, 1991 to December 20, 1991; and
- (iv) November 2, 1992 to January 22, 1993.

28th October, 1997

13. The Solicitor has been administratively suspended for failure to pay his Annual Membership Fee during each of the following periods:

- (i) December 1, 1992 to January 22, 1993;
- (ii) November 1, 1994 to December 3, 1994;
- (iii) January 27, 1995 to February 1, 1995;
- (iv) June 28, 1996 to July 29, 1996; and
- (v) November 1, 1996 to present.

14. At present, the Solicitor remains suspended for failure to pay his annual fees.

V. DISCIPLINE HISTORY

15. On November 28, 1995, the Solicitor was found to have committed professional misconduct and Reprimanded in Committee for failing to reply to the Law Society regarding the investigation of three discrete Complaints against the Solicitor.

DATED at Toronto, Ontario this 27th day of May, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that if the Solicitor has made his filings by the time this matter reaches Convocation that he be reprimanded in Convocation, failing which that the Solicitor be suspended for a definite period of one month and indefinitely thereafter until his filings are made.

REASONS FOR RECOMMENDATION AS TO PENALTY

There are two particulars in this Complaint against the Solicitor for practising law while under suspension, each for one month of time. The Solicitor admits in the Agreed Statement of Facts that he practised law on specific dates within those periods as set out therein. The Solicitor was suspended administratively on both occasions. On certain occasions, the Solicitor's explanation is that he had not received actual notice. On other occasions, his position is that he was aware of the suspensions but he was acting in furtherance of his clients' interests. The Solicitor's explanation for some of the occasions where he practised while under suspension was that he was working with the Law Society towards making the payment of his fees and he believed he had an extension when he did not. On a few occasions when the Solicitor was practising law while administratively suspended, he had no explanation.

Even if the Solicitor's explanations are accepted, there are three to four instances where he was practising law knowingly while under suspension where he has no explanation.

The Solicitor advises that he had not made his filing because he had been unable to afford to do so. He further advised that he has left the practice of law and expects to be seeking permission to resign after his filings have been made.

28th October, 1997

While the Committee is sympathetic with the difficulties the Solicitor has had, it is mindful of the Law Society's obligation to govern the legal profession in the public interest. Given the Solicitor's past discipline history, and the fact that the Solicitor had not yet made his filings at the hearing date, it was felt that the recommendation as to penalty was the appropriate one.

Thomas Michel Hicks was called to the Bar on June 22, 1990.

ALL OF WHICH is respectfully submitted

DATED this 6th day of September, 1997

Nancy L. Backhouse, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he made his filings failing which he be suspended for a definite period of 1 month and indefinitely thereafter until his filings were made.

Ms. Cohen advised that the filings had not been made and that the solicitor was no longer practising.

It was moved by Mr. Wright, seconded by Ms. Ross that the solicitor be suspended for a period of 1 month definite and indefinitely thereafter until his filings were made.

Carried

Re: Dorothy Jeanne MALLORY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Swaye and Bobesich and Ms. Stomp withdrew for this matter.

Ms. Lesley Cameron appeared for the Society. Mr. Robert MacKinnon appeared for the solicitor who was present.

Ms. Cameron requested that the in camera portion of the Report remain in camera.

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

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Gerald A. Swaye, Q.C., Chair
Gordon Z. Bobesich
Tamara K. Stomp

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

Lesley Cameron
for the Society

DOROTHY JEANNE MALLORY
of the City
of Toronto
a barrister and solicitor

Robert MacKinnon
for the solicitor

Heard: July 30 and
September 17, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 15, 1995 Complaint D53/95 was issued against Dorothy Jeanne Mallory alleging that she was guilty of professional misconduct.

The matter was heard in public, with parts of the hearing proceeding *IN CAMERA*, on July 30 and September 17, 1996 before this Committee composed of Gerald A. Swaye, Q.C., Chair, Gordon Z. Bobesich and Tamara K. Stomp. The Solicitor attended the hearing and was represented by Robert MacKinnon. Lesley Cameron appeared on behalf of the Law Society.

DECISION

After a full hearing and consideration of the evidence, including *viva voce* evidence, the following particulars of professional misconduct were found to have been established:

Complaint D53/95

2. a) She failed to reply to communications from the Law Society's Examiner attempting to conduct an audit despite the Law Society's:
 - ii) letters dated January 16, 1995, January 30, 1995 and February 13, 1995.
- c) she failed to file with the Society within six months of the termination of her fiscal year ending June 30, 1994, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

Reasons for Finding of Professional Misconduct

The letters referred to in particular 2(a)(ii) were sent to the address on file with the Law Society. The Member testified this was in fact her proper address and that she had lived at the address for the last twelve years. The Member testified that there is no mailbox on the ground floor of the building, nor a place for a courier to leave mail, and that there had been difficulty in getting mail there from time-to-time. There was no real evidence that the letters did not get to the Member at the address. Rather, the Member's evidence was that she did not recall getting the letters in question. This statement was considered in light of the other evidence from the Member and the witnesses, Janet Howard, who is a practising lawyer who was to act as mentor to the Member, and Gavin Brannan, a law clerk who tried to help her organize her files and return her calls from clients and creditors. All of that evidence established that:

- a) the Member became overwhelmed easily;
- b) the Member did not attend to her clients;
- c) the Member was not emotionally able to keep her practice together;
- d) the Member went missing when stressed;
- e) the Member forgot the password to her computer files;
- f) the Member could not organize the disarray of files in her home in order to prepare Legal Aid accounts on them;
- g) the Member cowered 'quite a bit' whenever asked for her files;
- h) the Member authorized Gavin Brannan to answer her telephone calls because, in her words, "I can't talk to clients" and "I don't want to talk to creditors";
- i) the Member did not continue mentoring with Janet Howard because "I just gave up"; "well it's hopeless"; "there's no solution".

Taken all together, this Committee is satisfied that the Member failed to reply to the letters sent.

The Member admitted the failure to file as set out in particular 2(c). The Member testified she believed she did not have to file because she was not practising at the time, there was no activity to report and no statement from the bank. However, this Committee finds that the Member is not excused from the required filings by her stated belief. There was no evidence of her exemption from filing pursuant to the Regulations. Therefore, professional misconduct for failure to file is found.

RECOMMENDATION AS TO PENALTY

The Committee unanimously recommends a penalty of one month definite suspension, such suspension to continue indefinitely thereafter until the Secretary of the Law Society is satisfied that the Member is fit to return to practice. If the Member is not satisfied with the decision of the Secretary, the issue is to be determined in accordance with the provisions of Section 47 of the Law Society Act. No costs are recommended.

REASONS FOR RECOMMENDATION

The Member is 65 years of age. She was called to the Bar in 1965 and has practised as a sole practitioner since 1979. Her practice is 98 percent Legal Aid. In response to questions from her own counsel, she advised she was divorced in 1976 and has one daughter, age 38. She is not presently practising and is under administrative suspension. She is supported by Social Assistance.

The Member has a discipline history. On February 18, 1992, she was reprimanded in Committee for Failure to maintain books and records and Failure to reply. Most significantly, she was reprimanded in Committee on June 24, 1994 on three counts of Failure to reply dating from late 1992 and early 1993. Terms of the reprimand were that the Member continue to be mentored by Janet Howard and that she fully cooperate with her and that she direct Ms. Howard to write to the Law Society on the 1st of June and December of each year advising as to her progress and bringing to the attention of the Society any matter that ought to be brought to its attention.

The terms of the reprimand are important to note because the Member admitted in testimony that she failed to maintain the mentoring relationship with Ms. Howard. The Committee wishes to be clear that it is our finding that Ms. Howard cannot be faulted in any way for the breakdown in the relationship. Further, we found nothing in the behaviour of the law clerk Gavin Brannan that could discourage the Member from accepting his help.

On the contrary, it is the Committee's finding that the Member failed to cooperate not only with Law Society rules, regulations and correspondence, but actively avoided cooperation which she justified with petty complaints and unreasonable positions. However, the mitigation of her action is provided through the two medical reports filed, which were received *in camera* and are attached to this Report *in camera*.

The October 4, 1993 report clearly outlines the deep and interwoven problems the Member faced for some time. The report effectively admits that further intervention is a precondition to the Member's return to an effective full-time practice as a lawyer.

IN CAMERA

IN CAMERA Content Has Been Removed

The reports along with the *viva voce* evidence heard, make it clear that the Member is unable to handle the many facets attendant on the practice of law. Her reaction to matters appears to be to shut down or shut out the difficulty. Such reaction cannot properly serve the interests of the public.

This Committee wishes it to be noted that this was not a Section 35 hearing. There were no findings of dishonesty to clients and as far as we know, none have complained. Rather, we had the benefit of letters and a Court transcript that observed the caring nature of the member to others and her clients.

The recommended penalty follows that preceded by the decisions in the matters of Ernest Arthur Dyck and John Rothel, Decisions of Convocation rendered November 26, 1993 and September 28, 1995 respectively.

28th October, 1997

Dorothy Jeanne Mallory was called to the Bar on March 26, 1965.

ALL OF WHICH is respectfully submitted

DATED this 16th day of May, 1997

Tamara Stomp, for the Committee

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month definite to continue indefinitely thereafter until the Secretary of the Society is satisfied that the Member is fit to return to practice. If the Member is not satisfied with the decision of the Secretary, the issue is to be determined in accordance with the provisions of Section 47 of the Law Society Act.

Counsel for the solicitor submitted that the recommended penalty be rejected.

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

Mr. MacKinnon continued with his submissions.

The public withdrew and Convocation heard submissions by counsel in camera concerning the medical report.

The public returned.

There were further submissions by Mr. MacKinnon.

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

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

It was moved by Ms. Eberts, seconded by Ms. Ross that the psychiatric condition be struck.

Carried

Mr. Carter is to draft Reasons which are to be reviewed by Ms. Eberts and Messrs. MacKenzie and Millar.

It was moved by Mr. MacKenzie, seconded by Mr. Gottlieb that Convocation convert to a committee of the whole and the solicitor be reprimanded in committee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in committee by Convocation converting to a committee of the whole and further that Reasons will be provided.

The Treasurer administered the reprimand.

28th October, 1997

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:15 P.M.

CONVOCATION RECONVENED AT 2:20 P.M.

PRESENT:

The Treasurer, Angeles, Arnup, Bobesich, Carey, Carter, Crowe, DelZotto, Gottlieb, Millar, Puccini, Ross, Sachs, Sealy, Stomp, Swaye, Wilson and Wright.

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IN PUBLIC

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Re: Oliverio Eugenio MASSIMILIANO - Sudbury

The Secretary placed the matter before Convocation.

Messrs. Wright, Wilson and DelZotto, Ms. Angeles and Ms. Sealy withdrew for this matter.

Ms. Cowie appeared for the Society and Mr. Greenspan appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 4th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppe that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Bradley H. Wright, Chair
Elvio L. DelZotto, Q.C.
Nora Angeles

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

Jane Ratchford
for the Society

OLIVERIO EUGENIO MASSIMILIANO
of the City
of Sudbury
a barrister and solicitor

Brian Greenspan
for the solicitor

Heard: July 3, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Oliverio Eugenio Massimiliano alleging that he was guilty of professional misconduct: on November 26, 1996 Complaint D178/96, on April 24, 1997 Complaint D185/97 and on June 6, 1997 Complaint D210/97.

The matters were heard in public on July 3, 1997 before this Committee composed of Bradley H. Wright, Chair, Elvio DelZotto, Q.C. and Nora Angeles. The Solicitor attended the hearing and was represented by Brian Greenspan. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D178/96

2. a) He made inappropriate representations to the court purporting to be *amicus curiae* in the matter of *R. v Tremblay* when he knew or ought to have known that he had no such standing before the court;
- b) He borrowed funds from a client, Rose Patterson, on two occasions through Rex Corporation, a company controlled by him;
- c) He borrowed funds from a client, Frank Talarico, through Rex Corporation, a company controlled by him;
- d) He failed to disclose in his Form 2 to the Society the fact that he borrowed funds from his clients, Rose Patterson and Frank Talarico;
- e) He communicated with other solicitors in a manner inconsistent with the proper tone of professional communications from a lawyer;
- h) He failed to conduct himself professionally as counsel for a matrimonial client, by communicating with her in an offensive and distasteful manner involving direct and demeaning comments of a sexual nature; and
- i) He failed to reply to communications from the Law Society regarding complaints by the Law Society and Ronald Tremblay.

Complaint D185/97

2. a) He communicated with other solicitors in a manner inconsistent with the proper tone of professional communications from a lawyer.

Complaint D210/97

2. a) He failed to conduct himself with courtesy and good faith towards a fellow solicitor, Robert MacRae, by threatening physical violence against Mr. MacRae.

Evidence

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

Re: Complaint D178/96

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D178/96 and is prepared to proceed with a hearing of this matter on July 3 and 4, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D178/96 with his counsel, Brian Greenspan, and admits that particulars 2(b), (c), (d) (i) and (h) constitute professional misconduct and that the letters at Tabs 31, 32, 38, 39 and 40 of the Document Book constitute professional misconduct. The Solicitor does not admit that particular 2(a) constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 30, 1990. He practices as a sole practitioner.

Particular 2a) He made inappropriate representations to the court purporting to be *amicus curiae* in the matter of *R. v. Tremblay* when he knew or ought to have known that he had no such standing before the court.

5. Ronald and Rose Anne Tremblay separated in or about November, 1993. Ms. Tremblay retained the Solicitor while Mr. Tremblay retained Elizabeth Kari and subsequently, Michael Keenan, regarding the matrimonial dispute. In or about August or September 1994, Mr. Tremblay was charged with the assault of his ex-wife, arising out of incidents which occurred between April 1977 and December 1993. Mr. Tremblay retained Herve Sauve to represent him with respect to the assault charges.

6. On February 6, 1996, Mr. Tremblay appeared for his trial before the Honourable Senior Justice, J.D. Bernstein. The Solicitor was also in attendance. At this time, the Solicitor was acting for Mrs. Tremblay in a tort action by Mrs. Tremblay against her ex-husband relating to the alleged assaults and was also involved in a personal relationship with her.

7. Mr. Tremblay pleaded guilty to the charges and a joint submission was proposed by the Crown and Mr. Sauve. One of the terms proposed by the Crown and agreed to by Mr. Sauve was for Mr. Tremblay to stay away from Mrs. Tremblay's residence at 2216 Gateway Drive. The hearing continued as follows:

The Court:	When a clause is proposed with respect to staying away from a location, surely I have to have some basis on which to do it. In other words, is there a history of him being around her house, harassing her, or the like, or anything of that nature. I mean, that is ordinarily what that sort of clause relates to.
The Solicitor:	Your Honour, I can appear as a friend of the court and I can make submission....
The Court:	Just please....
The Solicitor:	...Your Honour that he has in fact been around 2216 Gateway Drive....

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The Court: Would you mind.
The Solicitor: ...and also at our former residence.
Mr. Tremblay: Your Honour, Your Honour.
The Court: Just please.
The Solicitor: I am a friend of the court here.
Mr. Sauve: Just hold it. We...
Mr. Kurke: Your Honour...
The Solicitor: I can submit that the children at 16 and 18 years of age, and there is no necessity to correspond with Mr. Tremblay.
The Court: Excuse me. Would you be good enough to identify yourself?
The Solicitor: My name is Massimiliano, initial O., Your Honour.
The Court: I see.
The Solicitor: I am a practising solicitor with the Law Society of Upper Canada.
The Court: What is your function here?
The Solicitor: I'm a friend of the court.
The Court: You are a lawyer with the local bar. You are not for the purposes of the record?
The Solicitor: That's correct.
The Court: Are you inside the bar?
The Solicitor: Yes I am inside the bar.
The Court: Are you inside the bar?
The Solicitor: No, I'm not.
The Court: You are not inside the bar. Are you gowned?
The Solicitor: No, I'm not.
The Court: Do you have any official function in this case?
The Solicitor: As a friend of the court only, Your Honour.
The Court: Excuse me. You are a friend of the court if I call you a friend of the court.
The Solicitor: Thank you, Your Honour.
The Court: A friend of the court is a special legal position.
The Solicitor: Yes, Your Honour.
The Court: Would you be good enough to be seated, please.
The Solicitor: Thank you.
The Court: Thank you. Yes?

A copy of the transcript of the proceedings is contained at Tab 1 of the Document Book and the portion referred to above can be found at pages 10 to 12 of the transcript.

8. By letter dated February 19, 1996 (Tab 2, Document Book), Mr. Sauve made a complaint to the Law Society regarding the Solicitor. A copy of the Solicitor's letter to Mr. Sauve and the Crown Attorney dated February 8, 1996 was enclosed with Mr. Sauve's complaint. In his letter, the Solicitor apologized to the court for his appearance at trial on February 6, 1996. The Solicitor then criticized Mr. Sauve, the Crown Attorney and Police Services regarding the prosecution of Mr. Tremblay, stating that same was an "example of the miasma of the administration of justice in the District of Sudbury".

Particular 2i) He failed to reply to communications from the Law Society.

9. By letter dated February 22, 1996 (Tab 3, Document Book), the Law Society wrote to the Solicitor enclosing a copy of the transcript of the proceedings before Mr. Justice Bernstein and Mr. Sauve's letter dated February 19, 1996. The Solicitor was asked by the Law Society to address a number of concerns. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his response within two weeks.

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10. By letter dated March 6, 1996 (Tab 4, Document Book), the Solicitor advised the Law Society that he would not respond to the complaint until the investigator, James Varro, was removed from the file.

11. As of the date the Complaint was sworn, the Solicitor had not responded substantially to the Society's letter of February 22, 1996. By letter dated April 29, 1997 (Tab 4a, Document Book), the Solicitor responded to the Law Society regarding the complaint received from Herve Sauve.

Particular 2b) He borrowed funds from a client, Rose Patterson, on two occasions through Rex Corporation, a company controlled by him.

12. In January 1994, the Solicitor commenced proceedings on behalf of Rose Patterson (formerly Tremblay) against her ex-husband in their matrimonial dispute as well as in a tort action for damages. In the fall of 1994, she loaned Rex Corporation, a corporation owned by the Solicitor, the sum of \$10,000.00. At this time, he was acting on the tort action only. The source of the funds was from the sale of Ms. Patterson's matrimonial home.

13. In exchange for the loan, the Solicitor registered a mortgage in favour of Ms. Patterson, on a property owned by Rex Corporation at 182 Whittaker Street where both Ms. Patterson and the Solicitor resided. The mortgage was registered on October 6, 1994, a copy of which is contained at Tab 5 of the Document Book. A discharge was provided on July 29, 1995 and the loan paid back plus an additional \$1,500.00.

14. Ms. Patterson then lent the Solicitor, personally, \$8,000 from the proceeds of the discharge on Whittaker upon moving into the premises at 2216 Gateway Drive, to assist the Solicitor in his purchase of these premises. The loan was not secured but has now been paid back.

15. The Solicitor admits that he did not advise Ms. Patterson to seek independent legal representation in relation to the two loans.

Particular 2e) He failed to reply to communications from the Law Society.

16. By letter dated February 23, 1996 (Tab 6, Document Book), the Law Society wrote to the Solicitor enclosing a copy of the registered mortgage which disclosed that Ms. Patterson loaned the Solicitor money through his company, Rex Corporation, on property owned by him. The Solicitor was referred to Rule 7 of the Rules of Professional Conduct dealing with borrowing monies from a client. The Solicitor was asked for his comments within two weeks.

17. On March 1, 1996, the Solicitor and Mr. Varro spoke by telephone. Mr. Varro's typewritten notes of the conversation are found at Tab 7 of the Document Book.

18. By letter dated March 6, 1996 (Tab 8, Document Book), the Solicitor advised the Law Society's investigator, James Varro, that he had requested that Mr. Varro be removed from any complaints against him. The Solicitor indicated that Mr. Varro's removal had not been confirmed by the Law Society.

19. By letter dated March 19, 1996 (Tab 9, Document Book), the Law Society advised the Solicitor that this matter had been referred to the Chair and the Vice-Chair of the Discipline Committee and that a formal complaint against him had been authorized.

20. By letter dated March 21, 1996 (Tab 10, Document Book), J. Scott Kerr wrote to the Solicitor on behalf of the Chair of the Discipline Committee advising that the Solicitor's complaints against Mr. Varro did not justify his withdrawal from any investigations against him. The Solicitor was asked to provide a response to the Law Society as soon as possible.

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21. By letter dated April 9, 1996 (Tab 10a, Document Book), the Solicitor provided further correspondence to Mr. Varro.

22. As of the date the Complaint was sworn the Solicitor had not provided a substantive response to the Society's letter of February 23, 1996. By letter dated April 29, 1997 (Tab 10b, Document Book), the Solicitor responded to the Law Society regarding the concerns about his borrowing from his client, Rose Patterson.

Particular 2c) He borrowed funds from a client, Frank Talarico, through Rex Corporation, a company controlled by him.

23. The Solicitor acted for Frank Talarico on several mortgage transactions. While representing Mr. Talarico, the Solicitor arranged a mortgage loan from Mr. and Mrs. Talarico in favour of Rex Corporation, the Solicitor's company, in the amount of \$40,000.00. The mortgage was registered on July 5, 1994, a copy of which is contained at Tab 11 of the Document Book. On July 27, 1994 (Tab 12, Document Book), the Solicitor provided Mr. Talarico with a report setting out the particulars of the mortgage. A subsearch for the property is also found at Tab 12.

24. The Solicitor admits that he did not advise Mr. Talarico to obtain independent legal representation concerning the loan.

25. In August 1995, Mr. Talarico retained James Bubba regarding the various mortgage transactions on which the Solicitor had acted including the mortgage executed on behalf of Rex Corporation. Mr. Bubba's office advised the Solicitor that the Talaricos were attending at Mr. Bubba's office on August 11, 1995 to review this mortgage. By facsimile dated August 11, 1995, the Solicitor advised that the funds would be paid out that day. The Solicitor then forwarded a discharge of mortgage for the Talaricos' signature. The Talaricos would not execute the discharge prepared by the Solicitor.

26. By facsimile dated August 14, 1995 (Tab 13, Document Book), Mr. Bubba advised the Solicitor that he had prepared a discharge for Mr. and Mrs. Talarico's signatures and would forward a copy to the Solicitor upon receipt of payment in the amount of \$173.34 to cover costs of the discharge and disbursements. The Solicitor did not pay and continued to request a copy of the executed discharge.

27. By letter dated October 12, 1995 (Tab 14, Document Book), Mr. Bubba made a complaint to the Law Society regarding the Solicitor borrowing monies from his client.

28. By letter dated October 26, 1995 (Tab 15, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Bubba's letter dated October 12, 1995. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his comments within two weeks.

29. By letter dated November 27, 1995 (Tab 16, Document Book), the Solicitor wrote to the Law Society and suggested that the complaint was a third party complaint and wished to be advised regarding the release of any correspondence to Mr. Bubba.

30. By letter dated December 15, 1995 (Tab 17, Document Book), the Law Society advised the Solicitor that this was not a third party complaint as Mr. Talarico was a former client of the Solicitor's. The Solicitor was asked to respond within two weeks.

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31. Further letters were exchanged between the Law Society and the Solicitor concerning the issue of a third party complaint. A copy of the correspondence is contained at Tabs 18- 20 of the Document Book. The Solicitor finally responded by letter dated February 16, 1996 (Tab 21, Document Book) and requested the Law Society not to release his response to Mr. Bubba. The Solicitor advised that Mr. Talarico was a sophisticated lender in mortgage transactions and made a living by lending money at high interest rates. The Solicitor further advised that "in regard to the mortgage for Rex Corporation, the transaction was of a non-arms length. The corporation, is a corporation which exists independently of myself. I am the director and sole incorporator and shareholder thereof. Mr. Talarico was aware of all of the circumstances and at no time did he request independent legal advice." The Solicitor further advised that he completed various transactions on behalf of Mr. Talarico and his account in the amount of \$23,000.00 remained outstanding. The Solicitor advised further that the mortgage between Rex Corporation and Mr. Talarico had been paid out long ago.

Particular 2d) He failed to disclose in his Form 2 to the Society the fact that he borrowed funds from his clients, Rose Patterson and Frank Talarico.

32. The Solicitor's Form 2 dated June 28, 1995 for the fiscal year ended December 31, 1994 (Tab 22, Document Book), states "I have not been indebted for borrowed money either directly or indirectly to a client or to a person who at the time of borrowing was or had been my client or a client of a firm of which I was then a member." The Solicitor, however, as stated above, did borrow funds from his clients, Rose Patterson and Frank Talarico.

Particular 2h) He failed to conduct himself professionally as counsel for a matrimonial client, by communicating with her in an offensive and distasteful manner involving direct and demeaning comments of a sexual nature.

33. The Solicitor was retained on or about June 23, 1993 by Francine Kelly to handle her divorce action. Ms. Kelly states that at her final visit to the Solicitor's office in February 1995, the Solicitor described in detail a scene from the movie entitled, Full Metal Jacket, involving an Asian prostitute. The Solicitor's comments about the movie and included "...she wore a short black leather skirt and she was rubbing her body all over the American soldier asking for sex saying I can "fuck" you all night long, I'm horny". In February 1995, Ms. Kelly retained Nicola Munro to continue with her matrimonial matter.

34. By letter dated February 23, 1995 (Tab 23, Document Book), Ms. Kelly made a complaint to the Law Society regarding the foregoing.

Particular 2e) He communicated with other solicitors in a manner inconsistent with the proper tone of professional communications from a lawyer.

Miller, Maki

35. The Solicitor and the law firm of Miller, Maki, each represented opposite sides of a litigation matter. By letter dated August 24, 1994, the Solicitor wrote to Bernard Dumont, a solicitor representing another party in the litigation, as follows:

...

In regard to Mr. O'Hara's correspondence of August 8, 1994, our offices did receive the usual type of correspondence from Mr. O'Hara. Although much of the correspondence of Mr. O'Hara is tantamount to grocery check out line reading...

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Should your offices be in possession of a correspondence directed to all those persons from the offices of Michael O'Hara, including being directed to our offices, you could highlight the relevant portion of same and forward a copy to our offices. The highlighting would eliminate superfluous reading.

(Tab 29, Document Book) Mr. O'Hara's letter of August 8, 1994 is also at Tab 29.

36. In a separate matter, the Solicitor represented his client, Rose Patterson, in respect of the assessment of the account of Miller, Maki in a matter for which they acted for Ms. Patterson. By letter dated September 16, 1994, the Solicitor made the following comments addressed to Ms. Carol Hartman, a solicitor with that firm:

....I refer you to our Code of Ethics and suggest you remove the dust and cobwebs from your copy.
I found the involvement of Michael O'Hara to be totally inappropriate and benign. Much like the correspondences I have had the misfortune to receive from him.

(Tab 30, Document Book) Ms. Hartman's letter to the Solicitor dated September 14, 1994 is also at Tab 30.

37. By letter dated September 16, 1994, the Solicitor wrote to Mr. O'Hara with the following comments:

Apparently, Ms. Hartman required the bully of the law firm this morning. Your conduct reminded me of a cartoon character as I experienced at a third rate movie theatre in Fort Chipewayne in Northern Alberta while doing engineering work for the Alberta government. At that time I along with my survey crew and a large group of distraught Inuit laughed quite uproariously at the said character.
Like most of your conduct, correspondence and demeanour I, and I imagine my survey crew and the large and disgruntled Inuit community have forgotten the cartoon character's name.

(Tab 31, Document Book)

38. Ms. Hartman responded to the Solicitor by letter of the same date advising him that as Mr. O'Hara was co-counsel in this matter, it was appropriate that Mr. O'Hara be involved. Ms. Hartman further advised the Solicitor that either Mr. O'Hara or Ms. McGaughey-Ward (also of the firm) would be representing Ms. Hartman at the assessment. The Solicitor, in response, wrote the following on this correspondence:

...remind you of your underhanded conduct on the motion without notice for exclusive possession.
You will be the first lawyer, in my experience, to require another lawyer to represent her on an assessment. Perhaps Ms. Tremblay's law suit will force you to come out from underneath your desk.

(Tab 32, Document Book)

39. By letter dated September 19, 1994, the Solicitor wrote to the Local Registrar and to Miller, Maki regarding the assessment as follows:

It is the position of our offices that the conduct of Ms. Hartman and her assistants is a flagrant attempt at shopping for an adjudicator. It is trite to state that this type of conduct brings the fundamental administration of justice into disrepute.

(Tab 33, Document Book)

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40. By letter dated October 5, 1994, the Solicitor wrote to Lucille Shaw of Miller, Maki, and stated the following:

It is becoming apparent to the undersigned you have a penchant to practise in sharp fashion towards our offices. We would request that you review your code of ethics and specifically in regard to your conduct. It is unbecoming of a professional.

I suggest you give your head a shake Ms. Shaw.

(Tab 34, Document Book)

41. By letter dated October 7, 1994, the Solicitor wrote to Ms. Shaw, Mr. O'Hara and Ms. McGaughey-Ward as follows:

The award for costs is totally inappropriate and could only have been obtained by misleading the tribunal.

(Tab 35, Document Book)

42. By letter dated February 27, 1995, the Solicitor wrote to Mr. O'Hara and to three other parties involved in another matter and stated the following:

Our offices have proceeded as professionally as possible and extended all courtesies to Mr. O'Hara and Miller Maki. It is truly unfortunate that the interests of clients are unilaterally and forcibly entangled in the vendetta of Miller Maki against the undersigned.

(Tab 36, Document Book)

43. By letter dated March 6, 1995, the Solicitor wrote to Mr. O'Hara as follows:

It is the opinion of the undersigned that you merely continue to prejudice your clients, the client's of other counsel and to embarrass your law firm and colleagues thereat.

It is obvious that Miller Maki, specifically yourself and Lucille Shaw have lost total objectivity in this matter. I would suggest that both you and Ms. Shaw discontinue your involvement in this matter and perhaps that the firm of Miller Maki, completely be removed as Solicitors of Record.

(Tab 37, Document Book)

44. On July 31, 1995, settlement discussions took place by telephone conference and a further date was scheduled for September 5, 1995. By letter dated August 1, 1995, Michael O'Hara wrote to one of the party's solicitor and copied the Solicitor with the correspondence. In response, the Solicitor wrote across Mr. O'Hara's letter, in black marker, the following:

HEY OHARA!! WHY DON'T YOU DO THE HONOURABLE THING AND GET OFF OF THIS AND SAVE YOUR CLIENTS TIME & MONEY. WE HAVE GIVEN OUR POSITION ON NUMEROUS OCCASIONS. TRY READING OUR CORRESPONDENCES.

THE ORDER FOR COSTS WAS INAPPROPRIATELY OBTAINED, OUR RECORDS INDICATE THAT WE PAID IT, SOMEONE FROM YOUR OFFICE HAS AN INAPPROPRIATE GARNISH.

IN CLOSING, O'HARA, GET A "REALITY CHECK."

(Tab 38, Document Book)

R.B. Michael Keenan

45. Michael Keenan represented Ronald Tremblay in the divorce action in which the Solicitor represented Mrs. Tremblay. By letter dated September 27, 1994, the Solicitor wrote to Mr. Keenan as follows:

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Further to my advisement to you on the depth, breadth and height of your asininity, it is now obvious that that aspect of your personality has no limits in regard to time and space.

I have received your stupid motion regarding my removal as solicitor of record.

....

Mr. Keenan, again I wish to advise you that you are a "fucking asshole". We will be reporting extensively on your conduct to the Law Society.

(Tab 39, Document Book)

46. By letter dated October 5, 1994, Mr. Keenan wrote to the Solicitor enclosing a copy of Mr. O'Hara's affidavit. The Solicitor returned the said letter with the following written notation:

What is the meaning of this stupidity.

(Tab 40, Document Book)

47. By letter dated August 23, 1995 (Tab 41, Document Book), Ms. McGaughey-Ward made a complaint to the Law Society regarding the Solicitor's letters to Miller, Maki and provided the Law Society with copies of the correspondence referred to above.

48. By letter dated September 7, 1995 (Tab 42, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Ms. McGaughey-Ward's letter dated August 23, 1995 and enclosures. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his comments within two weeks.

49. By letter dated September 15, 1995 (Tab 43, Document Book), the Solicitor advised the Law Society that:

- a. in regard to the correspondence of August 24, 1994 to Mr. Dumont, the Solicitor advised that he saw no confrontational attitude on his part regarding the comments made. The Solicitor further advised that he was attempting to "admonish Mr. O'Hara for failing to conduct himself in a more appropriate manner by sticking to the issues".
- b. in regard to the correspondence of September 16, 1994 to Ms. Hartman, this was concerning the assessment of Ms. Patterson's account. The Solicitor indicated that the correspondence contained inaccuracies and a "misconstruing of the truth". The Solicitor again suggested that Ms. Hartman's conduct "smacked of Judge Shopping" and brought the administration of justice into disrepute.
- c. in regard to the correspondence of September 16, 1994 to Mr. O'Hara, this was also concerning the assessment of Ms. Patterson's account. The Solicitor indicated that the conduct of Mr. O'Hara, Ms. Hartman and Ms. McGaughey-Ward was inappropriate in that Ms. Hartman made derogatory comments regarding the Solicitor's competence to the client and that Ms. Hartman had been "judge shopping" in seeking a specific assessment officer;
- d. in regard to the correspondence of September 19, 1994, the Solicitor advised that he saw no problem with the correspondence as it was an outline of the serious concerns held by him and should be used to determine who had been in error regarding the conduct of the assessment.
- e. in regard to the correspondence of October 5, 1994, the Solicitor advised that Ms. Shaw had taken an adverse position against him and that she had defamed his professional and private personality.
- f. in regard to the correspondence of October 7, 1994, the Solicitor advised that he was again outlining the continued sharp practice against his law office.

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- g. in regard to the correspondence of February 27, 1995, the Solicitor advised that he saw no problem with his correspondence and does not find same offensive.
- h. in regard to the correspondence of March 6, 1995, the Solicitor advised that this letter deals with the lack of professionalism by the offices of Miller, Maki toward him. The Solicitor further advised that he attempted to address these problems with the senior partner of Miller, Maki without success.
- i. in regard to the correspondence of August 1, 1995, the Solicitor advised that he often made notations on correspondence to expedite matters. The Solicitor advised that the letter was another example of the nonsense received from Mr. O'Hara.
- j. in regard to the correspondence of October 5, 1994 to Mr. Keenan, same was an attempt by Mr. O'Hara to slander Ms. Patterson.

V. PRIOR DISCIPLINE

50. The Solicitor does not have a discipline history.

DATED at Toronto, this 3rd day of July, 1997."

Re: Complaint D185/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D185/97 and is prepared to proceed with a hearing of this matter on July 3 and 4, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D185/97 with his counsel, Brian Greenspan, and admits the particular contained therein. The Solicitor further admits that the said particular constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 30, 1990. He practises as a sole practitioner.

Particular 2a) He communicated with other solicitors in a manner inconsistent with the proper tone of professional communications from a lawyer.

5. Rose Patterson and Ronald Tremblay have been involved in a divorce proceeding since January 1994. Throughout this period, the Solicitor has been involved in a personal relationship with Rose Patterson. At the time of the communication in question, the Solicitor was (and still is) acting for Rose Patterson in a tort action by Ms. Patterson against Mr. Tremblay.

6. Patricia Meehan was appointed by the office of the Children's Lawyer to represent the interests of Trina Tremblay, one of the children of Rose Patterson and Ronald Tremblay. Ms. Meehan met with Trina Tremblay for an assessment and by letters dated February 24, July 8 and August 6, 1996 (Tabs 1-3, Document Book), advised Leo Arseneau (Ms. Patterson's matrimonial lawyer), Michael Keenan (Mr. Tremblay's lawyer) and the Solicitor of the results of her meeting with Trina. In particular, Ms. Meehan stated that the child did not wish to have any contact with her natural mother and that access would be strongly opposed by Ms. Meehan as a result. Given Trina's position, Ms. Meehan did not believe that her continued involvement would be of assistance. In her August 6, 1996 letter, Ms. Meehan advised the parties that if she did not receive a response from them, she would close her file.

7. By letter dated August 8, 1996 (Tab 4, Document Book), the Solicitor wrote to Ms. Meehan and Mr. Arseneau in response to Ms. Meehan's correspondence. In the letter, he stated that he was corresponding as agent for Rose Patterson. He further stated, among other things,

"On a personal note, I am quite surprised that Ms. Meehan is not aware of the fact that she is being duped by, in effect, the father of her client who is now a convicted criminal seeking to discharge his indebtedness and avoid the civil action for battering his wife for 17 years. This is the third correspondences reiterating the same paraphernalia. It appears as though Ms. Meehan may in fact have some type of persona (sic) interest in this matter.

I agree with Ms. Meehan that her continued involvement can be of no assistance with the exception that her further involvement can be seen as nothing but an embarrassment."

The Solicitor concluded the letter as follows:

"P.S. Ms. Meehan, get a reality check."

8. By letter dated August 15, 1996 (Tab 5, Document Book), Ms. Meehan made a complaint to the Law Society regarding the Solicitor's comments.

9. By letter dated August 28, 1996 (Tab 6, Document Book), James Varro of the Law Society wrote to the Solicitor enclosing a copy of Ms. Meehan's letter dated August 15, 1996. The Law Society reminded the Solicitor of his professional obligation to respond promptly to communications from the Law Society and requested his response within two weeks. The Law Society also wrote to Mr. Arseneau by letter of the same date requesting his comments.

10. By letter dated October 17, 1996 (Tab 7, Document Book), the Solicitor advised the Law Society that if Ms. Meehan wished to complain, she should indicate which comments were inappropriate and inaccurate. The Solicitor further advised that if Ms. Meehan was not clear regarding his and Ms. Patterson's instructions, they would commence an action against her and the Children's Lawyer for harassment. He characterized Ms. Meehan's complaint as "a further example of the penchant that many counsel in the City of Sudbury have for wasting time and effort in complaining about the undersigned."

11. By letter dated October 18, 1996 (Tab 8, Document Book), Jonathan Fedder advised the Solicitor that he now had carriage of the investigation on behalf of the Law Society. He asked for a response to Mr. Varro's letter of August 28, 1996. Mr. Fedder advised Ms. Meehan that he had taken over carriage of this matter under cover of a letter that same date (Tab 9, Document Book).

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12. By letter dated October 29, 1996 (Tab 10, Document Book), the Solicitor advised the Law Society that:

- i. he was counsel for Ms. Patterson in a personal injury action against her ex-husband while Mr. Arseneau was counsel for Ms. Patterson in the matrimonial matter;
- ii. his correspondence to Ms. Meehan was self explanatory regarding her "persona (sic) interest in this matter". The Solicitor advised that Ms. Patterson had not attempted to exercise access to her child and therefore "Ms. Meehan must have some form of problem with this matter, otherwise she would realize she is being duped";
- iii. with respect to his comment "can be seen as nothing but an embarrassment", the Solicitor indicated that he was a lawyer qualified by the Law Society to practice law and he found Ms. Meehan's conduct in this matter embarrassing;
- iv. with respect to his comment "Ms. Meehan, get a reality check", he indicated that the comment was meant to suggest that Ms. Meehan should take a more objective view of the situation. The Solicitor further stated that "I find this comment not to be unprofessional or inappropriate in any manner and in fact believe it to be appropriate in the context".

13. By letter dated November 12, 1996 (Tab 11, Document Book), Mr. Arseneau wrote to the Law Society in response to the Law Society's inquiries of August 28, 1996. Mr. Arseneau advised that he discussed the matter with the Solicitor and advised him not to send any letters on behalf of Ms. Tremblay (Patterson) unless authorized to do so by him. Mr. Arseneau further advised that the Solicitor's letter accurately reflected his client's opinion but Mr. Arseneau would have expressed himself differently. Mr. Arseneau further advised that access was no longer an issue as Ms. Meehan had been advised that his client was not pursuing her claim.

14. By letter dated January 14, 1997 (Tab 12, Document Book), the Law Society acknowledged receipt of the Solicitor's letter of October 29, 1996 and advised that a copy would be sent to Ms. Meehan for her comments. Ms. Meehan's comments were sought under cover of a letter dated January 14, 1997 (Tab 12, Document Book)

15. By letter dated January 24, 1997 (Tab 13, Document Book), Ms. Meehan provided her comments concerning the Solicitor's letter of October 29, 1996. She advised the Law Society that she had sent the letters to the Solicitor as a professional courtesy. Ms. Meehan further advised that she was not advised by either counsel that the issue of access had been resolved and that her involvement was no longer necessary.

16. By letter dated February 27, 1997 (Tab 14, Document Book), the Solicitor provided further information concerning his complaint about Ms. Meehan.

17. By letter dated March 13, 1997 (Tab 15, Document Book), the Solicitor complained to the Law Society about Patricia Meehan. The Solicitor stated as follows:

28th October, 1997

"It is the very personal opinion of the undersigned that Ms. Meehan had some apparent personal penchant in this matter to correspond with the undersigned. It is also my very personal opinion that this penchant was based on the fact that Ms. Meehan had learned that Ms. Patterson was holidaying in Italy and further that the undersigned would be joining her for approximately 28 days to travel throughout Italy and Europe.

It is my further very personal opinion that Ms. Meehan either in fact proceeded on wilful blindness or with the intention to disrupt the undersigned and Ms. Patterson by corresponding on a matter which, with all due respect, had to be very clearly indicative of a situation wherein the only interest was to antagonise Ms. Patterson."

18. By letter dated March 25, 1997 (Tab 16, Document Book), the Law Society advised the Solicitor that it was of the view that there was no grounds to initiate an investigation into the conduct of Ms. Meehan. The Solicitor was advised that the complaint against him would be referred to the Chair and Vice-Chairs of the Discipline Committee and that his concerns about Ms. Meehan would also be referred to the Chair and Vice-Chairs for direction. The Law Society also wrote to Ms. Meehan that same day (Tab 17, Document Book). a)

By letter dated April 9, 1997 (Tab 18, Document Book), the Law Society advised the Solicitor that a formal complaint had been authorized against him by the Chair and Vice-Chairs of the Discipline Committee. The Solicitor was further advised that the Chair and Vice-Chairs declined to direct that an investigation with respect to the Solicitor's concerns about Ms. Meehan be conducted.

19. The Society will be relying upon the documents at Tabs 19, 20 and 21 in penalty submissions.

V. PRIOR DISCIPLINE

20. The Solicitor does not have a discipline history.

DATED at Toronto, this 3rd day of July, 1997."

Re: Complaint D210/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D210/97 and is prepared to proceed with a hearing of this matter on July 3 and 4, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D210/97 with his counsel, Brian Greenspan, and admits that the said particular constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in March, 1990 and practises as a sole practitioner in Sudbury, Ontario.

28th October, 1997

5. The Solicitor acted on behalf of a number of parties who were plaintiffs in a lawsuit brought against clients of another solicitor, Robert MacRae, who practises in Sault Ste. Marie. The Solicitor's clients are Steven Watson and Sharon Dupuis and Mr. MacRae's clients are Douglas Utter, Nicole Utter and Scott Utter.

6. The lawsuit was commenced by Statement of Claim which was prepared by the Solicitor and issued on November 29, 1995 (Tab 1 of the Document Book). In the claim, the Solicitor set out the contents of a number of cellular telephone conversations which his client had recorded, including a conversation between Mr. MacRae and one of his own clients, which took place on November 1, 1995.

7. The Solicitor subsequently took the position that Mr. MacRae could not represent the Utters in the lawsuit due to what the Solicitor termed a "conflict of interest". Mr. MacRae denied any conflict of interest and advised the Solicitor to bring the appropriate motion if he wished to have Mr. MacRae removed as counsel of record. The Solicitor did not take any such action. Letters were exchanged by the Solicitor and Mr. MacRae, on this issue, dated December 22, 1995, January 3, 4, 8 and 29, 1996 (Tab 2).

8. By letter dated March 18, 1996 (Tab 3), the Solicitor advised Mr. MacRae that the defendants had been noted in default and he would be proceeding to note them in default. A motion was brought on behalf of the defendants to set aside the noting in default. Ultimately, the Solicitor consented to the noting in default being set aside (Tab 4).

9. The Statement of Defence was filed March 28, 1996 (Tab 5).

10. Further letters were exchanged concerning Mr. MacRae removing himself as solicitor of record on April 1, 1996 and April 3, 1996 (Tab 6).

11. Examinations for discovery were scheduled thereafter to take place in Sault Ste. Marie on May 13, 1996. The Solicitor and Mr. MacRae attended at the offices of the court reporter at which time an argument took place. During the course of this encounter, Mr. MacRae would state that he made the following comment to the Solicitor: "You don't have to be an asshole about this". In response, Mr. MacRae would state that the Solicitor stated the following: "You're a fucking jerk, you're nothing but a fucking jerk and do you know what I do to fucking jerks who call me an asshole? I punch their fucking lights out."

12. Thereafter, Mr. MacRae contacted the police and a charge of uttering a threat was laid against the Solicitor under Section 264(1) of the *Criminal Code* (Tab 7).

13. The charges were heard in the Ontario Court of Justice (Provincial Division) on January 30, 1997. At that time, the Solicitor pleaded not guilty to the charges of uttering a threat but did plead true to the statement of facts read to the court for the purposes of entering into a peace bond pursuant to Section 810 of the *Criminal Code*. A finding of true in relation to the exchange set out in paragraph 11 was made by the court and the Solicitor thereafter entered into a Recognizance to Keep the Peace for 12 months, which included the provision that he would not "molest, harass or physically interfere in any manner whatsoever with Robert MacRae." (Recognizance, Tab 21).

14. By letter dated March 13, 1997 (Tab 23), the Solicitor advised the Law Society that the criminal matter was resolved by way of a peace bond.

15. The Solicitor will be relying upon the documents at Tabs 8-20 and 22 on the issue of penalty.

V. PRIOR DISCIPLINE

16. The Solicitor has no prior discipline record.

DATED at Toronto, this 3rd day of July, 1997."

RECOMMENDATION AS TO PENALTY

1. The Committee recommends that Oliverio Eugenio Massimiliano be suspended for one month provided he has fulfilled, prior to the next sitting of Special Convocation (not earlier than September 1997), the following conditions, failing which he be suspended for three months to continue indefinitely thereafter until the conditions have been fulfilled:

- a) The Member shall file with the Society satisfactory evidence of having delivered letters of apology to each of Carol Hartman, Michael Keenan, Francine Kelly, Jackie McGaughey-Ward, Patricia Meehan, Michael O'Hara, Robert MacRae as to the threat of violence, and Lucille Shaw, and of having delivered a letter of apology addressed to the President and all the members of the District of Sudbury Law Association in care of the President;
- b) The Member shall file with the Society satisfactory evidence of having discontinued his action against Robert MacRae;
- c) The Member shall file with the Society satisfactory evidence of having discontinued or transferred to another lawyer the tort action brought by Rose Patterson against her former husband;
- d) The Member shall file with the Society an undertaking never to represent Rose Patterson in any litigation matter;
- e) The Member shall file a letter from Dr. A. M. McFarthing or other medical doctor in good standing stating that the Member has entered an anger management counselling program, and that either the Member has successfully completed the program or is continuing in the program, in which latter event the Member shall file with the Society an Undertaking to continue in the program until the Member has filed with the Society a letter from the attending physician that the Member has successfully completed the program;
- f) The Member shall file with the Society a letter or letters from not more than two members of the Society in good standing practising in the District of Sudbury that one or both such members are willing to act as mentor to the Member for one year which mentoring shall include meeting with the Member at least once per calendar month, failing which the Member shall file with the Society evidence satisfactory to Convocation that the Member has made bona fide efforts to find a mentor; and
- g) The Member shall agree in writing to pay the costs of the Society in the amount of \$5,000.00 repayable without interest at the rate of \$1,000.00 per year commencing one month after the expiration of any period of suspension.

REASONS FOR RECOMMENDATION

D178/96 Particular (e) (Improper communications with other lawyers)

2. In 1993, the Member was retained by Rose Patterson, also known as Rose Patterson-Tremblay, upon her separation from her husband, Ronald Tremblay - a man later convicted of assaulting her. Early in the retention, the Member and Ms. Patterson entered into a personal relationship which has continued for about three years. They are planning to marry. Ms. Patterson was present throughout the hearing.

28th October, 1997

3. Within the first few months of beginning to act on behalf of Ms. Patterson against her husband, i.e., shortly after the Member and she began their personal relationship, the Member referred her to the Sudbury law firm of Miller, Maki for family law representation.

4. Ultimately, Ms. Paterson desired to assess the Miller, Maki account. The Member became involved in her litigious matters. He swiftly lost perspective, became emotionally involved, and behaved very rudely toward several members of the Miller, Maki firm as set out in the Agreed Statement of Facts. The Member admitted to having lost control and to needing counselling in anger management.

5. By way of explanation but not excuse, Mr. Greenspan submitted that the Member had come to the practice of law relatively late in life from a rough background that had included working in the mines for three years, and that, as a result, the Member had not fully appreciated the degree to which others would find the impugned letters offensive. The Committee noted that many people come from similar backgrounds without resorting to such conduct, and that the Member had been practising for several years. He should have known better than to write such inappropriate letters. The Committee accepted that he had a demonstrated need for anger management counselling.

6. The Member submitted through counsel that he had an honest belief that the Miller, Maki firm was on a vendetta against him, and that his letters should be read in that light. Regardless of his state of mind, we find that the impugned statements were not true in fact.

7. The Committee does not condemn all strongly-worded or ill-received communications. Some true statements are unavoidably hurtful when they, for example, accurately describe conversion as conversion or false claims as false claims. Truthful statements professionally communicated are not misconduct even if they are hurtful to the subject of the statements. Untrue statements, or insults deriving from over-wrought opinion, misplaced hyperbole, or a desire to intimidate, sully or defame have no place in communications from lawyers, whether directed to colleagues or to members of the public. The line between candor and slander is sometimes fine; a lawyer is better advised to err on the side of courtesy.

D178/96 Particular 2(a) (Improper representation to court)

8. In February, 1996, Ronald Tremblay plead guilty to a charge of assaulting Ms. Patterson. At page 10, line 24 et seq. of the transcript of the trial, it is apparent that the Court was ruminating aloud about the basis on which to decide a request for an order that the accused stay away from Rose Patterson's house. At that point, the Member rose and suggested that he could, as a friend of the Court, make submissions on the very issue concerning the Court. After some questioning of the Member by the Court as to his status, the Court determined that he was not a friend of the court and asked him to be seated. The Member thanked His Honour and immediately sat down.

9. The most complete definition of *amicus curiae* submitted to us by counsel is from The Encyclopedia of Words and Phrases, Second Edition and is reproduced in full with emphasis added:

(Ont) The words *amicus curiae* mean "friend of the court", and the term is applied to one who suggests something for the information of the court. A point of law in favour of a defendant may be suggested to the court or argued by counsel who is not interested in the case, or by anyone else acting as *amicus curiae*. The term is generally applied to a solicitor of the court who, being present, makes some suggestion to the court in regard to the matter before it, and it is more rarely applied to counsel arguing the case. The term is also used of persons who have no right to appear in a suit but are allowed to protect their own interest, and finally, to a stranger who, being in court, calls the court's attention to some error in the proceedings. In a case where there is a plentiful supply of counsel, there is no room for an *amicus curiae*. The practice ought to be confined to the cases above mentioned and in the case where counsel simply comes and presents a point more or less roughly, the practice should be discouraged. Re Pehlke (1939), 20 C.B.R. 415; [1939] 4 D.L.R. 725.

10. The Member wished to suggest something for the information of the Court. He was a solicitor of the Court who, being present, wished to make some suggestion to the Court in regard to the matter before it. His Honour, presumably having in mind that there was a plentiful supply of counsel present and wishing to discourage the practice in light of Re Pehlke, supra, declined to hear the Member's submission. The Member appears from the transcript to have been polite throughout and to have been seated forthwith upon the Court's request.

11. Except in cases where an *amicus curiae* is clearly called for, the above definition derived from case law states that "the practice should be discouraged". It does not say that the practice is prohibited. The Member's attempt to be acknowledged as a friend of the Court was certain to fail, and in that sense, it was an error of judgment. However, the attempt did not amount to professional misconduct. This particular was not made out.

D178/96 Particulars (b), (c) and (d) (Improper borrowings and failing to disclose the borrowings in Form 2)

12. The first of the two lender-clients, Rose Patterson, is the Member's fiancée and co-habitant. She lent him money on two occasions. The first loan was fully secured by a registered mortgage and was repaid. The second loan occurred when they moved into a new residence together and was characterized, in the uncontradicted submission of Mr. Greenspan, as a repayable contribution by her toward some living expenses. It was secured by the Member's promissory note and was repaid. Ms. Patterson did not complain to the Society; the Society laid the complaint when it learned of the borrowings while investigating the complaint concerning the borrowing from Mr. Talarico. Prior to the investigation, the Member had repaid Ms. Patterson in full.

13. The second lender-client, Frank Talarico, was an experienced lender who had used the Member for several mortgage matters before retaining new counsel. The loan was secured by a registered mortgage and was repaid, save for the legal bill from Mr. Talarico's new counsel for preparing the discharge, prior to the complaint by Mr. Talarico's new counsel.

14. The Society did not allege that either lender had been in danger of not being repaid. The Society did not allege that the Member was in any way dishonest with respect to his financial dealings or the conduct of his law practice. Except for refusing to pay the legal bill for preparing the discharge, the Member discharged his financial obligations to the lenders without the spectre of a Law Society investigation looming over him.

28th October, 1997

15. Borrowing from clients, except in specified and limited circumstances, is strictly prohibited by Rule 7. Misconduct occurs even where there is no harm to the client, but the degree of any harm may play a role in the imposition of penalty. Where a member borrows without proper security or where the client loses money, Convocation may properly assess a serious penalty for breach of the Rule. Where a member provides sufficient security and repays the principal and interest in full, especially when not under Law Society pressure to do so, Convocation may lessen the penalty.

16. In this case, the Member demonstrated bona fides toward his lender-clients and repaid them prior to the investigation. Despite the bona fides and unpressured repayments, we find professional misconduct for the breach of the Rule, but we recommend mitigation of the penalty given the favourable disposition of the borrowings.

17. The Member was dishonest in one respect: he filed a false Form 2 for his 1994 fiscal year with respect to the borrowings. When the breach of Rule 7, the dishonest filing and other misconduct set out herein are considered together, he ought not to escape a suspension with conditions.

D178/96 Particular (h) (Offensive sexual comments to a female matrimonial law client) (There were no particulars (f) and (g))

18. Francine Kelly retained the Member on a matrimonial matter. He displayed insensitivity and bad manners by describing a sexually explicit movie scene to her. The subject matter of the scene had nothing to do with the retainer or their professional relationship. His conduct was thoughtless and offensive, and it disturbed her.

19. Such conduct lowers public esteem for the profession. Clients retain lawyers to provide them with advice that is in the clients' best interests. It is improper to damage the high levels of trust, professionalism and, where called for, sympathy and compassion that the public rightly expects from our members. Ms. Kelly is owed an unequivocal apology.

20. In mitigation of penalty, the Committee noted that there was no evidence of ulterior motive or that the Member had forced or advanced himself on Ms. Kelly. On the evidence before us, it was a case of poor judgment, bad manners and thoughtlessness, not a case of assault or harassment.

D178/97 Particular (i) (Failure to reply to the Society)

21. In one instance, the Member was tardy in replying. In another, he was initially timely, but the nature of the reply (seeking the replacement of the investigator) was unsatisfactory. Without deciding the issue in this case due to lack of evidence, the Committee does not find fault with a member seeking to replace an investigator in the rare case where the grounds are bona fide and not merely a delaying tactic. Members have an obligation to provide full and timely replies to the Society, and are well-advised to be factual, brief, cool and quick in making those replies. This particular is made out, but it does not, in the circumstances of this case, merit the imposition of a more serious penalty than the one recommended.

D185/97 Particular 2(a) (Improper communications with other lawyers)

22. As with the improper communications involving Miller, Maki in Complaint D178/96, the communications in this complaint arose out of the Member's involvement with Ms. Patterson and her legal troubles, and his resulting failure to maintain perspective, emotional control and decorum.

28th October, 1997

23. Ms. Patterson's former husband was seeking access to their child, Trina Tremblay. The Member was angry and frustrated at what he perceived as an improper failure by the justice system to bar Mr. Tremblay's efforts. The Member failed to understand that the lawyer appointed by the Children's Lawyer was acting in the best interests of the child, and that the interests of both parents were subordinate. The Member was blinded by his emotional involvement, and indulged in rude, unwise, and unprofessional communications.

24. A finding of misconduct was unavoidable but, in mild mitigation of penalty, he did not swear or use vulgarities, and his conduct was spurred by an ill-considered desire to help the woman he loves.

D215/97 Particular 2(a) (Threatening violence against Robert MacRae)

25. At a time when the Member was stressed by the ongoing travails of Ms. Patterson, he became frustrated by Mr. MacRae's refusal to remove himself from the record in a motor vehicle action despite being in a position that the Member saw as a conflict of interest. When they met for a discovery, Mr. MacRae said, perhaps conversationally, perhaps confrontationally, "You don't have to be an a_____e about this".

26. Regardless of the manner in which Mr. MacRae's comment was made, the Member badly over-reacted. The Member's conduct was tortious assault amounting to professional misconduct.

27. In mitigation of penalty, the Committee noted that the Member was not found criminally liable for having uttered a threat. We assume that the judge was satisfied that there had not been criminal intent behind the statement. Moreover, the Member did enter into a peace bond, and there is no evidence that he has failed to honour it.

Conclusion

28. The Committee regarded the misconduct, in its totality, as deserving of a suspension of three months. Given the lack of a discipline history, the full repayment of the principal and interest of the loans prior to any complaints, the relative mildness of the encounter with Ms. Kelly, the lack of criminal intent vis-a-vis Mr. MacRae, the emotional genesis of his abusive letters to the lawyers at Miller, Maki and Ms. Meehan, his seeming honesty, his apparent sincerity in seeking emotional counselling, the steps already taken in this regard, his apparent sincerity in wishing to apologize to every lawyer in Sudbury District, and last and not least, the infamy these complaints have occasioned upon him in Sudbury, the Committee felt that the suspension should be reduced to one month upon various conditions being satisfied.

The member was called to the Bar on March 30, 1990.

ALL OF WHICH is respectfully submitted

DATED this 4th day of September, 1997

Bradley H. Wright, Chair

There were no submissions.

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

Carried

28th October, 1997

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month provided that he had fulfilled the conditions set out in the Report failing which he be suspended for a period of 3 months to continue indefinitely thereafter until the conditions have been fulfilled.

Ms. Cowie advised that all the conditions had been met and both counsel made submissions in support of a 1 month suspension.

Mr. Greenspan requested that the suspension commence December 1st, 1997.

It was moved by Mr. Carter, seconded by Ms. Ross that the solicitor be suspended for a period of 1 month commencing December 1st, 1997.

Carried

Re: Peter Guy MARTIN - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar, Wilson and Carey, Ms. Carpenter-Gunn and Ms. Angeles withdrew for this matter.

Ms. Catherine Braid appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 9th September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppe that he had effected service on the solicitor by registered mail on 19th September, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Thomas J. P. Carey, Chair
Kim Carpenter-Gunn
Nora Angeles

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

Georgette Gagnon
for the Society

PETER GUY MARTIN
of the City
of Toronto
a barrister and solicitor

Colin D. Adams
for the solicitor

Heard: June 17, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 16, 1996, Complaint D358/96 was issued, and on December 17, 1996 Complaint D357/96 was issued against Peter Guy Martin alleging that he was guilty of professional misconduct.

The matter was heard in public on June 17, 1997 before this Committee composed of Thomas J.P. Carey, Chair, Kim Carpenter- Gunn and Nora Angeles. The Solicitor attended the hearing and was represented by Colin D. Adams. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D357/96

2. a) he breached section 18 of Regulation 708 under the *Law Society Act* as he failed to produce to the Law Society the client files of his practice for examination despite requests that he do so;
- b) he failed to comply with his Acknowledgement to the Law Society dated April 10, 1996 by failing to co-operate fully with the Law Society in respect of his obligations related to section 18 of Regulation 708.

Complaint D358/96

2. a) he failed to deposit retainer monies received in trust from a client into a trust account at a chartered bank, provincial savings office or registered trust corporation in accordance with subsection 1 of section 14 of Regulation 708;
- b) he failed to account to his client, Alan Dube, for monies entrusted to him as a retainer;
- c) he failed to reply to the Law Society regarding a complaint by Alan Dube despite a letter dated April 25, 1996.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D357/96 & D358/96 and is prepared to proceed with a hearing of this matter on June 17 and 18, 1997.

II. IN PUBLIC/IN CAMERA

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

28th October, 1997

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D357/96 and D358/96 with his solicitor, Colin Adams, and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. THE COMPLAINT

D357/96

- a) The Solicitor breached section 18 of Regulation 708 under the *Law Society Act* as he failed to produce to the Law Society the client files of his practice for examination despite requests that he do so;
- b) The Solicitor failed to comply with his Acknowledgement to the Law Society dated April 10, 1996 by failing to co-operate fully with the Law Society in respect of his obligations related to section 18 of Regulation 708.

D358/97

- a) The Solicitor failed to deposit retainer monies received in trust from a client into a trust account at a chartered bank, provincial savings office or registered trust corporation in accordance with subsection 1 of section 14 of Regulation 708;
- b) The Solicitor failed to account to his client, Alan Dube, for monies entrusted to him as a retainer;
- c) The Solicitor failed to reply to the Law Society regarding a complaint by Alan Dube despite a letter dated April 25, 1996.

V. BACKGROUND

4. The Solicitor was called to the Bar on March 30, 1990. He has been suspended administratively since May 26, 1995 for non-payment of his errors and omissions insurance levy. He was re-instated May 13, 1997.

VI. FACTS

D357/96

5. Pursuant to sections 9 and 18 of Regulation 708 of the Law Society Act, an audit was instructed on the Solicitor's practice to determine whether the Solicitor practised law while under suspension. The Solicitor's membership was suspended on May 26, 1995 for non-payment of his errors and omissions insurance levy.

6. Section 18(1) of Regulation 708 of the Law Society Act states:

The Chair or Vice Chairs of the Discipline Committee may at any time require an investigation to be made by a person designated by him or her, of the books and accounts of any member for the purpose of ascertaining and reporting whether sections 14, 15 and 16 have being complied with by such member who shall produce forthwith to such person all evidence, vouchers, records, books, papers and furnish such explanations as such person may require for the purpose of his or her investigation.

28th October, 1997

7. In October and November 1995, the Law Society attempted to arrange appointments with the Solicitor to review his books and records. The Solicitor did not produce his books and records and a complaint of professional misconduct was authorized on February 13, 1996 against the Solicitor for failure to produce his books and records.

8. On April 10, 1996, the Solicitor appeared before a Discipline Committee in response to the complaint of failure to produce his books and records.

9. On April 10, 1996, the Solicitor produced books and records of his practice. The complaint of professional misconduct was withdrawn. In consideration of the withdrawal of the complaint, the Solicitor received an Invitation to Attend and signed an acknowledgement dated April 10, 1996 that required the Solicitor to co-operate fully with the Law Society in respect of his obligations related to Section 18 of Regulation 708 of the Law Society Act. Attached at Tab 1 of the Document Book is a copy of the acknowledgement signed by the Solicitor and dated April 10, 1996.

10. Following the discipline hearing, the Solicitor was advised by the Law Society that a number of client files were required to complete the audit. The Solicitor asked the Law Society's auditor to contact him on April 15, 1996 at which time he would locate and produce the client files as requested.

11. Since April 15, 1996, the Solicitor has failed to produce client files of his practice to the Law Society in spite of requests from the Law Society, as follows:

28th October, 1997

DATE	TYPE OF CONTACT	RESULT
April 15, 1996	Telephone call to the Solicitor.	Refer to April 16, 1996. (Tab 2)
April 16, 1996	Telephone call from the Solicitor.	The Law Society's auditor spoke with the Solicitor and gave him a list of client files required for review. The Solicitor advised the auditor that he would deliver the files to the Law Society's main reception the following day. (Tabs 3 & 4)
April 17, 1996	Telephone call from the Law Society to the Solicitor.	No reply from the Solicitor. No client files were delivered to the Law Society by the Solicitor. (Tab 5)
April 18, 1996	The Solicitor left a message on the auditor's voice mail.	The Solicitor apologized for not delivering the client files to the Law Society and stated that he would deliver the files early that afternoon. A copy of the auditor's handwritten notes is attached at Tab 6. No client files were delivered to the Law Society by the Solicitor.
April 19, 1996	Telephone call to the Law Society from the Solicitor.	The Solicitor apologized for not delivering the client files to the Law Society and stated that he would deliver them later that day. A copy of the auditor's handwritten notes are attached at Tab 7. No clients files were delivered.
May 1, 1996	Letter sent to the Solicitor by ordinary mail and not returned.	No client files were delivered to the Law Society. A follow up letter to the Solicitor was later sent by the Law Society. (Tab 8)

28th October, 1997

May 8, 1996	The auditor attended at the Solicitor's office on Elm Street in Toronto with a Law Society examiner.	<p>The receptionist advised the Law Society that the Solicitor no longer had an office at that location however, messages were taken for him.</p> <p>The auditor left her business card and asked the receptionist to have the Solicitor contact her. A copy of the auditor's handwritten notes are attached at Tab 9.</p>
May 21, 1996	Letter sent to the Solicitor by ordinary and registered mail, asking him to produce client files as requested.	<p>No client files were delivered. A final letter to the Solicitor was later sent by the Law Society.</p> <p>The registered letter was returned to the Law Society "unclaimed". (Tab 10)</p>

12. The Solicitor produced client files of his practice on June 12, 1997.

13. In failing to produce his client files to the Law Society for examination, the Solicitor has failed to comply with and breached his acknowledgement to the Law Society dated April 10, 1996 and failed to co-operate fully with the Law Society in respect of his obligation pursuant to Section 18 of Regulation 708 of the Law Society Act.

14. The Solicitor did not request an extension for production of his client files and has not provided an explanation for his failure to produce client files to the Law Society.

D358/96

15. On June 1, 1995, Alan Dube ("Mr. Dube"), retained the Solicitor to obtain a better severance package from his former employer who had recently laid him off. The Solicitor was successful and obtained an increase in compensation for Mr. Dube. Attached at Tab 11 and 12 of the Document Book are copies of the Solicitor's letters to Mr. Dube and Blake Cassels & Graydon regarding Mr. Dube's compensation package dated June 8 and 9, 1995 and Blake Cassels & Graydon's letter to the Solicitor dated June 19, 1995.

16. During the course of the retainer, Mr. Dube gave the Solicitor \$500.00 and received a receipt. Mr. Dube also paid the Solicitor \$180.00 in cash and did not obtain a receipt.

17. In spite of frequent requests and assurances from the Solicitor that a statement of account would be provided, the Solicitor failed to provide Mr. Dube with a statement of account.

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18. The Solicitor deposited the amount of \$500.00 received from Mr. Dube into a bank account that was not a trust account. A bank deposit slip from the Canadian Imperial Bank of Commerce shows that the Solicitor deposited the amount of \$500.00 into account #19-89537 on June 6, 1995. Attached at Tab 13 of the Document Book is a copy of the bank deposit slip dated June 6, 1995.

19. In previous communication with the Law Society, the Solicitor provided information to the Law Society about bank accounts that he maintained. Account #19-89537 at the Canadian Imperial Bank of Commerce was not a bank account that the Solicitor informed the Law Society about.

20. The Law Society was later advised by the Canadian Imperial Bank of Commerce that account #19-89537 was closed and that such account was not a trust account but a personal account.

21. The Solicitor failed to deposit retainer monies of \$500.00 received in trust from his client Mr. Dube into his trust account at a chartered bank, provincial savings office or registered trust corporation in violation of Section 14(1) of Regulation 708.

22. The Solicitor failed to render an account to his client, Mr. Dube and failed to maintain client retainer funds in his trust account until a statement of account had been rendered to his client. The Solicitor failed to account to his client Mr. Dube for monies entrusted to him as a retainer.

23. By letter dated April 8, 1996, Mr. Dube complained to the Law Society of Upper Canada regarding the Solicitor and indicated that he required the Solicitor's account to support filings he had made with Revenue Canada.

24. On April 25, 1996, the Law Society wrote to the Solicitor enclosing a copy of Mr. Dube's complaint and requesting his comments. Attached at Tab 14 of the Document Book is a copy of the Law Society's letter to the Solicitor dated April 25, 1996.

25. On May 31, 1996, the Law Society telephoned the Solicitor and was advised that the telephone number was no longer in service. Directory Assistance did not have a listing at the address provided to the Law Society by the Solicitor. Attached at Tab 15 of the Document Book is a copy of the telephone transaction record of the Law Society staff member.

26. On June 5, 1996, the Law Society sent a letter by registered mail to the Solicitor which was returned marked "unclaimed". The letter asked the Solicitor to provide the requested information and advised that failure to respond can lead to disciplinary action and that the matter would be referred to the Chair of the Discipline Committee should a response not be received within seven days. Attached at Tab 16 of the Document Book is a copy of the Law Society's letter to the Solicitor dated June 5, 1996 and envelope returned marked "unclaimed".

27. On August 20, 1996, the Law Society telephoned a telephone number listed for the Solicitor and a message was left on an answering machine asking the Solicitor to call the Law Society.

28. Account sent to A. Dube, registered mail - received June 11, 1997. To date, the Solicitor has failed to reply to the Law Society regarding a complaint by Alan Dube.

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VI. DISCIPLINE HISTORY

29. The Solicitor does not have a discipline history.

DATED at Toronto this 17th day of June, 1997."

Finding of the Committee

The Committee has before it two complaints, D357/96 and D358/96. There is an Agreed Statement of Facts in which professional misconduct is admitted. Based on that and the submissions of counsel, the Committee is satisfied that the complaints have been made out.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Peter Guy Martin be reprimanded in Convocation if he has provided a supervisory plan satisfactory to the Law Society by the time the matter reaches Convocation, failing which, that he be suspended for a period of thirty days.

REASONS FOR RECOMMENDATION

As to penalty, we have a joint submission that the Solicitor be reprimanded in Convocation.

We have heard that the Solicitor, who was called in 1990 and is 35 years of age, got caught in the economic crunch that has hit many law practices. He found practising in these circumstances very difficult. He had some personal difficulties in a relationship that ended and he lost the house that he'd been living in. His reaction, which is not all that uncommon unfortunately, in our profession, was to be paralysed into inertia, or in the words of his counsel, he "buried his head in the sand".

The Solicitor's reaction to very persistent contacts from the Law Society was to, in some cases, reply and promise something that he didn't follow up on. He apologized and did not follow up. He promised files and did not follow up or just did not reply. This course of conduct over the better part of a year, resulted in his not producing his books and records as required and not providing a client's account. The latter was a serious matter in that the client required that account, (in a wrongful dismissal matter), in order to complete his Revenue Canada filings.

We are told that the Solicitor's books and records have been produced and all his filings and payments to the Law Society are up to date.

He has expressed his remorse for his previous actions by coming here, resolving the matter, bringing counsel, and indicating his desire to start life anew, and that certainly should be encouraged. Most importantly, he has agreed to enter into a supervisory situation with another lawyer who will monitor his files and his practice to hopefully avoid this kind of incident recurring.

On the basis of that agreement, it seems appropriate to accept the joint submission of a reprimand in Convocation as being an appropriate penalty. Were it not for that, the Committee would be recommending a more serious penalty, likely a period of suspension.

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The actions here of ignoring the Law Society and ignoring the client are extremely serious and certainly, at first blush, indicate a solicitor who was approaching being ungovernable. However, it's important to note all of the background here; the relative newness of the solicitor and the steps taken to correct the problem. It is also important to note that there is no discipline history here.

In all of the circumstances, the recommendation of the Committee is that Mr. Martin be reprimanded in Convocation, providing that when the matter comes to Convocation, he has provided through his counsel to discipline counsel, a supervisory plan, satisfactory to the Law Society counsel and failing that, it would be the recommendation of this Committee that he be suspended for a period of thirty days.

Peter Guy Martin was called to the Bar on March 30, 1990.

ALL OF WHICH is respectfully submitted

DATED this 9th day of September, 1997

Thomas J.P. Carey, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he has provided a supervisory plan satisfactory to the Law Society failing which that he be suspended for a period of 30 days.

Ms. Braid advised that an Undertaking of a supervisory plan satisfactory to the Law Society had been given by the solicitor.

The Undertaking was filed as Exhibit 3.

It was moved by Ms. Ross, seconded by Mr. Gottlieb that the solicitor be reprimanded and that the Undertaking be accepted.

Carried

The waiver was signed and the Treasurer administered the reprimand.

Re: Janice Marie PORTER - London

The Secretary placed the matter before Convocation.

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

Ms. Janet Brooks appeared on behalf of the Society and Mr. Anand, Duty Counsel appeared on behalf of the solicitor who was present.

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Convocation had before it the Report of the Discipline Committee dated 11th June, 1997, together with an Affidavit of Service sworn 21st July, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 11th July, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Gavin MacKenzie, Chair
Gerald A. Swaye, Q.C.
Nora Angeles

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

Janet Brooks
for the Society

JANICE MARIE PORTER
of the City
of London
a barrister and solicitor

Harry Black, Q.C.
for the solicitor

Heard: April 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 15, 1997 amended Complaint D208a/96 was issued against Janice Marie Porter alleging that she was guilty of professional misconduct.

This matter was heard on April 16, 1997 before a Committee composed of Gavin MacKenzie (Chair), Gerald Swaye, Q.C. and Nora Angeles. The Solicitor attended the hearing and was represented by Harry Black, Q.C. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D208a/96

- a. she improperly appropriated monies for services rendered on behalf of the law firm of Bitz, Szemenyei and Ferguson with respect to work performed and billed to the Ontario Legal Aid Plan and the Canadian Auto Workers Legal Services Plan in the sum of \$48,253.07;
- b. she improperly appropriated monies received for services rendered to clients of the law firm in the sum of \$21,795.00;
- c.(ii) she improperly appropriated monies received as retainers in the total sum of \$7,315.00.

EVIDENCE

The entirety of the evidence received by the Committee on the issue of whether the Solicitor is guilty of professional misconduct was contained in the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D208a/96 and is prepared to proceed with a hearing of this matter on April 15 and 16, 1997.

II. IN PUBLIC/IN CAMERA

2. The Solicitor will move that certain portions of this hearing be heard *in camera* pursuant to section 9 of the *Statutory Powers Procedure Act*. The Law Society will not oppose this request.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D208a/96 with her counsel Harry Black and admits particulars 2(a), (b) and (c)(ii) therein. The Solicitor further admits that the said particulars 2(a), (b) and (c)(ii) constitute professional misconduct.

IV. BACKGROUND FACTS

4. The Solicitor was called to the bar in April 1987. She has been suspended for non-payment of her insurance levy since December 31, 1995.

5. At all times relevant to this Complaint, the Solicitor practised mainly criminal and family law with Bitz, Szemenyei and Ferguson (the "law firm"). At all times relevant to this Complaint, her agreement with the firm was that all monies received by her from clients or on behalf of clients were to be deposited to either the firm's trust or general account, as the case may be. The Solicitor did not operate a general or trust account.

6. During her association with the law firm, her remuneration arrangement was salary as well as, at times, a percentage of her billings, and at times a combination of the two. On commencing her work with the law firm in April 1987, she was paid a straight salary based on approximately \$22,000 per annum, with an agreement that if her billings reached a certain amount an additional percentage would be paid. The amount was never reached. In 1988, she received salary of approximately \$29,500.00. In 1989, she received salary of approximately \$40,100.00. Income tax was not deducted from her salary in 1987, 1988 and 1989 but UIC and CPP contributions were deducted.

7. Commencing February 1, 1990, the Solicitor reached a new arrangement with the firm whereby she was to be paid 40% of her collected billings and the firm was to receive 60% of those billings. Income tax deductions were made for the first time. She received a weekly draw from the firm during this time. The Solicitor states that she received a draw of approximately \$350 per week against billings. The Solicitor further states that the net result of this arrangement was that her average monthly take-home pay decreased by approximately 50%.

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8. Commencing in February 1, 1991, the Solicitor's arrangement with the firm continued despite her request to renegotiate on the basis that she would pay what she considered to be her realistic share of the firm's overhead. Because it was the law firm's position that the Solicitor's draws exceeded her fees billed and collected, she was no longer paid any draw against billings, nor were CPP or UIC deducted. She continued to receive payments based on fees billed and collected. This remuneration arrangement continued in 1992 and into 1993.

9. Throughout the entire period of time (April 1987 to July 1993) that these various arrangements were in effect, the Solicitor paid all of her insurance levies, Law Society annual fees and states that she paid her local association fees and did not take vacation other than a vacation in 1989. Throughout this entire period of time, the firm paid practically all overhead associated with the Solicitor's practice including rent, bookkeeping and staff salaries and also financed disbursements and paid Goods and Services taxes on all billings.

10. The complaint to the Law Society dated July 20, 1993 from Mr. Andras Szemenyei, a partner in the firm, (Document Book - Tab 1) was initiated as a result of an internal audit following a request for a receipt by Mrs. Alba Mocellin. Mrs. Mocellin had told the firm's bookkeeper, Ms Liana Pitel, that she required a receipt for \$500.00 that she had paid directly to the Solicitor when she defended her son, Michael, on an assault charge.

11. The bookkeeper informed Mrs. Mocellin that she could find no record of the receipt that Mrs. Mocellin claimed to have received from the Solicitor, and asked her if she could provide evidence that she had paid the Solicitor the retainer. A copy of fax transmission from the bookkeeper to Mrs. Mocellin is at Tab 2 of the Document Book. On April 2, 1993, Mrs. Mocellin faxed to the bookkeeper, a memo and a copy of two receipts, one for \$250.00 dated March 6, 1992, and one for \$500.00 signed by the Solicitor on September 8, 1992. Copies of the memo and the receipts are at Tab 3 of the Document Book.

12. The firm had no record of the receipt of the \$500.00 in its accounting records, and this fact prompted the bookkeeper to question the Solicitor about this receipt, to send her a memo dated May 3, 1993 (at Tab 4 of the Document Book) and caused her to question other files that had remained outstanding, and apparently unbilled, for a period of time.

13. The Solicitor admitted to the bookkeeper that she had withheld some retainers, and some Ontario Legal Aid Plan ("OLAP") payments. The Solicitor co-operated with the firm and gave the firm copies of her own set of accounting records regarding retainers received and not deposited with the firm, as well as payments from OLAP and the Canadian Auto Workers Legal Services Plan ("CAW") which were not deposited with the law firm. Copies of computer prepared and manually prepared documents given to the law firm by the Solicitor are attached at Tab 5 of the Document Book. The Solicitor also gave the firm a letter from Beach & Doyle dated January 21, 1993 with respect to its payment of an account. A copy of the letter is at Tab 6 of the Document Book.

14. The Solicitor admits to improperly appropriating funds, as follows:

OLAP and CAW payments on account:	\$48,253.07
Private payments retainers and fees:	29,110.00
(\$21,795.00 + \$7,315.00)	
Total	<u>\$77,363.07</u>

The Law Society takes the position that the Solicitor's failure to deposit to trust, monies received by clients in respect of retainers constitutes misappropriation.

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These totals are further detailed in tables herein which summarize the transactions by fiscal year of the law firm and are also detailed in a listing prepared by the law firm at Tab 7 of the Document Book which corresponds to the Solicitor's listings at Tab 5 of the Document Book.

15. The findings were discovered by the firm on July 19, 1993. From July 1993 until October 1993, the Solicitor continued to practise at the firm under tight supervision. The firm received 100% of her billings. She received no payments from the firm during this time. The Solicitor states that she had to pay her living expenses by borrowing money from her parents. The Solicitor left the firm in October 1993.

16. Ultimately the law firm was repaid in full by early 1995. All receivables from OLAP were paid to the firm pursuant to Minutes of Settlement reached between her and the firm. The Solicitor states that during this period of time, her income consisted of monies received from private retainers.

17. The law firm performed its own internal audit. The law firm's internal audit results were verified by the Law Society's investigation, and no improper appropriations (or misappropriations in the Society's position) other than those that had been acknowledged by the Solicitor as set out in paragraph 14 above were discovered. The Law Society's audit established that the Solicitor had fully and accurately disclosed from her own records accurate details of all transactions. The Solicitor stated in her letter to the Law Society dated September 17, 1993, that she kept "complete records ... with respect to all of these transactions, in order to protect the client and ensure that an accurate accounting could be made to the firm when required".

The internal audit results and analyses are as follows:

INTERNAL AUDIT RESULTS

18. As stated above, improper appropriations (or, in the position of the Law Society, in some cases misappropriations) of retainers, payments for fees, and payments from OLAP and CAW for fees and disbursements were listed by the firm based on discussions with the Solicitor. The firm performed its own internal audit to verify the accuracy of the Solicitor's admissions.

19. Listings compiled by the firm indicated that fees and trust monies had been improperly appropriated or, in the Law Society's position, misappropriated, for the fiscal years ending January 31, 1990 through to January 31, 1994, as follows (Document Book - Tab 7).

OLAP and CAW Cheques (Fees and Disbursements)

Fiscal Year	Fees	Disbursements	G.S.T.	Total
1990	\$ 3,394.99	\$ 91.57	N/A	\$ 3,486.56
1991	25,472.63	1,538.47	18.92	27,030.02
1992	10,307.02	1,126.97	614.16	12,048.15
1993	5,232.69	83.52	372.13	5,688.34
Subtotal	44,407.33	2,840.53	1,005.21	\$48,253.07

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Retainers and Fees

Fiscal Year	Fees	Disbursements	G.S.T.	Retainers	Total
1990	\$ 2,100.00				
1991	4,990.00			200.00	
1992	10,330.00			440.00	
1993	3,875.00			3,775.00	
1994	500.00			2,900.00	
Subtotal	21,795.00			7,315.00	29,100.00
Total	\$66,202.33	\$2,840.53	\$1,005.21	\$7,315.00	\$77,363.07

20. As a part of the Law Society's audit procedures, these amounts were verified as to their accuracy. Additional files, that were not part of the list disclosed by the Solicitor were examined and no evidence of other improper appropriations or, in the Society's position, misappropriations was found.

21. As a part of the Law Society's audit procedures, printouts (Document Book - Tab 8) were obtained from OLAP to account for all certificates issued to the Solicitor from the date of her call to the bar to the date of the audit. The investigation confirmed that no improper appropriations of payments other than those disclosed by the Solicitor occurred.

22. Examples of each category were investigated to substantiate the amounts admitted by the Solicitor. A sample of the audit tests is as follows:

Client	Date Billed	Amount Improperly Appropriated	Details
Particular 2(a)			
Allen	1989	\$1,314.12	<ul style="list-style-type: none"> - Account delivered to OLAP - OLAP paid \$1,314.12 on February 19, 1990. - Funds were not deposited to the firm's general account by the Solicitor. - No copy of the bill to OLAP was found in firm's record.
	May 13/91	\$1,392.50	
		<hr/> \$2,706.62	
King	July 23/90	\$1,327.71	<ul style="list-style-type: none"> - Account delivered to OLAP - OLAP paid \$1,327.71 on September 17/90. - Funds were not deposited to firm's general account.
	May 27/91	\$ 718.02	
		<hr/> \$2,045.73	
Merrifield	December 27/90	\$1,622.06	<ul style="list-style-type: none"> - Account delivered to OLAP. - OLAP paid \$1,622.06 on February 25/91. - Funds were not deposited to firm's general account.
	May 31/91	\$ 202.72	
		<hr/> \$1,824.78	

Particular 2(c)			
Client	Date(s) Funds Received	Amount	Details
Skufca	June 14/93	\$1,500.00	<ul style="list-style-type: none"> - Client confirmed to Mr. Szemenyei that client had paid retainer of \$1,500.00 on June 14/93. - Funds not deposited to firm's trust account.
Thatcher	April 12/91 April /91 February 13/92 February /92 June 22/92	\$ 200.00 200.00 500.00 500.00 300.00 <hr/> \$1,700.00	<ul style="list-style-type: none"> - Interim statement of account dated August 20/93 prepared by Solicitor indicates client delivered \$2,150.00 - Amounts traced to firm's client trust ledger total \$450.00 (February 25/92 - \$250; July 24/93 - \$200). - Difference of \$1,700 was not deposited to firm's trust account.
Ries	April 28/92 May 20/92 June 12/92 August 24/92 October 23/92 January 4/93 January 26/93	\$ 100.00 100.00 100.00 150.00 150.00 200.00 100.00 <hr/> \$ 900.00	<ul style="list-style-type: none"> - Interim statement of account dated August 20/93 prepared by Solicitor indicates that client delivered \$900.00. - Funds were not deposited to firm's trust account.
Particular 2(b)			
Client	Date Fund(s) Received	Amount	Details
Trull	December 31/91	\$ 500.00	<ul style="list-style-type: none"> - Retainer received by Solicitor and receipt issued to client. - Funds not deposited to firm's trust account.
	January 7/92	\$ 500.00	<ul style="list-style-type: none"> - Retainer received by Solicitor and receipt issued to client. - Funds not deposited to firm's trust account.
		<hr/> \$1,000.00	

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Mocellin	March 6/92	\$ 250.00	- Client paid retainer in cash. Solicitor issued receipt.
	September 8/92	500.00	- Funds not deposited in firm's bank account.
		<hr/> \$ 750.00	- Client paid retainer in cash. Solicitor issued receipt but not on firm's stationery.
			- Funds not deposited in firm's bank account.
Jeck	October 15/92	\$ 800.00	- Retainer received by Solicitor.
			- Funds not deposited to firm's trust account

Particular 2(a) She improperly appropriated monies for services rendered on behalf of the law firm of Bitz, Szemenyei & Ferguson with respect to work performed for the Ontario Legal Aid Plan and the Canadian Auto Workers Legal Services Plan in the sum of \$48,253.07.

23. The following are examples of funds which the Solicitor improperly appropriated from the firm of Bitz, Szemenyei & Ferguson:

(A) DONETTA ALLEN - \$2,706.62

24. In the matter of Donetta Allen, the Solicitor submitted two accounts to OLAP and received payments, neither of which was deposited to the law firm's general account:

Payment received:	February 19, 1990	\$1,314.12
Payment received:	September 3, 1991	<u>\$1,392.50</u>
		<u>\$2,706.62</u>

25. A copy of the two accounts to OLAP dated December 29, 1989 and May 13, 1991 were not in the law firm's file, but the firm had a client ledger with respect to this client dating from June 1988, showing disbursements totalling \$363.70 (Document Book - Tab 9). In a handwritten note attached to the firm's file created after July 19, 1993 (Document Book - Tab 10), the law firm's bookkeeper stated that a copy of the account to OLAP had been found by the Solicitor's secretary, Tricia Bates. Civil Certificate Statement of Account dated December 29, 1989 and supporting documents were submitted by the Solicitor to OLAP (Document Book - Tab 11). On February 19, 1990, OLAP paid \$1,314.12 in respect of the account (Document Book - Tab 12). In order to correct its records, the law firm later created an invoice and updated its client ledger to account for the payment from OLAP on account of disbursements (Document Book - Tab 13).

26. The second account to OLAP was also found in the Solicitor's file after July 19, 1993. The interim Statement of Account dated May 13, 1991 was submitted by the Solicitor (Document Book - Tab 14). On September 3, 1991, OLAP paid \$1,392.50 in respect of the account (Document Book - Tab 15). In order to correct its records, the law firm generated an invoice on August 23, 1993 to reconcile the account for the September 1991 payment (Document Book - Tab 16), and a further invoice to reconcile the account for the February 1990 payment by OLAP (Document Book - Tab 17).

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(B) MARILYN KING - \$2,045.73

27. The Solicitor received two payments from OLAP in respect of Ms King's matter, neither of which was deposited in the firm's general account.

Payment received: September 17, 1990	\$1,327.71
Payment received: May 27, 199	<u>\$ 718.02</u>
	<u>\$2,045.73</u>

28. The first account to OLAP dated July 23, 1990 and signed by the Solicitor requested payment of \$1,324.44 (Document Book - Tab 18) and was supported by the Solicitor's Statement of Account (Document Book - Tab 19). On September 17, 1990, OLAP paid \$1,327.71 (Document Book - Tab 20). In order to correct its records, the law firm generated an invoice dated August 23, 1993 to account for the payment by OLAP (Document Book - Tab 21).

29. The second account to OLAP dated May 27, 1991 and signed by the Solicitor requested payment of \$718.02 (Document Book - Tab 22) was supported by the Solicitor's Statement of Account dated May 27, 1991 (Document Book - Tab 23). On July 2, 1991, OLAP paid this amount (Document Book - Tab 24). In order to correct its records, the law firm generated an invoice on August 23, 1993 to account for the payment by OLAP (Document Book - Tab 25).

(C) MICHELE MERRIFIELD - \$1,824.78

30. The Solicitor received two payments from OLAP in respect of Ms Merrifield's matter, neither of which was deposited in the firm's general account.

Payment received: February 25, 1991	\$1,622.06
Payment received: May 31, 1991	<u>\$ 202.72</u>
	<u>\$1,824.78</u>

31. The first account to OLAP was dated December 27, 1989 (Document Book - Tab 26) and was supported by the Statement of Account (Document Book - Tab 27). The account was signed by the Solicitor on December 27, 1990. On February 25, 1991, OLAP paid \$1,622.06 in respect of the account (Document Book - Tab 28).

32. Similarly, a second account to OLAP dated May 31, 1991 was submitted by the Solicitor (Document Book - Tab 29) and was supported by the Solicitor's Statement of Account (Document Book - Tab 30). On July 2, 1991, OLAP paid \$202.72 in respect of the account (Document Book - Tab 31). In order to correct its records, the law firm generated invoices on August 23, 1993 to account for these payments by OLAP (Document Book - Tabs 32 and 33).

Particular 2(c)(i) She misappropriated trust monies received as retainers in the total sum of \$7,315.00

(ii) In the alternative, she improperly appropriated monies received as retainers in the total sum of \$7,315.00.

33. The following are examples of this particular:

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(A) JOSEPH SKUFCA - \$1,500.00

34. In a handwritten note in Mr. Skufca's file, the Solicitor confirmed her request for a retainer of \$1,500.00 from Mr. Skufca for his matter scheduled for trial on June 30, 1993. (Document Book - Tab 34). The Solicitor received \$1,500.00 from Mr. Skufca on June 14, 1993. As a result of the internal audit, Mr. Szemenyei of the law firm telephoned Mr. Skufca to determine whether he had paid any retainer and made a note of his conversation (Document Book - Tab 35). Mr. Skufca confirmed that he had paid a retainer of \$1,500.00 however, the law firm's client ledger (Document Book - Tab 36), had no record of such a payment being received. The firm reimbursed the mixed trust account in the amount of \$1,500.00 (Document Book - Tab 37) on August 19, 1993.

(B) CHRIS THATCHER - \$1,700.00

35. In her interim statement to Mr. Thatcher, dated August 20, 1993, prepared by the Solicitor's secretary for her signature, the Solicitor acknowledged receipt of \$2,150, which the statement indicates was received in Trust (Document Book - Tab 38). The client ledger, (Document Book - Tab 39) showed that \$250.00 was received by the firm in Trust on February 25, 1992, and a copy of a cheque (Document Book - Tab 40) from Mr. Thatcher, found in the Solicitor's file by the bookkeeper, showed that Mr. Thatcher paid an additional \$200.00 on July 24, 1993.

36. The cheques submitted to the law firm account for only \$450.00 of the \$2,150.00 shown as received by the Solicitor on the interim statement. The Solicitor admitted that the \$1,700.00 difference was never deposited into Trust.

37. The firm reimbursed the mixed trust in the amount of \$1,700.00 (Document Book - Tab 41) on August 19, 1993.

(C) INGRID RIES - \$900.00

38. The facts in this case are similar to the previous case in that no cheques received as retainers had been deposited into Trust. The records maintained by the Solicitor indicate that she had received \$900.00 in trust from Ingrid Ries (Document Book - Tabs 5 and 9). This fact is documented by an interim statement prepared on August 20, 1993 (Document Book - Tab 42).

Particular 2(b) She improperly appropriated monies received for services rendered to clients of the law firm in the sum of \$21,795.00

39. The following are examples of improper appropriation of client fees, since the law firm was not aware that retainers had been received or that payments had been received from clients for legal services performed by the Solicitor.

(A) PETRA TRULL - \$1,000.00

40. The Solicitor received \$500.00 by way of a retainer from Petra Trull on December 31, 1991 as shown by a receipt issued by her (Document Book - Tab 43). A further \$500.00 was received on January 7, 1991, and was admitted by the Solicitor.

28th October, 1997

(B) MICHAEL MOCELLIN - \$500.00

41. As stated above, it was this file which initiated the complaint by the firm and the internal audit procedures. Mr. Mocellin was charged with assault and had applied to Legal Aid. His application was denied, however, and the Solicitor requested that he pay a retainer. In a letter to Mr. Mocellin on February 25, 1992 (Document Book - Tab 44), the Solicitor requested a total retainer of \$750.00 with \$375.00 to be paid prior to March 9, 1992, and an additional \$325.00 at least one month prior to the trial date. According to the receipts supplied by Mrs. Mocellin (Document Book - Tab 3), \$250.00 was paid on March 6, 1992, and \$500.00 on September 8, 1992. The initial \$250.00 was deposited into the firm's trust account properly, but the \$500.00 was not. Receipt of the \$250.00 was acknowledged in a letter from the Solicitor to Mr. Mocellin on September 1, 1992 (Document Book - Tab 45), the Solicitor acknowledges receipt of the \$250.00 and requests a further payment of \$500.00. The Solicitor received the \$500.00 but did not deposit it into the firm's trust account.

42. To correct its records, the firm issued an invoice dated August 23, 1993 (Document Book - Tab 46) and an amended statement of account showing receipt of the \$750.00 was prepared as at August 10, 1993 (Document Book - Tab 47).

(C) DIETER JECK - \$800.00

43. In a letter to Mr. Jeck which was undated (Document Book - Tab 48), but which referred to a telephone conversation on June 23, 1992, the Solicitor requested a retainer of \$800.00. The Solicitor's manual listing of amounts received (Document Book - Tab 5), shows that she received \$800.00 from Dieter Jeck on October 15, 1992 (Document Book - Tab 49). This amount was neither deposited into the trust nor general accounts of the firm.

44. The Solicitor fully cooperated with the Law Society during the investigation. On September 17, 1993, the Solicitor wrote to the Law Society a detailed response in respect of every matter raised by Mr. Szemenyei in his letter of complaint. A copy of the Solicitor's letter is at Tab 50 of the Document Book.

V. PRIOR DISCIPLINE

45. The Solicitor has no prior discipline record.

DATED at Toronto, this 16th day of April, 1997."

The Law Society alleged, in the alternative to particular (c)(ii), that the Solicitor misappropriated trust monies received as retainers in the amount of \$7,315. The parties deferred argument on this issue until after the Solicitor testified in mitigation of penalty, on the basis of their agreement that the Committee consider the Solicitor's evidence in deciding whether the Society's allegation of misappropriation had been established.

Although generally the conversion of funds received from clients as retainers will amount to misappropriation, the Committee was not satisfied to the necessary degree of certainty on the evidence that the allegation of misappropriation was made out in the present case. Although the funds in question that the Solicitor received from clients were described as "retainers" it was clear to the Committee based on the Solicitor's evidence that at least in many of the cases she was being paid an agreed fee in arrears for work that had already been performed, and that she did not convert the funds to her own use until after the work that she had undertaken was completed, as for example when she received an agreed sum from a client in a criminal matter on the date of the plea or trial.

Although the Solicitor had not rendered accounts to these clients, section 14(3) of Regulation 708 under the *Law Society Act* R.S.O. 1990, c.L-8. defines "trust money" to include "money advanced to a member on account of fees for services not yet rendered" (emphasis added). In cases in which an agreed fee was paid to her after her legal services were completed, the clients' payments were not "trust money". As in the case of the misconduct alleged in particulars (a) and (b), it was the partners of the law firm with which the Solicitor was associated who were the victims of her misconduct. The Committee is satisfied in any event that the Solicitor had no intention to misappropriate client funds.

This finding does not alter the fact that the Solicitor breached her duty to turn over such funds to the firm with which she was associated. The Committee accordingly finds, as the Solicitor has admitted, that particular (c)(ii) has been established.

RECOMMENDATION AS TO PENALTY

The Solicitor brought a motion before the Committee for an order pursuant to section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, as amended, for an order that the testimony of the Solicitor in mitigation of penalty, and various documents related to the Solicitor's testimony, be received *in camera*. The Law Society's counsel did not oppose the Solicitor's request.

Upon hearing submissions relating to the nature of the evidence that the Solicitor proposed to introduce through her counsel in mitigation of penalty, the Committee was satisfied that intimate personal matters would be disclosed at the hearing of such a nature that the desirability of avoiding disclosure of those matters outweighed the desirability of adhering to the general principle that hearings be open to the public. The Committee accordingly ordered that the Solicitor's testimony and the documents in question be received *in camera*.

The Committee has summarized the evidence received *in camera* in a separate portion of this Report and Decision, which follows.

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REASONS FOR RECOMMENDATION AS TO PENALTY - PUBLIC PORTION

As mentioned in the Agreed Statement of Facts that is quoted above, the Solicitor was called to the bar in 1987. Since her call to the bar her practice has been concentrated in the fields of family law and criminal law. The proportion of her practice devoted to criminal law increased significantly to the point that it comprised the vast bulk of her practice before she ceased practising as a result of her administrative suspension for non-payment of her insurance levy in December 1995.

The professional misconduct that the Committee has found established is unquestionably serious. It involved the Solicitor's repeatedly appropriating to her own use monies to which the law firm with which she was associated was entitled. Although the individual amounts wrongly appropriated were generally quite small, the total amount wrongly appropriated was in the amount of \$77,363.07. The Solicitor wrongly appropriated funds on 162 occasions over a period of four years.

Nevertheless, both counsel submitted that the appropriate penalty for the Solicitor's misconduct is a suspension from practice rather than the termination of the Solicitor's membership in the Law Society. While both counsel recognized that the termination of the Solicitor's membership in the Society may have been warranted were it not for certain mitigating circumstances, Mr. Black submitted that the appropriate penalty would be a six-month suspension, while Ms Brooks submitted that the Solicitor should be suspended for twelve months. Ms Brooks also submitted that the Committee should recommend that Convocation impose a condition that upon the Solicitor's resumption of practice she be required to work under the supervision of another member of the profession who is acceptable to the Secretary of the Law Society.

28th October, 1997

The Committee has taken into consideration the following mitigating circumstances.

1. No client suffered any disadvantage or was put at risk, either financially or otherwise, as a result of the Solicitor's misconduct.
2. The Solicitor kept a complete and accurate record of the funds that she appropriated, thereby facilitating the accounting that followed the inevitable discovery of her wrongful actions.
3. The Solicitor co-operated fully with both her firm and with the Law Society after the wrongful appropriations came to light. In due course she entered into an Agreed Statement of Facts in which she admitted her wrongdoing.
4. The Solicitor made complete restitution and did so at a time during which her financial circumstances made it difficult for her to do so.

As mentioned above, the Committee granted a request made by the Solicitor (and not opposed by the Law Society) that certain evidence in mitigation of penalty be received *in camera*. In the interest of assisting members of the public and of the profession who read this report to understand the Committee's reasons for its recommendation, the Committee considers it appropriate, without referring to the evidence received *in camera*, to summarize three conclusions that it came to as a result of the evidence:

- a. Apart altogether from her co-operation and her admissions of guilt, the Committee was satisfied based on the Solicitor's *viva voce* evidence that she is genuinely remorseful, and that it is unlikely that she will be before the Discipline Committee again if she is permitted to continue to practise.
 - i. The Solicitor is a capable, compassionate, and diligent counsel who deserves considerable credit for her work in representing disadvantaged individuals in need of legal assistance. Particularly in the early years of her practice, her clients were largely single mothers on welfare, often battered women who had been referred to her by a local women's shelter, for whom the Solicitor worked tirelessly to assist her clients to obtain custody, support, restraining orders, and reassurance from someone they felt they could trust to protect and assist them.
 - ii. The Solicitor's misconduct occurred as a result of personal circumstances that had a profound effect on her conduct over an extended period of time. The Committee's finding that it is unlikely that the Solicitor will place herself in a situation in which she will be subject to the stresses that influenced her conduct during the four-year period encompassed by the complaint is an important component of the Committee's conclusion that it is unlikely that the Solicitor will misconduct herself again if permitted to continue to practise.

The Committee also reviewed several prior decisions to which we were referred by counsel. These included decisions in which members' right to practise was suspended rather than terminated where lawyers have wrongly appropriated funds to which law firms with which they were associated were entitled. The *Benaiah*, *Sagel*, and *Kerbel* cases fall within this category.

Having considered all of these factors, the Committee recommends to Convocation that the Solicitor be suspended for a period of one year after the conclusion of any administrative suspension of her right to practise to which she may be subject.

28th October, 1997

The Committee has carefully considered Ms Brooks' submission that upon resuming practice, the Solicitor should be required to work under the supervision of another member of the profession who is acceptable to the Secretary of the Law Society. The Committee has concluded that such a condition is neither necessary nor desirable. The Solicitor has a strong resistance to becoming associated in practice again with another member of the bar in light of the difficulties that occurred in her previous association. It is important to bear in mind that serious though it was, the Solicitor's misconduct victimized not clients but other members of the profession with whom she was associated in practice. The Committee has also concluded that the likelihood of recurrence of the misconduct that brought the Solicitor before the Discipline Committee is slight, and very much doubts that any arrangement whereby the Solicitor practises under the supervision of another member will affect the likelihood of recurrence one way or the other.

DATED at Toronto this 11th day of June, 1997.

Gavin MacKenzie
(Chair)

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 year after the conclusion of any administrative suspension of her right to practise to which she may be subject.

Both counsel and duty counsel made submissions in support of the recommended penalty.

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

It was moved by Ms. Sealy, seconded by Mr. Millar that the solicitor be suspended for a period of 1 year after the conclusion of the administrative suspension.

Carried

Counsel, duty counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 1 year after the conclusion of the administrative suspension.

Re: Shayna Bella KRAVETZ - Toronto

The Secretary placed the matter before Convocation.

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

Mr. Stuart advised that the solicitor requested an adjournment due to ill health and that her doctor would provide a letter to the Society. Mr. Stuart did not oppose the adjournment.

Convocation granted the adjournment to the November Discipline Convocation.

28th October, 1997

Re: Alan Herbert COLES - Thornhill

The Secretary placed the matter before Convocation.

Ms. Stomp and Ms. Angeles withdrew for this matter.

Ms. Cowie appeared for the Society and Mr. Anand appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 16th May, 1997, together with an Affidavit of Service sworn 28th May, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 21st May, 1997 (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 DISCIPLINE COMMITTEE

REPORT AND DECISION

Tamara K. Stomp, Chair
Nora Angeles
Kim A. Carpenter-Gunn

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

Elizabeth Cowie
for the Society

ALAN HERBERT COLES
of the City
of Thornhill
a barrister and solicitor

Arie Gaertner
for the solicitor

Heard: September 17, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 6, 1994 Complaint D310/94 was issued against Alan Herbert Coles alleging that he was guilty of conduct unbecoming a barrister and solicitor.

The matter was heard in public on September 17, 1996 before this Committee composed of Tamara K. Stomp, Chair, Nora Angeles and Kim A. Carpenter-Gunn.. The Solicitor did not attend the hearing. He was represented by Arie Gaertner. Elizabeth Cowie appeared on behalf of the Law Society.

DECISION

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

Complaint D310/94

2. a) he was convicted on September 3, 1993 in the Ontario Court of Justice (General Division) Toronto Region before Mr. Justice Whealy that he together with Howard White and Sydney Sennet in the Municipality of Metropolitan Toronto in the Toronto Region and elsewhere in the Province of Ontario between the 1st day of January 1983 and the 29th day of September 1986, did unlawfully evade or attempt to evade taxes in the amount of \$15,113,050.00 imposed by the Income Tax Act, R.S.C. 1952, Chapter 148, as amended, upon HSW Controls Ltd. and RDF Energy Research Inc., by making false claims in relation to Part VIII Scientific Research Expenditures in the amount of \$30,226,100.00 for the taxation years 1984 and 1986 and did thereby commit an offence under paragraph 239(1)(d) of the said Income Tax Act for which on December 6, 1993, he was sentenced to a forty-eight month term of imprisonment.
- b) he admitted in a sworn affidavit dated August 31, 1993 to the criminal offence of perjury during the course of a receivership examination.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D310/94 and is prepared to proceed with a hearing of this matter on September 17, 1996.

II. IN PUBLIC/IN CAMERA

2. The Law Society takes the position that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act. The Solicitor may argue that the hearing should be held *in camera*.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D310/94 and admits that those of the particulars contained therein which are also contained in the facts hereinafter set out, together with any additional facts hereinafter set out, constitute conduct unbecoming.

IV. FACTS

4. The Solicitor has reviewed Complaint D310/94 and this Agreed Statement of Facts with his counsel, and admits those of the particulars set forth therein which are also contained in the facts hereinafter set out. The Solicitor admits that he is guilty of conduct unbecoming a barrister and solicitor in this matter.

5. The Solicitor was called to the Bar in 1970. He practised with Melnik, Cooper & Myer (which was one of two firms at which he articulated, the other being Fraser & Beatty) for approximately six years, eventually becoming a partner in that firm. After practising as a sole practitioner for about a year he formed a partnership called Coles & Gringorten with Gerry Gringorten. In 1983 the firm merged with another firm to form Baker, Coles, Schneider, Gringorten ("Baker, Coles"), where the Solicitor practised during the times relevant to the present complaint, 1984 to 1986. Since then, the Solicitor has practised as a sole practitioner, except for the period between December, 1993 and January, 1995.

6. The Solicitor at all material times has practised in the field of corporate and commercial law. Since he left Baker, Coles in late 1986 his practice has consisted almost exclusively of counselling and assisting small business clients with everyday commercial matters. The Solicitor has not administered a trust account since he left Baker, Coles in 1986. An audit of the Solicitor was conducted in July, 1989, with which the Law Society was satisfied, subject to minor modifications being made to the Solicitor's record-keeping practises. Such modifications were adopted by the Solicitor and the Law Society advised. The Solicitor has never been before the discipline committee previously in the 25 years since he was called to the Bar.

7. In 1984 the Solicitor was approached by Sidney Sennet ("Sennet"), an accountant the Solicitor had known professionally for several years, to consider working with him and for Howard S. White ("White"), an individual whom Sennet had known for several years. The Solicitor had not met White prior to this introduction by Sennet in 1984. Sennet was, at that time, a partner in the accounting firm of Sennet and Spencer located in Toronto, Ontario. As part of his accounting practice, Sennet promoted certain tax-driven investment deals and provided consulting services to companies in financial difficulty.

8. Sennet introduced the Solicitor to White as White was seeking information relating to offshore tax havens, and Sennet knew that the Solicitor had knowledge and experience in this area.

9. An initial meeting was held in 1984 among Sennet, White and the Solicitor. At this meeting the Solicitor was also introduced to Robert Batchelar ("Batchelar"). The Solicitor understood that Batchelar, an accountant, provided a variety of services to White.

10. At a subsequent meeting, White informed the Solicitor he wanted to move money through Europe and back to Canada without tax consequences to the White companies.

11. The Solicitor was later informed by White that certain companies controlled by White (the "White Companies") had received designations to do research and development pursuant to the Federal Government's Scientific Research Tax Credit Program (the "SRTC Program"). White advised the Solicitor that he wanted assistance moving the funds received by the White Companies from SRTC off-shore. In response, Sennet and the Solicitor proposed an invoicing/loan scheme whereby money would be routed to Europe using a scheme to move funds off-shore and return the same funds, once moved through European corporate structures, back to Canada without tax consequences. Pursuant to the above, a corporation was created in Guernsey (the Guernsey Loan Company) which lent funds to an Ontario corporation 589350, a corporation affiliated with the White Companies and controlled by White. The Guernsey Loan Company was owned by a Liechtenstein Anstalt. The only source of funds loaned by the Guernsey company to 589350 would be the funds received from the Anstalt. It was eventually understood by all of the participants that the primary source of money for the loan Anstalt would be the SRTC funds directed to it from Canada via the accommodators by the invoicing loan scheme.

12. The invoicing/loan scheme evolved to operate as follows:

- a) one of the White companies would enter into a contract with an accommodating company, identified and selected by White alone, either for goods at a grossly inflated price or for goods or services which were never delivered or performed;
- b) the White company would use the contract to reduce its tax liability and to have SRTC funds released from escrow;
- c) the White company would transfer the SRTC funds to the accommodating company;
- d) the accommodating company would enter into a further contract with another accommodating company, selected by White, which would then enter into a contract with a Guernsey Trading Company (to be set up by Sennet and the Solicitor) and transfer the SRTC funds to it, less its fees;
- e) the Guernsey Trading Company would use the funds to pay the true costs of the goods (if any), transferring the balance to its holding company, the Liechtenstein Anstalt;
- f) the Anstalt would then invest or loan the money to the Guernsey Loan Company, less any legitimate operating costs and less any fees or commissions which were to be paid to Sennet and the Solicitor;
- g) the Guernsey Loan Company would then loan the money to 589350 Ontario (a White company), pursuant to a loan agreement. The money would be paid through the Baker, Coles trust account, thus completing the drawing down of the escrow funds.

13. The Solicitor had no part in identifying goods or in negotiating prices with the suppliers or accommodators, but was strictly to ensure that funds, once in the hands of the trading company, moved expeditiously and tax free, and to supervise the transfer of funds from the lending company to the White Companies.

14. White chose areas of research where there had been very little scientific advancement so that he would be eligible for SRTC funds.

15. Initially it was agreed among Sennet, White, Batchelar and the Solicitor that there would be one transaction a month processed through the invoicing/loan arrangement. SRTC funds funnelled to Europe and returned to Canada by means of the above scheme were to rotate through the system twice to create working capital and maximize the benefit obtained from the scheme.

The Solicitor's Role in Creating the Infrastructure of the Scheme

Liechtenstein

16. The Solicitor and Sennet arranged for Anstalts ("Castlecreag", "Eastmore" and "Moran") to be incorporated in Liechtenstein. The Solicitor and Sennet had founder's rights over the Anstalts. In addition, the Solicitor and Sennet gave instructions for four other trusts to be created in Liechtenstein for the benefit of the four participants. The trusts were created in such a way that while the trustees had control over the trusts, the activities could be determined by the founders (Sennet and the Solicitor). An international charity was named as the beneficiary; however, the structure of the trust allowed Sennet and the Solicitor to direct the distribution of the funds held to any recipient at their discretion.

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17. Through the Royal Bank of Canada (Channel Islands), the Solicitor and Sennet set up the Guernsey Loan Company ("Ledger") and several trading companies ("Tankard", "Vellum" and "Nimbus"). When the Royal Bank expressed concern that White was the beneficial owner of both the Canadian and European entities, the Solicitor instructed the Liechtenstein Solicitors to send a letter to the Royal Bank indicating that only the Solicitor and Sennet held founder's rights in Castlecrag, the sole shareholder of the Guernsey companies. That letter gave the impression the dealings between the Guernsey companies and the White companies were to be at arm's length. That impression was false.

18. The Solicitor participated in negotiating the terms of a letter from the Royal Bank (CI) indicating Ledger was prepared to loan 589350 Ontario up to \$200,000,000 (U.S.). That letter created the false impression 589350 Ontario had third party financing available to it, subject to the limitations expressed in the letter. Despite requests by the Royal Bank, that letter was never returned to it. The Solicitor did not have control over the letter.

19. In the fall of 1984, the Royal Bank of Canada advised it was no longer prepared to administer the Guernsey Companies and recommended that the group turn for assistance to a particular administrative company. The Solicitor did so and was the main person to instruct that administrative company throughout the remainder of the period of the scheme.

20. In the fall of 1984, White, Sennet, Batchelar and the Solicitor agreed that it would be necessary to set up additional entities in different jurisdictions for the purpose of further obscuring the tax avoidance and evasion scheme. The Solicitor caused additional off-shore trading companies to be created in various jurisdictions.

The Solicitor's Ongoing Role

21. The loan/invoice scheme with various modifications operated from 1984 to 1986. During that time the White companies evaded in excess of \$15,000,000 in taxes and drew down the same amount in SRTC funds. The Solicitor's role in the invoicing/loan arrangement was primarily in planning for the routing of funds from the hands of an accommodator through the European structure and to Canada, pursuant to White's instructions. The Solicitor directly instructed the various administrators of the European companies. The Solicitor, together with Sennet, was responsible for the establishment of the European network, the integrity and legality of which, within the European context, are not challenged.

22. The Solicitor drafted offers to finance between Ledger and four of the White companies. These offers were not at arm's length. The Solicitor also drafted contracts in furtherance of the scheme.

23. The Solicitor also had copies of the Guernsey Company cash books and reconciled and kept track of the flow of funds. The Solicitor also reported to the group on the status of the funds and the European structure.

24. In addition to his other roles, the Solicitor was a "legal troubleshooter" for White.

25. The Solicitor involved associates in the office, such as D.S., whom the Solicitor instructed to process the documents necessary for the loan and share advancements to the White Companies from the Guernsey corporation. None of the lawyers in the Solicitor's firm had any knowledge or involvement in the scheme.

26. The Solicitor and other members of the group met on a weekly basis, usually on a Tuesday, to discuss the business affairs and strategies of the companies. The Solicitor often brought records of the Guernsey Company to the meetings. He usually left the records after reviewing them with the group, and knew they were being destroyed.

27. The Solicitor also arranged periodically for funds to be available for pick-up by White or Batchelar in England, New York City and Liechtenstein. In the performance of the Solicitor's tasks, it was necessary for him to communicate with the offshore administrators of the funds and to travel to Europe once or twice a year to review the administrators' financial reports with a view to reporting to Sennet, White and Batchelar upon the status of the European structure.

28. The Baker, Coles trust account was used as a depository of funds received in trust that related to and were in the ordinary course of the loan transactions between the White Companies and the Ledger company. Ledger was a loan company legitimately incorporated in the Channel Islands and operated in a perfectly legal manner within its incorporating and operating jurisdiction. Baker, Coles was not aware of the source of the lending company's funds, and acted as it would have with any arm's length lender *vis a vis* the borrower.

29. The Baker, Coles trust account was used to transfer funds, using the following methods:

- (i) commitment fees paid to the Guernsey Company by the White companies totalling \$1,232,964.30 (Cdn) were transferred through the Baker, Coles trust account on route to Guernsey;
- (ii) loans to and share purchases in the White Companies were all routed from Guernsey to the White companies through the Baker, Coles trust account and resulted in \$28,859,436.26 (Cdn) being advanced to the White Companies by Ledger; and
- (iii) loans made to Batchelar and White pursuant to promissory notes from Ledger were processed through the Baker, Coles trust account.

The Solicitor's Remuneration in Connection with the Invoicing/Loan Arrangement

30. The Solicitor, together with Sennet, charged fees for efforts expended in administering the European structure. His remuneration in respect of these investment management activities was calculated as a commission ranging from 2 to 10 percent of the funds channelled through the European portion of the invoicing/loan arrangement. This percentage was comprised as follows:

- (i) Fees paid to the Solicitor as consideration for work transacted by him in directing funds through the European corporate structure, and
- (ii) Benefits received in excess of 121,000.00 pounds sterling through the use of American Express credit cards. The bills from these credit cards were paid by the Liechtenstein entity or other corporations pursuant to the Solicitor's own instructions.

31. Below is a summary of the funds paid to the Solicitor from the Liechtenstein Anstalts, as detailed above:

- (i) 1984 - \$81,222.00 (U.S.) to the Solicitor's Liechtenstein trust;
- (ii) 1985 - \$884,000.00 (U.S.) to the Solicitor's Liechtenstein trust;
- (iii) 1986 - \$375,000.00 (U.S.) to the Solicitor's Liechtenstein trust.

During the period 1984 to May 1986 the Solicitor drew approximately \$282,000.00 (Cdn), \$165,000.00 (U.S.) and 20,000.00 pounds sterling from the Liechtenstein trust set up on his behalf.

32. In May of 1986, the Liechtenstein trust was liquidated and the remaining assets of approximately \$1,013,800.00 (U.S.) were transferred to Ascott Trust. During the period July 1987 to 1990 a number of transfers were made from the Ascott Trust account including payments in 1987 of \$285,000.00 (U.S.) and additional payment in July of 1987 of \$43,000.00 (U.S.).

28th October, 1997

33. Beginning in approximately 1986 or 1987 the Solicitor set up a trust in Switzerland for his fees to be transferred into from Liechtenstein and drew an allowance on a monthly basis of approximately \$3,000.00 (Cdn) from that trust.

34. The funds received by the Solicitor were invested in a variety of ventures including \$750,000.00 which was invested in a brewery which eventually went bankrupt. Additional funds were used to purchase a time share in Barbados, a building lot in Florida and another in Eleuthra as well as a condominium in Switzerland in regard to which the Solicitor was defrauded and lost all of his 320,000.00 swiss franc investment. The Solicitor used additional of the funds to purchase and renovate a home in Toronto (\$450,000.00 Cdn.), to purchase a sail boat and car and to pay other personal expenses for a total of approximately \$90,000.00 (U.S.).

35. The Solicitor reported only a small portion of the Liechtenstein fees on his income tax returns and classified those as management and consulting fees. The Solicitor roughly estimated net earnings and inserted it into his tax return as follows:

- (i) 1985 - \$26,000.00 (Cdn);
- (ii) 1986 - \$271,000.00 (Cdn);
- (iii) 1987 - \$40,000.00 (Cdn); and

The Solicitor did not report the \$3,000.00 (Cdn) monthly allowance that he received from Switzerland separately, as he considered it included in the net earnings.

36. Over a period of two to three years, accounts totalling approximately \$30,000.00 to \$40,000.00 (Cdn) annually were charged by the Baker, Coles firm to the White Companies. Neither the junior at Baker, Coles who assisted the Solicitor with drafting assignments, nor any of the Solicitor's partners in Baker, Coles, knew of or participated in any illegal aspects of the invoicing/loan arrangement. The Solicitor's share of these fees collected by Baker, Coles was limited to his partnership interest and, like all income received by the Solicitor, was properly included in his annual income tax returns. The Baker, Coles accounts remitted to White were billed at a premium although the amounts charged by the firm for the legal services are not alleged to be unreasonable.

Receivership Proceedings

37. In May 1986, Revenue Canada executed a search warrant of White's offices. The Solicitor and the other members of the group met following the searches and agreed to take immediate steps to defeat any further investigation by transferring shares and terminating the Liechtenstein trusts.

38. In 1986, upon White's explicit instructions, the Solicitor destroyed any records he determined related to the activities of the White Companies and the evasion by the White Companies of taxes owing to the Government of Canada pursuant to the SRTC Program.

39. The Solicitor's office was searched by Revenue Canada in May, 1986. Prior to that, the Solicitor had routinely destroyed, as a file housekeeping effort, copies of cash books, faxes and telexes that related to the invoicing/loan arrangement. Following the search of his law office by Revenue Canada, the Solicitor instructed the administrators of the European corporate structure to destroy their records. Following the Solicitor's departure from Baker, Coles in 1987, he removed his records to a public storage facility. Some time later, in transferring the files to his garage, the Solicitor culled the files in consolidating them, and disposed of a number of documents. It is possible that the Solicitor destroyed relevant documentary evidence at this time.

40. Through the course of the receivership proceedings, the Solicitor, together with Sennet, instructed one of the Guernsey companies (Ledger) to start receivership proceedings. As a direct result, the receiver distributed \$560,356.00 (Cdn) which was used to wind down the European structure and the balance then remaining was divided equally by Sennet and the Solicitor. White did not receive any of this money.

41. During the course of the receivership proceedings, the Solicitor gave evidence under oath regarding the relationship between the Guernsey Company (Ledger) and the White Companies. The Solicitor lied during the examination. A copy of the transcript of this examination is attached hereto as Exhibit 1 to this Agreed Statement of Facts.

42. On or about November 6, 1989, the Solicitor received a written requirement from the Department of National Revenue, the Solicitor responded by a letter dated November 28, 1989 in which he stated he did not have any relevant documentation. This letter was false and the Solicitor subsequently destroyed relevant records in his possession. Following May, 1993 the Solicitor did provide the DNR investigators with documents in his possession.

43. The Solicitor left Baker, Coles in 1987 following the Revenue Canada search of the firm's offices. Between 1987 and 1993 the Solicitor practised as a sole practitioner. For part of this period, the Solicitor was also involved in the ownership and management of a brewery, which enterprise failed.

Charge, Conviction and Sentencing of the Solicitor

44. The Solicitor was first charged on or about April 22, 1992 with three counts of fraud and one count of conspiracy to commit fraud as a result of the facts as set out above. The Solicitor co-operated extensively with the Crown and the investigating agencies by contributing information and evidence against White and Sennet, and by participating in lengthy interviews with Revenue Canada and Department of Justice lawyers. The Solicitor had legal representation only at the first of those interviews. The Solicitor travelled, at his own expense, to certain off-shore jurisdictions to obtain documentation that otherwise could not have been accessed by the authorities, and filled in important gaps in the authorities' understanding of the illegal activity engaged in by Sennet and White which, with his testimony, was critical to the Crown's effective prosecution of Sennet and White.

45. On September 3, 1993, the Solicitor appeared before Mr. Justice Whealy and pleaded guilty to a single tax evasion charge laid pursuant to the *Income Tax Act* in respect of taxes evaded by the White Companies. An Affidavit of the Solicitor, sworn August 31, 1993, was entered into evidence and formed the basis for the finding of guilt. A copy of that Affidavit is attached as Exhibit 2 to this Agreed Statement of Facts. The fraud and conspiracy charges were withdrawn. As acknowledged by the Department of Justice's counsel, by pleading guilty and co-operating fully with the investigation and the Court as described above, the Solicitor saved the community a substantial amount of time and resources. A copy of the transcript of the plea of guilty is attached hereto as Exhibit 3 to this Agreed Statement of Facts. The Solicitor states that his plea was motivated by lack of resources, fear and remorse.

46. Between September 3, 1993 and December 6, 1993, the Solicitor, released on his own recognizance, attended and testified openly and extensively at the trials of Sennet and White. Both Sennet and White were convicted and sentenced to 4½ and 6½ years respectively. Batchelar also testified at the trial and was granted full immunity from prosecution for so doing. Both Sennet and White have appealed their convictions and have been granted bail pending appeal.

47. In part due to the agreement between the Solicitor and the Crown that, in exchange for his co-operation, a reduced sentence would be requested, and due also to the weight Mr. Justice Whealy attributed to the Solicitor's efforts and early guilty plea, the Solicitor was sentenced on December 6, 1993 to a prison term of 45 months, credit being given to the Solicitor for time spent serving as a witness at the trials of Sennet and White.

48. In imposing sentence, Mr. Justice Whealy stated as follows:

I would point out, before setting out to describe the mitigating facts, that Coles was a lawyer, with a family and lifestyle suitable to a professional man. All of this now is in ruins. This fact is not an important imitating factor. It is Mr. Coles' education and qualifications as a lawyer that enabled him to play his part in this scheme. It required his expert professional skills to create the fictional corporations and their minute books, and to arrange for malleable directors, who had varying degrees of awareness. Coles' part in the crime could not have been carried out if he had not been a lawyer.

Turning to the important ameliorating considerations that have affected the quantum of sentence, I will start with the most obvious: he pleaded guilty and did not put the Crown to its proof at a trial. This has always been considered a factor when deciding any sentence on any criminal charge.

As well, although well assisted by counsel, Coles made his decision to plead guilty very early on, and waived any right of confidentiality concerning this matter. Coles gave a very particularized and comprehensive affidavit -- now Exhibit 1 -- to the Crown, and in so doing, outlined the participation of himself and his co-conspirators. This document also filled in important series of gaps in the investigators line of proof.

In addition, this man assisted the investigation in other ways and travelled at his own expense to various tax havens and retrieved relevant papers which investigators would not have been able to obtain. His efforts enhanced the Crown's case against certain other co-conspirators which the investigators would not have been able to achieve alone.

The last but not the least, Coles was a Crown witness at the ongoing trial of certain other conspirators in another court and so concluded the maximum effort that it was possible for him to give.

It matters not what the outcome of that trial is: Coles can contribute no more to the Crown's case.

It may seem that Coles has earned total forgiveness. That cannot be permitted as a matter of public policy. Public policy must encourage persons who acknowledge their guilt and seek forgiveness. But forgiveness does not, however, equate with the notion of no punishment. When one breached the law in a fashion such as this there must be a noteworthy element of condemnation. It is a matter of judgment. It is a question of balance the (sic) whether the accused's assistance is a matter of remorse, revenge or some other motive. In a case of greed for money and profit like this, there may be some or all of those motives. But public policy is to acknowledge the efforts this accused has made to redeem himself but not measured necessarily by the result achieved at the other trial.

28th October, 1997

The foregoing is not intended to supplant the dominant considerations that affect all sentences. The foremost of those is deterrence. The second consideration the court must consider is the element of rehabilitation; can the offender be returned safely to the community.

There are two elements to deterrence: deterrence to the offender which may be termed the punishment and deterrence to others who may want to do the same thing - which might be termed a severe warning. *Here punishment is not a realistic consideration; Coles has wholly acknowledged his criminal behaviour and is unlikely to ever re-offend.* The warning to others is most important. No one who deliberately sets out to commit a crime, knowing it is a crime, ought to walk away without approbation (*sic*). That point is most important.

Rehabilitation is another important but secondary part of the quotient. It is a subsidiary aim of the law to enable an offender to re-enter the community without danger. At trial that is a factor in the quantum of sentence.

A copy of the transcript of the reasons for sentence is attached hereto as Exhibit 4 and a copy of the endorsed indictment as Exhibit 5 to this Agreed Statement of Facts.

49. Upon sentencing, the Solicitor proceeded directly to Millhaven Penitentiary and, seven days later, was transferred to Beaver Creek where, over the next nine months, he taught a computer course and was engaged as a computer assistant by the finance section of Corcan, a Crown corporation. The Solicitor, due to the nature of his offence and to very favourable assessments, was classified for Accelerated Parole Review and, accordingly, was released on day parole from Beaver Creek in nine months' time, then taking up residence at a Salvation Army halfway house. The Solicitor continued to reside at the halfway house until March 7, 1995, when he was released on full parole.

50. The Solicitor now earns approximately \$1,500.00 to \$2,000.00 per month net.

51. The Solicitor has not made any restitution (nor was he ordered to) for the amounts in regard to which he personally benefitted from the scheme. The Solicitor's personal benefit was approximately \$2,000,000. The Solicitor's entire investment in the brewery was lost.

52. The Solicitor is active in a number of charitable organizations. In addition, the Solicitor is active on behalf of a number of juvenile athletic associations, coaching and assisting young players. The Solicitor makes a considerable contribution of time and energy to these various charitable enterprises.

V. DISCIPLINE HISTORY

53. The Solicitor does not have a discipline history.

DATED at Toronto this 17th day of September, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Alan Herbert Coles be disbarred.

REASONS FOR RECOMMENDATION

The Member did not attend in person for the hearing, but was represented by A. Gaertner, counsel, who advised that he was authorized by the Member to proceed. Through the Agreed Statement of Facts and upon the admissions made thru Mr. Gaertner, findings of conduct unbecoming a Barrister and Solicitor were made with respect to the particulars contained in paragraphs 2(a) and (b) of Complaint D310/94. The particulars contained in Complaint 3(a) were withdrawn on consent.

Counsel for the Society requested a recommendation that the Member be disbarred and counsel for the Member requested that he be allowed permission to resign. With respect, this Committee cannot agree with the latter result for many reasons, the least of which is that the protection of the public requires disbarment.

The Member assisted his clients in perpetuating a total fraud of approximately 30 million dollars on the Canadian government. Half of that was in the evasion of taxes and the other half in the receipt of benefits of the federal government's Scientific Research Tax Credit Programme (SRTC Programme). Although counsel for the Member spent much time in clarifying that the role of the Member was not that of the mastermind of this scheme, it is clear that the Member was the engineer facilitating the scheme. The Member employed an elaborate scheme of a series of companies in different countries involving a complicated invoicing/loan scheme and was actively involved in administering and supervising all of it. The Member used his law firm personnel and trust accounts to assist although it is admitted that no one at his law firm was complicit in the activities of the Member. The result, however is that they were clearly at risk. Although counsel for the Member took great pains to attempt to point out to us that Howard S. White (White), his client, was the mastermind, it is clear that the Member's particular skill in the area of law applicable, fostered the scheme. The Member was actively involved in mutating the scheme to accommodate the evolving needs and instructions of his client.

The Member benefitted personally in the amount of approximately two million dollars from his involvement in this matter. The length of time over which the activities stretched was over two years and involved numerous individual acts of the Member in the furtherance of the scheme. There is no way that the actions of the Member can be characterized as secluded to an isolated incident or series of incidents. Rather, this was an elaborate and complicated, well thought out and continuously monitored scheme that benefitted from the planning and knowledge of the Member.

The involvement of the Member is aggravated by the fact that he destroyed documents evidencing this scheme and he instructed others to do so as well. He lied under oath during the course of a receivership examination in a further attempt at covering up. Ultimately, on September 3, 1993, he was convicted by the Ontario Court of Justice (General Division) at Toronto of unlawfully evading or attempting to evade taxes of approximately 15 million dollars under the Income Tax Act by making false claims in relation to Part VIII Scientific Research Expenditures. For this offence, he was sentenced to a 48 month term of imprisonment with three months pre-trial detention taken into consideration. He served only 9 months before being released.

It was submitted to us that mitigation can be found in the fact that the Member did cooperate with the Federal authorities and gave testimony against White (his former client) and Sydney Sennet (Sennet), the accountant, in their criminal trials where they received four and a half and six and a half year sentences respectively. His cooperation was more than just giving oral testimony, but included his efforts in collecting evidence which necessitated trips to Europe to gather same. His assistance contributed to the successful prosecution against White and Sennet.

We are advised that the Member has been unable to personally benefit from the monies he received because of poor investments he made with it. We are informed that he is active in charitable organizations, has an impeccable history in practice and no prior discipline findings. He presently suffers from a medical condition that was not in existence at the time the offences occurred. The Member is age 54 and married but all of his children are grown and are not dependants. He is presently a sole practitioner, practising under certain restrictions undertaken to the Law Society pending the outcome of this matter.

This Committee wishes to state for the record that at the beginning of the proceeding, no request for adjournment was made by counsel for the Member and only when questioned by one of the Committee members regarding medical information did the Solicitor interject a motion for adjournment so that he could pursue the possibility. That motion was refused and there is no indication in any of the documentation that was filed with us on consent of counsel for the Solicitor, which included documentary evidence of the criminal proceedings, that there was a basis for or report of any medical reason for the Member's actions.

We were assisted by a Book of Authorities from Society's counsel which was also referred to by Counsel for the Member. Although counsel for the Member urged us to follow the matter of Byron Dean Boughner, we find Convocation's Order of April 21, 1994, allowing Mr. Boughner permission to resign as exceptional in the circumstances. Rather, the reasoning in the decisions of David Henry Conrad, Convocation order of April 25, 1996, William Walter Kay, Convocation order of November 26, 1992, Rocco Anthony Morra, Convocation order of September 28, 1995, Derek George Nayduk, Convocation order of April 25, 1996, Alan Bernard Silver, Convocation order of October 27, 1995 and Ross Hainsworth, Convocation order of March 23, 1995, pronouncing disbarment are more appropriate to the case at bar.

Although the 1993 English Court of Appeal decision in *Bolton v. Law Society* is of great guidance in this matter, we find two prior decisions of Convocation adequately express our view. Ronald Paul Milrod was disbarred by order of Convocation dated January 30, 1986 for misappropriating \$75,000.00 from an Estate, forging a will and preparing a false estate statement. Notwithstanding family and financial pressure, a psychiatric report and unblemished past, the Committee's report to Convocation stated:

"...The Society cannot countenance theft and fraud by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities..."

Daniel Gilad Cooper was disbarred by order of Convocation of April 26, 1991 for misappropriating approximately \$238,485.00 from his firm and clients of the firm, accomplished by 28 fraudulent billing entries over nearly 5 years. The Committee stated:

"Mr. Cooper clearly chose fully the dishonest course that was his destruction and appreciated that his behaviour was wrong. He clearly personally benefitted financially from the thefts."

and:

"The legal profession would see public confidence rapidly evaporate if it failed to pronounce its condemnation of Mr. Cooper's conduct in the strongest possible terms. While his rehabilitation must be encouraged, that will have to take place outside of the legal profession. Any penalty short of disbarment would be grossly inadequate in reflecting the gravity of Mr. Cooper's misconduct and the censure of his peers."

28th October, 1997

For the same reasons, the recommendation is for disbarment of the Member.

Alan Herbert Coles was called to the Bar on March 19, 1970.

ALL OF WHICH is respectfully submitted

DATED this 16th day of May, 1997

Tamara Stomp, Chair

There were no submissions.

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

Carried

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

Ms. Cowie advised that the solicitor was seeking permission to resign at the end of November in order to wind down his practice.

The Society did not oppose permission to resign.

Mr. Anand made submissions in support of the solicitor being permitted to resign. He advised that the solicitor was in poor health.

Counsel, duty counsel, the reporter and the public withdrew.

It was moved by Mr. Swaye, seconded by Mr. Millar that the solicitor be disbarred.

Carried

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

Re: Joseph Reed HUNTER - Toronto

The Secretary placed the matter before Convocation.

Mr. DelZotto and Mr. Carey withdrew for this matter.

Mr. Stuart appeared for the Society and Mr. Ross Morrison appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 10th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th October, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

28th October, 1997

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

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

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

Glenn Stuart
for the Society

JOSEPH REED HUNTER
of the City
of Toronto
a barrister and solicitor

Ross Morrison
for the solicitor

Heard: January 28, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 29, 1996 Complaint D95/96 was issued against Joseph Reed Hunter alleging that he was guilty of professional misconduct.

The matter was heard in public on January 28, 1997 before this Committee composed of Elvio L. Delzotto, Q.C. Chair, W. Michael Adams and Mary Eberts. The Solicitor attended the hearing and was represented by Ross Morrison. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D95/96

2. a) he failed to comply with the terms of a direction dated July 13, 1993 and signed by his client, Robert Hess, which direction the Solicitor, by his signature, acknowledged and agreed to be bound; and
- b) he failed to comply with the terms of a direction dated February 24, 1994 and signed by his client, Robert Hess, which direction the Solicitor, by his signatures dated February 24 and 25, 1994, acknowledged and agreed to be bound.

EVIDENCE

Part of the evidence before the Committee consisted of the following agreed statement of facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D95/96 and is prepared to proceed with a hearing of this matter on December 10, 1996.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed this Agreed Statement of Facts with his counsel, V. Ross Morrison, and admits the facts contained herein. The Solicitor does not admit that these facts or the particulars of Complaint D95/96 constitute professional misconduct.

IV. FACTS

4. The Solicitor is sixty-seven years old and was called to the Bar on June 28, 1956. He is a partner in the Toronto law firm of Ricketts, Harris, practising civil litigation.

Particular 2(a) he failed to comply with the terms of a direction dated July 13, 1993 and signed by his client, Robert Hess, which direction the Solicitor, by his signature, acknowledged and agreed to be bound.

5. The Solicitor acted for Robert Proudfoot Hess with respect to an Application brought in the Ontario Court (General Division) under the *Ontario Business Corporations Act, 1982* for an Order requiring the majority shareholders to purchase his minority interest in a company known as Proudfoot Motels Limited ("Proudfoot").

6. During the course of the litigation, Mr. Hess retained an appraiser, Dieter Mashke, to value the shares of Proudfoot. By letter dated July 6, 1993, Mr. Hess provided the Solicitor with an irrevocable Direction to pay of Mr. Mashke the sum of \$20,000 from the proceeds of the valuation of Proudfoot (Document Book, Tab 1).

7. Mr. Hess signed a second irrevocable Direction, dated July 13, 1993, to the Solicitor to pay Mr. Mashke's firm, Mashke, McGregor Appraisal Corporation ("Mashke McGregor"), \$20,000 forthwith from the proceeds of any judgment Mr. Hess obtained against Proudfoot. The Solicitor also signed this document directly beneath the following statement: "I, J. Reed Hunter, Q.C., acknowledge this direction and agree to be bound by it" (Document Book, Tab 2).

8. By letter dated July 20, 1993, the Solicitor provided Mr. Mashke with a copy of the Direction dated July 13, 1993 (Document Book, Tab 3).

9. An appraisal report, prepared by Mr. Mashke, was submitted in evidence, on behalf of Mr. Hess, on the reference to determine the value of Mr. Hess' share in Proudfoot. The value of the properties, as appraised by Mr. Mashke, was \$19,000,000.00. Mr. Hess' interest therein was 22%. The reference was heard by Master Linton over ten days in September 1993 and March 1994.

28th October, 1997

Particular 2(b) he failed to comply with the terms of a direction dated February 24, 1994 and signed by his client, Robert Hess, which direction the Solicitor, by his signatures dated February 24 and February 25, 1994, acknowledged and agreed to be bound.

10. Mr. Hess provided a further, unsigned, Direction, dated February 22, 1994, (Document Book, Tab 4) to the Solicitor to pay Mashke McGregor \$6,996.17 forthwith from the proceeds of any judgment Mr. Hess obtained against Proudfoot, in addition to the \$20,000 identified in the previous Direction of July 13, 1993.

11. By letter dated February 24, 1993 [sic] (Document Book, Tab 5), Mr. Hess again provided the same Direction to the Solicitor, except that it was signed by Mr. Hess and specified the amount of \$7,000.

12. On February 25, 1994, the Solicitor wrote to Mr. Mashke enclosing a copy of Mr. Hess' letter dated February 24, 1993 [sic], and a copy of the Direction dated February 22, 1994 (Document Book, Tab 6). The Solicitor had signed the Direction, acknowledging its terms and agreeing to be bound by them (Document Book, Tab 4). In his letter, the Solicitor noted his signature of the Direction, dated February 22, 1994, and advised Mr. Mashke of the following:

"Please note, in my view, the Direction of Mr. Hess dated February 24 and the acknowledgement by myself to be bound by the Direction dated February 22 should be sufficient for your purposes."

13. In April 1994 Master Linton of the Ontario Court (General Division) released his reasons for judgment wherein Master Linton rejected the appraisal prepared by Mr. Mashke and, instead, accepted the appraisal of \$4,320,000.00 prepared by the defendants' appraiser. A transcript of the oral reasons delivered by Master Linton is contained at Tab 6A of the Document Book. A copy of his formal report, dated October 17, 1994, is contained at Tab 7 of the Document Book.

14. Pursuant to the report of Master Linton, dated October 17, 1994, the sum of \$205,555.80 was paid to the Solicitor's firm, in trust, on behalf of Mr. Hess, on or before October 31, 1994.

15. The Solicitor did not make any payment to Mr. Mashke or Mashke McGregor forthwith from the proceeds of the litigation received by his firm in trust. On November 9, 1994, Stanley Shier, Q.C., counsel for Mr. Mashke, wrote to the Solicitor enquiring as to when Mr. Mashke could expect to receive payment in accordance with the Direction (Document Book, Tab 8).

16. On November 18, 1994, the Solicitor responded to Mr. Shier's letters of November 9 and 16, 1994. He did not enclose payment of Mr. Mashke's account pursuant to the Directions but suggested that an arrangement be made to provide Mr. Mashke with security for his account (Document Book, Tab 9).

17. On November 21 and 30, 1994, Mr. Shier wrote to the Solicitor to demand payment of Mr. Mashke's account in accordance with the two Directions acknowledged by the Solicitor (Document Book, Tabs 10 and 11).

18. By letter dated December 1, 1994 (Document Book, Tab 12), the Solicitor responded to Mr. Shier's letter of November 30, 1994. He did not enclose a cheque in the sum of \$27,000.00 as Mr. Shier had requested in his letter of November 30, 1994 but advised that Mr. Hess had no funds available to pay Mr. Mashke's account.

28th October, 1997

19. Mr. Mashke subsequently retained Stephen R. Jackson to pursue payment of Mr. Mashke's accounts. On December 14, 1994, Mr. Jackson wrote to the Solicitor advising that he had been retained by Mr. Shier with respect to this matter (Document Book, Tab 13). Mr. Jackson asked the Solicitor to confirm that his firm had received proceeds from the judgment of Master Linton.

20. By letter dated December 20, 1994, Mr. Jackson advised the Solicitor that he had received the report of Master Linton dated October 17, 1994 (Document Book, Tab 14). He again asked the Solicitor to *"confirm that you have received those funds and that you are now in a position to release them pursuant to the terms of the Report."*

21. On January 4, 1995, the Solicitor responded to Mr. Jackson's letter of December 20, 1994 (Document Book, Tab 15). He suggested that certain matters had to be resolved before funds could be released to Mr. Mashke. The Solicitor also suggested that Mr. Mashke could accept a lesser amount in settlement of his account.

22. The Solicitor and Mr. Jackson subsequently exchanged further correspondence with respect to resolving payment of Mr. Mashke's account. Throughout this correspondence, the Solicitor took the position that Mr. Mashke's account should be settled for an amount less than its face value or the amount identified in the two Directions. As the matter had not been resolved between the parties, Mr. Jackson wrote to the Solicitor on May 1, 1995 (Document Book, Tab 16), and stated:

"Our client's claim arises from the direction signed by your client and acknowledged by you. You agreed to be bound by it and our client must look to you for payment."

"We have instructions from our client to proceed with this matter if final arrangements have not been made before May 9, 1995."

23. By letter dated May 10, 1995 (Document Book, Tab 17), Mr. Mashke complained to the Law Society about the Solicitor's conduct in this matter.

24. By letter dated June 2, 1995 (Document Book, Tab 18), the Solicitor responded to the Law Society regarding Mr. Mashke's complaint. In his response, the Solicitor advised that proceeds of the judgment in favour of Mr. Hess had been consumed by his firm's legal fees and that no funds were available to pay Mr. Mashke's account. The Solicitor took the position that Mr. Mashke was aware that he would be paid only after legal fees had been fully paid.

25. To date, the Solicitor has not paid Mr. Mashke's account and the two Directions remain unfulfilled by him.

DATED at Toronto this 9th day of December, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Joseph Reed Hunter be reprimanded in Convocation and pay Law Society costs in the amount of \$3,500.

REASONS FOR RECOMMENDATION

The issue in this case is the obligation of the Solicitor to honour an undertaking to abide by an irrevocable Direction given to him by his client.

His client was upset with the results of a trial in which his expert appraiser, the beneficiary of the Direction, was criticized for not using the proper legal criteria in establishing value. The client gave instruction not to comply with the irrevocable Direction. The Direction was signed by the Solicitor as follows: "*I, J. Reed Hunter, Q.C. acknowledge this direction and agree to be bound by it*". This is a clear personal undertaking with no disclaimer.

The Solicitor found himself in the difficult situation of conflicting obligations to act on his client's instructions or to abide by his undertaking.

Rule 13 states "The lawyer should assist in maintaining the integrity of the profession and should participate in its activities".

Commentary 6 sets out the solicitor's duties to meet financial obligations "assumed or undertaken on behalf of clients unless, before incurring such obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one".

Rule 14, Commentary 6, states that the lawyer should give no undertaking that cannot be fulfilled and the lawyer should fulfill every undertaking given.

It is clear that there is a professional obligation to the public to honour undertakings.

The Solicitor followed his client's instructions not to pay the appraiser, yet he withdrew his own fees from the funds held in trust. The Solicitor subsequently, from his own funds, placed in his counsel's trust account the money claimed by the appraiser and then endeavoured to get the appraiser to agree to a reference to the courts to determine whether there was an obligation to honour that Direction.

Had the Solicitor not preferred himself by taking his fees he could have, as trustee of those funds, paid them into court and asked for directions.

The Committee does not accept the argument of counsel that there was no consideration for the undertaking. On the evidence before us, it was clear that the Solicitor felt that he could not continue the law suit without the appraiser's report and thus complied with his request for an irrevocable Direction, and the Solicitor's undertaking to comply with it.

The Solicitor in his testimony insists that the appraiser, who in the Solicitor's opinion was the expert, should have complied with the guidelines set out in the Farlinger case, which states that in valuing property, the appraiser should consider probabilities not possibilities in determining the best use of the property. The Solicitor did not feel that the legal implication of that decision should have been explored with the appraiser when discussing his report. In his letter of April 11, 1994, he writes to the appraiser to that effect. Clearly that is a legal question.

The Solicitor puts all blame on the appraiser for the bad results, yet does not consider that he the Solicitor, should have been aware of the standard set out in the Farlinger decision.

28th October, 1997

In conclusion, even if the appraiser was at fault, or even negligent, it does not relieve the Solicitor from his undertaking.

In the William Donald Gray decision, the solicitor's obligation is clearly set out: "an undertaking is a solemn promise made by a solicitor to a fellow solicitor or others. A solicitor's undertaking is his or her bond. The practice of law would become infinitely more complicated and costly and the public interest could not be as well protected if solicitors were not scrupulous about fulfilling their undertakings".

Joseph Reed Hunter was called to the Bar on June 28, 1956.

ALL OF WHICH is respectfully submitted

DATED this 10th day of April, 1997

Elvio L. DelZotto, Q.C., Chair

Convocation took a brief recess at 3:05 p.m. and resumed at 3:20 p.m.

Mr. Morrison made submissions against the finding of professional misconduct.

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

It was moved by Mr. Millar, seconded by Mr. Swaye that the Report be adopted.

Carried

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

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and pay the Society's costs of \$3,500.

Mr. Morrison made submissions in support of the recommended penalty.

Mr. Stuart made submissions of an increased penalty of a 1 month suspension with costs.

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

It was moved by Mr. Wilson, seconded by Mr. Carter that the solicitor be suspended for a period of 1 month.

Lost

It was moved by Mr. Millar, seconded by Mr. Wright that the solicitor be reprimanded with costs.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Convocation with costs.

28th October, 1997

The solicitor waived his right of appeal and was reprimanded by the Treasurer and ordered to pay costs in the amount of \$3,500.

CONVOCATION ROSE AT 4:25 P.M.

Confirmed in Convocation this 28 day of November, 1997

Harry T. Stewsey
Treasurer