

23rd January, 1997

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 23rd January, 1997  
9:00 a.m.

PRESENT:

The Treasurer (E. Susan Elliott), Aaron, Adams, Angeles, Arnup, Backhouse, Bellamy, Cole, Crowe, DelZotto, Gottlieb, Krishna, MacKenzie, Manes, Marrocco, O'Connor, Sachs, Scott, Sealy, Strosberg and Wright.

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The reporter was sworn.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Ms. Georgette Gagnon, Acting Senior Counsel - Discipline introduced Mr. William McDowell who acted as Duty Counsel.

Re: Francis Xavier FAY - Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott, Marrocco and Cole withdrew for this matter.

Ms. Christina Budweth appeared as counsel for the Society and Mr. Paul French appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 26th November, 1996, together with an Affidavit of Service sworn 16th December, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 2nd December, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Neil Finkelstein, Chair  
Larry A. Banack  
Thomas E. Cole

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

Christina Budweth  
for the Society

23rd January, 1997

FRANCIS XAVIER FAY  
of the City  
of Toronto  
a barrister and solicitor

Paul J. French  
For the solicitor

Heard: October 1, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

#### REPORT

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On June 24, 1996 Complaint D181/96 was issued against Francis Xavier Fay alleging that he was guilty of professional misconduct. This complaint was withdrawn and replaced by Complaint D181a/96 issued on September 30/ 1996.

The matter was heard in public on October 1, 1996 before this Committee comprising Neil Finkelstein, Chair, Larry A. Banack and Thomas E. Cole. The Solicitor attended the hearing and was represented by Paul J. French. Christina Budweth appeared on behalf of the Law Society,

#### DECISION

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

##### Complaint D181a/96

2. a) he improperly failed to deposit client retainer funds into trust and further failed to make those funds available to the client when called upon to do so.

##### Evidence

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

##### "AGREED STATEMENT OF FACTS"

##### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D181/96 and is prepared to proceed with a hearing of this matter on October 1, 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 D181/96 and this Agreed Statement of Facts and admits the facts as hereinafter set out. The Solicitor further admits that the particular of the Complaint as supported by the facts as hereinafter set out constitutes professional misconduct.

IV. FACTS

4. The Solicitor is 55 years of age. He was called to the Bar in 1969 and has for the most part practised law as a sole practitioner. In or about August, 1987, the Solicitor again became a sole practitioner until he joined the law firm, Associates, Coutts, Crane, Ingram, as counsel. On or about May 14, 1990, the Solicitor once again returned to practise as a sole practitioner. On or about October 31, 1991, the Solicitor ceased to practice law until July 1, 1994. Once again, on or about January 1, 1995, the Solicitor advised the Society that he was no longer practising law. The Solicitor has been suspended for non-payment of his annual fees as of May 12, 1995 and to date ceases to practise law.

5. On or about March 2, 1993, the Solicitor was retained by Bruce MacDonald to act for him in respect of a criminal matter.

6. The Solicitor met with Mr. MacDonald on March 3, 1993 at a coffee shop in Richmond Hill at which time he provided the Solicitor with a \$1,000.00 cash retainer. The Solicitor provided Mr. MacDonald with a receipt for same, a copy of which is attached as Exhibit 1 to this Agreed Statement of Facts. During their meeting, the Solicitor confirmed his earlier estimate that his fee for representing Mr. MacDonald in the matter would be \$3,500.00.

7. In April of 1993, Mr. MacDonald again met the Solicitor at the same location and provided a further \$1,000.00 retainer. The Solicitor did not provide a receipt but advised he would do so at a later time. The Solicitor advised Mr. MacDonald that he had not yet received disclosure from the police regarding his case. This meeting occurred in the Solicitor's motor vehicle in Richmond Hill.

8. In May of 1993, Mr. MacDonald and the Solicitor met again. Mr. MacDonald provided a further \$1,000.00 cash retainer and was again advised by the Solicitor that he had not yet received disclosure from the police. This meeting also occurred in the Solicitor's motor vehicle in Richmond Hill.

9. On August 7, 1993, the Solicitor contacted Mr. MacDonald's sister and indicated that he was confused as to whether the trial date was set for August 20th or August 23rd. The Solicitor advised Mr. MacDonald's sister that he was leaving the country and that his friend, Bruce Scott, would assume carriage of the matter. The Solicitor had discussed the case with Mr. Scott in a social setting. The Solicitor understood that Mr. Scott agreed to accept the file and it was delivered to Mr. Scott's office with a post-dated cheque in the amount of \$1,500.00 as a retainer. Mr. Scott did not have the same understanding of the matter and when the file was delivered to Mr. Scott sometime later, he noticed that he had a trial conflict. Mr. Scott does not dispute that the Solicitor may have believed that he would be undertaking the defence of the matter.

10. After a number of attempts, Mr. MacDonald finally made contact with Mr. Scott on August 17, 1993, who advised him that he would not be able to act for him, Mr. MacDonald. Mr. Scott also advised that the Solicitor had given him a cheque for \$1,500.00 which would be forwarded to Mr. MacDonald's new counsel and that he was unable to account to Mr. MacDonald for the remaining \$1,500.00. The Solicitor was out of the country and unaware of the problems being encountered by Mr. MacDonald. The Solicitor believed he had left the client in capable and very experienced hands.

11. Mr. MacDonald was able to retain new counsel and a Paralegal who attended with him in Court on August 23, 1993 and was able to put the trial of the matter over.

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12. Mr. MacDonald's new counsel attempted to negotiate the \$1,500.00 cheque but it was returned NSF. The Solicitor, immediately upon his arrival in South Africa realized he had forgotten to fund his bank account to cover this cheque. He wrote a letter to Mr. Scott alerting Mr. Scott to this fact, and advised Mr. Scott he would straighten this matter out on his return to Canada. By the time the Solicitor's letter reached Mr. Scott, the file had been transferred and Mr. McDonald's new counsel had attempted to negotiate the cheque which had been returned NSF.

12.(a) On the Solicitor's return from South Africa he met with Mr. Scott to resolve the matter of fees and the NSF cheque. This was in late October or early November 1993. It was at this meeting the solicitor was informed by Mr. Scott that Mr. Scott had not handled the case, did not know its outcome, nor did he know where the file was. Mr. Scott mentioned the NSF cheque and it is the Solicitor's recollection that Mr. Scott agreed to follow up on the matter by finding out the identity of the lawyer who eventually represented Mr. McDonald. The Solicitor believed that Mr. Scott was following up on the matter. Regardless of the Solicitor's belief, there was no follow-up and the Solicitor accepts that it was his responsibility and not that of Mr. Scott.

13. Mr. MacDonald wrote to the Law Society by letter dated August 27, 1994 setting out his version of the chronology of events which formed the basis of his Complaint, a copy of Mr. MacDonald's letter is attached to this Agreed Statement of Facts as Exhibit 2. The Solicitor acknowledges that Mr. MacDonald's August 27, 1994 letter is generally accurate in the matters which are described therein. Mr. MacDonald had not contacted the Solicitor during the year preceding the complaint.

14. Mr. MacDonald's letter of complaint was forwarded to the Solicitor for reply by the Law Society on September 14, 1994.

15. The Solicitor responded by letter dated October 3, 1994, a copy of which is attached as Exhibit 3 to this Agreed Statement of Facts.

16. The Solicitor wrote a further letter of reply to the Law Society dated October 28, 1994, a copy of which is attached as Exhibit 4 to this Agreed Statement of Facts.

17. As of December 2, 1994, Mr. MacDonald had received \$1,500.00 in repayment from the Solicitor.

18. By letter dated February 21, 1995, the Law Society wrote to the Solicitor requesting the whereabouts of Mr. MacDonald's \$3,000.00. A copy of the Society's February 21, 1995 letter is attached as Exhibit 5 to this Agreed Statement of Facts.

19. The Solicitor wrote to the Law Society by letter dated March 24, 1995, a copy of which is attached as Exhibit 6 of this Agreed Statement of Facts. In his March 24, 1995 letter, the Solicitor stated that he and Mr. MacDonald had a specific arrangement wherein Mr. MacDonald did not require the Solicitor to deposit his retainer funds into trust and invited the Law Society to confirm the same with Mr. MacDonald.

20. Mr. MacDonald commented on the Solicitor's March 24, 1995 letter by letter dated April 25, 1995, a copy of which is attached as Exhibit 7 to this Agreed Statement of Facts. Mr. MacDonald denied any agreement with respect to the retainer funds.

21. The Law Society has had subsequent communications with the Solicitor regarding the issue of repayment to Mr. MacDonald. Mr. MacDonald was repaid the monies he gave to the Solicitor for fees on or about September 23, 1996.

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V. DISCIPLINE HISTORY

23. The Solicitor has no past discipline history.

VI. JOINT SUBMISSION AS TO PENALTY

24. The Society and the Solicitor, through counsel, respectfully request that in all of the circumstances of the case that the hearing Committee recommend to Convocation that this matter be disposed of on the following basis:

1. That the Solicitor be suspended for a period of 16 months and that he be permitted to resume practice only on the following conditions, that.
  - a) he file a letter with his A.A. Sponsor attesting to compliance with conditions b, c, and d, prior to returning to practice;
  - b) he continue to attend A.A.;
  - c) he join an A.A. group;
  - d) he have an A.A. sponsor;
  - e) he provide the Society with the report of his physician that he is able to resume practice;
  - f) he not accept client retainers except through deposit to a trust account maintained by a solicitor approved by the Law Society, for a period of 16 months following his return to practice.

DATED at Toronto this 1st day of October, 1996."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that the Solicitor be suspended for a period of 16 months and that he be permitted to resume practice only on the following conditions, that,

- a) he file a letter from his A.A. Sponsor attesting to compliance with conditions b, c, and d, prior to returning to practice;
- b) he continue to attend A.A.;
- c) he join an A.A. group;
- d) he have an A.A. Sponsor;
- e) he provide the Society with the report of his physician that he is able to resume practice;
- f) he not accept client retainers except through deposit to a trust account maintained by a solicitor approved by the Law Society, for a period of 16 months following his return to practice.

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REASONS FOR RECOMMENDATION

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Mr. Fay admits the facts in the Agreed Statement of Facts in Exhibit 2, understands them, and admits that they constitute professional misconduct. This Committee, therefore, finds that Mr. Fay has committed professional misconduct.

As to the penalty and the joint submission, again, Mr. Fay understands the joint submission in Exhibit 2, page 5, and accepts the penalty. This Committee recommends it to Convocation. The Solicitor has apologized to his client and to the Law Society of Upper Canada through this Committee. Restitution has been made by Mr. Fay to his former client. There is no previous discipline history. There are mitigating circumstances in this case which are set out in the medical report at Exhibit 4, tab 8. As well, there are very good character references from people that this Committee regards as very senior and very credible.

The Committee, therefore, recommends the joint submission to Convocation. We would not recommend any order as to costs.

Francis Xavier Fay was called to the Bar on March 21, 1969.

ALL OF WHICH is respectfully submitted

DATED this 26th day of November, 1996

Neil Finkelstein, Chair

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 16 months and that he be permitted to resume practice with conditions.

Mr. French made submissions in support of the recommended penalty but requested that the commencement of the suspension be retroactive to the date of the Committee's decision of October 1, 1996.

Ms. Budweth made submissions in support of the recommended penalty and argued against the request that the commencement date of the suspension be the date of the Committee decision.

There was a reply by Mr. French.

There were questions from the Bench.

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

It was moved Mr. Gottlieb, seconded by Mr. Crowe that the period of suspension be 6 months.

Lost

It was moved by Mr. Adams, seconded by Ms. Sachs that the period of suspension be 12 months and not be retroactive.

Lost

The recommended penalty was voted on and adopted.

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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 16 months, commencing January 23rd, 1997.

Re: Donald Alan GARDNER - Mississauga

The Secretary placed the matter before Convocation.

Mr. Marrocco withdrew for this matter.

Mr. Neil Perrier appeared as counsel for the Society and Mr. Larry Levine appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 17th May, 1996, together with an Affidavit of Service sworn 29th May, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 22nd May, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Frank Marrocco, Q.C.

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

Neil J. Perrier  
for the Society

DONALD ALAN GARDNER  
of the City  
of Mississauga  
a barrister and solicitor

Larry Levine, Q.C.  
for the solicitor

Heard: April 3, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On January 28, 1992 Complaint D11/92 was issued against Donald Alan Gardner alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced by Complaint D11a/92 issued on January 9, 1996.

On consent the matter was heard in public on April 3, 1996 before Frank Marrocco, Q.C. sitting as a single Bencher. The Solicitor attended the hearing and was represented by Larry Levine, Q.C. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D11a/92

2.   a)   In or about the spring of 1989, he acted on a land development syndicate in which he knew or ought to have known that a false Land Transfer Deed and Land Transfer Tax Affidavit were drafted, executed and registered in the amount of \$1,000,000 when the actual consideration was the sum of \$465,000;
- b)   On or about July 31, 1989 he breached the requirements of Rule 5, Commentary 8, of the Rules of Professional Conduct when he acted for a syndicate of investors, some of whom he had acted for previously, on the purchase of 25 acres of industrial property in Fergus for \$465,000 from Settler Court Enterprises Inc., a company in which he had a 25% interest, in that he failed to insist that the investors obtain independent legal advice;
- c)   He preferred his own interest, or the interests of his client, Fernando Liorti, over those of his other clients when he acted for a syndicate of investors, some of whom he had acted for previously, on the purchase of 25 acres of industrial property in Fergus;
- d)   On or about June 15, 1989 the Solicitor misapplied the approximate sum of \$80,000 from a syndicate known as Fergus Industrial Park Incorporated, whose bank account he controlled;
- e)   He misapplied some or all of the investment funds of Nick Schaafsma and Ernest Priess, former clients of his, and investors in the Fergus Industrial Park Incorporated Syndicate;
- f)   In the period March 25, 1987 to October 31, 1989 he failed to maintain sufficient balances in his trust account to meet his trust obligations;
- g)   He failed to serve his clients in a conscientious, diligent and efficient manner by restructuring the "London Syndicate" from a subscription of shares in 807583 Ontario Inc., to a Co-Tenancy Agreement, without seeking his clients' instructions or consent to the restructuring of the transaction.

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 D11a/92 and is prepared to proceed with a hearing of this matter on December 18, 1995.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D11a/92 and admits the particulars therein. The Solicitor further admits that the said particulars constitute professional misconduct.

3. The Solicitor states, however, that to pursue the defence of a contested public hearing concerning all of the matters contained in the Notice of Hearing would seriously put at risk the continued recovery from a state of grave illness which the Solicitor has suffered over the preceding three years. He has received medical advice to this effect. The Solicitor continues at the present time to take medication and is under doctor's care. Based upon the aforesaid admission however, that certain of his conduct could be viewed as professional misconduct, the Solicitor seeks permission to resign from the Law Society.

IV. FACTS

4. The Solicitor was called to the Bar in 1972 and, at all material times, practised real estate law in the city of Mississauga as the named partner in the firm of Gardner and Associates, which became Gardner/Cutler in 1990.

5. An audit investigation of the Solicitor's practice was commenced in October, 1989 after the receipt of a complaint from Mr. David Rubin of the law firm of Messrs. Pallett, Valo on behalf of their client, Hugh Rinaldo Construction, who were concerned with the whereabouts of a deposit in the sum of \$5,000 that was to have been held in the Solicitor's trust account.

Particular 2(g)

He failed to serve his clients in a conscientious, diligent and efficient manner by restructuring the "London Syndicate" from a subscription of shares in 807583 Ontario Inc., to a Co-Tenancy Agreement, without seeking his clients' instructions or consent to the restructuring of the transaction.

6. The Solicitor states that he structured the Co-Tenancy Agreement in the manner in which he did in order to claim an advantage for the benefit of the investors pursuant to the provisions of the Income Tax Act. Furthermore, the Solicitor states that the documentation was structured in a manner that was specifically to ensure that the provisions of the Ontario Securities Act would not be violated. In this regard, he had sought the opinion of the law firm, Holden, Murdock, and from solicitor, Gary Hoy at that firm.

*807583 Ontario Inc. Purchase of 19 Unit Townhouse Complex at 215 Commissioners Road West in London from As/Gar in Trust ("London Syndicate")*

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7. At all material times the Solicitor acted on behalf of, and charged legal fees to, the syndicate with respect to the subsequently referred to transactions in which he had a financial interest. The Solicitor did not insist that his clients receive independent legal advice with respect to the investment.

8. On January 27, 1989 the Solicitor and a real estate agent, Terence Nero, in the name of As/Gar Financial Corporation ("As/Gar") in trust, entered into an Agreement of Purchase and Sale of a property from Mr. Randy Armstrong in trust, for the sum of \$1,190,000 (Document Book, Tab 1).

9. On February 3, 1989, As/Gar transferred the property for the sum of \$1,330,000 to 807583 Ontario Inc. ("807583") (Document Book, Tab 2). The gross paper profit from the transfer was the sum of \$140,000. The two transactions closed simultaneously on June 15, 1989 (Document Book, Tab 3).

10. In response, the Solicitor states that he and Mr. Terence Nero took shares, in lieu of money as part of their arrangement with the individuals who were in the syndicate. *Ultimately, the shares became worthless, and the Solicitor realized no actual monetary benefit from the transaction. In fact, he lost a substantial sum himself.*

11. 807583, which had been incorporated on November 30, 1988, was to be used as the vehicle for the investment. The Solicitor owned 100% of the shares of 807583. The Solicitor originally structured an investment transaction whereby investors would subscribe for shares of 807583. Later, in August or September of 1989 the transaction was restructured as a "Co-Tenancy Agreement", with 807583 acting as Trustee. The Solicitor states that the reason for the restructuring was that the original agreement had breached certain sections of the Ontario Securities Act. The Solicitor sought and acted on the advice the advice of his then counsel.

12. Pursuant to the terms of the original agreement, between February 13, 1989 and June 15, 1989 eleven investors invested a total amount of \$250,000 in the shares of 807583. At Document Book, Tab 4 is an example of the original subscription form. The funds were either deposited by the Solicitor to the 807583 bank account or were placed in term deposit receipts.

13. As of June 15, 1989, the Solicitor had been unable to obtain sufficient funds from investors to close the transaction. In order to close the purchase transaction, the Solicitor borrowed the sum of \$80,000 from another syndicate, Fergus Industrial Park Incorporated ("*Fergus Syndicate*"), in which other clients of the Solicitor had invested funds, without their knowledge or approval. The loan was secured by a mortgage registered on title to the Property (Document Book, Tab 5). The Solicitor also borrowed another \$16,445.39 from his spouse's company, As/Gar.

14. In response, the Solicitor states that in fact the numbered company borrowed the monies. The Solicitor states that he arranged the loan of the monies. The Solicitor states that he had the permission of Peter Liorti and Gabriel Spolitini, two investors who were, directly or indirectly, leading participants in both projects. However, the Solicitor did not attempt to verify with any of the other investors that Messrs. Liorti and Spolitini had authority to instruct the Solicitor on their behalf. At all times, monies that were the subject of the loan transaction were secured. Furthermore, the monies were repaid with interest and bonus within the time specified.

15. As previously stated, the two transactions closed simultaneously on June 15, 1989, with the title of the property going directly from the vendor to 807583 (Document Book, Tab 3).

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16. The Solicitor's trust account statement included at Document Book, Tab 6 indicated that the sum of \$433,912.92 was received to close the transaction and that it came from the following sources:

Investors	\$197,467.53
Fergus Industrial Park - loan	80,000.00
As/Gar Syndications - loan	16,445.39
Invested by Nero and Gardner	140,000.00
TOTAL	\$433,912.92

17. After the land transfer transaction had closed the following transactions occurred in the 807583 bank account:

<u>Date</u>	<u>Source/Payee</u>	<u>Receipts</u>	<u>Payments</u>
July 6/89	Amber Ing	\$ 25,000.00	
July 6/89	Gardner trust a/c	59.00	
July 6/89	As/Gar Syndications Inc.*		\$16,445.39
July 6/89	Gardner trust a/c (Fergus Industrial Park)		10,000.00
July 18/89	Gardner trust a/c	219.67	
July 28/89	As/Gar Syndications Inc.*	75,000.00	
July 28/89	Fergus Industrial Park*	71,000.00	
July 31/89	Bank charges		21.65
July 31/89	Bank account balance		2,811.63
		<u>\$100,278.67</u>	<u>\$100,278.67</u>

\* The Solicitor had a significant interest in these corporations.

18. On the same day on which Mr. Amber Ing invested in the *London Syndicate*, the Solicitor repaid to his spouse's corporation, As/Gar the funds that he had invested up to the close of the transaction. He also caused his As/Gar to advance the sum of \$75,000 to ensure the repayment to the Fergus Syndicate.

19. On July 28, 1989, the Solicitor made payment of the sum of \$71,000 to the *Fergus Syndicate* because that was the day the *Fergus Syndicate* transaction was to close, and the funds which had been previously borrowed by the *London Syndicate* were required for the closing of its land purchase transaction. (Note: the particulars of the *Fergus Syndicate* transaction are set out beginning at paragraph 47).

20. Subsequently one of the original investors, Geoffrey Hale, made a second investment in the amount of \$25,000. The Solicitor directed the funds to himself, and thereby reduced his own cash investment in the development to the sum of \$50,000. Geoffrey Hale knew and understood that the property had been flipped for a profit and that the Solicitor had an interest in the transaction. Mr. Hale did not know, however, the amount of the profit. However, Mr. Hale has stated that he is satisfied with the investment.

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21. As previously mentioned, in August or September of 1989 the Solicitor received legal advice that the original deal had breached certain sections of the Ontario Securities Act. In order to comply with the Act, he would have to either file a prospectus under the Ontario Securities Act or obtain an exemption. The deal was then restructured as a Co-Tenancy Agreement with 807583 acting as Trustee. Under the terms of the Co-Tenancy Agreement the investors received units in the property instead of shares in 807583. A total of 20 units were deemed to have been issued with each unit being worth \$25,000.

22. The investors, who had invested a total sum of \$350,000 in the property, received a total of 14 units of \$25,000 each. The remaining six units were assigned to the Solicitor and Mr. Nero and represented their profit on the transfer on the property. Mr. Nero received 2.5 units which were put in the name of Execucan Holdings Inc. The Solicitor received 3.5 units which were placed in the name of Lear/Gar Realty Incorporated ("Lear/Gar").

23. The Solicitor owned 90% of Lear/Gar and Michael Lear, a lawyer who was then an associate with the Solicitor, owned 10%.

24. Bryon Dale, the Law Society's investigation auditor, William Edward and investigator, spoke to four of the investors. They were Amber Ing, Barbara Neville, Paul Robinson and Geoffrey Hale. The information they provided is as follows:

Amber Ing

25. She said she was approached by the Solicitor to invest in the project. He told her he had purchased it himself but did not have the time to manage it himself and wanted to sell it. He said it was a good price and she checked out the current prices of condominium townhouses in London.

26. The Solicitor never suggested that she get independent legal advice or retain her own lawyer. She knew he was acting on the transaction but did not think of him as her lawyer on the transaction. It was purely an investment and the most she thought she could lose was the \$25,000. In fact, that is the sum that she lost.

27. The Solicitor did not disclose to her his paper profit on the transaction. She did not get a copy of the reporting letter on the purchase and did not know how many mortgages were on the property.

28. She did not know how the deal was structured. She said she had received some papers recently but had not looked at them.

Barbara Neville

29. She said she invested in the *London Syndicate* on the advice of a real estate agent. She had only purchased a 1/5 share for \$5,000.00 and the balance of the share was owned by Milton Nosov.

30. She did not look upon the Solicitor as her solicitor but as a co-investor in the project. She did not know the Solicitor had made a profit by transferring the property to the investors at a higher price.

31. She was uncertain whether or not she was a shareholder in the project or a co-tenant. She was a financial planner by profession. She was quite happy with the investment and thought her money was very secure.

32. The Solicitor states that at no time did he ever meet Barbara Neville.

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33. She sent the Law Society a copy of an information circular that she was given about the property showing projected earnings. A copy of the said information circular is contained at Document Book, Tab 7.

Geoffrey Hale

34. He said he had known the Solicitor for 11 years and that he had acted for him twice before on real estate deals. He bought one \$25,000 share originally then subsequently bought another for a total investment of \$50,000.

35. He said there was no solicitor/client relationship on this deal. The Solicitor had disclosed to him he had previously purchased the property and flipped it to the investors at a profit. The Solicitor, however, did not disclose the amount of the profit.

36. He viewed the investment as two to four year turn-around, at an opportune time. He appeared to be quite happy with his investment.

37. He thought that he was a shareholder in a limited partnership and that 807583 Ontario Inc. managed the property. He did not know anything about the Co-Tenancy Agreement.

38. Subsequently Mr. Hale said he had received from the Solicitor a letter dated May 23, 1991 enclosing a reporting letter and accounting.

39. At Document Book, Tab 8 is a copy of the letter dated May 23, 1991 and enclosures.

40. The letter stated that 807583 Ontario Inc. held the property in trust as a "Tenant in common" and that he had previously received the Co-Tenancy Agreement.

Paul Robinson

41. He invested \$25,000 in one share on May 18, 1989. He said Terry Nero told him about this deal. Nero said there were high hopes that they could make a major profit in a matter of two weeks.

42. The Solicitor states that at no time did he ever meet Mr. Robinson.

43. Nero told Robinson that the \$25,000 was for interim financing on a building that would cost \$1.3 million and it was to be conveyed to an already lined up buyer for \$1.5 million. The deal never transpired.

44. He said he had never met the Solicitor. However, he thought there was a solicitor/client relationship as the Solicitor was acting on the real estate deal for the investors. He knew the Solicitor and Nero were in on the deal and therefore, thought he would not have to pay legal or real estate fees. Nero told him he did not need his own lawyer. However, he did not know the Solicitor and Nero had transferred the property to the investors at a profit.

45. He was very unhappy about his investment and was concerned it might be a total loss. He said Nero had led him to believe that there was all kinds of government backing on the project and that his money was safe.

46. He had received and signed the co-tenancy papers but he did not really understand their meaning. He thought he was a shareholder in 807583 and, therefore, a part owner of the building.

47. He had also received the information circular at Document Book, Tab 7.

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48. At a meeting on October 11, 1990, he gave the Law Society a letter dated October 3, 1990 that he had just received from the Solicitor enclosing a cheque for \$200 representing his share of the profits on the property to that date. At Document Book, Tab 9 is a copy of the letter and enclosures.

49. Mr. Robinson did not know what to do about his investment or the \$200 cheque. He was advised to consult with another lawyer before cashing the cheque in case it affected his legal position.

50. The Law Society has not heard from Mr. Robinson or any lawyer on his behalf since October 11, 1990.

Particular 2(a)

In or about the spring of 1989, he acted on a land development syndicate in which he knew or ought to have known that a false Land Transfer Deed and Land Transfer Tax Affidavit were drafted, executed and registered in the amount of \$1,000,000 when the actual consideration was the sum of \$500,000;

Particular 2(b)

On or about July 31, 1989 he breached the requirements of Rule 5, Commentary 8, of the Rules of Professional Conduct when he acted for a syndicate of investors, some of whom he had acted for previously, on the purchase of 25 acres of industrial property in Fergus for \$465,000 from Settler Court Enterprises Inc., a company in which he had a 25% interest, in that he failed to insist that the investors obtain independent legal advice;

Particular 2(c)

He preferred his own interest, or the interests of his client, Fernando Liorti, over those of his other clients when he acted for a syndicate of investors, some of whom he had acted for previously, on the purchase of 25 acres of industrial property in Fergus;

Particular 2(d)

On or about June 15, 1989 the Solicitor misapplied the approximate sum of \$80,000 from a syndicate known as Fergus Industrial Park Incorporated, whose bank account he controlled;

Particular 2(e)

He misapplied some or all of the investment funds of Nick Schaafsma and Ernest Priess, former clients of his, and investors in the Fergus Industrial Park Incorporated Syndicate

*Fergus Industrial Park Incorporated ("Fergus") Purchase of 25 Acres of Industrial Property in Fergus from Settler Court Enterprises Inc. ("Settler")*

51. At all material times the Solicitor acted on behalf of, and charged legal fees to, all parties with respect to the following transactions in which he had a financial interest. He did not insist that the investors obtain independent legal advice with respect to the investment.

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52. On February 23, 1989, Mr. Fernando Liorti entered into an Agreement of Purchase and Sale of 25 acres of land in the town of Fergus (hereinafter the "Fergus Property") for the sum of \$465,000 (Document Book, Tab 10). The transaction was originally scheduled to close on June 14, 1989. On March 17, 1989, Mr. Liorti entered into an Agreement of Purchase and Sale with *Settler* of the Fergus Property for the sum of \$950,000 (Document Book, Tab 11). On the same date a draft Agreement was prepared for *Fergus* to purchase the property for the sum of \$1,350,000 (Document Book, Tab 12). The draft Agreement was never executed.

53. On March 22, 1989 *Settler* was incorporated. The officers of *Settler* were as follows:

President	-	Gabriel Spolitini
Vice-President	-	Peter Liorti
Secretary	-	Donald A. Gardner
Treasurer	-	Fernando Liorti

54. The shareholders of *Settler* were Lear/Gar Realty Inc. (90% owned by the Solicitor), Liorti Development Corporation and Atog Investments Limited.

55. Also on March 22, 1989, *Fergus* was incorporated. The Solicitor was appointed secretary/treasurer and was a 33 1/3% shareholder of *Fergus*.

56. The purpose of the incorporation of *Fergus* was to have a vehicle for a syndicate to attract investors for the development of the 25 acres of industrial property. Messrs. Gardner, Liorti and Spolitini then solicited investment funds from potential investors.

57. On or about March 29, 1989, the Solicitor contacted Mr. Nick Schaafsma concerning a possible investment in the development. On April 3, 1989, Mr. Schaafsma signed a Notice of Intention to Participate which had been drafted by the Solicitor or his law firm (Document Book, Tab 13). The said Notice contained a statement that Mr. Schaafsma "...acknowledges that one of the principles of the Vendor shall be ... Donald Gardner ... who has a substantial interest in the corporation and shall act as the solicitor for Fergus Industrial Park Incorporated and shall be one of the co-tenants...and the undersigned further acknowledges that Donald A. Gardner... shall make a profit from the sale of the subject property from Settler Court Enterprises Inc. to Fergus Industrial Park Inc.".

58. Mr. Schaafsma mailed his cheque in the sum of \$50,000 to the Solicitor and on April 14, 1989, the Solicitor deposited the funds in a bank account that had been opened in the name of *Fergus*.

59. Two other officers of *Settler*, the Liortis, contacted three people who each invested a total of \$50,000. Mr. Spolitini contacted Ernest Priess who invested the sum of \$50,000.

60. All investors' cheques were made payable to the company and deposited in the *Fergus* bank account. The transactions set out in Document Book, Tab 14 took place through the *Fergus* bank account.

61. The purchase of the property by *Fergus* from Wolverine Tube was scheduled to close on June 14, 1989 but was postponed due to lack of funds.

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62. As set out in paragraphs 11 and 12, on June 15, 1989, there was a payment of \$80,000 from the *Fergus* bank account to Donald A. Gardner in trust. That payment was made without the knowledge or consent of all of the investors (i.e. only Liorti and Spolitini were aware). The Solicitor borrowed the funds to invest in the *London Syndicate*. The land transfer transaction in the *London Syndicate* was due to close on June 15, 1989 and the Solicitor had not been able to obtain sufficient funds from investors to close that transaction. The loan to the *London Syndicate* was secured by a mortgage (Document Book, Tab 5) and was repaid in full by July 28, 1989 along with interest. This loan was outstanding for forty three days.

63. Due to a lack of investment funds needed to close the *Fergus* transaction the Solicitor arranged mortgage financing in the sum of \$250,000 from Clovergreen Land Holdings Limited ("*Clovergreen*") and the transaction closed on July 31, 1989. The loan was secured by a first mortgage registered against the *Fergus Property* (Document Book, Tab 15).

64. The balance of the funds due on closing being \$232,250 were paid directly by the first mortgagee, Clovergreen, to the vendor. The first mortgage costs amounted to a total of \$17,750 for brokerage fees, legal fees and an appraisal fee.

65. The property was appraised at the sum of \$500,000, and the consideration paid to close the purchase was the sum of \$465,000. Notwithstanding the foregoing, the Land Transfer Deed and Land Transfer Tax Affidavit (Document Book, Tab 16) prepared by the Solicitor's office stipulated the consideration to be the sum of \$1,000,000 and land transfer tax was paid on the sum of \$1,000,000.

66. Prior to the closing, on July 28, 1989 Messrs. Liortis, Spolitini and the Solicitor met at the Solicitor's office. There was a discussion concerning the amount of the consideration to be placed on the Land Transfer Deed for land transfer tax purposes. The contents of the discussion which occurred on that day are contained in the Solicitor's memo to file dated July 28, 1989, (Document Book, Tab 17). The Solicitor has admitted to the Society's investigation auditor, William Edward, that it was wrong to use the \$1,000,000 figure on the Land Transfer Tax Affidavit.

67. The Solicitor denies that he authored the memorandum at Document Book, Tab 17. The Law Society takes the position that the memorandum was authored by the Solicitor. For the purposes of this hearing it is agreed between the Solicitor and the Society that this will remain a neutral factor.

68. The Solicitor admitted that it was the Syndicate's intention to persuade up to 20 investors to invest \$50,000 each to finance the *Fergus Syndicate* so that the principal shareholders of *Fergus* would not have to put up any more money and could recover their investment. The principals intended to allocate co-tenancies to themselves out of the "profit" on the transfer of the property.

69. In August of 1989, a dispute arose between Mr. Spolitini and Mr. Liorti when the Solicitor was overseas. In late August, a meeting was held at the Solicitor's office. Following the meeting, the Solicitor dictated the memorandum dated August 24, 1989, contained at Document Book, Tab 18.

70. Subsequently, the property was listed for sale. As of February 2, 1992 it had not been sold and was the subject of foreclosure proceedings by the first mortgagee.

71. A reporting letter and accounting of the land transfer transaction which closed on July 31, 1989 was not sent by the Solicitor to the investors until May 23, 1991 (Document Book, Tab 19).



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72. The Solicitor had acted on previous occasions for two of the investors, Mr. Priess and Mr. Schaafsma. Neither Mr. Schaafsma nor Mr. Priess have received any return on their initial investment. Both Mr. Schaafsma and Mr. Priess state that they relied on the Solicitor to represent their interests with respect to the investment.

Trust Account Shortages

73. In the period March 25, 1987 to October 31, 1989 the Solicitor failed to maintain sufficient balances in his trust account to meet his trust obligations.

74. The trust account, duration and amount of these shortages were as follows:

Client	Duration of Shortage	Amount
Deanlee ("Complainant")	March 25/87- January 31/89	\$ 3,722.86
Gardner ("Solicitor")	October 14/88- May 15/89	8,549.05
Denning	October 14/88- Nov. 1/90	5,969.07
Scott	October 14/88- Nov. 1/90	5,543.00

75. Attached at Document Book, Tab 20, is a schedule of the client trust accounts in which the Solicitor had failed to maintain a sufficient balance.

76. The Solicitor's position is that he relied on his accountant, Carol Robb, to maintain these accounts. Carol Robb was fired in February for allegedly stealing cash retainers from clients. It was not until May, 1989 that the trust bank account was reconciled.

77. The Solicitor states that Carol Robb was also charged with and convicted of the offence of theft in relation to the aforesaid matters. The Law Society has been unable to confirm or deny the Solicitor's assertion.

Prior Discipline Record

78. The Solicitor has no prior discipline record.

DATED at Toronto, this 3rd day of April, 1996."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Donald Alan Gardner be granted permission to resign.

REASONS FOR RECOMMENDATION

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I have decided to adopt the joint submission of counsel and to recommend to Convocation that Mr. Gardner be permitted to resign his membership in the Society.

Mr. Gardner has no previous discipline history and in proceeding the way he has, he has saved the Law Society approximately a full week of hearings. Mr. Gardner has for the past four years complied with his undertaking not to practise. Further, the Solicitor was both responsible and responsive throughout this investigation.

None of the clients affected by the transactions set out in the Agreed Statement of Facts have complained to the Law Society notwithstanding the fact that they were interviewed by Law Society staff during the course of this investigation. No claims against the compensation fund and no civil suits involving the Law Society's insurer have been commenced.

Perhaps the most serious particular is Number 2(a) which deals with a Land Transfer Tax Affidavit which was not factually accurate. Counsel for the Society acknowledged in a pre-trial hearing that the background of its most essential witness was not exemplary and that it foresaw potential credibility problems with this witness if there was a contested hearing.

With respect to the particular dealing with the restructuring of the London Syndicate, it is clear that this restructuring had the effect of conferring a tax benefit upon the members of the syndicate. This fact, however, does not excuse the solicitor's having carried out the restructuring without the consent of all the members of the syndicate.

With respect to the misapplication of funds between the two investment syndicates, this misapplication occurred in circumstances where many but not all of the members of both syndicates were the same people. This does not excuse Mr. Gardner from failing to obtain the consent of all of the members of the Fergus Syndicate (the lending syndicate), but it does mitigate his conduct to some extent. Further, the misapplied funds were repaid without prejudice to the Fergus Syndicate.

It is clear that the Solicitor believed in the merits of the investment on Consumers Road due to the fact that he invested and lost \$50,000 of his own money in that project. This does not excuse the fact that the Solicitor failed to ensure that the other investors received independent legal advice and otherwise failed to ensure that the transaction proceeded in a legally appropriate fashion, but it does prove, and I so find, that the Solicitor at all times believed that the transaction would benefit himself and all the other investors. The Solicitor was not attempting to benefit himself at the expense of the other investors.

With respect to the particular alleging that the Solicitor failed to maintain sufficient balances in his trust account, while this is true, it is also a fact that the Solicitor's bookkeeper at that time was later prosecuted and convicted of theft and that the Solicitor was found to be one of the victims of this bookkeeper. The Solicitor placed sufficient funds in his trust account to put it in balance once he became aware of the shortage.

Finally, it should be observed that Mr. Gardner suffers from cancer and has been receiving treatment for that illness for some considerable period of time. His condition at present is described as stable, but it does seem to me that the fact that he suffers from the condition and the fact that he cannot be operated upon is a mitigating circumstance which can be considered on the question of penalty.

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Convocation indicated in its reasons in the case of *O'Donnell* that the two purposes for which penalties are imposed in a discipline matter are (1) the protection of the public and (2) the protection of the reputation of the profession. Both of those principles, in my view, are served if, as both counsel jointly submitted, Mr. Gardner's membership in the Society is terminated by way of resignation, and I so recommend to Convocation.

Donald Alan Gardner was called to the Bar on March 24, 1972.

ALL OF WHICH is respectfully submitted

DATED this 17th day of May, 1996

Frank Marrocco, Q.C.

There were no submissions, the finding was confirmed and the Report adopted.

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

Both counsel made submissions in support of the joint submissions made before the Discipline Committee that the solicitor be permitted to resign.

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

It was moved by Mr. Aaron, seconded by Mr. Cole that the solicitor be disbarred.

Counsel, the solicitor, the reporter and the public were recalled and informed of the motion for a higher penalty.

There were further submissions by both counsel in support of the recommended penalty of permission to resign.

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

Messrs. Aaron and Cole withdrew their motion that the solicitor be disbarred.

The recommended penalty was voted on and adopted.

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

Re: Thomas Allan BATES - London

The Secretary placed the matter before Convocation.

Messrs. DelZotto, Adams and MacKenzie and Ms. O'Connor withdrew for this matter.

Ms. Janet Brooks appeared as counsel for the Society. The solicitor appeared on his own behalf.

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Convocation had before it the Report of the Discipline Committee dated 14th November, 1997, together with an Affidavit of Service sworn 26th November, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 26th November, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 20th January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Elvio L. DelZotto, Q.C., Chair  
W. Michael Adams  
Shirley O'Connor

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

Janet Brooks  
for the Society

THOMAS ALLAN BATES  
of the City  
of London  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 29, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 24, 1996 Complaint D175/96 was issued against Thomas Allan Bates alleging that he was guilty of professional misconduct.

The matter was heard in public on October 29, 1996 before this Committee composed of Elvio DelZotto, Q.C., Chair, W. Michael Adams and Shirley O'Connor. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D175/96

2. a) he failed to fulfill in a timely fashion his Undertaking to Oliver & Wright dated December 2, 1986 wherein he undertook, among other things, to register a reference plan on title to the property municipally known as 414 - 414 1/2 Rectory Street, London, Ontario.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D175/96 and is prepared to proceed with a hearing of this matter on October 29 and 30, 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 D175/96 and admits the particular contained therein. The Solicitor further admits that the said particular, supported by the facts hereinafter set out, constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He currently practises as a sole practitioner.

5. The Solicitor acted for the vendors, Arends, on a sale of a property to purchasers, Semple. Counsel for the purchasers were the firm of Oliver & Wright. The transaction closed on December 2, 1986 in consideration of the Solicitor's Undertaking to, among other things, register a Reference Plan on title. A copy of the Solicitor's Undertaking dated December 2, 1986 is attached at Tab 1 of the Document Book.

6. In the period 1986 through 1993, Wendy Oliver of Oliver & Wright contacted the Solicitor on numerous occasions to request that he register the Reference Plan in accordance with his Undertaking. By letter dated May 27, 1993, Wendy Oliver wrote to the Law Society and complained that notwithstanding her repeated written requests over the years, the Solicitor had failed to comply with his Undertaking to register the Reference Plan. A copy of Ms. Oliver's letter of complaint dated May 27, 1993 is attached at Tab 2 of the Document Book.

7. By letter dated June 24, 1993, the Law Society requested the Solicitor's response to the letter of complaint by Ms. Oliver. A copy of the Law Society's letter of June 24, 1993 is attached at Tab 3 of the Document Book.

8. On July 30, 1993, the Solicitor contacted the Law Society by telephone in response to its letter of June 24, 1993. The Solicitor advised that he had been trying for the last two months to obtain a Reference Plan from the surveyor to no avail. A copy of the notes of the conversation are at Tab 4 of the Document Book.

9. By letter dated August 4, 1993, the Solicitor confirmed his telephone conversation. He advised that he was "still awaiting the actual registration of the Reference Plan from the surveyor". He also advised that:

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"apparently, because of the crush of work during the summer months, they have been unable to complete the registration although it has been submitted to the Registry Office for approval. [The surveyor estimates that it will be approximately the middle of August before all of the work is finally completed and when this is done, I will forward a copy of the Plan to you as well as Wendy Oliver]".

A copy of the letter dated August 4, 1993 is attached at Tab 5 of the Document Book.

10. On January 17, 1994, the Law Society contacted the Solicitor with respect to the status of the registration of the Plan. The Solicitor advised that the surveyor had contacted him just prior to Christmas and confirmed ongoing problems with the Plan. The Solicitor indicated that he had trust monies earmarked as payment for registration of the Plan. The Law Society's employee advised the Solicitor that she understood preparation of the Plan was out of his hands but needed to know that he was making every attempt to work with the surveyor to finalize same in light of his outstanding Undertaking. The Solicitor agreed to contact the surveyor for the status of the matter and contact the Law Society's employee. A copy of the notes of the telephone conversation are attached at Tab 6 of the Document Book.

11. By letter dated January 31, 1994, the Law Society requested in writing the status of the subject Reference Plan. A copy of the Law Society's letter of January 31, 1994 is attached at Tab 7 of the Document Book. The Solicitor did not respond to the Law Society's request.

12. By letter dated May 17, 1994, the Law Society requested a response to its letter of January 31, 1994. The Solicitor's written comments were requested within two weeks. A copy of the Law Society's letter of May 17, 1994 is attached at Tab 8 of the Document Book. The Solicitor did not respond to the Law Society's letter.

13. On July 15, 1994, the Law Society attempted to contact the Solicitor by telephone. A message was left with the Solicitor's receptionist to contact the Law Society with respect to the status of the file. A copy of notes of the telephone conversation is attached at Tab 9 of the Document Book. The Solicitor did not return the telephone call.

14. On August 25, 1994, the Law Society attempted to reach the Solicitor. A message was left with his secretary for him to contact the Law Society with respect to the matter. The Solicitor returned the call that day and advised that the survey had been submitted to the Registry Office and should be approved in a few weeks. He advised that the delay was caused by quit claim deeds which had to be obtained from neighbours. The Solicitor advised that he would deliver his response by fax the following day. A copy of the notes of the telephone conversation are attached at Tab 10 of the Document Book.

15. By letter dated August 26, 1994, the Solicitor advised the Law Society that:

"... this Reference Plan has turned out to be much more complicated than anyone originally envisioned.

In any event, in order to complete the Plan, it was necessary for my surveyor, Howard Gibson, to arrange for Quit Claim deeds from neighbouring owners. Apparently, he now has obtained these and the Plan has now been submitted to the Registrar for approval. Assuming that the approval is forthcoming, the registration should be completed within approximately two weeks.

In any event, I will keep you up to date as to whatever happens, whether it be registration or some further amendment."

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A copy of the Solicitor's letter of August 26, 1994 is attached at Tab 11 of the Document Book

16. Having not received any word from the Solicitor, the Law Society wrote to the Solicitor on December 16, 1994 requesting an update. A copy of the Law Society's letter of December 16, 1994 is attached at Tab 12 of the Document Book. The Solicitor did not reply to this letter.

17. On March 16, 1995, the Law Society contacted Bruce Bart, the Registrar of the Land Registry Office at London. The status of the registration as of that date was that no Plan had been submitted by or on behalf of the Solicitor for approval. A copy of the Law Society's notes of the telephone conversation is attached at Tab 13 of the Document Book.

18. By letters dated April 6, 1995, June 23, 1995 and July 13, 1995, the Law Society wrote to the Solicitor requesting his written status report indicating whether or not the subject Reference Plan had been submitted to the London Registrar for approval for registration and if so, whether the Reference Plan had been approved and registered on title. A copy of the Law Society's letters of April 6, 1995, June 23, 1995 and July 13, 1995 are attached at Tabs 14, 15 and 16 respectively of the Document Book. The Solicitor failed to respond to the letters within the time frame requested.

19. By letter dated September 21, 1995, the Solicitor enclosed a draft of the Reference Plan, dated September 20, 1995. He stated that he would advise of registration of the Plan. He also stated:

"I might add that the surveyor advises me that this is one of, if not the worst, Plan with which he has been involved."

A copy of the Solicitor's letter of September 21, 1995 is attached at Tab 17 of the Document Book.

20. On October 1, 1995, the Law Society contacted the surveyor, Howard Gibson. Mr. Gibson had first been asked to prepare the survey two years previous. He prepared and submitted the Plan for approval in 1995, not a year earlier as indicated by the Solicitor. This was the first preliminary Plan that he had prepared. Two years previous, he had been asked to prepare the Plan and had provided the Solicitor with some information, but did not hear back from the Solicitor until recently. A copy of the notes of the telephone conversation are attached at Tab 18 of the Document Book.

21. Under letter dated October 6, 1995, the Solicitor enclosed a copy of the registered Reference Plan. A copy of the Solicitor's letter and the Plan are attached at Tab 19 of the Document Book.

22. By letter dated October 16, 1995, the Law Society wrote to the Solicitor expressing concern over the amount of time that had elapsed since the Undertaking. The Solicitor was asked for an explanation as to the apparent lack of steps having been taken between 1986 and 1993. The Law Society also expressed a concern that the Solicitor had apparently misrepresented the steps which he had taken. In particular, the Law Society stated:

"In a letter to the Law Society dated August 4, 1993, you stated that you were awaiting the registration of the Reference Plan which had been submitted to the Registry Office for approval. Mr. Gibson has advised me that the Plan dated September 20, 1995 was the first draft Plan that he has prepared, and that no previous Plan had been submitted to the Registry Office for approval..."

The Solicitor's comments were requested. A copy of the letter of October 16, 1995 is attached at Tab 20 of the Document Book.

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23. By letter dated October 18, 1995, the Solicitor responded to the Law Society's letter of October 16, 1995. The Solicitor confirmed that the Plan had been registered. Further, he stated:

"With respect to any steps been taken between 1986 and 1993, I have no excuse for this. The file simply became buried in a mass of other correspondence and as the letters came in from Wendy Oliver, my secretary simply kept filing them. It was not until matters had deteriorated to the point where Wendy wrote to The Law Society that it then came to my attention. I was not intentionally ignoring her and I apologize to her if it appears that way.

As you probably know, I have been participating in the Practice Review Program in an attempt to re-organize this office and make sure that this sort of thing will not happen again and I can assure you that if I have anything to do with it, it won't.

With respect to the statement that you were waiting for the registration of the Reference Plan had been submitted to the Registry Office, this was my understanding. Mr. Gibson delivered to my office all of the documentation which he had accumulated at the Registry Office in order to prepare the Reference Plan and it was my impression from speaking with him that he was proceeding with a draft which then required some comments and modifications at the Registry Office before it could be registered. I did not intentionally misrepresent to any one what I thought was happening but I did discover that Mr. Gibson was waiting for my approval before he then proceeded any further. I wanted to get this out of the way as quickly as possible and so I was not withholding any approval since it was only in my best interest to complete this in short order. Once I realized that he and I had this misunderstanding, I told him to finish it up as quickly as possible and he did so. In case you think that cost was some factor in the delay, it was not because Mr. Gibson was doing this as a favour to me and only charging us for whatever disbursements he had."

A copy of the Solicitor's letter of October 18, 1995 is attached at Tab 21 of the Document Book.

24. By letter dated November 9, 1995, the Law Society acknowledged receipt of the Solicitor's letters of October 6 and 18, 1995. The Solicitor was advised that the matter would be referred to the Chair and Vice-Chairs of Discipline for their instructions.

25. On December 20, 1995, the Law Society contacted Wendy Oliver and Hugh Fraser, the lawyer who took over her practice. Both advised that they had not received confirmation from the Solicitor that the Plan had been registered. A copy of the notes of the telephone conversations is attached at Tab 22 of the Document Book.

#### V. DISCIPLINE HISTORY

26. On April 15, 1986, the Solicitor received a reprimand in Committee for having wrongfully appropriated client trust monies for an overdraft in his personal chequing account and for having misled his client and her new Solicitor.



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27. On October 4, 1994, the Solicitor received a reprimand in Committee and was ordered to pay \$1,500.00 in costs with respect to his failure to serve a client in a conscientious, diligent and efficient manner; for misleading a client; and failing to promptly advise the Director of Insurance, E. & O. Department of the Law Society, of his potential liability for his failure to take action on behalf of his client. In that matter, the Discipline Committee stated:

"We propose to reprimand the Solicitor in Committee and we ask that the record should reflect that we do not expect that if he is ever in trouble again, the slightest leniency could possibly be shown to him."

A copy of the transcript is attached at Tab 23 of the Document Book.

DATED at Toronto, this 29th day of October, 1996."

#### RECOMMENDATION AS TO PENALTY

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The Committee accepts the joint submission as to penalty and recommends that Thomas Allan Bates be reprimanded in Convocation and pay Law Society costs in the amount of \$1,000.

#### REASONS FOR RECOMMENDATION

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The Solicitor has had a history of what can be described as sloppy practice and admits that he is guilty of professional misconduct in his failure to fulfill his undertaking to another lawyer to register a reference plan. He is enrolled in the Practice Review Program and has been involved since his last discipline hearing where he received a reprimand in committee on October 4, 1994.

The matter before this Committee dates back to December 2nd, 1986 at which time the Solicitor gave his undertaking to register a reference plan which was not completed until October 6, 1995. The Solicitor in his letter to the Law Society of October 16, 1995 states:

"with respect to any steps taken between 1986 and 1993, I have no excuse for this. The file simply got buried in a mass of other correspondence and as the letters came in from Wendy Oliver my secretary simply kept filing them. It was not until matters had deteriorated to the point where Wendy wrote the Law Society that it then came to my attention."

All of these events happened while he was before the last discipline hearing at which he was required to attend the Practice Review Program.

The Solicitor now advises that he has with the help of his wife improved his office practices by introducing computers, tickler systems and better office management. He also says that he has learned to say 'no' to handling too many matters resulting in his inability to give all files their proper attention.

He has instituted for his secretary of 18 years a program to update her skills, since in the past she handled primarily sales.

Any undertakings and lawyers letters relating to them now go to his wife and to him and not to his secretary.

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In his previous discipline hearing the panel stated:

"We propose to reprimand the Solicitor in Committee and we ask that the record should reflect that we do not expect that if he is in trouble again, the slightest leniency could possibly be shown to him."

From that comment we as a Committee would be recommending a greater penalty than a reprimand in Convocation if it were not for the fact that the matter before us existed before and during the time he was last reprimanded. Therefore we feel that the joint submission as to penalty is reasonable.

The Committee however, wants the Solicitor to know that the failure to fulfill an undertaking to another solicitor is a very serious matter. The practice of law depends on efficiency and on the ability of solicitors to rely on undertakings. In particular, real estate transactions would be very difficult and costly to the clients if it were not for the ability of a lawyer to rely on an undertaking.

Counsel for the Law Society submitted the cases of John Kenneth Henry Stiff and William Donald Gray in support of this principle, with which we agree.

For these reasons we recommend to Convocation that the joint submission as to penalty outlined above be accepted.

ALL OF WHICH is respectfully submitted

DATED this 14th day of November, 1996

Elvio L. DelZotto, Q.C., Chair

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and pay the Society's costs of \$1,000.

Ms. Brooks advised that the Society's costs had been paid.

Both counsel and the solicitor made submissions in support of the joint submissions made before the Discipline Committee that the solicitor be reprimanded in Convocation.

It was moved by Mr. Scott, seconded by Ms. Bellamy that the recommended penalty be adopted.

Carried

The Treasurer administered the reprimand.

Re: Farida Mir Mohammed SHAIKH - Toronto

The Secretary placed the matter before Convocation.

Ms. Brooks appeared as counsel for the Society. Mr. McDowell, Duty Counsel, appeared on behalf of the solicitor who was present.

23rd January, 1997

Convocation had before it the Report of the Discipline Committee dated 1st November, 1996, together with an Affidavit of Service sworn 26th November, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 26th November, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Tamara K. Stomp

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

Janet Brooks  
For the Society

FARIDA MIR MOHAMMED SHAIKH  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
For the solicitor

Heard: August 27, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On January 5, 1996, Complaint D1/96 was issued against Farida Mir Mohammed Shaikh alleging that she was guilty of professional misconduct. This Complaint was withdrawn and replaced with Complaint D1a/96, issued on February 26, 1996.

The matter was heard in public on August 27, 1996, before Tamara K. Stomp, sitting as a single Benchers. The Solicitor did not attend and was not represented by counsel. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D1a/96

- 2.a) she failed to file with the Law Society since her call to the Bar on February 8, 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.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Farida Mir Mohammed Shaikh be reprimanded in Convocation if her filings are completed to the satisfaction of the Law Society by the time this matter is heard in Convocation, failing which, that she be suspended for a period of one month and indefinitely thereafter until her filings have been completed.

REASONS FOR RECOMMENDATION

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This matter first came before me, sitting as a single Benchler, on August 7, 1996 for hearing. At that time, counsel for the Law Society, Ms. Cado, produced a letter dated August 7, 1996 signed by the Solicitor in which the Solicitor indicated that she was unable to attend because of a severe allergic migraine. I granted an adjournment until August 27, 1996 and requests were made of the Society to notify the Solicitor of the new date which was marked peremptory to proceed.

Service

On August 27, 1996, the Solicitor did not attend. The hearing proceeded before me and Exhibit #1 was an Affidavit from James Godding sworn on August 20, 1996 wherein Mr. Godding states that he attempted to serve the Solicitor personally on August 9, 12, 14 and 15, 1996. Further, the Affidavit states that on August 15, 1996 at 10:20 a.m., he left a copy with Zita MacNeil, a person having care and control of business at the offices of the Solicitor at 69 Bloor Street East, Suite 210, Toronto, Ontario. The said address at 69 Bloor Street East, corresponds with the address on the letterhead of the August 7, 1996 correspondence from the Solicitor received by the Society on the same date and that resulted in my adjournment of the hearing of that date. The copy that was so served by James Godding as Exhibit #1 was an August 7, 1996 letter to the Solicitor addressed to the address at 69 Bloor Street East, Suite 210, Toronto, Ontario and to 17 Braemar Avenue, Toronto, Ontario, M5P 2L1, from Janet L. Brooks, Discipline Counsel of the Law Society of Upper Canada. In that letter, the Solicitor is advised that an adjournment was granted from August 7, 1996 and that the new hearing date was August 27, 1996 at 9:00 a.m. peremptory.

Exhibit #2 to the proceedings was the Affidavit of Terri Spence who swears on August 27, 1996 that on August 7, 1996 she served the Solicitor with the same letter of August 7, 1996 from Janet L. Brooks, Discipline Counsel by sending it by facsimile to transmission number (416) 961-2534 and to facsimile transmission number (416) 485-4835. As well, the Affidavit of Terri Spence indicates that on August 7, 1996, she caused the mailroom of the Law Society of Upper Canada to send the August 7, 1996 letter from Janet L. Brooks registered to Suite 210, 69 Bloor Street East, Toronto, Ontario, M4W 1B3

The two facsimile transmission numbers referred to by Terri Spence are the same as those mentioned on the August 7, 1996 letter of the Solicitor previously mentioned. As well, Exhibit #2 attaches to it an Acknowledgement of Receipt Card signed on August 9, 1996 showing that the mail was received but the signature is indecipherable.

23rd January, 1997

Exhibit #3 to the proceedings is another Affidavit by Terri Spence sworn August 27, 1996 which states that on August 19, 1996 she instructed the mailroom of the Law Society of Upper Canada to send to the Solicitor by same day courier, a letter dated August 19, 1996 from Janet L. Brooks to the address at 69 Bloor Street East aforementioned. The August 19, 1996 letter of Janet L. Brooks is attached to the said Affidavit and is a letter to the Solicitor confirming again that Tuesday, August 27, 1996 at 9:00 a.m., peremptory to the Solicitor, is the new proceeding. Also attached as an Exhibit to the said Affidavit is a copy of the courier delivery receipt indicating that the letter was accepted by "Vincent" at 1:55 p.m. on August 19, 1996.

No contact of any kind has been received from the Solicitor by the Law Society despite the attempts at communication aforesaid. By the communications outlined in Exhibits 1, 2, and 3, the Law Society has discharged its obligations of service and communication to all places that it is aware the Solicitor can be contacted. Therefore, the hearing proceeded in the absence of the Solicitor.

#### Complaint

The only witness for the Law Society of Upper Canada was Helen Pasceri from the Membership Records Department. Her evidence established the following:.

1. The Solicitor was called to the Bar on February 8, 1994.
2. Helen Pasceri swore the Complaint in this matter, being D1a/96 on February 26, 1996 and that up to that time, no information has been received by the Law Society of the fiscal year end of the Solicitor.
3. The Law Society's ordinary procedure is to assume a fiscal year at the end of twelve months from the date of call unless otherwise advised by the Solicitor.
4. The Regulations of the Law Society required that filings be made within six months after the fiscal year end of each Solicitor.
5. According to this calculation, the Solicitor should have made her filings by August 9, 1995 and she did not do so.
6. On August 13, 1996, the Solicitor filed for the fiscal period ending January 31, 1995, thereby completing her first filing and giving notice that it is based on a January 31 fiscal year end.
7. Based upon this January 31 year end, the filing for the fiscal year ending January 31, 1996 was due no later than July 31, 1996.

In summary, the present situation is that the Solicitor has now elected a fiscal year end of January 31st, has filed, albeit late, for the fiscal period ending January 31, 1995, and has still to file for the fiscal period ending January 31, 1996.

I accept the evidence of Helen Pasceri. It has not been contradicted. As mentioned previously, the Solicitor did not attend nor has she offered any explanation by any other contact with the Law Society. There shall be a finding of Professional Misconduct with respect to the allegations in complaint D1a/96.

The recommended penalty is a reprimand in Convocation if the Solicitor brings her filings up-to-date by that time. If the filings have not been brought up-to-date by Convocation, then the recommended penalty is that Convocation suspend the Solicitor for one month fixed and thereafter indefinitely until the filings are brought up-to-date. There shall be no order as to costs.

23rd January, 1997

Farida Mir Mohammed Shaikh was called to the Bar on the 8th day of February, 1994.

ALL OF WHICH is respectfully submitted

DATED this 1st day of November, 1996

Tamara K. Stomp

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if her filings are completed failing which that she be suspended for a period of 1 month and indefinitely thereafter until the filings were completed.

Ms. Brooks advised that the filings were made and made submissions in support of a reprimand in Convocation.

Mr. McDowell made submissions in support of a reprimand and advised that the solicitor had declared bankruptcy.

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

It was moved by Mr. Gottlieb, seconded by Mr. Aaron that the matter be treated as a reprimand 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.

Convocation constituted itself as a Committee of the whole and the Treasurer administered the reprimand.

Re: Anthony Leandro FURGIUELE - Woodbridge

The Secretary placed the matter before Convocation.

Mr. Scott withdrew for this matter.

Ms. Rhonda Cohen appeared as counsel for the Society and Mr. Douglas Crane appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 15th January, 1997, together with an Affidavit of Service sworn 22 January, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 16th January, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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:

23rd January, 1997

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip M. Epstein, Q.C.

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

Rhonda Cohen  
For the Society

ANTHONY LEANDRO FURGIUELE  
of the Town  
of Woodbridge  
a barrister and solicitor

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

Heard: December 12, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 17, 1996 Complaint D157/96 was issued against Anthony Leandro Furguele alleging that he was guilty of professional misconduct.

The matter was heard in public on December 12, 1996 before Philip Epstein, Q.C. sitting as a single bencher. The Solicitor attended the hearing and was represented by Douglas Crane, Q.C. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D157/96

2. a) he breached an Order of Convocation that he suspend his practice of law for failure to pay his Errors & Omissions Insurance Levy, by practising law during the period May 26, 1995 to September 22, 1995.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D157/96 and is prepared to proceed with a hearing of this matter on December 12, 1996.

23rd January, 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 D157/96 with his counsel, Douglas Crane, Q.C., 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 March 25, 1966. He is a sole practitioner specializing in real estate law.

Particular 2(a) He breached an Order of Convocation that he suspend his practice of law for failure to pay his Errors & Omissions Insurance Levy, by practicing law during the period May 26, 1995 to September 22, 1995.

5. By First Notice dated December 20, 1994, the Solicitor was notified by the Law Society that his errors and omissions insurance levy for the period January 1 to June 30, 1995 was due and payable on January 1, 1995 (Document Book, Tab 1). The Solicitor did not respond or remit payment.

6. By Second and Final Notice dated April 10, 1995, the Solicitor was notified by the Law Society that his errors and omissions insurance levy for the period January 1 to June 30, 1995 was due and payable. The Solicitor was further advised that to avoid suspension any balance owing must be paid by the close of business (5:00 p.m.) On May 5, 1995, and that if payment was not received prior to that date no other notice would be sent before suspension. (Document Book, Tab 2). The Solicitor did not respond or remit payment.

7. By registered letter dated May 29, 1995, the Solicitor was notified by the Law Society that by Order of Convocation dated May 26, 1995, the Solicitor's rights and privileges as a member of the Law Society were suspended effective that date, as a result of the Solicitor's failure to satisfy his errors and omissions insurance levy. The Solicitor was notified that his rights and privileges would continue to be suspended until an application for exemption had been approved or the necessary levy had been paid together with any other fee or levy owing to the Law Society which had then been owing for four months or longer. The registered letter was signed for and retrieved on behalf of the Solicitor on June 2, 1995. (Document Book, Tab 3).

8. On or about June 7, 1995, a representative of the Law Society attempted to contact the Solicitor by telephone. The Solicitor's receptionist advised the Law Society representative that the Solicitor was not in the office at that time but was expected to return in approximately 1.5 hours. The Law Society representative left a message asking the Solicitor to return the call (Document Book, Tab 4).

9. The Solicitor returned the Law Society's call later that day. When asked whether he was practicing law at that time, the Solicitor advised that he was not and that he was "just in the office". The Solicitor inquired into what he could and could not do as a suspended member and was reminded of his obligations by the Law Society representative. The Solicitor reiterated that he was not practicing law while under suspension (Document Book, Tab 4).



23rd January, 1997

10. As at October 3, 1995, the Solicitor complied with the Law Society's errors and omissions insurance plan for the period July 1, 1995 to December 31, 1995, and his membership was reinstated (Document Book, Tab 7).

11. As evidenced by the documents at each of Tabs 8 - 163 of the Document Book, the Solicitor continued to carry on his practice of law throughout the period during which his rights and privileges as a member of the Law Society had been suspended.

12. Due to difficult economic circumstances, the Solicitor practised law during the period in which his rights and privileges as a member of the Law Society were suspended.

13. The Solicitor has been practicing law since 1966, and this is his only source of income. During the period of suspension, the Solicitor billed the sum of \$4,630.00. During 1993, the Solicitor billed \$79,000 and, after deducting expenses, his net worth was \$25,101. In 1994, the Solicitor billed \$54,125 and his net loss was \$44,580. In 1995, the Solicitor billed \$29,156 and his net loss was \$5,266.

14. In order to satisfy his errors and omissions insurance levy, the Solicitor realized RRSP funds in the amount of \$8,000.00.

V. DISCIPLINE HISTORY

15. The Solicitor does not have a discipline history.

DATED at Toronto, Ontario, this 12th day of December, 1996."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Anthony Leandro Furgieuele be suspended for a period of two months, commencing February 1, 1997.

REASONS FOR RECOMMENDATION

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The Solicitor is charged with professional misconduct in that he breached an Order of Convocation that he suspend his practice of law for failure to pay his Errors and Omissions Insurance levy, by practising law during the period May 26, 1995 to September 22, 1995, a period of somewhat less than four months. In effect, the solicitor is charged with practising while under suspension for that period of time.

The Society and the Solicitor have entered into an agreed statement of facts in which the Solicitor admitted that the particular supported the complaint and that he was guilty of professional misconduct.

The Solicitor was called to the Bar on March 25, 1966 and does not have a discipline history.

23rd January, 1997

There is no doubt that the Solicitor was aware that he was practising while under suspension. The Solicitor was faced with extremely difficult economic circumstances. Although he has been practising law since 1966 and this is his only source of income, his billings in the past few years have been meagre. During the period of suspension, the Solicitor billed the sum of \$4,630. During all of 1993, the Solicitor billed \$79,000 and suffered a net loss. In the following year, he billed \$54,000 and had a more significant loss. In 1995, the Solicitor billed under \$30,000 and also suffered a loss. I am advised that 1996 was not significantly better.

In order to satisfy his Errors and Omissions Insurance levy, the Solicitor cashed in RRSP funds and applied them to the outstanding levy.

Counsel for the Society and counsel for the Solicitor have agreed upon a joint submission. That is a significant fact that I take into account in determining the appropriate penalty.

The Solicitor put forward some ten character letters from other members of the profession, clients, and the Solicitor's minister, Father David Sands. All of the deponents of these character letters indicate that the complaint is entirely out of character with the person and lawyer that they have known for an extensive period of time.

Mr. Furgiuele has had personal and matrimonial problems and has suffered great strains on his financial and emotional resources.

Both counsel are aware of the MacGregor decision of Convocation and the Reasons of Convocation in the case of John Patrick O'Donnell. I note that MacGregor and O'Donnell held that solicitors who practise while under suspension should not be put in a better position as a result of being disciplined than they would be if they had complied with their obligations not to practise. For that reason, it is appropriate that solicitors who practise while under suspension be suspended for as least as long as the period during which they practised while under suspension. Convocation specifically noted, however, that the specific penalty in each case should reflect a multitude of considerations; some of which are referred to above and many of which are not susceptible to a mathematical formula.

Ms. Cohen, for the Society, and Mr. Crane, for the Solicitor, are both experienced discipline counsel. They have considered the matter very carefully and looked at all of Mr. Furgiuele's circumstances. Ms. Cohen has, quite responsibly, looked at the Solicitor's obligations to the Society and the public at large.

Having carefully considered the matter, both counsel have assured me that they believe that this is the appropriate penalty for reasons of the special or extenuating circumstances that exist in this case.

Any suspension will be, for this Solicitor, an extremely significant penalty. He is already facing the real possibility that unless his economic conditions improve, he will be unable to remain in practice. The period of suspension that would be equal to the time that the Solicitor practised while under suspension would be, in the particular circumstances of this case, a crushing blow. I accept that a two month suspension is at the low end of the range, but I have no hesitation in finding that it is clearly and unequivocally within the range.

23rd January, 1997

In all of the circumstances, therefore, I have no hesitation in accepting the joint submission which I think is a fit and appropriate penalty in the particular circumstances of this case. I accept Convocation's reasoning in O'Donnell that there are a multitude of circumstances that must be considered when determining the appropriate penalty. I also accept that a joint submission should not lightly be ignored.

In all the circumstances, therefore, I recommend to Convocation that the Solicitor be suspended for a period of two months, commencing February 1, 1997.

The Solicitor, understandably, is anxious to put this matter behind him and has voluntarily agreed that he will suspend his practice effective February 1st in the hope and anticipation that Convocation will accept this recommendation and do so before February 1st. In the event that Convocation is not able to reach or hear this matter before the Solicitor voluntarily undertakes a suspension, then it is my recommendation that the suspension period of two months be made retroactive by Convocation to February 1, 1997 so that it coincides with the Solicitor's voluntary cessation from practice.

ALL OF WHICH is respectfully submitted

DATED this 15th day of January, 1997

Philip M. Epstein, Q.C.

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 months commencing February 1st, 1997.

Both counsel made submissions in support of the joint submissions made before the Discipline Committee that the solicitor be suspended for a period of 2 months.

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

Carried

Re: Clayton James WALLACE - Hamilton

The Secretary placed the matter before Convocation.

Messrs. Scott and Marrocco and Ms. Angeles withdrew for this matter.

Ms. Cohen appeared as counsel for the Society. No one appeared for the solicitor nor was the solicitor present.

The Report of the Discipline Committee dated November 26th, 1996 together with the Affidavit of Service was marked Exhibit 1.

Ms. Cohen advised of a preliminary matter that there was an outstanding Complaint against the solicitor concerning a failure to file 2/3 forms.

The finding in the November 26th Report was confirmed and the Report adopted.

23rd January, 1997

The recommended penalty of the Discipline Committee was that the solicitor be suspended until he complies with his obligation to produce his books and records to the Law Society and that he be suspended for a further period of three months following his compliance.

Ms. Cohen advised that the solicitor's books and records had not been produced and made submissions in support of the recommended penalty.

It was moved by Ms. Sachs, seconded by Mr. Manes that the recommended penalty be adopted.

Counsel, the reporter and the public withdrew.

It was moved by Mr. DelZotto, seconded by Ms. Bellamy that the solicitor be disbarred if the solicitor did not appear at the next Discipline Convocation with his books and records uptodate.

Not Put

It was moved by Ms. Bellamy, seconded by Mr. MacKenzie that the adoption of the Report be rescinded.

Carried

It was moved by Ms. Bellamy, seconded by Mr. MacKenzie that the matter be adjourned to the April 3rd Discipline Convocation peremptory to the solicitor and that he be informed of the motion for a higher penalty.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the adoption of the Report was rescinded and that the matter be adjourned to the April 3rd Discipline Convocation peremptory to the solicitor and that the solicitor be informed of the motion for a higher penalty.

Convocation took a brief recess at 10:50 a.m. and resumed at 11:10 a.m.

Re: James Francis DUNN - Peterborough

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Wright, Gottlieb and Cole withdrew for this matter.

Ms. Jane Ratchford appeared as counsel for the Society and Mr. Michael O'Reilly appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 6th August, 1996, together with an Affidavit of Service sworn 22nd August, 1996 by Ron Hoppie that he had effected service on the solicitor by registered mail on 14th August, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Bradley H. Wright, Chair  
Gerald A. Swaye, Q.C.  
Gary L. Gottlieb, Q.C.

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

Jane Ratchford  
for the Society

JAMES FRANCIS DUNN  
of the City  
of Peterborough  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: July 9, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On March 6, 1996 Complaint D73/96 was issued against James Francis Dunn alleging that he was guilty of professional misconduct.

The matter was heard in public on July 9, 1996 before this Committee comprising Bradley H. Wright, Chair, Gerald A. Swaye, Q.C. and Gary L. Gottlieb, Q.C. The Solicitor did not attend the hearing nor was he represented. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D73/96

2. a) He failed to co-operate with the Law Society of Upper Canada investigation by failing to produce his books and records for his law practice and by refusing to respond to inquiries from the Law Society auditor, during the period September 22, 1993 to September 20, 1994.

RECOMMENDATION AS TO PENALTY

---

The Committee makes a finding of professional misconduct and recommends that James Francis Dunn be suspended indefinitely until he has produced to the Law Society all evidence, vouchers, records, books, accounts and papers for his law practice and has furnished such explanations as the Society reasonably requires for audit and investigation purposes in respect of all matters arising under complaint D73/96.

23rd January, 1997

REASONS FOR RECOMMENDATION

---

The Member is a 78 year old retired member of the Law Society. The Member was properly served with the complaint and advised of the date and time of the hearing, but did not attend.

Entered as evidence were copies of several letters from the Member to the Society in which he made it abundantly clear that he had no intention of co-operating with the Society or producing any of his books and records or complying with any orders or process of the Society.

In other circumstances, the Member may well have been found to have been ungovernable and disbarred and struck off the Rolls; however, such a disposition would put him beyond the jurisdiction of the Society, eliminating any chance of the Society gaining access to the books and records.

The Society is able to help maintain the integrity of the profession and protect the public partly because of its powers of audit and investigation under section 18 of Regulation 708 under the Law Society Act. Without access to the books and records of members, the efficacy of the Society in these matters would be seriously compromised.

Failure by a member to abide by the obligations arising under the Law Society Act is very serious misconduct and understandably rings a veritable carillon in the mind of the investigator.

James Francis Dunn was called to the Bar on October 18, 1945.

ALL OF WHICH is respectfully submitted

DATED this 6th day of August, 1996

Bradley H. Wright, Chair

There were questions from the Bench regarding background information.

Mr. O'Reilly requested that the solicitor's name not be publicized because of his advanced age and ill health.

Ms. Ratchford advised that the solicitor's books and records were now completed and made submissions that the suspension not take effect but the matter be publicized.

Counsel, the reporter and the public withdrew.

Mr. Cole withdrew for this matter.

It was moved by Mr. MacKenzie, seconded by Ms. Bellamy that the finding was confirmed and the Report be adopted.

Carried

It was moved by Ms. Sealy, seconded by Ms. Bellamy that a letter of admonishment be sent to the solicitor.

Carried

Counsel, the reporter and the public were recalled and informed that the Report was adopted. Convocation requested further submissions on costs.

23rd January, 1997

Ms. Ratchford did not take a position on the issue of costs.

Mr. O'Reilly requested that there be no costs.

Counsel, the reporter and the public withdrew.

It was moved by Ms. Backhouse, seconded by Mr. DelZotto that costs be fixed in the amount of \$900.

Carried

It was moved by Ms. Backhouse, seconded by Mr. DelZotto that there be no other penalty.

Lost

The recommended penalty was voted on and lost.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor pay costs in the amount of \$900, that a letter be sent to the solicitor setting out the solicitor's obligations as a retired member and that the matter not be publicized.

Re: Peter David CLARK - Barrie

The Secretary placed the matter before Convocation.

Messrs. Scott, Marrocco and Wright, Ms. Bellamy, Ms. Backhouse and Ms. Sachs withdrew for this matter.

Ms. Ratchford appeared as counsel for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 13th September, 1996, together with an Affidavit of Service sworn 25th September, 1996 by Ron Hoppie that he had effected service on the solicitor by registered mail on 23rd September, 1996 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Bradley H. Wright, Chair  
Nancy L. Backhouse  
Jane Harvey

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

PETER DAVID CLARK  
of the Town  
of Barrie  
a barrister and solicitor

Jane Ratchford  
for the Society

Not Represented  
for the solicitor

Heard: July 23, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

REPORT

---

On April 27, 1995, Complaint D514/94 was issued, and on February 22, 1996, Complaint D50/96 was issued against Peter David Clark alleging that he was guilty of professional misconduct.

The matter was heard in public on July 23, 1996 before this Committee composed of Bradley H. Wright, Chair, Nancy L. Backhouse and Jane Harvey. The Solicitor was in attendance. He was not represented by counsel. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D514/94

- 2.a) He failed to reply to the Law Society requesting further particulars with respect to a complaint by Gord R. Shafer despite letters dated April 19, 1994 and December 1, 1994 and telephone conversations on June 8, 1994, August 4, 1994 and November 17, 1994 and a telephone message left on August 17, 1994.

Complaint D50/96

- 2.a) From and after October 22, 1990, he misappropriated trust funds in the amount of approximately \$9,374.00 which he held to the credit of his client Sherie Lee Shafer;
- b) He misled:
- (i) Bruce R. Robinson of the firm MacMillan, Rooke, Avery Boeckle & Robinson when he confirmed by letter dated August 6, 1991, that the Shafer settlement funds were being held in trust pending the Court's approval of the matter, when in fact he had misappropriated the funds;
  - (ii) Willson A. McTavish, Official Guardian when he advised him by letter dated October 26, 1994, that the proceeds of the Shafer settlement funds were invested in a term deposit, when in fact he had misappropriated the funds.
- c) He misled clients Gordon Shafer and Sherie Lee Shafer by:
- (i) falsely advising the Shafers orally and by letter dated October 24, 1994, that settlement monies received from the Waterloo Insurance Company on behalf of Ms. Shafer were paid into Court pursuant to the Rules of the Court;
  - (ii) falsely advising the Shafers orally and by letter dated March 13, 1995, that he had sent a trust cheque to the Law Society for co-signing which represented the settlement monies including judgment amount and accrued interest in the sum of \$14,386.36.



EVIDENCE

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

Complaint D514/94

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D514/94 and is prepared to proceed with a hearing of this matter on .

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 D514/94 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 April 10, 1986. He practices as a sole practitioner.

5. By letter dated January 13, 1994 (Tab 1, Document Book), Mr. Gord R. Shafer wrote to the Law Society advising that he retained the Solicitor in July of 1986 to pursue an action on behalf of his daughter who was hit by a car in a parking lot while riding her bike. Mr. Shafer complained that he was unable to obtain a response from the Solicitor.

6. By letter dated February 8, 1994 (Tab 2, Document Book), the Law Society enclosed a copy of Mr. Shafer's letter and requested the Solicitor's comments within two weeks.

7. On February 28, 1994, a Law Society employee called the Solicitor who advised that he was meeting with Mr. Shafer on March 7, 1994, and that he would reply to the Law Society by March 9, 1994. Having not received his reply by March 9, 1994, a Law Society employee telephoned the Solicitor on March 14, 1994 and was advised that the meeting with Mr. Shafer had been rescheduled for March 17, 1994. The Solicitor further advised that he would reply to the Law Society by March 18, 1994. The Solicitor was advised that if his reply was not received by March 18, 1994, a registered letter would be sent to him. A copy of the handwritten notes of the telephone communications are contained at Tab 3 of the Document Book.

8. By letter dated March 18, 1994 (Tab 4, Document Book), the Solicitor advised the Law Society that a motion would be brought to approve the settlement in April, 1994. He further advised that the retainer in the amount of \$250.00 was not paid to him, but to another lawyer. The Solicitor further advised that his fees would be paid out of the proceeds and that he would ensure the return of the \$250.00 to Mr. Shafer.

23rd January, 1997

9. By letter dated April 19, 1994 (Tab 5, Document Book), the Law Society acknowledged receipt of the Solicitor's March 18, 1994 letter. The Law Society requested that the Solicitor provide an explanation concerning the relationship between the retainer in the sum of \$250.00 and the settlement proceeds. The Solicitor was further requested to provide the Law Society with the name of the solicitor who received the funds in July 1986, and why court approval was required. The Solicitor was requested to reply within two weeks.

10. On June 8, 1994, a Law Society employee telephoned the Solicitor and was advised that he was waiting for copies of the judgment, which he expected to receive that month. The Law Society advised the Solicitor that it would wait for a response until June 30, 1994. A copy of the handwritten notes of the telephone conversation are contained at Tab 6 of the Document.

11. On August 4, 1994, a Law Society employee telephoned the Solicitor and was advised that he did not have all the information he required in order to respond by June 30, 1994. However, the Solicitor advised that he had now received the information and that he would respond by Monday, August 8, 1994. A copy of the handwritten notes of the telephone conversation are contained at Tab 7 of the Document Book.

12. On August 17, 1994, a Law Society employee left a message on the Solicitor's answering machine. On November 17, 1994, the Solicitor telephoned the Law Society advising that he would fax his response by November 22, 1994. A copy of the handwritten notes of the telephone conversation are contained at Tab 7 of the Document Book.

13. By registered letter dated December 1, 1994 (Tab 8, Document Book), the Solicitor was advised that the Law Society had not yet received his response to the complaint by Mr. Shafer. The Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his written response was not received within seven days, the matter would be forwarded to the Chair of the Discipline Committee for further instructions. The letter was delivered and signed for on December 2, 1994. The Solicitor did not respond.

#### V. DISCIPLINE HISTORY

14. On March 25, 1994, the Solicitor was reprimanded in Committee for failure to file for the fiscal year ended November 30, 1991. The Solicitor executed an Undertaking dated March 25, 1994, not to practise until all filings were filed.

15. On April 27, 1995, the Solicitor was suspended for eight months by Convocation for failing to maintain books and records; misleading the Law Society; failing to produce books and records; failing to co-operate with the Law Society; failing to reply; failing to serve clients; and practising while under suspension.

DATED at Toronto this 1st day of May, 1996."

#### Complaint D50/96

#### "AGREED STATEMENT OF FACTS

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D50/96 and is prepared to proceed with a hearing of this matter on April 30 and May 1, 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 D50/96 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 in 1986. The Solicitor was suspended by Convocation on April 27, 1995 for, *inter alia*, failing to maintain his books and records, failing to serve a client, misleading the Law Society and for practising while under suspension, and remains suspended to date (see Tab 38).

5. In June, 1986, Sherie Lee Shafer was involved in a motor vehicle accident. At the time, she was only nine years old. In 1988, Sherie Lee's parents retained the services of the firm, Handelman, Korman to act on their daughter's behalf in connection with the accident (Document Book, Tabs 1 and 2).

6. On May 9, 1988, a Statement of Claim (Document Book, Tab 3) was issued and served against the defendants, Marilyn Wilson and Waterloo Insurance Company.

7. In the fall of 1989, the file was assigned to the Solicitor, who was then an employee of the Handelman, Korman firm (Document Book, Tab 4). In September, 1990, the Solicitor left the Handelman, Korman firm and began practising as a sole practitioner (Document Book, Tab 5). He continued to act on the Shafer matter.

8. In October, 1990, the action was settled in the amount of \$11,314.00, inclusive of general and special damages, pre-judgment interest, disbursements and legal fees (Document Book, Tab 6). The Solicitor was provided with a cheque in the amount of \$11,314.00, payable to his firm, in trust, from the Waterloo Insurance Company. Minutes of Settlement were to be prepared by the Solicitor and the Plaintiff's action dismissed.

9. On October 22, 1990, the Solicitor deposited the settlement cheque in his trust account at the Canadian Imperial Bank of Commerce (Document Book, Tab 7).

10. On November 2nd 1990, Maurice Keeble of the firm of MacMillan, Rooke, Avery, Boeckle & Robinson, solicitor for Waterloo Insurance Company, wrote to the Solicitor (Document Book, Tab 8) advising that his client wished to obtain Judgment against Marilyn Wilson regarding the payout of the insurance claim. Mr. Keeble reminded the Solicitor that he was expecting copies of the Solicitor's draft material regarding the infant settlement for his review. Waterloo Insurance had cross-claimed against Ms. Wilson who was the driver at fault in the accident and who did not defend. It was anticipated that as part of the motion for court approval of the settlement, Judgment would also be sought against Ms. Wilson for the amount of the settlement paid out by Waterloo Insurance. Mr. Keeble also suggested in his letter that the Solicitor make arrangements to deposit the trust funds he received on behalf of Sherie Lee Shafer into an interest bearing account in the interim until the approval and Judgment against Ms. Wilson was obtained.

11. As of November 2nd 1990, Bruce R. Robinson took carriage of the file from Mr. Keeble and began corresponding with the Solicitor.

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12. By correspondence dated March 1, 1991 (Document Book, Tab 9), Mr. Robinson reminded the Solicitor that the settlement funds had been in his hands for some time pending approval of the settlement of the action. Mr. Robinson also sought information from the Solicitor as to when the infant settlement would be approved.

13. Mr. Robinson again wrote to the Solicitor by letter dated May 1, 1991 (Document Book, Tab 10). Mr. Robinson requested copies of the infant settlement documents for his review and reminded the Solicitor that he should still be holding the settlement funds in trust.

14. Mr. Robinson wrote to the Solicitor by letter dated August 2, 1991 (Document Book, Tab 11), requesting a reply to his letters of March 1st and May 1, 1991. Mr. Robinson further requested confirmation from the Solicitor that the monies received on behalf of Sherie Lee Shafer were still being held in trust pending approval of the matter.

15. The Solicitor wrote to Mr. Robinson by letter dated August 6, 1991 responding as requested (Document Book, Tab 12). He confirmed that the settlement funds were being held in trust pending approval of the matter and enclosed a copy of the draft materials, including draft Judgment for Mr. Robinson's review. As will be seen in paragraph 45 below, this information was false. As of the date of this letter, the Solicitor had misappropriated the settlement funds from his trust account.

16. Mr. Robinson responded to the Solicitor by letter dated August 12, 1991 (Document Book, Tab 13). Mr. Robinson advised the Solicitor that he had reviewed the Minutes of Settlement and other draft materials and requested amendments.

17. Mr. Robinson wrote to the Solicitor by letter dated September 11, 1991 (Document Book, Tab 14) when he did not receive a response to his letter of August 12, 1991.

18. The Solicitor wrote to Mr. Robinson by letter dated September 11, 1991 (Document Book, Tab 15) in response to Mr. Robinson's letters of August 12th and September 11, 1991. He advised that he would incorporate the amendments as suggested and would attend upon the Shafers to sign the Minutes of Settlement.

19. On October 30, 1991, Minutes of Settlement were executed by Gordon Shafer, Sherie Lee Shafer's litigation guardian and father (Document Book, Tab 16). The solicitors representing the Waterloo Insurance Company signed the Minutes of Settlement on January 8th 1992 (refer to Document Book, Tab 16). The Solicitor was allowed \$1,940.00 out of the \$11,314.00 settlement for the Plaintiff's legal costs. This sum was in full satisfaction of his solicitor-client account to Sherie Lee Shafer. Under the Minutes of Settlement, the balance of \$9,374.00 was to be paid to the Accountant of the Ontario Court (General Division) to the credit of Ms. Shafer, until she attained the age of eighteen, subject to any further order of a Judge.

20. Mr. Robinson wrote to the Solicitor by letter dated July 1, 1992 (Document Book, Tab 17), requesting a reply to past letters as to whether he has succeeded in obtaining court approval of the Shafer settlement.

21. Mr. Robinson wrote to the Solicitor by letter dated October 1, 1992 (Document Book, Tab 18), requesting that he forward the Judgment to him as approved by the court or in the alternative to explain his delay. In the letter, Mr. Robinson reminded the Solicitor that he has been in possession of the settlement funds since October of 1990 and that if he did not hear from him within two weeks of the letter, Mr. Robinson would bring a motion to dismiss the action because of delay.

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22. On October 1, 1992, Bruce Robinson left his firm and Gerald Rooke took over the matter on behalf of Waterloo Insurance.

23. Mr. Rooke wrote to the Solicitor by letter dated February 9, 1993 (Document Book, Tab 19) advising him that Mr. Rooke was now looking after the matter and that he did not understand why Judgment had not yet been taken out. He reiterated that the infant's monies of \$9,374.00 should have been paid into court in late 1990 and interest should have accrued in the amount of \$1,700.00 to \$1,800.00. Mr. Rooke requested that a motion be brought forthwith to pay the money into court.

24. Mr. Rooke wrote to the Official Guardian by letter dated February 9, 1993 (Document Book, Tab 20), reporting the matter to the attention of Willson A. McTavish. In the letter, Mr. Rooke explained that a settlement had been reached with the Solicitor and that \$11,314.00 had been in the Solicitor's possession since October, 1990. Judgment was never taken out by the Solicitor and Mr. Rooke requested the Official Guardian's assistance in bringing the matter to conclusion.

25. Mr. Rooke wrote to the Solicitor by letter dated May 4, 1993 (Document Book, Tab 21) acknowledging receipt of a draft Judgment (and approving same) and revised Motion Record to have the monies paid into court, which had been recently received from the Solicitor. The Solicitor was requested, upon the hearing of the motion, to provide a copy of the Judgment and receipt from the Accountant for the amount paid into court with acknowledgement from the Solicitor as to the payment of costs.

26. Mr. Rooke wrote to the Solicitor by letter dated March 4, 1994 (Document Book, Tab 22), reminding him that the draft Judgment had been approved but that he had discovered that the Solicitor had never taken out the Judgment. This became apparent to Mr. Rooke when he attempted to collect on Waterloo Insurance's cross-claim against Ms. Wilson for the \$11,314.00 paid out. Mr. Rooke advised that if the Solicitor did not take immediate steps to complete the matter, he would forward a letter to the Law Society reporting his actions.

27. On June 13, 1994, Judgment (Document Book, Tab 23) was obtained by the Solicitor, which, *inter alia*, approved the infant settlement and ordered that the sum of \$13,717.63 inclusive of pre-judgment interest be paid to the Accountant of the Ontario Court to the credit of Sherie Lee Shafer, until she attained the age of 18, subject to further order of a Judge. The Solicitor's account was fixed at \$1,940.00.

28. Mr. Rooke wrote to the Solicitor by letter dated July 8, 1994 (Document Book, Tab 24), requesting a true copy of the Judgment and a receipt from the Accountant for the amount paid into court from the Solicitor.

29. By letter dated August 9, 1994 (Document Book, Tab 25), Mr. Rooke acknowledged receiving a copy of the issued and entered Judgment from the Solicitor, however, Mr. Rooke requested a copy of the receipt from the Accountant for the amount paid into court on behalf of Sherie Lee Shafer as well as an acknowledgement from the Solicitor as to the payment of his costs.

30. The Official Guardian, Willson McTavish, wrote to Mr. Rooke by letter dated October 21, 1994 (Document Book, Tab 26), advising that as of October 19th, no money had been paid into court on behalf of Sherie Lee Shafer. Mr. McTavish further advised that he was very concerned as the Solicitor had ignored his letters making inquiries in this regard.

23rd January, 1997

31. The Solicitor wrote to Gordon Shafer by letter dated October 24, 1994 (Document Book - Tab 27), enclosing a copy of the final Judgment of the Ontario Court. In the letter he explained to Mr. Shafer that pursuant to the Rules of Court, the money paid into court on behalf of Sherie Lee Shafer would be released to her when she has attained the age of majority on March 6, 1995. As will be seen from paragraphs 45 and 47 below, this information was false.

32. By letter dated October 26, 1994 (Document Book, Tab 28), the Solicitor wrote to the Official Guardian advising that the proceeds of the settlement were invested in a term deposit which was earning a higher rate of interest than the post-judgment interest rate set out in the Judgment which would mature on March 1, 1995. At that time, the monies would be paid into court and when Sherie Lee Shafer attained the age of majority, pursuant to the Rules of Court, she could attempt to obtain payment out of court of the proceeds of settlement. As will be seen in paragraphs 45 and 48 below, this information was false.

33. By letter dated October 27, 1994 (Document Book, Tab 29), the Official Guardian wrote to the Solicitor and requested from the Solicitor proof of his investment of the monies in a term deposit.

34. Mr. Rooke also wrote to the Solicitor by letter dated November 18, 1994 (Document Book, Tab 30), requesting the particulars of the Shafer term deposit.

35. The Solicitor did not provide a response to either the Official Guardian or Mr. Rooke as to the Shafer investment particulars.

36. On March 6, 1995, Sherie Lee Shafer turned 18 years old and made a claim for her funds at the court house in Brampton, where the Shafers resided. She was advised that no monies were on deposit to the credit of Ms. Shafer.

37. According to Mr. Shafer, the Solicitor explained the delay in payment by alleging that he sent a letter to the Law Society to the attention of William B. Simpson (Law Society Examiner) dated March 13, 1995 (Document Book, Tab 31). In the letter, the Solicitor stated that he had enclosed a trust cheque payable to the Accountant of the Ontario Court. The trust cheque represented the amount of the Judgment obtained, together with interest accrued in the sum of \$14,386.36 (Document Book, Tab 32). Furthermore, the Solicitor requested the trust cheque be co-signed by Mr. Simpson as co-signing controls had been in effect against his trust account since January 29, 1994. The Solicitor requested the trust cheque be signed and returned to him so that the cheque could be deposited with the Accountant of the Ontario Court. As will be seen in paragraph 50 below, this letter was fabricated by the Solicitor and was never sent.

38. The Solicitor further alleged in a letter dated March 13, 1995 to Gordon Shafer (Document Book, Tab 33) that he had sent a trust cheque to the Law Society for co-signing. The trust cheque represented the Judgment amount and accrued interest. The Solicitor further explained that once he had received the co-signed cheque, he would deposit the cheque immediately with the Accountant of the Ontario Court. He enclosed a copy of the letter addressed to the Law Society (see Tab 31).

39. Gordon Shafer wrote to Neil Perrier, Discipline Counsel for the Law Society by letter dated March 15th 1995 (Document Book, Tab 34). In Mr. Shafer's letter, he explained that he had attempted to obtain the settlement money through the Brampton Court, however, the Court told Mr. Shafer that nothing had been deposited with them. Brampton Court gave Mr. Shafer a telephone number for the

23rd January, 1997

Accountant of the Ontario Court. Mr. Shafer contacted the Accountant's office and they advised him that no settlement money was deposited with them. Mr. Shafer then contacted the Solicitor who re-confirmed that he had deposited the settlement cheque with the Accountant's office in downtown Toronto. This was a false statement as evidenced by the paragraphs below. Mr. Shafer asked the Solicitor for a bank receipt or a letter advising as to the disposition of settlement funds. Mr. Shafer requested that he facsimile it to him immediately. The Solicitor advised that he could not because he was on his way to Court but advised that he would facsimile the information to Mr. Shafer on Monday, March 13, 1995 (see Tab 34).

40. Mr. Shafer contacted the Solicitor on Monday, March 13, 1995 and the Solicitor advised Mr. Shafer that he had mailed the receipt to him. Mr. Shafer then decided to double check with the Accountant's office regarding their receipt of the settlement funds. Mr. Shafer spoke with an Elizabeth Cooper of the Accountant's office. She advised Mr. Shafer that she could not find a record of the receipt of funds for Sherie Lee Shafer and that she would contact the Solicitor on his behalf. Mr. Shafer advised that Ms. Cooper told him that when she spoke with the Solicitor, he admitted that he had not deposited any money with the Accountant's office.

41. On March 15, 1995, Mr. Shafer spoke with the Solicitor by telephone. The Solicitor told Mr. Shafer that he had just sent him a letter by registered mail. Mr. Shafer then asked him what was in the letter. The Solicitor advised Mr. Shafer to read it upon receipt of same and if he had any questions, to give him a call. Mr. Shafer said he then questioned the Solicitor about the receipt regarding the settlement cheque deposited with the Accountant's office. Mr. Shafer said the Solicitor would not answer him. Mr. Shafer said that he never did receive the registered letter.

42. By letter dated May 18, 1995 (Document Book, Tab 35), Willson A. McTavish, Official Guardian, wrote to the Solicitor advising that Sherie Lee Shafer had not yet received her money. Mr. McTavish made reference in his letter to the Solicitor that something is very wrong and requested his immediate explanation and production of the term deposit referred to in the Solicitor's letter dated October 26, 1994 (see Tab 28).

43. Willson McTavish, the Children's Lawyer, wrote to the Law Society by letter dated August 14, 1995 to complain about the Solicitor's conduct in this matter (Document Book, Tab 36).

44. At the request of the Law Society, the Solicitor attended at the Law Society on September 6, 1995 and met with Law Society Examiner, Anita McCann and Law Society employee Tina Perryman (Law Clerk). Ms. McCann's notes of the meeting are found at Tab 37 of the Document Book and record the information hereinafter set out concerning admissions made by the Solicitor during the meeting.

45. The Solicitor admitted to misappropriating the settlement funds received from the Waterloo Insurance Company on behalf of Sherie Lee Shafer. The Solicitor advised that on October 22, 1990 he deposited the cheque in the sum of \$11,314.00 into his trust account at the Canadian Imperial Bank of Commerce. Once the funds were deposited into the trust account he began to withdraw the funds a little at a time. The Solicitor advised that at first he withdrew \$2,500.00. Then approximately a month later, he withdrew another similar amount. The Solicitor advised that he continued to do this over the next three to four months until there was nothing remaining of the Shafer trust money.

46. The Solicitor is unable to produce trust bank statements and cancelled trust cheques demonstrating the withdrawals of the trust funds.

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47. The Solicitor admitted that the letter he wrote to Gordon Shafer on October 24, 1994 (see Tab 27) wherein he advised Mr. Shafer that pursuant to the Rules of Court, the money was paid into court on behalf of Sherie Lee Shafer was false.

48. The Solicitor further admitted that the information set out in his letter dated October 26, 1994 (see Tab 28) to the Official Guardian was also false. The proceeds of the settlement were never invested in a term deposit which was to mature on March 1, 1995 as set out in this letter.

49. The Solicitor stated that he lied in each of the letters in order to maintain the coverup of the misappropriation.

50. The Solicitor also admitted that his letter dated March 13, 1995 to the Law Society Examiner, William Simpson (see Tab 31), was fabricated by him. He also admitted that his representation to Gordon Shafer in his letter of March 13, 1995 (see Tab 32) that the money would be available upon the Law Society co-signing a cheque was also false.

51. To date, the Shafer misappropriation has not been repaid.

V. PRIOR DISCIPLINE

52. The Solicitor was found guilty of professional misconduct on March 25th 1994 in regard to his failure to file his Form 2/Form 3 for the fiscal year ended November 30th 1991. He was reprimanded in Committee and executed an Undertaking dated March 25th 1994, agreeing not to practise law until all his filings are up to date and in a form acceptable to the Senior Counsel-Discipline.

53. The Solicitor was found guilty of professional misconduct in regard to failing to maintain books and records; misleading a client and the Law Society as to the status of the client's matter; failing to cooperate with the Law Society in their attempt to conduct an examination of his books and records; failing to reply to the Law Society's communications; failing to serve a client; and practising under suspension. At Convocation on April 27th 1995, the Solicitor was suspended for 8 months, said suspension to continue until the following conditions are satisfied:

- a) the Solicitor has made all his filings to the Law Society;
- b) the Solicitor produces satisfactory books and records to the Law Society;
- c) the Solicitor delivers a certain client file to Discipline;
- d) the Solicitor satisfies Senior Counsel-Discipline that he is psychologically fit to continue the practice of law.

DATED at Toronto, this 29th day of April, 1996."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Peter David Clark be disbarred.

REASONS FOR RECOMMENDATION

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Counsel for the Law Society submitted that disbarment was the appropriate remedy. The Solicitor sought permission to resign.



23rd January, 1997

The Solicitor has been found guilty of misappropriating trust funds in the amount of \$9,374.00 paid to him for an infant settlement. He put these funds into his trust account on October 22, 1990, and misappropriated them over the next three to four months. From the end of 1990 until September, 1995, the Solicitor embarked on a course of conduct to try to cover up the misappropriation. He misled another solicitor and the Official Guardian about the funds. He misled his minor client's father, leading him to believe the monies were being paid into Court when he had already removed them from his trust account and used them for his own purposes. He fabricated a letter to make it appear to the client that he had sent a trust cheque representing the infant settlement to the Law Society to be co-signed when the funds had been used up by him four to five years previously. Restitution has not been made.

#### Prior Discipline History

On April 27, 1995, the Solicitor was suspended for 8 months and indefinitely thereafter until certain conditions were satisfied. The Solicitor remains suspended today under the Order. He is also administratively suspended. The type of misconduct established in the prior disciplinary matter was of an extremely serious nature. There were difficulties and problems with respect to the Solicitor in all areas of his practice. One of the particulars of the prior misconduct was for failure to advise his client that a limitation period had expired and falsely advising his client that settlement negotiations were continuing.

The Solicitor submitted that permitting him to resign would demonstrate the appropriate condemnation of his conduct but at the same time provide him with an opportunity to rehabilitate himself. He submitted that he had demonstrated the skill and ability in his practice of immigration and criminal law which might, in the future, yet serve the public. He asked us to consider the personal shame under which he had lived since 1990.

The Committee accepts the Solicitor's explanation for his misconduct: that in desperate circumstances, when the bank which had initially approved his line of credit, changed their policy and left him with no funds with which to fund his new practice, he did the most foolish thing he had ever done by misappropriating trust funds, thinking that he could use it to establish his practice and pay back the funds. He advised the Committee that he considered it his obligation to make restitution which he intended to do once his financial circumstances allowed. He informed the Committee that his conduct had been a contributing factor to the breakdown of his marriage and that the economic consequences of his misconduct resulted in the loss of his home and his career. He submitted that the penalty of permitting him to resign was not an insignificant one. Finally he informed us of the circumstances of the ill health of his wife and daughter.

The general rule in misappropriation cases, cited time and time again, is that, save in unusual circumstances, disbarment is required. (Re: Daniel Gilad Cooper; Re: Spencer Black). As sympathetic as we are to the Solicitor's personal difficulties, the primary obligation of the Law Society is to protect the public. In the Committee's view, this cannot be done if the Solicitor is allowed to return to practice. Permitting the Solicitor to resign would send the wrong message to the profession and undermine the confidence of the public in the Law Society. The appropriate penalty is that the Solicitor be disbarred.

23rd January, 1997

Peter David Clark was called to the Bar on the 10th day of April, 1986.

ALL OF WHICH is respectfully submitted

DATED this 13th day of September, 1996

Nancy Backhouse

There were no submissions, the finding was confirmed and the Report adopted.

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

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

It was moved by Mr. DelZotto, seconded by Mr. Cole that the solicitor be disbarred.

Carried

Re: Moeen Mahmood Ahmad JANJUA - Mississauga

The Secretary placed the matter before Convocation.

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

Mr. Glenn Stuart appeared as counsel for the Society. Mr. McDowell, Duty Counsel appeared on behalf of the solicitor who was present.

Convocation had before the Report of the Discipline Committee dated 24th September, 1996, together with an Affidavit of Service sworn 23rd October, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 8th October, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Bradley H. Wright, Chair  
Nancy L. Backhouse  
Jane Harvey

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

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

Glenn Stuart  
for the Society

Not Represented  
for the solicitor

Heard: July 23, 1996

23rd January, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

#### REPORT

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On June 22, 1995, Complaint D159/95 was issued against Moeen Mahmood Ahmad Janjua alleging that he was guilty of professional misconduct.

The matter was heard in public on July 23, 1996 before this Committee composed of Bradley H. Wright, Chair, Nancy L. Backhouse and Jane Harvey. The Solicitor was neither in attendance nor represented by counsel. Glenn Stuart appeared on behalf of the Law Society.

#### DECISION

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

- 2.a) he breached an Order of Convocation that he suspend his practice for non-payment of his Annual Fees, by continuing to practise during the period November 1, 1994 to December 15, 1994.

The Solicitor had sought and been granted an adjournment of these proceedings in October, 1995, and in January, 1996. In April, 1996, the Solicitor again sought an adjournment to June or July, 1996. The committee before whom this matter came in April, 1996, was of the view that the matter should proceed. However, the matter was not reached. Accordingly, it was adjourned to July 23 and July 24, 1996, peremptory upon the Solicitor. The Solicitor who was in Uganda, was advised by letter to his address in Uganda of this and did not attend. This committee was of the view that this matter should proceed without the Solicitor in attendance.

#### REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

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Debbie Mosaheb, Administrator of the Deferral/Waiver of Fees and Levies in the Membership Records and Annual Filings Department of the Law Society of Upper Canada swore an Affidavit on April 30, 1996 which was marked as Exhibit 2. It established that the Solicitor was notified that he had been suspended effective November 1, 1994, for failure to pay his annual dues. This suspension remained in effect until December 15, 1994. The Affidavit of Christine Phillips, an Examiner with the Department of Audit and Investigation at the Law Society, sworn May 27, 1996, (Exhibit 3), established that the Solicitor continued to act on one purchase and one sale during the period that he was suspended. Accordingly, the committee finds that professional misconduct has been established.

#### RECOMMENDATION AS TO PENALTY

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The committee recommends that Moeen Mahmood Ahmad Janjua be suspended for a period of 2½ months commencing at the conclusion of his current administrative suspension, and that he pay Law Society costs in the amount of \$600 prior to his reinstatement.

23rd January, 1997

#### REASONS FOR PENALTY

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It was the submission of Counsel for the Law Society that the appropriate penalty was permission for the Solicitor to resign. Counsel for the Law Society submitted that while the usual penalty for the misconduct established was a 2½ month suspension, taking into account the Solicitor's disciplinary history and his failure to attend the hearing, this should lead to a conclusion that the Solicitor was ungovernable.

#### Solicitor's Discipline History

In the last 10 years, there have been 5 findings of professional misconduct against the Solicitor. In June, 1986, he was reprimanded for failing to maintain his books and records. In February, 1991, misconduct was established for failing to serve a client. In March, 1993, misconduct was established for knowingly filing a false declaration. In December, 1994, misconduct was established for failing to cooperate with the Law Society. There is a further complaint extant for failing to file for the last fiscal year.

#### Conclusion

The Solicitor acted while under suspension for a relatively short period and did relatively little during that time period. For these reasons, the committee is prepared to impose the usual penalty. The Solicitor should be aware, however, that the committee was of the view that he was on the borderline of ungovernability and that further incidents of misconduct on his part, in view of his disciplinary history, would likely be seen as proof of ungovernability on his part with the result and penalty of termination of his right to carry on as a member of the profession.

Moeen Mahmood Ahmad Janjua was called to the Bar on the 8th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 24th day of September, 1996

Nancy Backhouse for the Committee

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 1/2 months commencing at the conclusion of the solicitor's current administrative suspension and that costs be paid in the amount of \$600 prior to his reinstatement.

Mr. McDowell made submissions in support of the recommended penalty except the payment of costs. Counsel advised that the solicitor had declared bankruptcy.

Mr. Stuart made submissions in support of the recommended penalty and did not take a position on the issue of costs.

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

It was moved by Mr. Gottlieb but failed for want of a seconder that the costs be waived.

23rd January, 1997

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

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 2 1/2 months commencing at the conclusion of the administrative suspension and pay the Society's costs.

RULE 20 APPLICATIONS

Rule 20 provides as follows:

No lawyer shall, without the express approval of Convocation, retain, occupy office space with, use the services of or employ in any capacity having to do with the practice of law any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, or suspended, or who has been involved in disciplinary action and been permitted to resign as a result thereof, and has not been reinstated or yet been readmitted.

Re: Jonathan H. Marler, Applicant  
James W. Andrew, Suspended Member

The Secretary placed the matter before Convocation.

It was moved by Mr. Adams, seconded by Mr. DelZotto that Mr. Marler's application to continue to employ Mr. Andrew, a suspended member be approved.

Carried

Re: Barbara Jackman, Applicant  
Milosava Hrnjez, Suspended Member

The Secretary placed the matter before Convocation.

Mr. Marrocco asked that the following amendment be made:

that condition #5 i) be amended by deleting the word "legal" in the second sentence and inserting at the end of the sentence the words "outside the scope of paragraph #2".

Not Put

It was moved by Mr. Strosberg, seconded by Mr. Gottlieb that the matter be referred back to Committee to determine whether the suspended member was setting up a separate business or if she is going to be employed and if retaining services, on what basis.

Withdrawn

It was moved by Mr. DelZotto, seconded by Mr. Krishna that the matter be deferred pending a policy review of Rule 20.

Carried

(Background material to be found in Convocation file)

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:45 P.M.

23rd January, 1997

CONVOCATION RECONVENED AT 1:45 P.M.

PRESENT:

Acting Treasurer (Frank Marrocco), Adams, Angeles, Arnup, Cole, Crowe, DelZotto, Gottlieb, Manes, O'Connor, Strosberg, Thom and Wright.

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IN PUBLIC

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DISCIPLINE COMMITTEE

Re: Murray Harrison MISKIN - Whitby

The Secretary placed the matter before Convocation.

Mr. Stuart appeared as counsel for the Society and Mr. Crane appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 7th October, 1996, together with an Affidavit of Service sworn 23rd October, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th October, 1996 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd January, 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 LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gavin MacKenzie

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

Glenn Stuart  
for the Society

MURRAY HARRISON MISKIN  
Of the Town  
of Whitby  
a barrister and solicitor

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

Heard: July 4, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 4, 1996 amended Complaint D394a/95 was issued against Murray Harrison Miskin alleging he was guilty of professional misconduct.

The matter was heard in public on July 4, 1996. The parties filed, as exhibit 2, their signed consent to the Complaint being heard by a single bencher pursuant to section 9(3.1)(b) of Regulation 708 of the *Law Society Act* (R.R.O. 1990, as amended by O.Reg. 513/95).

In exhibit 2 the parties also consented to my serving as the single bencher hearing panel, notwithstanding that I presided at a pre-hearing conference in respect of an earlier version of the Complaint on May 31, 1996.

The Solicitor was in attendance at the hearing, and was represented by his counsel J. Douglas Crane, Q.C. Glenn Stuart appeared as counsel for the Law Society.

DECISION

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

Complaint D394a/95

2.   a)   the Solicitor failed to maintain books and records in accordance with section 15 of Regulation 708 under the *Law Society Act*;
- b)   throughout the period from March 31, 1989 to December 14, 1994, the Solicitor failed to maintain sufficient balances in his mixed trust account in accordance with section 14(12) of Regulation 708 under the *Law Society Act* to meet all trust obligations to clients;
- c)   during the period from May 1, 1992 to August 10, 1992 the Solicitor improperly removed approximately \$9,511.84 of the trust shortage noted in particular 2(b) above from his mixed trust account for his own personal use and benefit;
- d)   during the period from February 1, 1992 to October 31, 1992 the Solicitor misapplied approximately \$3,170.17 of the trust shortage noted in particular 2(b) above from his mixed trust account to or on behalf of clients who had no funds or insufficient funds on deposit;
- e)   having made an assignment into bankruptcy on October 21, 1992, and while an undischarged bankrupt, the Solicitor continued to operate his trust bank account, notwithstanding being instructed by the Staff Trustee of the Law Society to cease operating said account;
- f)   in or about October 1992, the Solicitor used his mixed trust account to make disbursements some of which were of a personal nature and some of which were made to creditors of his law practice, contrary to subsections 14(8) and (9) of Regulation 708 under the *Law Society Act*, for the purpose of preferring certain creditors prior to his assignment into bankruptcy;

- g) the Solicitor failed to serve his clients, the estates of Frank Porter and Arnold A. Metcalf, in a conscientious, diligent and efficient manner ; and,
- h) the Solicitor failed to maintain books and records for the estate matters identified in particular 2(g) above in accordance with section 15 of Regulation 708 under the *Law Society Act*.

#### REASONS

An Agreed Statement of Facts containing the following paragraphs was received in evidence as exhibit 3:

#### "IV. FACTS

Particular 2 (a) the Solicitor failed to maintain books and records in accordance with section 15 of Regulation 708 under the *Law Society Act*;

4. An examination of the Solicitor's books and records by the Law Society was commenced on June 22, 1990. The Examiner's report on this examination is at Tab 1 of the Document Book. The Solicitor's books for his general account were three months in arrears at that time. The Solicitor's books for his trust account were three weeks in arrears, except that his trust comparisons had not been completed since April 30, 1990. The books were updated by the conclusion of the examination on June 29, 1990.

5. In a letter, dated August 31, 1990 (Document Book, Tab 2), the Solicitor advised the Law Society that his books had been in arrears at the beginning of his practice but that they were "now maintained on a current basis at all times". The Solicitor further advised that he had been having difficulties around this time with his bookkeeper and computer accounting programs which contributed to the arrears in his books.

6. Following inquiries from the Law Society regarding his annual filing for the fiscal year ending March 31, 1991, the Solicitor wrote to the Law Society on December 31, 1991 (Document Book, Tab 3). He confirmed to the Law Society that he was aware that there was a problem with overdrawn trust accounts as this matter had been raised by the Law Society in June 1990. He also advised that his bookkeeper during that year had fallen ill and that she consequently had been unable to keep the books up-to-date; however, he advised that he had a new bookkeeper now who updated the books on a daily basis.

7. On October 5, 1992, the Solicitor filed his forms for the fiscal year ended March 31, 1992. This filing included a note, dated December 17, 1991, written by the bookkeeper (Document Book, Tab 4) which stated that the books had been entered to March 31, 1991 when she began working for the Solicitor on September 20, 1991 (that is, they were in arrears by almost six months). It was also indicated that the bookkeeper corrected the situation and brought the books up to date.

8. Another examination of the Solicitor's books and records was commenced on September 9, 1993. The Solicitor's books had only been entered to June 30, 1993, at that time, that is, they were two months in arrears, and the trust comparisons were in arrears by four months. In addition, the trust comparisons were not properly balanced.



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9. When the Examiner returned to the Solicitor's offices on October 8, 1993, and again on October 18, 1993, the Solicitor's books and records had still not been updated and were not balanced. The notes made by the Examiner at that time of the outstanding deficiencies are contained at Tab 5 of the Document Book. Due to a shortfall in the account, co-signing controls were placed on the trust account to freeze it. In addition, due to the numerous discrepancies and the deficiency in maintaining the trust accounting records, the Law Society required the Solicitor to retain an accountant to reconstruct the trust records from October 21, 1992, forward. The examination was delayed many months due to the enormity of the reconstructive process.

Particular 2(b) throughout the period from March 31, 1989, to December 14, 1994, the Solicitor failed to maintain sufficient balances in his mixed trust account in accordance with section 14(12) of Regulation 708 under the *Law Society Act* to meet all trust obligations to clients;

Particular 2(c) during the period from May 1, 1992, to August 10, 1992, the Solicitor improperly removed approximately \$9,511.84 of the trust shortage noted in particular 2(b) above from his mixed trust account for his own personal use and benefit;

Particular 2(d) during the period from February 1, 1992, to October 31, 1992, the Solicitor misapplied approximately \$3,170.17 of the trust shortage noted in particular 2(b) above from his mixed trust account to or on behalf of clients who had no funds or insufficient funds on deposit;

10. The Solicitor's filing for the period from April 1, 1988 to March 31, 1989, detailed 37 overdrawn trust ledger accounts totaling \$69,133.10 which were not corrected forthwith. Of this amount, \$44,784 related to one cheque; the balance was composed of a number of smaller amounts. The \$44,784 cheque was a certified cheque which was lost in transit by a courier. The Solicitor states that the bank did not complete the process of canceling the certified cheque for some period of time, during which both it and the replacement cheque remained on the Solicitor's books. At March 7, 1990, a year later, \$3,674.33 of the overdrawn total had still not been corrected. A copy of the schedule of debit trust balances which was enclosed with the Solicitor's Form 3 filing is located at Tab 6 of the Document Book.

11. During the course of the examination of the Solicitor's books and records on June 22 and 29, 1990, the Examiner identified 69 overdrawn trust ledger accounts, which had been left uncorrected for more than one month, during the preceding year. As at May 31, 1990, twelve of these accounts remained, containing a total of \$42,447.00. Of this amount, \$39,770.74 related to one cheque and the balance was composed of a number of smaller amounts. With respect to the \$39,000 cheque, the Solicitor advises that this was a real estate transaction in which he was acting for the purchaser. At closing, the Solicitor had deposited certified funds into his trust account and then issued a certified cheque payable to the vendor to close the deal. The bank credited the deposit on Monday, but the debit appeared on the preceding Friday, creating the overdraft. The other eleven of these accounts, containing a total of \$2,676.26, remained uncorrected and had been outstanding longer than one month. The listing of these accounts, prepared by the Examiner, is located at Tab 7 of the Document Book.

12. The Solicitor's Form 3 filing for the period from April 1, 1990, to March 31, 1991, detailed 19 overdrawn trust ledger accounts totaling \$2,971.53 which were not corrected forthwith, and of which \$174.27 was outstanding. A copy of the schedule of debit trust balances which was enclosed with the Solicitor's 1991 Form 3 filing is located at Tab 8 of the Document Book.

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13. On September 10, 1991, the amount of \$12,000.00, was transferred from the Solicitor's trust account to a term deposit held in trust for his clients Mr. and Mrs. Peters. The transfer is reflected in the Solicitor's client trust ledger for the Peters (Document Book, Tab 9). The Solicitor states that he believed that he was transferring the final advance under a mortgage loan from a third party to these clients which the Solicitor thought had been deposited previously into his mixed trust account. However, the \$12,000.00 had not been deposited into the mixed trust account, and had not been otherwise paid to the Solicitor, at that time, and the transfer of funds out of the mixed trust account left a deficit. This deficit was not detected because the books were not up-to-date. At the time this occurred, the Solicitor did not have a bookkeeper. In addition, the Solicitor states that the secretary who had been handling the file had quit just before this time, and her notes in the file did not reflect the latest plans for the handling of the term deposit.

14. On November 12, 1991, the bank returned the \$12,000.00 term deposit, with interest of \$143.28, to the Solicitor's mixed trust account. These transactions are also reflected in the Solicitor's client ledger for Mr. and Mrs. Peters which is at Tab 9 of the Document Book.

15. On February 5, 1992, the mortgage broker who was to advance, but had not previously advanced, the \$12,000.00 under the mortgage to Mr. and Mrs. Peters paid the balance of this amount to the Solicitor in trust for his clients. The mortgage broker's letter, dated February 5, 1992, to the Solicitor is at Tab 10 of the Document Book. Subsequently, in an effort to correct the mistaken transfer from trust in September 1991, the bookkeeper made numerous unexplained transfers and reversals to and from several trust ledgers, including miscellaneous ledgers and the Solicitor's personal ledgers. These transfers are reflected in the client ledger at Tab 9 of the Document Book and are summarized by the Solicitor's accountant in the handwritten chart at Tab 11 of the Document Book. Copies of the other trust ledgers involved in these transfers are contained in Tabs 12, 13 and 14 of the Document Book.

16. The Solicitor's annual filing for the year ended March 31, 1992, reported a trust shortage of \$3,497.48 and 21 overdrawn trust ledger accounts totaling \$7,014.05 which were not corrected forthwith. Twenty of these accounts totaling \$6,950.56 had been corrected by March 31, 1992, so that \$63.49 remained outstanding at that time. A copy of the schedule of debit trust balances which was enclosed with the Solicitor's 1992 Form 3 filing is located at Tab 15 of the Document Book. The Solicitor's accountant reported differences in each month during that year between the total of trust obligations recorded in the books and the total of the bank trust reconciliation. No trust comparisons were performed the entire fiscal year. The Solicitor's Forms 2 and 3 and accountant's letter of explanation are contained at Tab 16 of the Document Book.

17. On May 1, 1992, the Solicitor improperly removed \$3,500.00 from his trust account for his own personal use and benefit by issuing trust cheque #6590 to his general account. A copy of the Solicitor's trust cheque is contained at Tab 17 of the Document Book. The funds were not paid to him on account of fees and disbursements. The Solicitor states that he withdrew these funds because he deemed them to be "surplus" trust funds because the trust listing showed an amount in the trust account in excess of the amount shown on the bank statement. The Solicitor states that he examined the trust

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listing at the time and compared it with his trust bank statement, and on the basis of this information he concluded that this alleged "surplus" existed. No proper trust comparisons existed at the time. The Solicitor did not examine any other records, prior to disbursing these funds to himself, to ascertain the proper allocation of the funds, although he acknowledged to the Examiner that he should have done so. In addition, although the Solicitor believed that his records were up to date and accurate at the time, they were not.

18. On August 7, 1992, the Solicitor improperly removed \$4,500.00 from his trust account for his own personal use and benefit by issuing trust cheque #7074 to his general account. A copy of the Solicitor's trust cheque is contained at Tab 17 of the Document Book. The funds were not paid to him on account of fees and disbursements. The Solicitor states that he withdrew these funds because he deemed them to be "surplus" trust funds because the trust listing showed an amount in the trust account in excess of the amount shown on the bank statement. The Solicitor states that he examined the trust listing at the time and compared it with his trust bank statement, and on the basis of this information he concluded that this alleged "surplus" existed. No proper trust comparisons existed at the time. The Solicitor did not examine any other records, prior to disbursing these funds to himself, to ascertain the proper allocation of the funds, although he acknowledged to the Examiner that he should have done so. In addition, although the Solicitor believed that his records were up to date and accurate at the time, they were not.

19. On August 10, 1992, the Solicitor improperly removed \$1511.84 from his trust account for his own personal use and benefit by issuing trust cheque #7077 to his general account. A copy of the Solicitor's trust cheque is contained at Tab 17 of the Document Book. The funds were not paid to him on account of fees and disbursements. The Solicitor states that he withdrew these funds because he deemed them to be "surplus" trust funds because the trust listing showed an amount in the trust account in excess of the amount shown on the bank statement. The Solicitor states that he examined the trust listing at the time and compared it with his trust bank statement, and on the basis of this information he concluded that this alleged "surplus" existed. No proper trust comparisons existed at the time. The Solicitor did not examine any other records, prior to disbursing these funds to himself, to ascertain the proper allocation of the funds, although he acknowledged to the Examiner that he should have done so. In addition, although the Solicitor believed that his records were up to date and accurate at the time, they were not.

20. As reflected by their notes contained at Tab 18 of the Document Book, which were made when the Solicitor's trust records were reconstructed in or about October 1993, the Solicitor's accountants determined that a trust shortage of \$12,682.01 existed from at least October 21, 1992. Due to the inadequacy of the Solicitor's records, this shortage had not been identified previously. This deficit originated with either the payment from the trust account on September 10, 1991, which is identified in paragraph 13 of this Agreed Statement of Facts, or the three cheques issued to the Solicitor himself in May and August 1992.

21. By means of the three trust cheques written by him in May and August 1992, the Solicitor improperly removed \$9,511.84 from his trust account. The balance of \$3,170.17 of the trust shortage identified in October 1993 was misapplied through numerous transfers, reversals and "corrections" to other trust ledgers, as identified in paragraph 15 of this Agreed Statement of Facts, and for bank charges. In effect, trust funds belonging to some clients were used to correct overdrawn trust accounts of other clients. Overdrawn trust accounts totaling \$166.13 were in existence as of October 21, 1992.

22. On January 27, 1994, the Solicitor and the Law Society's Examiner discussed the shortage in the Solicitor's trust account. The Examiner would testify that the Solicitor advised her that he had replaced some, but not all, of the funds he had withdrawn from his trust account in May and August 1992. In fact, no funds had been replaced at this time. The Solicitor would testify that he did not advise the Examiner that he had replaced any funds in cash but that some of the money he had withdrawn from the trust account had been offset (and, therefore, effectively replaced) by that time by the amount of fees and disbursements which were owed to him but which had not been transferred from his trust account to his general account as a result of the trust account being frozen. No fee billings were produced to support this position at the time, although the Solicitor states that none were requested.

23. In their discussion on January 27, 1994, the Examiner advised the Solicitor that all funds had to be replaced or a new trust account would need to be opened. Consequently, the Solicitor assured the Examiner that he would replace balance of funds.

24. On February 8 and February 23, 1994, the Solicitor deposited \$3,500.00 and \$2,672.14, respectively, into his trust account which, together with the deduction of a \$300.00 item which had been included in the trust shortage during the reconstruction of the records but was later corrected, reduced the deficit to \$6,509.87.

25. A subsequent review of the Solicitor's books and records by the Examiner in November 1994 revealed funds retained in the trust account totaling \$2,220.83, which had been earned and billed by the Solicitor as fees and disbursements, and therefore owing to the Solicitor, after the Solicitor had improperly withdrawn funds in the summer of 1992. The subsequent earning of these funds by the Solicitor went to the credit of the Solicitor in the trust account, as would an actual repayment of the improper withdrawals by him. This reduced the deficit to \$4,289.04. However, the identification of this amount does not justify any part of the withdrawals by the Solicitor since the fees had not been earned at that time. The identification of the amount of \$42.78 of the Solicitor's personal funds in the trust account further reduced the deficit to \$4,246.26. The Solicitor had also advised the Examiner that other earned fees were in trust, but he did not provide any records to support this position until June 17, 1996.

26. As of December 14, 1994, one overdrawn trust ledger in the amount of \$165.00 remained outstanding. In addition, a shortage of \$4,246.26 remained outstanding in the trust account.

27. The Solicitor provided additional client ledgers, and related documentation, to the Law Society on June 17, 1996, to support his position that, as of that time, there was a portion of the shortage which represented funds owing to him as a result of fees and disbursements which had been earned or incurred, and billed, but not yet transferred from the trust account. This documentation indicated that a further \$1,302.83 had been retained in the trust account, although it was owed to the Solicitor. By the same analysis described in paragraph 25, the identification of this sum reduced the deficit in the trust account at that time to \$2,943.43.

28. The Solicitor provided more additional client ledgers, and related documentation, to the Law Society on July 3, 1996, to support a further reduction of the trust shortage. This documentation indicated that a further \$1,201.04 had been retained in the trust account, although it was owed to the Solicitor. By the same analysis described in paragraph 25, the identification of this sum reduced the deficit in the trust account to \$1,742.39, which has not been replaced by the Solicitor at the present time.

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Particular 2(e) having made an assignment into bankruptcy on October 21, 1992, and while an undischarged bankrupt, the Solicitor continued to operate his trust bank account, notwithstanding being instructed by the Staff Trustee of the Law Society to cease operating said account

29. Beginning in April 1992, the Solicitor began to experience significant financial difficulties as a result of demands being made by mortgagees on real estate he owned, namely his office building. Ultimately, these financial difficulties forced the Solicitor to make an assignment into bankruptcy on October 21, 1992.

30. From April 1992 to the time of his assignment into bankruptcy, both the Solicitor and his associate, Robin D. Scott, held signing authority over the Solicitor's trust account (Document Book, Tab 19). A copy of the account statement for the period ending October 30, 1992, is contained at Tab 20 of the Document Book. An example of the cheques for the account is contained at Tab 21 of the Document Book, among others.

31. On October 22, 1992, the Solicitor had attended at the Bank of Nova Scotia and advised the manager that he had made an assignment into bankruptcy and that he was seeking guidance from the Law Society as to the operation of the trust account during his bankruptcy. The Solicitor advised the bank manager subsequently that the Law Society had told him that he was no longer to sign on the trust account. The Solicitor and the bank manager agreed that the account could be handled by the Solicitor's associate, Scott, until the Solicitor's discharge from bankruptcy. The Solicitor did not formally close the account or formally remove his signing authority on the account.

32. By letter dated November 5, 1992, the Solicitor advised the Law Society in writing that he had made an assignment into bankruptcy (Document Book, Tab 22). By letter dated November 11, 1992, the Law Society's Staff Trustee advised the Solicitor of the guidelines for and the prohibitions on the activity of bankrupt members (Document Book, Tab 23). Among other matters, the Law Society advised the Solicitor that he could operate neither a bank account in his name for which he had signing or co-signing authority nor a bank account in his name for which another solicitor acted as signing officer or co-signer. This confirmed information provided orally to the Solicitor previously.

33. The Solicitor did not formally close his trust account or formally remove his signing authority upon making this assignment into bankruptcy. It is the Law Society's position, consequently, that he continued to operate his trust account in his name throughout the period of his bankruptcy. Copies of the account statements for the Solicitor's trust account for July and September 1993 are contained at Tabs 24 and 25 of the Document Book.

34. The Solicitor wrote eight cheques on this account throughout the period of his bankruptcy; three of these cheques were co-signed by Robin Scott. Copies of the cheques written on the Solicitor's trust account in November and December 1992, and signed or co-signed by the Solicitor, are contained at Tabs 26, 27 and 28 of the Document Book. Two of these cheques were written to the Solicitor's general account (Document Book, Tab 28). It is the Solicitor's position that these cheques were signed inadvertently by him. The Law Society accepts that the cheques which were signed by the Solicitor and then co-signed by Robin Scott may have been signed inadvertently by the Solicitor, the error then being corrected by Scott's signature. However, it is the Law Society's position that the signing of the other cheques, particularly those to the Solicitor's general account, was not inadvertent, although the Law Society does not contend that these cheques were paid for an improper purpose.

23rd January, 1997

35. On October 18, 1993, the Solicitor's trust account was frozen by the Law Society.

36. The Solicitor was discharged from bankruptcy on November, 25, 1993.

Particular 2(f) in or about October 1992, the Solicitor used his mixed trust account to make disbursements some of which were of a personal nature and some of which were made to creditors of his law practice, contrary to subsections 14 (8) and (9) of Regulation 708 under the *Law Society Act*, for the purpose of preferring certain creditors prior to his assignment into bankruptcy

37. On October 9, 1992, the Solicitor received \$123,673.94 in trust as final settlement of a motor vehicle accident claim for his client Ms. Cassandra Differ. On that same date, the Solicitor disbursed \$108,073.32 from trust to his clients and to others on behalf of his clients, including \$32.61 to his general account. These transactions are reflected in the Solicitor's trust bank journal (Document Book, Tab 29).

38. In addition, on October 9, 1992, the Solicitor issued a fee billing to his client Ms. Differ (and related parties) indicating fees and disbursements of \$15,633.23 owed to the Solicitor (a further \$3,040.71 in disbursements being paid directly to the service providers) (Document Book, Tab 30). These fees were not transferred to the Solicitor's general account. Instead, the Solicitor that same day disbursed \$9,100.62 to certain of his own creditors and \$6,500.00 to Training and Lifestyle Consultants, a sole proprietorship operated by his wife, from his remaining fees and disbursements in the trust account. These payments are reflected in the Solicitor's trust bank journal (Document Book, Tab 30).

39. On October 15, 1992, the Solicitor received \$78,659.84 in trust as final settlement of a motor vehicle accident claim for clients Mr. and Mrs. Weir. Through a series of transactions on that date and October 22, 1992, the Solicitor disbursed \$67,285.33 from trust to these clients and to others on behalf of these clients, including \$2,495.56 to his general account. These transactions are reflected in the Solicitor's trust bank journal (Document Book, Tab 29) and in the Solicitor's client trust ledger for this client (Document Book, Tab 31).

40. In addition, on October 15, 1992, the Solicitor issued a fee billing to his clients Mr. and Mrs. Weir indicating fees and disbursements of \$16,863.71 owed to the Solicitor. These fees were not transferred to the Solicitor's general account. Instead, on that day and the following day, the Solicitor disbursed \$9,374.51 to certain of his own creditors and \$2,000.00 to Training and Lifestyle Consultants, a company controlled by his wife, from his remaining fees and disbursements in the trust account. He also disbursed a further \$2,994.00 to his general account. These payments are reflected in the Solicitor's trust bank journal (Document Book, Tab 29).

41. On October 13, 1992, the Solicitor received \$400.00 from his client Mr. Richards and deposited these funds in his trust account as reflected by the trust bank journal. On October 20, 1992, the Solicitor rendered a fee billing to Mr. Richards in the amount of \$400.00. On the same day, he paid \$266.35 from these funds in his trust account to Goodyear on his own personal account (Document Book, Tab 32). The following day, he transferred the remaining \$136.90 of this client's funds to his general account from this client's funds. (An overdraft of \$1.00 was repaid later by the Solicitor.)

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42. The Solicitor made an assignment into bankruptcy on October 21, 1992. The Solicitor has admitted that he conducted the aforementioned personal transactions from his trust account so that he could pay certain creditors of his law practice without having these funds frozen in his general account upon his bankruptcy. The Solicitor states that he believed that the payment of these creditors was required to allow him to continue his law practice. The Solicitor's trustee in bankruptcy did not learn of these transactions. However, it is the Law Society's position that the involvement of the trust account in these transactions exposed all of the client funds in the account to the risk of seizure by the Solicitor's trustee in bankruptcy. The Solicitor does not accept that such a risk existed.

Particular 2(g) the Solicitor failed to serve his clients, the estates of Frank Porter and Arnold A. Metcalf, in a conscientious, diligent and efficient manner; and,

Particular 2(h) the Solicitor failed to maintain books and records for the estate matters identified in particular 2(g) above in accordance with section 15 of Regulation 708 under the *Law Society Act*.

43. On May 3, 1990, the Solicitor was retained by Clayton and Clive Metcalf, the executors of the Estate of Frank Porter ("Porter Estate") and the Estate of Arnold Metcalf ("Metcalf Estate"), to act for both estates. Arnold Metcalf had been the executor of the Porter Estate prior to his death in December 1989, and, consequently, the executors of his estate were the executors of the Porter Estate. The Solicitor received the files for both estates from another lawyer on June 29, 1990.

44. Although they gave the Solicitor no specific written instructions, the executors understood that the Solicitor was administering all aspects of the estates on their behalf, including paying taxes. The Solicitor states that Clayton and Clive Metcalf had exclusive signing authority on a separate estate account of which the Solicitor was aware but with which the Solicitor was not involved. This account was the principal account for the Porter estate. However, the executors assumed that the Solicitor received copies of all relevant information for this account directly from the bank.

45. On October 15, 1990, Clayton and Clive Metcalf gave the Solicitor a Power of Attorney to sign on their behalf for all matters related to the Metcalf Estate, and, therefore, the Porter Estate (Document Book, Tab 33). Around the same time, the Solicitor applied for Letters Probate for the Metcalf Estate; the application was returned for an Affidavit of Condition of Will due to alterations to the will. Letters probate were granted on December 6, 1990.

46. On January 3, 1991, the Solicitor opened a bank account for the Metcalf Estate at the Bank of Nova Scotia. Records were kept for the account up to December 31, 1992, with only 4 partial and undated entries being recorded after that time. Although the Solicitor could not locate the bank book for the account at the time of the Examiner's request, a print-out obtained from the bank on November 25, 1994, by the Law Society Examiner showed that balance in the account at October 31, 1994, was \$3,801.55. The records were subsequently reconstructed by the Law Society Examiner. The Solicitor states that he located the bank book subsequently and placed it in the file.

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47. The Solicitor took no action on the Porter Estate until May 23, 1991, except that he considered whether a new probate was required for the Porter estate due to the death of the initial executor, ultimately determining that it was not. On May 23, 1991, he wrote to the Government of Canada to request a replacement cheque for a stale-dated June 1990 Canada Pension Plan death benefit cheque in amount of \$2,218.86 which had been in the file at the time he took it over in June 1990 and had remained in the Solicitor's file for almost one year. The Solicitor's position is that it took some time to figure out the logistics of opening a bank account because of his belief that he needed to obtain probate before he could open the account. It is the Law Society's position that the Solicitor's delay in addressing this matter was unacceptable.

48. On June 25, 1991, the Solicitor opened a second bank account for the Metcalf Estate at the Royal Bank with a \$20,000.00 deposit from the Bank of Nova Scotia account. This bank account represented a specific bequest under the will to be held in trust for Metcalf's infant grandchildren. No records were maintained for this account, and a bank book could not be located by the Solicitor at the time of the Examiner's request. A print-out obtained from bank by the Examiner on November 25, 1994, showed a balance of \$22,020.57 at October 31, 1994. The Solicitor states that he located the bank book subsequently and placed it in the file.

49. The Solicitor filed the terminal (1989) tax return for the Metcalf Estate on March 9, 1992. The tax return was due on June 14, 1990, approximately twenty-one months earlier. Income tax of \$3,131.59 was paid from the estate's bank account on March 18, 1992.

50. The Solicitor states that there was no tax information in the Metcalf file when he received it in June 1990. Clayton Metcalf would testify that all of the information with respect to his father's financial affairs at the time of his death was either in the file provided to the Solicitor by Frank Aprile or available from Arnold Metcalf's accountants with whom he had put the Solicitor in contact. However, additional information did have to be obtained from certain sources, and this was requested by the Solicitor in late 1991. The Solicitor states that he retained an accountant to prepare the return in July 1991; however, according to the Solicitor, the bank information was not received until February 1992. After that time, the return was promptly completed, provided to the executors for signature, and filed. The Solicitor admits that he failed to take appropriate steps to expedite the gathering of this information (if it was not already available to him) and, in turn, the filing of this return.

51. On June 16, 1992, Revenue Canada assessed penalties, instalment interest and arrears interest totalling \$3,341.90 for the 1989 tax year for the Metcalf estate, more than the actual income tax owed (Document Book Tab 34). Of this amount, \$346.84 was for instalment interest and \$2,995.06 was for penalties and interest arrears. By letter dated June 24, 1993 [sic], the accountants for the Metcalf Estate applied for a reversal of the penalties assessed (Document Book, Tab 35).

52. By letter dated July 20, 1993, Revenue Canada denied the Metcalf Estate's request for a reversal of the penalties assessed because "the facts presented do not justify the delay in filing" (Document Book, Tab 36). The estate was billed an additional \$176.55 by the accountants for making this request plus \$3.00 interest charge due to late payment of accountants' bill by Solicitor.



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53. On January 2, 1992, the Solicitor opened a bank account for the Porter Estate at the Bank of Nova Scotia. No adequate books or records were kept for this account from its inception to its closure on November 15, 1994. The books were reconstructed subsequently by the Law Society Examiner. The Solicitor advises that he kept a bank book for this account, although it was not available when the Examiner was at his office. The bank book was subsequently located and placed in the file.

54. By letter dated June 16, 1992, the Solicitor provided the accountants with financial information so that March 7, 1991 and March 7, 1992 T-3 tax returns for the Porter Estate could be prepared and filed (Document Book, Tab 37). These returns were due on June 5, 1991, and June 5, 1992, respectively, but were not filed by the Solicitor until sometime in 1993.

55. After making his assignment in bankruptcy in October 1992, the Solicitor gave a Power of Attorney to his associate, Robin Scott, on February 12, 1993, to sign on his behalf under the Power of Attorney granted by the executors for matters involving the Metcalf Estate, and, by extension, the Porter Estate (Document Book, Tab 38).

56. The Solicitor filed the T-3 returns for the Metcalf Estate for the estate years ended December 14, 1990, and December 14, 1991, which were due March 14, 1991, and March 14, 1992, respectively, on February 22, 1993. Income tax of \$4,544.16 for 1990 and \$998.47 for 1991 was paid. By Notice of Assessment, dated July 27, 1993, (Document Book, Tab 39) Revenue Canada assessed penalties and arrears interest of \$2,076.11 for 1990 and \$276.95 for 1991. According to the handwritten notation on the Notice of Assessment, the Solicitor did not pay these penalties and arrears interest from the estate bank account until September 24, 1993, almost two months after his receipt of the notices of assessment. The bank records for the Metcalf estate's account indicate that these payments were withdrawn from the account on November 1, 1993.

57. On November 10, 1993, the Solicitor received a Notice of Reassessment, dated November 5, 1993, for the 1990 taxation year for the Metcalf Estate (Document Book, Tab 40). By that Notice, the total taxes and penalties owing at that time, according to the records of Revenue Canada, was reduced by approximately \$150 to \$2,211.55. The Notice made no reference to the payment which had been made earlier that same month by the Solicitor.

58. By Notice of Assessment dated October 6, 1993, Revenue Canada advised the Solicitor, on behalf of the Porter Estate, that the preferred beneficiary election for the estate made in the 1991 and 1992 returns was denied because the election was not made within 90 days of fiscal year end (Document Book, Tab 41). As a result, the estate's income was taxable in the hands of the estate, rather than the hands of the beneficiaries. In addition, Revenue Canada assessed additional tax of \$2,903.57 for 1992, plus penalties of \$435.54 and arrears interest of \$417.02, a total of \$3,756.13, because the filing was late. The Solicitor did not respond to or make any payments pursuant to this Notice of Assessment.

59. Revenue Canada sent a further notice on February 3, 1994, advising that the 1992 tax and penalties for the Porter Estate had increased to \$3,841.36 by that time (Document Book, Tab 42).

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60. By letter dated January 5, 1994, the accountants who had completed returns for the Metcalf Estate asked the Solicitor to provide the information required to complete T-3 return for year ending December 14, 1993 (Document Book, Tab 43). They advised the Solicitor that the return and any tax payable were due March 14, 1994. As no response to this letter was received, the accountants faxed another copy of this letter to the Solicitor on February 25, 1994, and again inquired as to whether they could be of assistance in preparing the Metcalf Estate's 1993 tax return (Document Book, Tab 44). No action was taken by the Solicitor in response to this letter.

61. In February 1994, the Solicitor received the T-5 forms from both the Royal Bank of Canada and the Bank of Nova Scotia with respect to the Metcalf Estate for 1993. These were located by the Law Society Examiner in the file for the Porter Estate in November 1994, at which time they were brought to the Solicitor's attention. All outstanding returns for both estates were filed in April 1996, and the Solicitor is awaiting an assessment of these returns.

62. The Collections Section of Revenue Canada sent a letter, dated February 28, 1994, to the Solicitor with respect to the outstanding taxes, in the amount of \$3,851.78, owed by Metcalf Estate for the 1989 taxation year (the year in which Mr. Metcalf died). This amount represented only the penalties and arrears interest charged on the taxes paid for this taxation year. The letter reiterated the obligations of an executor to pay the taxes owed by the estate and the personal liability of the executors if they failed to do so (Document Book, Tab 45). Given that the Notice of Reassessment, dated November 5, 1993, indicated that the only outstanding arrears at that time related to the 1990 and 1991 tax years, this amount was apparently paid prior to November 1993, and this letter was sent in error. Revenue Canada did not follow up on this letter in any way.

63. Notwithstanding the notice of February 3, 1994, the Solicitor did not immediately pay the taxes by the Porter Estate for the 1992 tax year. Consequently, on June 14, 1994, the Solicitor received a letter, dated June 10, 1994, from the Collection Section of Revenue Canada which stated that a balance of \$3,924.22 was owing and that a failure to contact them in 15 days could result in legal action (Document Book, Tab 46). No action was taken by Solicitor.

64. On October 19, 1994, the Solicitor filed the T-3 return for the Porter Estate's 1993 tax year, which was due on March 7, 1994. Although the return was filed late, Revenue Canada assessed no penalties or arrears interest on 1993 income tax which was paid.

65. As the Solicitor had still not paid the tax owing for the 1992 tax year, Revenue Canada sent a further notice, dated November 9, 1994, to the Solicitor to advise him that additional interest in the amount of \$222.46 had been levied against the Porter Estate bringing the total due to \$4,063.82 (Document Book, Tab 47). The Solicitor received this notice on November 15, 1994.

66. On November 14, 1994, the Solicitor directed the payment of the outstanding balance owed to Revenue Canada by the Porter Estate from the Estate bank account at the Bank of Nova Scotia over which the Solicitor held signing authority by way of Power of Attorney (Document Book, Tab 48). The tax, penalties and arrears interest owed by the Porter Estate for the 1992 taxation year were paid from the estate bank account the following day leaving a nil balance in the account. The account was closed subsequently.

67. The executors had no knowledge that the taxes for both estates had not been paid in a timely manner, and, in fact, had not received a written report of any kind since September 1991.

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68. The Solicitor did not maintain adequate records of the affairs of these two estates until the Law Society Examiner reconstructed the banking records in November 1994. It is the Solicitor's position that he maintained bank books for the estate accounts, and he believed that they were the only records which were necessary. The Solicitor now acknowledges that he was required to maintain additional books for these accounts.

V. PRIOR DISCIPLINE

69. The Solicitor does not have a discipline history"

Based upon the admissions contained in the Agreed Statement of Facts, I found that particulars (a) through (h) in the Complaint had been established.

EVIDENCE AS TO PENALTY

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The Solicitor testified in mitigation of penalty.

The Solicitor is 41 years old. He was called to the Bar in 1981. He is a sole practitioner who operates a general practice, emphasizing civil litigation, in Whitby.

He articulated at Phelan, O'Brien in Toronto, and practised at the same firm for approximately a year after his call to the bar. Thereafter he practised for a period of approximately three years at Aiken, Capp, also in Toronto. His work during this period included personal injury, construction, employment, and debtor-creditor litigation.

In 1985 the Solicitor relocated to Whitby, where he practised in association with another lawyer for approximately three years. He founded his own practice in 1988 and though another lawyer practised in association with him for part of the intervening period, at present he practises as a sole practitioner.

After he relocated to Whitby in 1985 the Solicitor's practice quickly became successful. In 1988 he purchased and renovated a well-known historical building. The dramatic downturn in the real estate market in the early 1990's had a disastrous effect on the Solicitor, partly because a real estate company that rented space in the historical building went bankrupt. The Solicitor was unable to relet the space that the real estate company had occupied.

The Solicitor was forced to sell the building at a significant loss. On October 21 1992 he made an assignment in bankruptcy. He and his wife lost their home in Whitby as a result.

The Solicitor testified that he was under great stress at this time, and that he was hospitalized with a fast and irregular heart beat. He also suffered a transient ischemic attack. A few days before his bankruptcy he also sustained a fracture in the lower lumbar region of his back.

The Solicitor was discharged from bankruptcy on November 25 1993. He testified that whereas his gross billings prior to his bankruptcy were in the range of approximately \$400,000 a year, they dropped to approximately \$150,000 a year thereafter, more because of his loss of the ability to run his practice than because of a loss of clients. He added that his billings have started to recover, and will be in the range of approximately \$250,000 this year.

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In addition to his practice, the Solicitor has been active in the Arbitration and Mediation Institute of Ontario for many years. He has served as a Vice-President of the Institute, and currently serves as a director. He has taught arbitration to hundreds of lawyers and also members of other professions since 1985.

The Solicitor explained the problems that culminated in the Complaint largely by explaining that for many years he has had difficulty finding and keeping competent bookkeepers. When he opened his sole practice in 1988, he testified, he was so busy that the bookkeeping fell behind. He added that he hired a bookkeeper who turned out not to be competent, and that a second person that he hired, an accountant, did not do trust reconciliations. The Solicitor testified that a third person he hired, Cheryl Harper, was hired approximately at the time of the Law Society's first audit in June 1990 (which is referred to in paragraph 11 of the Agreed Statement of Facts). He testified that Ms Harper was quite good, and that in the year that she was responsible for working on the Solicitor's books and records they were brought up-to-date. However, because of complications in her pregnancy Ms Harper had to leave his employment suddenly.

The Solicitor testified that after a hiatus of a few months he hired a receptionist/bookkeeper. Although he believed the books were being kept up, he testified, it later became evident that the receptionist/bookkeeper "really didn't know what she was doing". This employee worked for the Solicitor from mid-1991 to mid-1993, then left to take another position without providing him with any notice.

The Solicitor testified that after this employee left he had a major problem with his books in that another lawyer who was associated with him deleted time records from their computer system.

The Solicitor contacted the Law Society's Practice Advisory Service and obtained the name of a person familiar with the Law Society's requirements (who in fact had worked as an employee of the Law Society). Though he found this person very committed, she suffered from health problems and was not in the office much. Moreover, the Solicitor could not afford to pay her on time, and she left after about eight or nine months to take a full-time job elsewhere.

The Solicitor testified that his next bookkeeper delegated the work to someone who was not as competent as she. He added that he could not afford to pay this bookkeeper.

The Solicitor testified that Cheryl Harper, whom he described as the only good bookkeeper he has had over the last eight years or so, is working with him again at the present time. He added that he now has confidence that the books are being handled well, though they are still a couple of months behind, and though he and Ms Harper are still working on a reconciliation of the trust account.

In particular 2(c) of the Complaint the Law Society alleges that between May 1 and August 10, 1992 the Solicitor improperly removed \$9,511.84 from his mixed trust account for his own personal use and benefit. In particular 2(d) that Law Society alleges that between February 1 and October 31, 1992 the Solicitor misapplied \$3,170.17 on behalf of clients who had insufficient funds on deposit. The Solicitor has admitted these allegations.

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The Solicitor explained that the receptionist/bookkeeper referred to above informed him in late April 1992 that she had discovered that the Solicitor had approximately \$12,000 too much in his trust account, and assured him that this surplus must be for fees, on closed real estate files that had not been transferred to his general account. The Solicitor testified that he accordingly believed that there was a surplus in his trust account because fees he had billed on real estate transactions had not been transferred from his trust account to his general account, even though neither he nor the receptionist/bookkeeper had yet identified the files in respect of which he was entitled to transfer the funds to pay his fees.

The Solicitor arranged for three sums totalling \$9,511.84 to be transferred to his general account between May 1 and August 10 1992 (see paragraphs 17 to 19 of the Agreed Statement of Facts). He acknowledged that though the trust listing showed an amount of \$12,000 in the trust account in excess of the amount shown in the bank statement, no proper trust comparisons existed at the time, and he examined no client ledgers or other records to ascertain the proper allocation of the funds before transferring the funds to his general account for his own benefit. He testified that he now realizes that he should not have done so without identifying the files on which his fees had not been paid. As it turned out, the Solicitor was not entitled to transfer any amount from his trust account for unpaid fees.

The Solicitor testified that the incident occurred after Cheryl Harper had worked for him, and that he thought that the books and records problem had been straightened out. He explained that he did not personally attempt to confirm what the receptionist/bookkeeper told him by reviewing the records, not because he knew that the records would have been inadequate to enable him to confirm that he was entitled to transfer funds to his general account in payment of his fees, but because he relied on the accuracy of the receptionist/bookkeeper's conclusion.

In paragraph 2(e) of the Complaint the Law Society alleges that, while an undischarged bankrupt, the Solicitor continued to operate his trust bank account, notwithstanding having been instructed by the Law Society that he must cease to do so.

The Solicitor testified that he did not intend to operate a trust account while he was in bankruptcy, but acknowledged that he signed eight trust cheques after his assignment into bankruptcy and prior to his discharge. Three of the eight cheques were co-signed by the lawyer with whom he shared space at the time. Two of the cheques were written to the Solicitor's general account.

In addition to explaining what led to each of the problems particularized in the Complaint, the Solicitor explained that he considers himself a "big picture person" who has always put clients first and has gained the respect of clients as a result. He testified that he had such a busy practice he could not control the administration of it. Although he acknowledges that he has had a long-term history of books and records problems for which he is responsible, he considers these difficulties to be understandable when considered in the context of the financial, health, and staff problems that he has encountered over the last several years. He testified that he still has not re-established himself after his bankruptcy.

The Panel also received in evidence seven letters in the nature of character evidence. In these letters practitioners and others with whom the Solicitor has had professional contact (including one client) have attested to their surprise at learning of the conduct that has given rise to the Complaint, and to their view that the Solicitor's misconduct is completely out of character based on their own experiences.

# RECOMMENDATION AS TO PENALTY

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I recommend that the Solicitor be suspended for a period of three months; that as a condition of his reinstatement, the Solicitor enroll in and co-operate with the Practice Review Program; that as a further condition of his reinstatement, the Solicitor have no signing authority over any trust account containing client funds for a period of two years after his reinstatement; and that the Solicitor be required to pay the Society's costs fixed in the amount of \$7,000 within a period of one year after his reinstatement.

## REASONS FOR RECOMMENDATION

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The Law Society's counsel submitted that the Panel should recommend that the Solicitor be suspended for a period of 12 months, and that his reinstatement be conditional upon his enrolling in and co-operating with the Practice Review Program, and on his having no signing authority over any trust account containing client funds for a period of two years after his reinstatement. The Law Society also submitted that the Solicitor should be required to pay the costs of the investigation and hearing, fixed at \$7,000, a sum that represents approximately half of the costs that would be assessed on the usual scale (a sum that is explained primarily because of the considerable time that representatives of the Society's audit department have had to devote to the Solicitor's practice over a period of several years).

The Law Society's counsel submitted that between 1988 and 1994 the Solicitor's practice, from an administrative and financial point of view, was out of control, and that problems were identified repeatedly during this period. For a period of between five and six years, it was submitted, the Solicitor was unable to account for funds that had been entrusted to him.

The Society's counsel submitted that the improper removal of \$9,511.84 from the Solicitor's trust account took place in the midst of this pattern of confusion. The Society's counsel emphasized that neither the Solicitor nor his bookkeeper could attribute the "surplus" to fees owing on any particular file or files, and that indeed there was no evidence available that the funds in fact belonged to the Solicitor.

The Society's counsel relied upon *Bolton v. The Law Society*, [1994] 1 W.L.R. 512 (C.A.), in which the Court of Appeal adopted the Divisional Court's description of a solicitor's client trust account as "sacrosanct".

The Society's counsel also relied upon Convocation's decisions in the *Gardner* (April 25, 1996) and *Loney* (February 22, 1996) cases, in which periods of suspension of 12 months were imposed in other cases involving the improper removal of trust funds for a lawyer's own benefit. Convocation's decision in the *Houlahan* case (June 7, 1993), in which a solicitor was reprimanded in Convocation for similar misconduct, was also referred to by the Society's counsel.

The Solicitor's counsel submitted that the Panel should recommend that the Solicitor be reprimanded in Convocation, ordered to participate in the Practice Review Program, and ordered to pay costs in the amount of \$7,000. He emphasized the significant contribution that the Solicitor has made to the profession in his work with the Arbitration and Mediation Institute, and the favourable character evidence that the Panel received.

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The Solicitor's counsel submitted that a 12 month suspension would be akin to disbarment, because of the difficulty that the Solicitor would encounter in attempting to re-establish his practice after a suspension of that duration.

Certain aspects of the misconduct that has been established are particularly troubling. The Solicitor failed to maintain the books and records required by section 15 of Regulation 708 under the *Law Society Act* over a period of several years. Even more seriously, the Solicitor failed to maintain sufficient balances in his mixed trust account to meet all trust obligations to clients, again over a period of several years. What is particularly alarming is that even at the time of the hearing the Solicitor's trust account had still not been reconciled, and the Solicitor continued to have a deficit of \$1,742.39 in his trust account (Agreed Statement of Facts paragraph 28).

I respectfully agree with the Law Society's counsel that the Solicitor's improper removal of \$9,511.84 from his trust account for his own personal use and benefit between May 1 and August 10, 1992, is the most serious of the eight particulars in the Complaint. Particularly in light of the difficulties that he had had since establishing his practice in 1988, and the receptionist/bookkeeper's inability to identify the clients' files in respect of which the Solicitor had funds in trust that supposedly could be applied to unpaid fees, the Solicitor's transfer of the funds to his general account must be considered to be highly improper.

The Solicitor also misapplied funds; continued to operate and write cheques on his trust account while an undischarged bankrupt, despite having been instructed by the Law Society of the impermissibility of doing so; made disbursements out of his trust account, some of which were for his personal benefit; failed to serve two clients in a conscientious, diligent and efficient manner; and failed to maintain books and records for two estates in accordance with section 15 of Regulation 708 under the *Law Society Act*.

In other circumstances, I would agree with the Society's counsel that a suspension of 12 months (together with the other terms recommended) would be warranted.

However, I am concerned that a suspension of that duration would have such a severe impact on the Solicitor's practice that he would never be able to recover from it. I accept that the Solicitor is capable of serving the public effectively as a lawyer, and that he has in the past and can reasonably be expected in the future to make a significant contribution to the profession. Serious though the Solicitor's misconduct is, in my view it does not warrant a penalty of such severity that the Solicitor should be prevented from having an opportunity to serve the public and the profession as a lawyer in the future.

The penalty that I recommend to Convocation is intended to serve several purposes. Although even a three-month suspension will have a harsh effect on the Solicitor, a period of suspension of at least this duration in my opinion is necessary to mark the seriousness of the misconduct and to assure the public that such misconduct will not be tolerated by the Law Society. The recommended penalty is also intended to encourage and help the Solicitor in the aspects of his practice that have led to the problems particularized in the Complaint. Finally, the recommended penalty is intended to protect the public from any recurrence of these events.

Accordingly, I recommend as follows:

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- a. that the Solicitor be suspended for a period of three months;
- b. that the Solicitor's reinstatement be conditional upon his enrolling in and co-operating with the Practice Review Program;
- c. that the Solicitor's reinstatement also be conditional upon his having no signing authority over any trust account containing client funds for a period of two years after his reinstatement; and
- d. that the Solicitor pay the Law Society's costs, fixed in the amount of \$7,000, within a period of one year after his reinstatement.

Murray Harrison Miskin was called to the Bar on April 9, 1981.

ALL OF WHICH is respectfully submitted

DATED this 7th day of October, 1996

Gavin MacKenzie

There were no submissions, the finding was confirmed and the Report adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 months and that as a condition of his reinstatement, the solicitor enroll in and co-operate with the Practice Review Program and have no signing authority over any trust account for a period of 2 years after his reinstatement and pay the Society's costs in the amount of \$7,000 within a period of 1 year after his reinstatement.

The Society's counsel submitted that the Committee made an error in principle in considering the adverse impact that a lengthy suspension would have on the solicitor's return to practice. Mr. Stuart made submissions in support of the increased penalty of a 12 month suspension.

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

It was moved by Mr. Crowe, seconded by Mr. Cole that the recommended penalty be adopted.

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

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

It was moved by Mr. Wright but failed for want of a seconder that the solicitor be suspended for a period of 8 months.

It was moved by Mr. Gottlieb, seconded by Mr. Adams that the solicitor be suspended for a period of 12 months.

Lost

The Crowe/Cole motion was voted on and adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to suspend the solicitor for a period of 3 months together with conditions.



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Convocation further approved the commencement date of the suspension be February 1st, 1997.

Law Society Motion for Interim Suspension

Re: Robert Noel BATES - Burlington

The Secretary placed the matter before Convocation.

Messrs. Crowe and Adams and Ms. Sachs withdrew for this matter.

Mr. Perrier appeared as counsel for the Society. Mr. McDowell appeared on behalf of the solicitor. The solicitor was not present.

Mr. McDowell requested an adjournment in order to confer with the solicitor who had been unable to retain counsel. He advised that there was no urgency for this matter to proceed as the conditions imposed by Mr. Banack were adequate.

Mr. Perrier made submissions for an interim suspension until Convocation met in April.

There was a reply by Mr. McDowell.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

A vote to adjourn the matter was adopted.

Counsel, the reporter and the public were recalled and informed of Convocation's decision to adjourn the matter until the April Discipline Convocation.

Re: Harvey Howard HACKER - Toronto

Mr. Faust, counsel for the solicitor requested the recommended penalty be backdated if Convocation adjourned the matter to the April Discipline Convocation.

It was moved by Mr. Gottlieb, seconded by Mr. Wright that this Convocation recommends that if Convocation in April accepts the recommended penalty of suspension, the suspension be deemed to have taken effect January 23rd, 1997.

Carried

23rd January, 1997

Re: David Eric HOWLETT - Niagara Falls

An adjournment was granted to the next Discipline Convocation in April. Convocation was informed that the solicitor was not practising.

CONVOCATION ROSE AT 4:05 P.M.

Confirmed in Convocation this *28* day of *February*, 1997.

  
Treasurer