

MINUTES OF DISCIPLINE CONVOCATION

Saturday, 9th December, 1995
9:00 a.m.

PRESENT:

The Treasurer (Susan Elliott), Armstrong, Backhouse, Banack, Carey, Cronk, Crowe, Curtis, Eberts, Feinstein, Gottlieb, MacKenzie, Millar, Murray, O'Connor, Puccini, Ross, Swaye, Sealy, Wilson and Wright.

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IN PUBLIC

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ADMISSIONS AND MEMBERSHIP COMMITTEE

Meeting of December 9, 1995

The Report of the Admissions and Membership Committee was stood down so that copies of the Report could be distributed and reviewed by the Benchers.

MOTION

It was moved by Ms. Curtis, seconded by Ms. Ross that the Treasurer and Mr. Stephen Goudge be authorized to sign the Regulation incorporating changes to the Legal Aid Tariff as authorized by Convocation in September and October 1995.

Carried

DISCIPLINE COMMITTEE

Re: Melvin Nathan DIAMOND and Sheldon Marshall FISCHMAN - Oshawa

The Deputy Secretary placed the matter before Convocation.

Mr. MacKenzie withdrew for this matter.

Mr. Michael Brown appeared for the Society and Mr. Edward Morgan appeared for the solicitors who were present.

Convocation had before it the Report of the Discipline Committee dated 10th October, 1995, together with an Affidavit of Service sworn 24th October, 1995 by Ron Hoppie that he had effected service on solicitor, Melvin Nathan Diamond by registered mail on 16th October, 1995 (marked Exhibit 1), together with the Report and Affidavit of Service sworn 24th October, 1995 by Ron Hoppie that he had effected service on solicitor Sheldon Marshall Fischman on 16th October, 1995 (marked Exhibit 2), together with the Acknowledgement, Declaration and Consent signed by solicitor Sheldon Marshall Fischman on 8th December, 1995 (marked Exhibit 3) together with the Acknowledgement, Declaration and Consent signed by solicitor Melvin Nathan Diamond on 8th December, 1995 (marked Exhibit 4). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Roger D. Yachetti, Q.C., Chair
Ian Blue, Q.C.
Nora Angeles

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

Christina M. Budweth
for the Society

MELVIN NATHAN DIAMOND AND
SHELDON MARSHALL FISCHMAN
of the City
of Oshawa
a barrister and solicitor

Edward M. Morgan and
Sandra A. Forbes
for the solicitor

Heard: May 3, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 29, 1994 Complaint D170/94 was issued against Melvin Nathan Diamond alleging that he was guilty of professional misconduct.

On June 29, 1994 Complaint D171/94 was issued against Sheldon Marshall Fischman alleging that he was guilty of professional misconduct.

On consent of both counsel these matters were heard jointly, in public, on May 3, 1995, before this Committee comprised of Roger D. Yachetti, Q.C. Chair, Ian Blue, Q.C. and Nora Angeles. Both solicitors attended the hearing and were represented by Edward M. Morgan and Sandra A. Forbes. Christina Budweth appeared on behalf of the Law Society.

DECISION

The following particulars of professional misconduct, as amended on consent, were found to have been established:

Complaint D170/94

2. a) He borrowed money from clients either directly or indirectly through 800731 Ontario Ltd., 690204 Ontario Ltd. and 664776 Ontario Ltd., corporations in which he had an interest, without ensuring that the lender client received independent legal representation contrary to the provisions of Rule 7 of the Rules of Professional Conduct.

9th December, 1995

- b) He breached the provisions of Rule 23 of the Rules of Professional Conduct by personally guaranteeing clients' mortgage investments.
- d) He failed to act in a diligent, efficient, and conscientious manner in serving his clients Bonnie Ball, Beverly Harrison, Frank Pagnello, and Evelyn Buchanan by:
 - ii) by arranging a mortgage loan from Frank Pagnello to Gary Bolen without advising Mr. Pagnello that he was aware Gary Bolen had a poor history of making mortgage payments in a timely manner; and
 - iii) by instructing his secretary not to make further mortgage payments to Evelyn Buchanan until Evelyn Buchanan signed an acknowledgement waiving her right to independent legal advice which the Solicitor had previously failed to obtain from her.
- e) He failed to serve his client, Bonnie Ball, in a diligent, efficient and conscientious manner regarding the clarity with which he advised her regarding a mortgage investment secured by a mortgage on a property at 340 Killarney on the sale of that property to Alan and Cindy Bouchi.
- f) He acted in a conflict of interest acting for both Elsie Brennan and Evelyn Buchanan on the sale of part of Elsie Buchanan's interest in a mortgage on 19 Celina Street, Oshawa, to Evelyn Buchanan.

Complaint D171/94:

- 2. a) He breached the provisions of Rule 23 of the Rules of Professional Conduct by personally guaranteeing clients' mortgage investments;
- b) He borrowed money either directly or indirectly from clients through Merideth Development Corporation, 690204 Ontario Limited, and Nath-Mar Investments Limited, corporations in which he had an interest, without ensuring that the lender client received independent legal representation, contrary to the provisions of Rule 7 of the Rules of Professional Conduct.

Evidence

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

In regard to Complaint D170/94 the agreed facts were as follows:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

I. The Solicitor admits service of Complaint D170/94 and is prepared to proceed with a hearing of this matter on May 3, 1995.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

III. The Solicitor has reviewed Complaint D170/94 and this agreed statement of facts with his counsel, Edward M. Morgan and Sandra A. Forbes, and admits particulars 2(a), (b), (d)(ii) as amended, (e) as amended and (f). The Solicitor also admits that the facts contained in this agreed statement of facts constitute professional misconduct as herein described in regard to those particulars.

IV. FACTS

IV. The Solicitor is 52 years of age. He was called to the Bar on March 21, 1969 and has, since the date of his call to the Bar, practised law in partnership with Sheldon Fischman. The law practice of Diamond & Fischman is located in Oshawa, Ontario (the "firm"). Neither lawyer has a Discipline record.

V. BACKGROUND FACTS

V. The allegations of professional misconduct particularized in the Complaint result from the Solicitor's involvement in the mortgage brokerage business and involve the following corporations and individuals:

- (i) The Solicitor and Mr. Fischman incorporated an Ontario corporation, 556426 Ontario Limited ("556426"), the shares of which were owned 75% by the Solicitor's wife, Leona Diamond, and 25% by Mr. Fischman. 556426 was registered as a mortgage brokering company operating under the name Secure Mortgage Company. Through 556426, the Solicitor and Mr. Fischman arranged mortgages. Specifically, 556426 would act as an intermediary and broker between potential mortgagors and either lending institutions or private parties who might act as mortgagees. For certain clients, mortgage payment cheques were processed through 556426's bank accounts. For the most part, the collection of mortgage payments, calculation of amount of cheques and preparation of those cheques, and the allocation of the payments to various clients were services performed by the firm, not 556426. Any charges incurred for the collection of cheques, the return of cheques due to insufficient funds, or for mortgage renewals were assessed to the mortgagors and paid to the firm.
- (ii) The Solicitor incorporated MND Enterprises Ltd. ("MND Ltd."), a corporation wholly owned by him. MND Ltd. held a 25 percent interest in 800731 Ontario Limited ("800731").
- (iii) SMF Enterprises Ltd. ("SMF Ltd.") was incorporated by Sheldon Fischman and is a corporation wholly owned by him. SMF Ltd. owns 25 percent of the shares of 800731.
- (iv) The remaining 50 percent of 800731 was owned by an unrelated individual by the name of Joe Bigas.
- (v) 495807 Ontario Ltd. is a company 75% owned by Leona Diamond and 25% by Mr. Fischman.

- (vi) The Solicitor owns 50 percent of the shares of 664776 Ontario Limited. A client and business associate of the Solicitor, Paul Kahn, owns the remaining 50 percent of the shares.
- (vii) Nath-Mar Investments Limited ("Nath-Mar") is an Ontario corporation the shares of which are held equally by Mr. Fischman and Leona Diamond. Nath-Mar was incorporated in order to assist in preparing discharges of mortgages and was also involved in some mortgage investments.
- (viii) Meredith Development Corporation ("Meredith") is jointly owned by Mr. Fischman and Paul Kahn. Meredith was in the business of buying and selling property and had invested in eight commercial properties with a view to developing these properties. These properties appeared to have lucrative development potential. Large sums of money were spent on development but, unfortunately, market conditions changed drastically so that development was not financially feasible.
- (ix) MND Ltd. and SMF Ltd. each owned 50 percent of the shares of 690204 Ontario Limited ("690204"). 690204 is a bare trustee for Meredith.

6. During the late 1980s, the Solicitor and Mr. Fischman arranged mortgages. Many of the firm's clients invested in these mortgages and the firm guaranteed a number of investor clients' mortgages. At May 31, 1991, a total of 709 mortgages had been arranged with a principal balance of \$44,944,864.99. Of that principal balance, \$2.5 million was comprised of the Solicitor and Mr. Fischman's own mortgages, and approximately \$3.2 million were not mortgages arranged by 556426 but were comprised of vendor take back mortgages or mortgages placed by lending institutions.

7. In the late 1980s, the real estate market went into sharp decline. Many of the mortgaged properties that the Solicitor and Mr. Fischman believed were very secure were abandoned by owners who were no longer able to meet their mortgage obligations. The Solicitor and Mr. Fischman attempted to assist the firm's clients and protect the clients' interests in a manner which was consistent with the clients' personal circumstances by, for example, re-purchasing a number of non-performing mortgages. The money used to assist the firm's clients came from 495807 and 556426. The Solicitor and Mr. Fischman spent over \$500,000 of their own funds to honour mortgage guarantees, and also to make mortgage payments to clients who did not receive such a guarantee but were in need of the money when the mortgage went into default. The Solicitor estimates that approximately \$50,000 of this was paid toward mortgages where the solicitors had an interest in the borrower. The Lawyers' Professional Indemnity Company has also expended funds to settle errors & omissions claims that have arisen as a result of these transactions.

8. The Solicitor and Mr. Fischman, through their counsel, approached the Law Society as soon as they realized that problems regarding the guaranteeing of mortgages and borrowing of funds from clients existed. This was prior to the receipt of any client complaints. In January 1991, John I. Laskin, who was retained by the firm in December 1990, contacted the Law Society to report that he had been retained regarding the investment of client funds in mortgages, and advised the Law Society that there may be a problem. He outlined the nature of the potential problem to the then senior discipline counsel.

9. In February 1991, the Law Society began to receive complaints from various clients referred to throughout the body of this document regarding their mortgage investments.

10. By letter dated May 10, 1991, a copy of which is attached as Exhibit 1 to this Agreed Statement of Facts, Mr. Laskin provided the Law Society with a status report and informed the Law Society that Peat Marwick had been retained by Diamond & Fischman to prepare a financial analysis of the mortgage loans. This report was commissioned by the Solicitor and Mr. Fischman at substantial cost to the firm. By May 31, 1991, power of sale proceedings had been commenced on 139 of the 709 mortgages, with a cumulative balance due of \$13,828,416.21. This cumulative balance does not reflect the actual loss to the clients. Many mortgages were either fully or partly paid off as a result of power of sale proceedings and other recovery mechanisms. Many clients did not suffer any losses even where their mortgage went into default. Attached as Exhibit 2 to this agreed statement of facts is a three page list of mortgages which indicates the status of the mortgages at May 31, 1991 and May 31, 1992. This three page list is a random sampling of an eleven page list of all mortgages. This random sample was chosen by the solicitors to indicate the status of a number of the mortgages as at May 31, 1992.

11. A meeting took place in the offices of the Law Society on July 9, 1991 at which time counsel for the Solicitor and Mr. Fischman outlined the entire mortgage portfolio situation as well as the difficulties that the Solicitor and Mr. Fischman were having in meeting all of the guarantees they had made to clients regarding the mortgage investments. While the Solicitor and Mr. Fischman had initially continued to make mortgage payments from their own funds when mortgagors defaulted, Mr. Laskin stated that the downturn in the real estate market had had disastrous financial consequences and that the Solicitor and Mr. Fischman were now facing personal bankruptcy.

12. Under cover of a letter dated October 25, 1991, Mr. Laskin provided the Law Society with the formal report prepared by Peat Marwick and a letter from the Solicitor and Mr. Fischman dated October 23, 1991 containing comments on the report and providing assurance that all best efforts were being taken to resolve their clients' difficulties. The Peat Marwick report, dated October 22, 1991, assessed the number and value of outstanding mortgages and the assets available to meet any personal guarantees. The report also confirmed that the firm's trust accounts did not reveal any irregularities. This was subsequently confirmed by the Law Society as a result of its own investigation. No evidence of misuse or misappropriation of the mortgage loan proceeds has ever been discovered, and none is alleged by the complainants.

13. The Law Society commenced an audit and investigation of the firm's practice in October 1991 as a result of the client complaints. The Solicitor and Mr. Fischman co-operated fully in the audit and investigation and willingly provided the Law Society with a volume of material. They also provided a letter dated March 10, 1992 in which they, to the best of their ability at that time, provided a list of clients to whom either written or verbal guarantees regarding mortgage investments had been given, with the proviso that since there was no central register of all guarantees it was possible that a few names of persons who had received verbal assurances (as opposed to written guarantees) had been omitted. A copy of the March 10, 1992 letter is attached as Exhibit 3 to this agreed statement of facts.

Particular 2a) - Borrowing from Clients

VI. A review of the Solicitor's records from early 1988 to early 1990 reveals that the Solicitor borrowed money from clients directly and indirectly through the corporations 800731, 690204 and 664776, corporations in which, as indicated above, he and or his wife had an interest. Nine mortgages were registered during that period as follows:

Date Mortgage Signed	Mortgagor	Mortgagee	Mortgage Principal
15/3/88	690204 Ontario Limited	Mike & Anna Fesiak	\$ 18,750.00
23/6/88	664776 Ontario Limited	Glenson Investments Limited	100,000.00
20/12/88	690204 Ontario Limited	Annette Merkur	21,000.00
1/5/89	664776 Ontario Limited	Jerry Paquette	100,000.00
1/5/89	664776 Ontario Limited	John Rossetti	40,000.00
14/12/89	664776 Ontario Limited	Sheila Raskin	75,000.00
1989	800731 Ontario Limited Mel Diamond Sheldon Fischman Joe Bigas	Kvia Investments Limited	100,000.00
1989	664776 Ontario Limited	Teresa Rossetti	70,000.00
23/04/90	800731 Ontario Limited Mel Diamond Sheldon Fischman Joe Bigas	Glenson Investments Limited	300,000.00

15. In all cases, investing clients were informed that Mr. Fischman or the Solicitor had a personal interest in the property. The Solicitor's mortgage files for the above described mortgages each include a standard form Acknowledgement in which the investor acknowledged being advised by the Solicitor and/or Mr. Fischman that they had a substantial interest in the borrowing company. In each case, the clients also waived their right to independent legal advice by executing the Acknowledgement.

16. In April 1988, the Law Society reviewed the firm's books and records. By letter dated April 25, 1988, a copy of which is attached as Exhibit 4, the Law Society requested certain information, including information regarding transactions which the Solicitor and Mr. Fischman had disclosed as involving borrowing from clients. Mr. Fischman provided the Law Society with this information by letter dated August 16, 1988. In this letter, Mr. Fischman advised that such clients had waived independent legal advice and had signed Acknowledgements that they were aware of the personal interests of the Solicitor and/or Mr. Fischman. Mr. Fischman's August 16, 1988 letter is attached as Exhibit 5 to this agreed statement of facts.

17. By letter dated February 27, 1989, a copy of which is attached as Exhibit 6, in response to the receipt of Mr. Fischman's 1988 Form 2 declaration, the Law Society requested particulars of Mr. Fischman's indebtedness to clients, including a report of the lender's solicitor in accordance with Rule 7 of the *Rules of Professional Conduct* and an acknowledgement from each lender waiving recourse to the Compensation Fund. A revised Acknowledgement form incorporating a provision waiving recourse to the Compensation Fund as required by the Law Society was sent to the Law Society by the firm. No further response regarding the revised Acknowledgement was received from the Law Society. The Solicitor and Mr. Fischman did not advert their minds to the fact that all of the concerns raised in the February 27, 1989 letter were not addressed by the revised Acknowledgement. The Law Society does not allege any dishonesty on the Solicitor and Mr. Fischman's behalf. A sample Acknowledgement in use prior to the amendment and a sample as amended are attached as Exhibit 7 to this agreed statement of facts.

18. As a result of receiving the Solicitor's Form 2 filing for the year 1988, the Society wrote to him by letter dated April 4, 1989, a copy of which is attached as Exhibit 8 to this agreed statement of facts. The Solicitor responded by letter dated May 5, 1989, a copy of which is attached as Exhibit 9 to this agreed statement of facts.

19. The Solicitor admits that, despite the execution of the Acknowledgement in a form acceptable to the Law Society, he failed to ensure that the clients received independent legal representation in regard to their loan advance, in violation of Rule 7.2 of the *Rules of Professional Conduct*. In all other respects, the lending clients' interests were protected by the Solicitor and Mr. Fischman as required by the nature of the transactions.

Particular B) - Rules 23 - Mortgages Guarantees

20. The Solicitor and Mr. Fischman acted for many client/investors in arranging mortgages. At the outset of each mortgage transaction, they disclosed, in writing, that they acted solely for the investor and that the funds might also be advanced out of companies in which they or their family relations were shareholders. In the majority of cases, funds were not advanced by such companies. As described above, Acknowledgements were obtained to indicate that the firm acted solely for the mortgagee and not for the borrower. Also, the borrower was asked to have the mortgage documentation reviewed by an independent solicitor of their choice.

21. The Solicitor and Mr. Fischman provided guarantees to a number of clients regarding their mortgage investments in good faith and out of a sense of commitment to and support for the firm's clients. From the 1970s until stopping their practice in the late 1980s, approximately \$10 to \$12 million worth of the mortgages were guaranteed. At the time the guarantees were given, the Solicitor and Mr. Fischman were confident that their substantive asset base was large enough to meet the eventualities of having to make good on the guarantees. The schedule of clients to whom the Solicitor and/or Mr. Fischman gave these guarantees has previously been referred to as Exhibit 3 to this agreed statement of facts. Examples of the written guarantees provided by the Solicitor's firm are attached collectively as Exhibit 10 to this agreed statement of facts.

22. In the fall of 1990, the Solicitor and Mr. Fischman advised their clients that they would no longer be able to compensate for missed mortgage payments or to honour repurchase agreements. Clients who would be in a better position to be repaid if they held onto their investments were advised, when appropriate, to renew their mortgages. In still other cases, power of sale proceedings were initiated in order to recuperate as much of the client's investment as was possible. In other cases, where the client was in desperate circumstances following a mortgagor's default, the Solicitor and Mr. Fischman continued to personally make the mortgage payments to the best of their ability. At no time has the Solicitor or Mr. Fischman been accused of abandoning the firm's clients. Further, in all instances, the above described assistance was provided free of charge by the firm and the firm incurred disbursement charges which in many instances were not reimbursed by the clients. Attached as Exhibit 11 to this agreed statement of facts are examples of letters sent to clients at this time.

23. As a result of the circumstances set out above, the Solicitor and Mr. Fischman have been unable to honour all of the guarantees made to the firm's clients.

Particular 2d) i) & e) - Bonnie Ball

24. In January 1989 a number of individuals purchased a property at 340 Killarney Court, Oshawa. The purchasers assumed the existing first, second and third mortgages. Some months following the closing, the purchasers wished to rearrange financing and contacted the Solicitor's firm for assistance. The

Solicitor did not act on the purchase but had acted previously on some matters for the purchasers. The Solicitor presented the opportunity to invest in the Killarney property to Bonnie Ball and Beverly Harrison, who had come to him indicating that they had funds they wished to invest in a mortgage.

25. In October 1989, a second mortgage of \$37,000.00 was registered on title to the property in favour of Bonnie Ball and Beverly Harrison. The Solicitor acted for both Ms Harrison and Ms Ball. The Solicitor did not act for the mortgagors in this transaction.

26. In the letter reporting to Ms Ball and Ms Harrison regarding their investment, dated October 1, 1989, the Solicitor represented the value of the property to be \$150,000.00. A copy of the Solicitor's October 1, 1989 letter is attached as Exhibit 12 to this agreed statement of facts. The combined value of the first and second mortgages in October 1989 was \$119,000.00. The purchase price in January 1989 was \$123,900.00.

27. A formal appraisal of this property was not obtained but the Solicitor requested a valuation of this property from Gary Shannon, a real estate agent for Remax Reflection Agency, the largest real estate agency in Oshawa. Mr. Shannon advised that the value of the property was \$150,000.00. The Solicitor issued a final report to both Ms Harrison and Ms Ball on November 29, 1989.

28. The first three mortgage payments were made directly to the mortgagees. No payment was made in February 1990 by the mortgagors; however, the Solicitor protected the interests of his clients by making the payments through 556426 for the months of February and March.

29. In March 1990, the first mortgagee, Regional Trust, commenced Power of Sale proceedings in regard to the property. The first mortgage was paid out by other of the Solicitor's clients and assigned to Sheldon Fischman in trust for the investing clients. The Solicitor admits that he failed to advise either Ms Ball or Ms Harrison of the Regional Trust mortgage buy out.

30. 556426 continued to make mortgage payments to Ms Ball and Ms Harrison during the period April to August 1990. At that point, the property was listed for sale. In September 1990, an offer to purchase in the amount of \$135,000.00 was received from Alan and Cindy Bouchie.

31. The Solicitor met with Ms Ball in late September or early October 1990. At this time he advised her of the Bouchie offer. Ms Ball maintains that the Solicitor further advised her that her investment would be paid out upon the closing of the transaction. The Solicitor states that he did not assure Ms Ball that her investment would be paid out of closing, as that would have been impossible given the terms of the offer. The parties respectfully submit that it is not necessary to resolve this dispute in the evidence in order to reach an appropriate disposition of this matter.

32. During a meeting at the Solicitor's office on October 18, 1990, which Ms Ball attended to sign the discharge papers of her mortgage, the Solicitor advised her about the previous power of sale proceeding and the loss that would be suffered on the sale transaction. Even though a loss would result, in light of the downturn in the market the Solicitor recommended that they accept the Bouchie offer and they did. This advice is confirmed in the Solicitor's letter of October 18, 1990, a copy of which is attached as Exhibit 13 to this agreed statement of facts.

33. Mortgage payments were made on the Bouchie mortgage until April 1991. At that time, Mr. Fischman commenced sale proceedings in respect of the first mortgage and an appraisal for the property of \$115,000.00 was obtained. The property was sold for \$135,000.00 in November 1991. There was a shortfall of funds available to pay for the second mortgage. Bonnie Ball and Beverly Harrison lost the majority of their investment, although \$4,521.26 remained in trust for them after the sale. This was paid out to them in June of 1991.

34. The Solicitor admits that in acting for Ms Harrison and Ms Ball in regard to their investment in the Killarney property he failed to serve them by: failing to immediately advise them when the mortgagor first defaulted; failing to immediately advise them about the payout of the first mortgage; and failing to immediately advise them of the reduction in the value of their mortgage on the sale to Bouchie.

Particular 2d) i) & ii) - Frank Pagnello

35. The Solicitor acted for Frank Pagnello regarding a mortgage investment of \$50,000.00 on a property at 269 Huntingwood Drive, Oshawa owned by Gary Bolen. This property was appraised at \$350,000.00. This was the fifth such transaction in respect to which the Solicitor acted for the Pagnellos. The mortgage was registered on March 10, 1989 and the Solicitor reported to the Pagnellos by letter dated April 11, 1989, a copy of which is attached as Exhibit 14 to this agreed statement of facts. This mortgage was to be a second mortgage by way of postponement by the then second mortgagee. Through mere inadvertence and as a result of it being an extremely busy time for the firm, the postponement agreement was not registered until October 30, 1989; no prejudice was suffered by the client as a result of this delayed registration.

36. The Solicitor and his partner had acted for Mr. Bolen on at least two other mortgage loans from clients prior to and during 1989, although they did not act for Mr. Bolen in this transaction.

37. At the time of the Solicitor's discussions with Mr. Pagnello regarding this mortgage advance and in the course of his retainer by Mr. Pagnello, the Solicitor did not inform Mr. Pagnello that his partner, Mr. Fischman, held, in trust for other clients, a \$100,000.00 first mortgage, on the same Huntingwood Drive property, as collateral security to a mortgage on another property in Oshawa. It was always intended that the Fischman, in trust, mortgage would be postponed to Mr. Pagnello's mortgage, and, in fact, it was postponed to the Pagnello mortgage.

38. The Solicitor did advise Mr. Pagnello that the Royal Trust Corporation had a prior mortgage on the property in the amount of \$245,000. This is confirmed in the Solicitor's letter dated April 11, 1989, a copy of which is attached as Exhibit 15 to this agreed statement of facts.

39. Despite the report to Mr. Pagnello that he held a good and valid second mortgage, as described above, it was not until October 1989 when a \$430,000.00 mortgage in favour of an unrelated party was registered on title to the Huntingwood Drive property that the Solicitor obtained postponements of the \$100,000.00 mortgage therefore allowing Mr. Pagnello's \$50,000.00 mortgage to move into second position behind that of the Royal Trust mortgage. Again, no prejudice was suffered by Mr. Pagnello as a result of this delayed registration.

40. Further financing of \$525,000.00 provided by Citicapital Financing Limited was advanced in August of 1990 and the \$430,000.00 mortgage was discharged. The Solicitor did not act on either of the subsequent financings.

41. The Solicitor ensured that the mortgage payments were made through 556426 from June 1989 to March 1990, despite delinquent payments by the mortgagor, Mr. Bolen, during this period.

42. When the time came for renewal in March 1990, the Solicitor discussed with Mr. Pagnello the options of both renewal and non-renewal. The Solicitor advised that, notwithstanding Mr. Bolen's financial record, he had a secure job and, if power of sale proceedings were commenced, the Pagnellos might not receive their equity given the decline in property values. When Mr. Pagnello's mortgage came due in March 1990 it was extended for a further year on the instructions of Mr. Pagnello. Mr. Pagnello says that he extended the mortgage in March 1990 on the Solicitor's assurance that his investment would be safe. The Solicitor denies this and maintains that Mr. Pagnello made his own decision based on the options discussed. Again, the parties respectfully submit that a proper disposition of this matter can be achieved without a resolution of the issue.

43. The Solicitor admits that, although Mr. Bolen had a good record of payments regarding his own home, and that he had been able to increase his mortgage in 1988, and that further, Royal Trust thought enough of Mr. Bolen's credit worthiness to grant him a \$249,000 first mortgage, Mr. Bolen had a history of being unable to make mortgage payments on time prior to Mr. Pagnello's initial investment and again prior to the extension of the Pagnello mortgage. However, although he was late in making some payments, Mr. Bolan had always up to this point met his obligations and the Solicitor knew this. Copies of letters, cheques and a client ledger in connection with these other mortgages are attached as Exhibit 16 to this agreed statement of facts. The Solicitor admits that he had an obligation to provide Mr. Pagnello with the information regarding Mr. Bolan's prior delinquencies in payment.

44. When the mortgagor again went into default, the firm, through 556426, covered the payments until November 1990. The first mortgagee sold the property under power of sale. A small shortfall of funds to satisfy the first mortgage resulted and there were no funds available for Mr. Pagnello's second mortgage.

Particular 2d) iii) & f) - Evelyn Buchanan

45. Evelyn Buchanan is the sister of Frank Pagnello. The Solicitor acted for Ms Buchanan on approximately eight mortgage investment transactions before the one described below.

46. In 1986, Meredith purchased a property located at 19 Celina Street, Oshawa. This property was appraised in 1988 at a value of \$750,000.00. In December 1988, a \$500,000.00 first mortgage in favour of the Federal Business Development Bank was registered on title. In January 1989, a \$150,000.00 second mortgage in favour of Elsie Brennan (94.85 percent interest) and 495807 Ontario Ltd. (5.15 percent interest), was registered on title. Elsie Brennan, a client of the Solicitor's, signed an Acknowledgement regarding Mr. Fischman's interest in Meredith and expressly waived her right to independent legal advice.

47. In 1989, the Solicitor discussed with Ms Buchanan an opportunity to invest in the property. In October 1989, Elsie Brennan sold a 26.667 percent interest in the mortgage to Evelyn Buchanan for \$40,000.00 and a 37.333 percent interest to Scrooge Investments Ltd., for \$56,000.00. Elsie Brennan retained a 30.85 percent interest in the mortgage. The Solicitor advised Ms Buchanan that Mr. Fischman, through a corporation, was a co-owner of the property in which she was investing.

48. The mortgage went into default, and power of sale proceedings were commenced by the Federal Business Development Bank on its first mortgage in November 1990. Ms Buchanan was not advised of this fact. Ms Buchanan received all of her mortgage payments from November 1989 until February 1991. Nevertheless, during this period, when necessary, the Solicitor and Mr. Fischman subsidized the payments in cases where the mortgagor was unable to make the payments.

49. Sometime in late 1990, Ms Buchanan attended at the Solicitor's home to pick up a cheque for the mortgage payment. The Solicitor asked her to sign an Acknowledgement that she had waived her right to independent legal advice and that it had been disclosed to her that Mr. Fischman had an interest in the property. This was a standard requirement for all clients as mentioned above and, through oversight, was not initially requested of Ms Buchanan. The oversight occurred because Ms Buchanan had purchased a share of an existing mortgage from another client, who had herself executed an Acknowledgement. The Solicitor encouraged her to obtain independent advice from a solicitor. Ms Buchanan refused to sign the Acknowledgement as requested.

50. In January 1991, both the Solicitor and Mr. Fischman attended at Ms Buchanan's home to advise that the mortgage was in default and asked her to accept principal only payments. These payments were to be made not by the mortgagor, but by the Solicitor and Mr. Fischman personally in an effort to save Ms Buchanan from further loss. In return, they again requested that she sign the Acknowledgement.

51. Ms Buchanan attended at the Solicitor's office in February 1991 to pick up a cheque and was advised by the Solicitor's secretary, Jackie Ramphal, that no further payments would be made to her unless she signed the Acknowledgement. Ms Buchanan refused to do so and did not receive any further payments.

52. The property has been listed for sale by the first mortgagee for \$550,000.00. If the property is sold for this price there will be no monies left for payment of the second mortgage.

VI. THE INVESTIGATION AND PROCEEDINGS TO DATE

53. Following John Laskin's report to senior discipline counsel in January 1991, the Law Society received the complaints outlined above. The first of these was received by the Law Society on February 18, 1991. Each of the complaints was forwarded to the Solicitor and Mr. Fischman for their comments, and they responded to each of these complaints promptly and in writing.

54. At the July 9, 1991 meeting between Mr. Laskin and then senior discipline counsel, Gavin MacKenzie, Mr. Laskin was informed that the Law Society would be unable to advise the Solicitor and Mr. Fischman of its position until some time after mid-August. The Solicitor and Mr. Fischman wrote to a number of their creditors and client-claimants on July 11, 1991 in order to advise them that they would proceed with plans to make a financial proposal once they had the Law Society's response.

55. On October 25, 1991, the Peat Marwick report described above was complete, and a copy was sent directly to the Law Society. In his covering letter, Mr. Laskin expressed his hope that discipline counsel would "have an opportunity to review this material fairly quickly" so that they could meet soon after to discuss how best to proceed. A copy of Mr. Laskin's letter and the Peat Marwick Report are attached hereto and marked as Exhibits 17 and 18 respectively. Mr. Laskin received no response, and wrote to the Law Society again on November 19, 1991, reiterating the stated desire to have these matters dealt with as soon as possible. A copy of John Laskin's letter dated November 19, 1991 is attached hereto and marked as Exhibit 19.

56. In early 1992, a Law Society investigator, Doug Weber, attended at the firm's offices in order to review the mortgage files. The Solicitor and Mr. Fischman cooperated with Mr. Weber, providing him with any information he required and access to the firm's files. Mr. Laskin wrote to the Law Society on March 4, 1992, confirming that a review by the Law Society of the files at

Diamond & Fischman's offices had taken place. A copy of John Laskin's letter dated March 4, 1992 is attached hereto and marked as Exhibit 20. In this letter, Mr. Laskin again conveyed the desire to have the uncertainty surrounding the Solicitor's and Mr. Fischman's professional life resolved once and for all, and requested the opportunity to meet with Law Society discipline counsel within two weeks (i.e. by mid-March 1992).

57. Having received no reply from the Law Society, John Laskin wrote to discipline counsel again on April 14, 1992, proposing that a meeting be held within a week to ten days. A copy of John Laskin's letter dated April 14, 1992 is attached hereto and marked as Exhibit 21. During this time, the proposal by the Solicitor and Mr. Fischman to their creditors remained in abeyance, the potentially damaging effects of which were noted by Mr. Laskin in his letter. Gavin MacKenzie wrote back to Mr. Laskin that same day, indicating that he expected a completed report by the end of the following week and advising that he would contact Mr. Laskin once it was available. A copy of Gavin MacKenzie's letter dated April 14, 1994 is attached hereto and marked as Exhibit 22.

58. John Laskin wrote to the Law Society on June 9, 1992, again indicating that the Solicitor and Mr. Fischman were anxious to address the Law Society's concerns and to have the matter resolved, and that they would therefore like to set a date to meet with the Law Society. A copy of John Laskin's letter dated June 9, 1992 is attached hereto and marked as Exhibit 23.

59. Mr. MacKenzie telephoned Mr. Laskin in response to his letter of June 9, 1992. Mr. MacKenzie advised Mr. Laskin that the Law Society investigator's report would be complete pending some further information from the Solicitor and would be ready by month end. Mr. Laskin and Mr. MacKenzie then had preliminary discussions about an appropriate penalty, subject to review of the report. During this conversation Mr. MacKenzie advised Mr. Laskin that he did not view this as a disbarment case.

60. John Laskin took the opportunity in late July 1992, while attending a meeting at the Law Society with respect to another client, to inquire into the status of the Law Society's investigation of our matter. Mr. Laskin was advised by Douglas Weber, the Law Society's Audit and Investigation Department employee who had conducted the audit of the firm's files, that the report which discipline counsel had indicated he was waiting for had just been finalized.

61. John Laskin met with Gavin MacKenzie at the Law Society's offices on August 13, 1992 and discussed the various complaints that the Law Society had received. Mr. MacKenzie indicated at this meeting that he expected that an agreed statement of facts could be agreed upon by counsel within 30 days. Two weeks later, on August 26, 1992, John Laskin received the Law Society's Counsel Briefs in this matter. In a covering letter, Mr. MacKenzie indicated that another complaint had been filed following completion of Mr. Weber's report and that an addendum to the report would be provided as soon as one was completed. Attached hereto and marked as Exhibit 24 is a copy of Gavin MacKenzie's covering letter dated August 26, 1992.

62. No addendum to the original Counsel Briefs was ever produced by the Law Society.

63. By letter dated November 3, 1992 a copy of which is attached as Exhibit 25 to this Agreement Statement of facts, Mr. MacKenzie provided Mr. Laskin with an update on the status of the investigation of the new complaint referred to in paragraph 62 above. In December 1992, Mr. Laskin confirmed a meeting between himself, the Solicitor, Mr. Fischman, Doug Weber and Mr. MacKenzie at the Law Society offices on January 11, 1993. At this meeting, they reviewed all of the complaints and the Solicitor and Mr. Fischman were again informed that some resolution of the matter could be expected from the Law Society shortly. The Solicitor and Mr. Fischman advised their clients accordingly.

64. The Solicitor and Mr. Fischman then heard nothing further from the Law Society through the balance of 1993 and throughout the first half of 1994. During this time they also received no notice of any new complaints against them.

65. While no new complaints were reported to the Solicitor and Mr. Fischman, both solicitors subsequently learned, from Discipline Counsel that new complaints from clients were being received by the Society. In addition, there were concerns of dishonesty by the solicitors; investigation by the Society resulted in a finding that no such dishonesty took place.

66. On June 29, 1994, Christina Budweth, who assumed carriage of the Solicitor's and Mr. Fischman's file as discipline counsel at the Law Society following Gavin MacKenzie's departure in June 1993, wrote to the Solicitor and Mr. Fischman enclosing the formal complaints.

67. Edward Morgan, who replaced John Laskin as counsel for the Solicitor and Mr. Fischman upon Mr. Laskin's appointment to the Bench in February 1994, spoke to Christina Budweth on July 14, 1994 and requested full disclosure from the Law Society prior to the set date hearing. Mr. Morgan was informed by Ms. Budweth that disclosure of the Law Society's case is contained in the Counsel Briefs which were provided to Mr. Laskin two years earlier. Mr. Morgan confirmed this conversation by way of letter dated July 14, 1994, a copy of which is attached hereto and marked as Exhibit 26.

68. A set date hearing took place on July 26, 1994, and the discipline hearing was scheduled to take place on November 29 and 30, 1994. Subsequently, however, Ms Budweth and Mr. Morgan agreed that it would be profitable for both sides to attend at a pre-trial conference, which was held in November 1994 and which resulted in the rescheduling of the disciplinary hearing. Counsel appeared at a new set date hearing on February 6, 1995, at which time the discipline hearing was scheduled for May 3, 1995.

69. Since first informing the Law Society of their problems in January 1991, the Solicitor and Mr. Fischman have felt that it would be irresponsible and risky to seek out new clients while there are disciplinary hearings pending against them. They have, consequently, confined their practice primarily to servicing the matters for existing clients at the time that difficulties in their practice arose. All of the work they have done with respect to delinquent mortgages -- all power of sale proceedings, negotiations, mortgage renewals and related business -- has been performed for the firm's clients free of charge. The effect of this has been that the Solicitor and Mr. Fischman have virtually ceased building a renewed client base and practice and have virtually no income from the work they continue to do.

70. The passage of time has also inevitably had an impact on the Solicitor and Mr. Fischman in their position with creditors and claimants. The resources which were available to the Solicitor and Mr. Fischman to reimburse the various creditors who suffered losses in the economic downturn have been substantially depleted.

VII. CHARACTER REFERENCES

71. The Solicitor and Mr. Fischman have received numerous character references from clients, colleagues at the bar, and members of the community. These letters are contained in the Character Brief which will be filed separately.

VIII. PENALTY

72. Discipline counsel for the Law Society and the Solicitor jointly propose (i) a suspension of the Solicitor's right to practise for a period of four months; (ii) participation in and co-operation with the Practice Review Program; (iii) the Solicitor's undertaking that he cease mortgage brokering from the firm; (iv) periodic audits at the Solicitor's expense (timing and frequency to be discussed); and (v) costs in the amount of \$7,500, payable in instalments of \$250 per month commencing after serving the four month suspension as the appropriate penalty in the circumstances of this case.

DATED at Toronto this 3rd day of May, 1995."

In regard to Complaint D171/94 the agreed facts were as follows:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D171/94 and is prepared to proceed with a hearing of this matter on May 3, 1995.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D171/94 and this agreed statement of facts with his counsel, Edward M. Morgan and Sandra A. Forbes, and admits particulars 2(a) and (b). The Solicitor also admits that the facts contained in this agreed statement of facts constitute professional misconduct as herein described in regard to those particulars.

IV. FACTS

4. The Solicitor is 52 years of age. He was called to the Bar on March 21, 1969 and has, since the date of his call to the Bar, practised law in partnership with Melvin Diamond. The law practice of Diamond & Fischman is located in Oshawa, Ontario (the "firm"). Neither lawyer has a Discipline record.

V. BACKGROUND FACTS

5. The allegations of professional misconduct particularized in the Complaint result from the Solicitor's involvement in the mortgage brokerage business and involve the following corporations and individuals:

- (i) The Solicitor and Mr. Diamond incorporated an Ontario corporation, 556426 Ontario Limited ("556426"), the shares of which were owned 75% by Mr. Diamond's wife, Leona Diamond, and 25% by the Solicitor. 556426 was registered as a mortgage brokering company operating under the name Secure Mortgage Company. Through 556426, the Solicitor and Mr. Diamond arranged mortgages. Specifically, 556426 would act as an intermediary and broker between potential mortgagors and either lending institutions or private parties who might act as mortgagors. For certain clients, mortgage payment

cheques were processed through 556426's bank accounts. For the most part, the collection of mortgage payments, calculation of amount of cheques and preparation of those cheques, and the allocation of the payments to various clients were services performed by the firm, not 556426. Any charges incurred for the collection of cheques, the return of cheques due to insufficient funds, or for mortgage renewals were assessed to the mortgagors and paid to the firm.

- (ii) Mr. Diamond incorporated MND Enterprises Ltd. ("MND Ltd."), a corporation wholly owned by him. MND Ltd. held a 25 percent interest in 800731 Ontario Limited ("800731").
- (iii) SMF Enterprises Ltd. ("SMF Ltd.") was incorporated by the Solicitor and is a corporation wholly owned by him. SMF Ltd. owns 25 percent of the shares of 800731.
- (iv) The remaining 50 percent of 800731 was owned by an unrelated individual by the name of Joe Bigas.
- (v) 495807 Ontario Ltd. is a company 75% owned by Leona Diamond and 25% by the Solicitor.
- (vi) Mr. Diamond owns 50 percent of the shares of 664776 Ontario Limited. A client and business associate of the Solicitor, Paul Kahn, owns the remaining 50 percent of the shares.
- (vii) Nath-Mar Investments Limited ("Nath-Mar") is an Ontario corporation the shares of which are held equally by the Solicitor and Leona Diamond. Nath-Mar was incorporated in order to assist in preparing discharges of mortgages and was also involved in some mortgage investments.
- (viii) Meredith Development Corporation ("Meredith") is jointly owned by the Solicitor and Paul Kahn. Meredith was in the business of buying and selling property and had invested in eight commercial properties with a view to developing these properties. These properties appeared to have lucrative development potential. Large sums of money were spent on development but, unfortunately, market conditions changed drastically so that development was not financially feasible.
- (iv) MND Ltd. and SMF Ltd. each owned 50 percent of the shares of 690204 Ontario Limited ("690204"). 690204 is a bare trustee for Meredith.

6. During the late 1980s, the Solicitor and Mr. Diamond arranged mortgages. Many of the firm's clients invested in these mortgages and the firm guaranteed a number of investor clients' mortgages. At May 31, 1991, a total of 709 mortgages had been arranged with a principal balance of \$44,944,864.99. Of that principal balance, \$2.5 million was comprised of the Solicitor and Mr. Diamond's own mortgages, and approximately \$3.2 million were not mortgages arranged by 556426 but were comprised of vendor take back mortgages or mortgages placed by lending institutions.

7. In the late 1980s, the real estate market went into sharp decline. Many of the mortgaged properties that the Solicitor and Mr. Diamond believed were very secure were abandoned by owners who were no longer able to meet their mortgage obligations. The Solicitor and Mr. Diamond attempted to assist the firm's clients and protect the clients' interests in a manner which was consistent with the clients' personal circumstances by, for example, re-purchasing a number of non-performing mortgages. The money used to assist the firm's clients came from 495807 and 556426. The Solicitor and Mr. Diamond spent over \$500,000 of their own funds to honour mortgage guarantees, and also to make mortgage payments to clients who did not receive such a guarantee but were in need of the money when the mortgage went into default. The Solicitor estimates that approximately \$50,000 of this was paid toward mortgages where the solicitors had an interest in the borrower. The Lawyers' Professional Indemnity Company has also expended funds to settle errors & omissions claims that have arisen as a result of these transactions.

8. The Solicitor and Mr. Diamond, through their counsel, approached the Law Society as soon as they realized that problems regarding the guaranteeing of mortgages and borrowing of funds from clients existed. This was prior to the receipt of any client complaints. In January 1991, John I. Laskin, who was retained by the firm in December 1990, contacted the Law Society to report that he had been retained regarding the investment of client funds in mortgages, and advised the Law Society that there may be a problem. He outlined the nature of the potential problem to the then senior discipline counsel.

9. In February 1991, the Law Society began to receive complaints from various clients referred to throughout the body of this document regarding their mortgage investments.

10. By letter dated May 10, 1991, a copy of which is attached as Exhibit 1 to this agreed statement of facts, Mr. Laskin provided the Law Society with a status report and informed the Law Society that Peat Marwick had been retained by Diamond & Fischman to prepare a financial analysis of the mortgage loans. This report was commissioned by the Solicitor and Mr. Diamond at substantial cost to the firm. By May 31, 1991, power of sale proceedings had been commenced on 139 of the 709 mortgages, with a cumulative balance due of \$13,828,416.21. This cumulative balance does not reflect the actual loss to the clients. Many mortgages were either fully or partly paid off as a result of power of sale proceedings and other recovery mechanisms. Many clients did not suffer any losses even where their mortgage went into default. Attached as Exhibit 2 to this agreed statement of facts is a 3 page list of mortgages which indicates the state of the mortgages at May 31, 1991 and May 31, 1992. This 3 page list is a random sampling of an eleven page list of all mortgages chosen by the solicitors to indicate the status of a number of the mortgages as at May 31, 1992.

11. A meeting took place in the offices of the Law Society on July 9, 1991 at which time counsel for the Solicitor and Mr. Diamond outlined the entire mortgage portfolio situation as well as the difficulties that the Solicitor and Mr. Diamond were having in meeting all of the guarantees they had made to clients regarding the mortgage investments. While the Solicitor and Mr. Diamond had initially continued to make mortgage payments from their own funds when mortgagors defaulted, Mr. Laskin stated that the downturn in the real estate market had had disastrous financial consequences and that the Solicitor and Mr. Diamond were now facing personal bankruptcy.

12. Under cover of a letter dated October 25, 1991, Mr. Laskin provided the Law Society with the formal report prepared by Peat Marwick and a letter from the Solicitor and Mr. Diamond dated October 23, 1991 containing comments on the report and providing assurance that all best efforts were being taken to resolve their clients' difficulties. The Peat Marwick report, dated October 22, 1991, assessed the number and value of outstanding mortgages and the assets available to meet any personal guarantees. The report also confirmed that the firm's trust

9th December, 1995

accounts did not reveal any irregularities. This was subsequently confirmed by the Law Society as a result of its own investigation. No evidence of misuse or misappropriation of the mortgage loan proceeds has ever been discovered, and none is alleged by the complainants.

13. The Law Society commenced an audit and investigation of the firm's practice in October 1991 as a result of the client complaints. The Solicitor and Mr. Diamond co-operated fully in the audit and investigation and willingly provided the Law Society with a volume of material. They also provided a letter dated March 10, 1992 in which they, to the best of their ability at that time, provided a list of clients to whom either written or verbal guarantees regarding mortgage investments had been given, with the proviso that since there was no central register of all guarantees it was possible that a few names of persons who had received verbal assurances (as opposed to written guarantees) had been omitted. A copy of the March 10, 1992 letter is attached as Exhibit 3 to this agreed statement of facts.

Particular 2b) - Borrowing from Clients

14. A review of the Solicitor's records revealed borrowing from clients during the period 1987 to 1990. The borrowings were direct and indirect through Meredith, 690204, Nath-Mar and 800731. At least 17 mortgages were registered during that period as follows:

Date Mortgage Signed	Mortgagor	Mortgagee	Mortgage Principal
30/10/87	The Merideth Development Corp.	Glenson Investments Inc.	\$100,000.00
25/03/88	*The Merideth Development Corp.	Oreste Emmanula Mizzi	22,728.91
23/06/88	The Merideth Development Corp.	Glenson Investments Inc.	100,000.00
02/12/88	*The Merideth Development Corp.	Joseph & Enza Lamarca	76,600.00
07/07/88	The Merideth Development Corp.	Kvia Investments Limited	155,000.00
21/07/88	The Merideth Development Corp.	David & Pearl Grossman	60,000.00
1988	The Merideth Development Corp.	Jennifer Jenkins Sharon Cohen 495807 Ontario Ltd.	102,000.00
15/03/88	690204 Ontario Ltd.	Mike & Anna Fesiak	18,750.00
20/12/88	690204 Ontario Ltd.	Annette Merkur	21,000.00
04/01/89	The Merideth Development Corp. 495807 Ontario Ltd.	Elsie Brennan	150,000.00
01/05/89	Paul Kahn in trust for The Merideth Development Corp.	Janet & Forest McKnight	100,000.00
05/05/89	Nath-Mar Investments Ltd. 638048 Ontario Limited	Carl and Romy Gold	150,000.00
08/06/89	The Merideth Development Corp.	Winston Williams	150,000.00
30/03/89	The Merideth Development Corp.	495807 Ontario Ltd. in trust for Rick & Elizabeth West & Marina Bovay	32,800.00
13/09/89	The Merideth Development Corp.	Teresa Rossetti	70,000.00
1989	800731 Ontario Limited Sheldon Fischman Joe Bigas Mel Diamond	Kvia Investments Limited	100,000.00
23/04/90	800731 Ontario Limited Mel Diamond Sheldon Fischman Joe Bigas	Glenson Investments Limited	300,000.00

* Mortgage assigned to client

15. In all cases, investing clients were informed that the Solicitor or Mr. Diamond had a personal interest in the property. The Solicitor's mortgage files for the above described mortgages each include a standard form Acknowledgement in which the investor acknowledged being advised by the Solicitor and/or Mr. Fischman that they had a substantial interest in the borrowing company. In each case, the clients also waived their right to independent legal advice by executing the Acknowledgement.

16. In April 1988, the Law Society reviewed the firm's books and records. By letter dated April 25, 1988, a copy of which is attached as Exhibit 4, the Law Society requested certain information, including information regarding transactions which the Solicitor and Mr. Diamond had disclosed as involving borrowing from clients. The Solicitor provided the Law Society with this information by letter dated August 16, 1988. In this letter, the Solicitor advised that such clients had waived independent legal advice and had signed Acknowledgements that they were aware of the personal interests of the Solicitor and/or Mr. Diamond. The Solicitor's August 16, 1988 letter is attached as Exhibit 5 to this agreed statement of facts.

17. By letter dated February 27, 1989, a copy of which is attached as Exhibit 6, in response to the receipt of the Solicitor's 1988 Form 2 declaration, the Law Society requested particulars of Solicitor's indebtedness to clients, including a report of the lender's solicitor in accordance with Rule 7 of the *Rules of Professional Conduct* and an acknowledgement from each lender waiving recourse to the Compensation Fund. A revised Acknowledgement form incorporating a provision waiving recourse to the Compensation Fund as required by the Law Society was sent to the Law Society by the firm. No further response regarding the revised acknowledgement was received from the Law Society. The Solicitor and Mr. Diamond did not advert their minds to the fact that all of the concerns raised in the February 27, 1989 letter were not addressed by the revised acknowledgement. The Law Society does not allege any dishonesty on the Solicitor and Mr. Diamond's behalf. A sample Acknowledgement in use prior to the amendment and a sample as amended are attached as Exhibit 7 to this agreed statement of facts.

18. The Solicitor admits that, despite the execution of the Acknowledgement in a form acceptable to the Law Society, he failed ensure that the clients received independent legal representation in regard to their loan advance, in violation of Rule 7.2 of the *Rules of Professional Conduct*. In all other respects, the lending clients' interests were protected by the Solicitor and Mr. Diamond as required by the nature of the transactions.

Particular a) - Rule 23 - Mortgages Guarantees

19. The Solicitor and Mr. Diamond acted for many client/investors in arranging mortgages. At the outset of each mortgage transaction, they disclosed, in writing, that they acted solely for the investor and that the funds might also be advanced out of companies in which they or their family relations were shareholders. In the majority of cases, funds were not advanced by such companies. As described above, Acknowledgements were obtained to indicate that the firm acted solely for the mortgagee and not for the borrower. Also, the borrower was asked to have the mortgage documentation reviewed by an independent Solicitor of their choice.

20. The Solicitor and Mr. Diamond provided guarantees to a number of clients regarding their mortgage investments in good faith and out of a sense of commitment to and support for the firm's clients. From the 1970s until stopping their practice in the late 1980s, approximately \$10 to \$12 million worth of the mortgages were guaranteed. At the time the guarantees were given, the Solicitor and Mr. Diamond were confident that their substantive asset base was large enough to meet the eventualities of having to make good on the guarantees. The schedule of clients to whom the Solicitor and/or Mr. Diamond gave these guarantees has previously been referred to as Exhibit 3 to this agreed statement of facts. Examples of the written guarantees provided by the Solicitor's firm are attached collectively as Exhibit 8 to this agreed statement of facts.

21. In the fall of 1990, the Solicitor and Mr. Diamond advised their clients that they would no longer be able to compensate for missed mortgage payments or to honour repurchase agreements. Clients who would be in a better position to be repaid if they held onto their investments were advised, when appropriate, to renew their mortgages. In still other cases, power of sale proceedings were initiated in order to recuperate as much of the client's investment as was possible. In other cases, where the client was in desperate circumstances following a mortgagor's default, the Solicitor and Mr. Diamond continued to personally make the mortgage payments to the best of their ability. At no time has the Solicitor or Mr. Diamond been accused of abandoning the firm's clients. Further, in all instances, the above described assistance was provided free of charge by the firm and the firm incurred disbursement charges which in many instances were not reimbursed by the clients. Attached as Exhibit 9 to this agreed statement of facts are examples of letters sent to clients at this time.

22. As a result of the circumstances set out above, the Solicitor and Mr. Diamond have been unable to honour all of the guarantees made to the firm's clients.

Particular 2c) - Communications with the Law Society

23. In 1987, Margo Ferguson, then an Examiner with the Law Society, now the Manager of the Examiner Program with the Law Society, conducted a spot audit of the books and records of the firm. She met with the Solicitor and asked him to reply to an Audit Questionnaire, a copy of which is attached as Exhibit 10 to this agreed statement of facts. In the Audit Questionnaire, while the Solicitor did disclose the firm's investment relationship with some of its clients, he indicated that the members of the firm were not indebted either directly or indirectly to a client or former client. The Solicitor signed the report containing this answer on March 18, 1988.

24. Shortly after the audit, the Solicitor realized his error and called someone in the Law Society's audit department, who he believes was Robert Anderson, to advise that he omitted disclosing borrowings from clients during the audit.

25. The Solicitor was mistaken when he made the representation outlined in paragraph 23 above. Three days previously, a mortgage was given to the firm's clients, Anna and Mike Fesiak, from 690204. The Solicitor was not aware of this when he signed the report on March 18, 1988. The Solicitor did not intend to misrepresent to the Law Society the fact of borrowing from clients. This was an oversight.

26. In the Solicitor's Form 2 filing for the 1988 fiscal year end, he declared he was indebted to clients for monies borrowed. By letter dated February 27, 1989, the Law Society inquired about this indebtedness. A copy of the Law Society's February 27, 1989 letter is attached as Exhibit 6 to this agreed statement of facts. The Solicitor replied by way of letter dated May 5, 1989, a copy of which is attached as Exhibit 11 to this agreed statement of facts. In this letter, the Solicitor indicated that "the information remains the same as last year with the exception of one file, for which the appropriate documents are disclosed herewith. Also attached is a copy of last year's letter dated August 16, 1988".

27. In stating that the information was the same as last year's, the Solicitor meant that the situation set out in the August 16, 1988 letter (being that the firm had clients who had loaned monies to corporations in which the Solicitor and Mr. Diamond held interests) remained, with the proviso that he was aware of one new loan that had occurred since that letter, being the loan by Elda Del Degan, who was the Solicitor's client. While there were other new mortgages during this time period, the Solicitor's failure to disclose them was an oversight. He was at the time unaware of several mortgages arranged by Mr. Diamond.

VI. THE INVESTIGATION AND PROCEEDINGS TO DATE

28. Following John Laskin's report to senior discipline counsel in January 1991, the Law Society received the complaints outlined above. The first of these was received by the Law Society on February 18, 1991. Each of the complaints was forwarded to the Solicitor and Mr. Diamond for their comments, and they responded to each of these complaints promptly and in writing.

29. At the July 9, 1991 meeting between Mr. Laskin and then senior discipline counsel, Gavin MacKenzie, Mr. Laskin was informed that the Law Society would be unable to advise the Solicitor and Mr. Diamond of its position until some time after mid-August. The Solicitor and Mr. Diamond wrote to a number of their creditors and client-claimants on July 11, 1991 in order to advise them that they would proceed with plans to make a financial proposal once they had the Law Society's response. A copy of this letter is attached hereto and marked as Exhibit 12.

30. On October 25, 1991, the Peat Marwick report described above was complete, and a copy was sent directly to the Law Society. In his covering letter, Mr. Laskin expressed his hope that discipline counsel would "have an opportunity to review this material fairly quickly" so that they could meet soon after to discuss how best to proceed. A copy of Mr. Laskin's letter and the Peat Marwick Report are attached hereto and marked as Exhibits 13 and 14 respectively. Mr. Laskin received no response, and wrote to the Law Society again on November 19, 1991, reiterating the stated desire to have these matters dealt with as soon as possible. A copy of John Laskin's letter dated November 19, 1991 is attached hereto and marked as Exhibit 15.

31. In early 1992, a Law Society investigator, Doug Weber, attended at the firm's offices in order to review the mortgage files. The Solicitor and Mr. Diamond cooperated with Mr. Weber, providing him with any information he required and access to the firm's files. Mr. Laskin wrote to the Law Society on March 4, 1992, confirming that a review by the Law Society of the files at Diamond & Fischman's offices had taken place. A copy of John Laskin's letter dated March 4, 1992 is attached hereto and marked as Exhibit 16. In this letter, Mr. Laskin again conveyed the desire to have the uncertainty surrounding the Solicitor's and Mr. Diamond's professional life resolved once and for all, and requested the opportunity to meet with Law Society discipline counsel within two weeks (i.e. by mid-March 1992).

32. Having received no reply from the Law Society, John Laskin wrote to discipline counsel again on April 14, 1992, proposing that a meeting be held within a week to ten days. A copy of John Laskin's letter dated April 14, 1992 is attached hereto and marked as Exhibit 17. During this time, the proposal by the Solicitor and Mr. Diamond to their creditors remained in abeyance, the potentially damaging effects of which were noted by Mr. Laskin in his letter. Gavin MacKenzie wrote back to Mr. Laskin that same day, indicating that he expected a completed report by the end of the following week and advising that he would contact Mr. Laskin once it was available. A copy of Gavin MacKenzie's letter dated April 14, 1994 is attached hereto and marked as Exhibit 18.

33. John Laskin wrote to the Law Society on June 9, 1992, again indicating that the Solicitor and Mr. Diamond were anxious to address the Law Society's concerns and to have the matter resolved, and that they would therefore like to set a date to meet with the Law Society. A copy of John Laskin's letter dated June 9, 1992 is attached hereto and marked as Exhibit 19.

34. Mr. MacKenzie telephoned Mr. Laskin in response to his letter of June 9, 1992. Mr. MacKenzie advised Mr. Laskin that the Law Society investigator's report would be complete pending some further information from the Solicitor and would be ready by month end. Mr. Laskin and Mr. MacKenzie then had some preliminary discussions about an appropriate penalty subject to review of the report. During this conversation, Mr. Mackenzie advised Mr. Laskin that he did not view this as a disbarment case.

35. John Laskin took the opportunity in late July 1992, while attending a meeting at the Law Society with respect to another client, to inquire into the status of the Law Society's investigation of our matter. Mr. Laskin was advised by Douglas Weber, the Law Society's Audit and Investigation Department employee who had conducted the audit of the firm's files, that the report which discipline counsel had indicated he was waiting for had just been finalized.

36. John Laskin met with Gavin MacKenzie at the Law Society's offices on August 13, 1992 and discussed the various complaints that the Law Society had received. Mr. MacKenzie indicated at this meeting that he expected that an agreed statement of facts could be agreed upon by counsel within 30 days. Two weeks later, on August 26, 1992, John Laskin received the Law Society's Counsel Briefs in this matter. In a covering letter, Mr. MacKenzie indicated that another complaint had been filed following completion of Mr. Weber's report and that an addendum to the report would be provided as soon as one was completed. Attached hereto and marked as Exhibit 20 is a copy of Gavin MacKenzie's covering letter dated August 26, 1992.

37. No addendum to the original Counsel Briefs was ever produced by the Law Society.

38. By letter dated November 3, 1992 a copy of which is attached as Exhibit 21 to this Agreement Statement of facts, Mr. MacKenzie provided Mr. Laskin with an update on the status of the investigation of the new complaint referred to in paragraph 62 above. In December 1992, Mr. Laskin confirmed a meeting between himself, the Solicitor, Mr. Diamond, Doug Weber and Mr. MacKenzie at the Law Society offices on January 11, 1993. At this meeting, they reviewed all of the complaints and the Solicitor and Mr. Diamond were again informed that some resolution of the matter could be expected from the Law Society shortly. The Solicitor and Mr. Diamond advised their clients accordingly.

39. The Solicitor and Mr. Diamond then heard nothing further from the Law Society through the balance of 1993 and throughout the first half of 1994. During this time they also received no notice of any new complaints against them.

40. While no new complaints were reported to the Solicitor and Mr. Diamond, both solicitors subsequently learned from Discipline Counsel that the Law Society had received further client complaints. In addition, there were concerns of dishonesty by the solicitors; investigation by the Society resulted in a finding that no such dishonesty took place.

41. On June 29, 1994, Christina Budweth, who assumed carriage of the Solicitor's and Mr. Diamond's file as discipline counsel at the Law Society following Gavin MacKenzie's departure in June 1993, wrote to the Solicitor and Mr. Diamond enclosing the formal complaints.

42. Edward Morgan, who replaced John Laskin as counsel for the Solicitor and Mr. Diamond upon Mr. Laskin's appointment to the Bench in February 1994, spoke to Christina Budweth on July 14, 1994 and requested full disclosure from the Law Society prior to the set date hearing. Mr. Morgan was informed by Ms. Budweth that disclosure of the Law Society's case is contained in the Counsel Briefs which were provided to Mr. Laskin two years earlier. Mr. Morgan confirmed this conversation by way of letter dated July 14, 1994, a copy of which is attached hereto and marked as Exhibit 22.

43. A set date hearing took place on July 26, 1994, and the discipline hearing was scheduled to take place on November 29 and 30, 1994. Subsequently, however, Ms Budweth and Mr. Morgan agreed that it would be profitable for both sides to attend at a pre-trial conference, which was held in November 1994 and which resulted in the rescheduling of the disciplinary hearing. Counsel appeared at a new set date hearing on February 6, 1995, at which time the discipline hearing was scheduled for May 3, 1995.

44. Since first informing the Law Society of their problems in January 1991, the Solicitor and Mr. Diamond have felt that it would be irresponsible and risky to seek out new clients while there are disciplinary hearings pending against them. They have, consequently, confined their practice primarily to servicing the matters for existing clients at the time that difficulties in their practice arose. All of the work they have done with respect to delinquent mortgages -- all power of sale proceedings, negotiations, mortgage renewals and related business -- has been performed for the firm's clients free of charge. The effect of this has been that the Solicitor and Mr. Diamond have virtually ceased building a renewed client base and practice and have virtually no income from the work they continue to do.

45. The passage of time has also inevitably had an impact on the Solicitor and Mr. Diamond in their position with creditors and claimants. The resources which were available to the Solicitor and Mr. Diamond to reimburse the various creditors who suffered losses in the economic downturn have been substantially depleted.

VII. CHARACTER REFERENCES

46. The Solicitor and Mr. Diamond have received numerous character references from clients, colleagues at the bar, and members of the community. These letters are contained in the Character Brief which will be filed separately.

VIII. PENALTY

47. Discipline counsel for the Law Society and the Solicitor jointly submit that (i) a suspension of the Solicitor's right to practise for a period of three months (ii) his participation in and cooperation with the Practice Review Program (iii) the Solicitor's undertaking that he will cease mortgage brokering from the firm (iv) periodic audits at the Solicitor's expense (timing and frequency to be discussed and (v) costs in the amount of \$7,500, payable in monthly installments of \$250 per month commencing after serving the three month suspension is the appropriate penalty in the circumstances of this case.

DATED at Toronto this 3rd day of May, 1995."

RECOMMENDATION AS TO PENALTY

The Committee recommends in regard to Melvin Nathan Diamond:

- i) that the Solicitor be suspended for a period of six (6) months;
- ii) that the Solicitor participate in and co-operate with the Practice Review Program;
- iii) that the Solicitor undertake to cease mortgage brokering from the firm;
- iv) that there be periodic audits at the Solicitor's expense (timing and frequency to be discussed); and
- v) costs in the amount of \$7,500 payable in instalments of \$250 per month commencing after serving the suspension.

The Committee recommends with regard to Sheldon Marshall Fischman:

- i) that the Solicitor be suspended for a period of five (5) months, the suspension to commence 1 month after the termination of suspension of Melvin Diamond;
- ii) that the Solicitor participate in and co-operate with the Practice Review Program;
- iii) that the Solicitor undertake that he will cease mortgage brokering from the firm;
- iv) that there be periodic audits at the Solicitor's expense (timing and frequency to be discussed); and
- v) costs in the amount of \$7,500, payable in monthly instalments of \$250 per month commencing after serving the suspension.

REASONS FOR RECOMMENDATION

Joint submissions with respect to penalty were in conformity with paragraph 72 of the Agreed Statement of Facts in regard to Mr. Diamond and paragraph 47 of the Agreed Statement of Facts in regard to Mr. Fischman. The suspensions proposed for each are four months in the case of Mr. Diamond and three months in the case of Mr. Fischman, based upon their relative acts or participation in the misconduct alleged.

The Committee's recommendations are an endorsement of the joint submissions except in so far as the periods of suspension are concerned. Convincing this Committee to accept the concept of suspension over a more serious form of penalty is in itself a substantial accomplishment. However, your Committee feels that it is correct in its acceptance based upon all of the circumstances.

The most important factors which convinced the Committee to put forward its recommendations to Convocation are as follows:

1. substantial disclosure to the Law Society was made by the solicitors at a very early stage and voluntarily;
2. the solicitors have been co-operative throughout;
3. by admitting their misconduct, the solicitors have made unnecessary what would have been a very long and difficult hearing;
4. there was no apparent dishonesty on the part of the solicitors in their dealings with numerous parties involved in numerous transactions;
5. the solicitors engaged in very substantial efforts at restitution;
6. each of the solicitors have been at the Bar for over 25 years with, until now, unblemished discipline records;

7. the filing of approximately 25 written character references largely from clients and members of the Bar.

A most disturbing aspect of the conduct of both solicitors is that of the somewhat astounding magnitude of their activities. As we understand the facts, these solicitors were administering, in one way or another, a portfolio of some 709 mortgages having a total face value of some \$45,000,000.00 on May 31, 1991 (see paragraphs numbered 6 in both Agreed Statements of Facts). Perhaps, we might be allowed to speculate that there were some established financial institutions in the Province of Ontario who were doing less mortgage business at the time.

However, it has been accepted by Counsel for the Law Society and now by this Committee, that the solicitors were acting in good faith and in apparent ignorance of the requirements of Rules 7 and 23 of the Rules of Professional Conduct. In the case of Mr. Diamond, there were several violations of other Rules, as well. Obviously, the conduct of these solicitors has created and may very well continue to create serious difficulties for the profession in regard to errors and omissions claims. We are of the view that this is a matter which we can and do take into account in making our recommendations as to penalty.

We also take into account the following factors:

1. given their past records and excellent reputations, these solicitors are very likely rehabilitated now and it is extremely unlikely that they will ever be in trouble with the Law Society again;
2. the suspensions recommended will be significant punishments for these solicitors in all the circumstances;
3. the requirement that the solicitors undertake to cease mortgage brokering activities from the firm will provide future protection for the profession;
4. the requirement of periodic audits will provide specific deterrence although we are confident that these solicitors are well motivated to police themselves;
5. the requirement that the solicitors participate in the Practice Review Programme will provide an excellent opportunity for the solicitors to become better acquainted with the Rules of Professional Conduct.

Considering the magnitude of the solicitors' activities and the seriousness of their misconduct in relation to the Rules and, in particular Rule 7, we are of the opinion that the suspensions recommended are not sufficient and accordingly, recommend the longer suspensions set out above.

Your Committee was convinced by representations made by Counsel for the solicitors that suspending both solicitors for roughly the same period of time would be excessively onerous given their partnership and the nature of their practice. We are therefore recommending to Convocation that their suspensions be served consecutively - Mr. Diamond's and then Mr. Fischman's - with a one month overlap in order to allow for an orderly transition. We believe that such a disposition conforms with the concern often expressed in Convocation for the disproportionate affect of suspensions on sole practitioners as opposed to those practising in firms. In this case, the solicitors are the entire firm and, therefore, to have their suspensions run concurrently we believe would work an excessive hardship upon them.

9th December, 1995

Finally, Counsel for the solicitors referred us to the decisions of Convocation in the cases of Harvey Samuel Margel and David Warga, two solicitors who were found guilty of professional misconduct arising from their activities while in partnership together. Their professional misconduct related to a number of mortgage transactions, albeit of a magnitude far less than that presented in this case. In the result, Mr. Margel was ordered to serve a nine month suspension whereas Mr. Warga was ordered to serve a three month suspension based upon a lesser degree of involvement in the transactions in question. Similarly, in this case, we are satisfied that Mr. Fischman's participation was somewhat less than Mr. Diamond's and have differentiated in our recommendations for that reason.

Some years ago, Convocation was presented with an invitation to prohibit altogether mortgage brokering activities on the part of solicitors. Convocation chose not to do that, but ultimately, did impose additional filing and administrative obligations upon solicitors who engaged in mortgage brokering activities. Perhaps, this case will convince Convocation to revisit the issue.

Melvin Nathan Diamond was called to the Bar on the 21st day of March, 1969.

Sheldon Marshall Fischman was called to the Bar on the 21st day of March, 1969.

ALL OF WHICH is respectfully submitted

DATED this 10th day of October, 1995

Roger D. Yachetti, Q. C.
Chair

There were no submissions and the Reports were voted on and adopted.

The recommended penalty of the Discipline Committee was as follows:

- (1) that Melvin Nathan Diamond be suspended for a period of 6 months, pay costs in the amount of \$1,500 together with the conditions set out in the Report; and
- (2) that Sheldon Marshall Fischman be suspended for a period of 5 months, the suspension to commence 1 month after the termination of suspension of Melvin Diamond, to pay costs in the amount of \$7,500 together with the conditions set out in the Report.

Mr. Brown drew to Convocation's attention the implications of accepting the recommended penalty of the Discipline Committee that the solicitors serve their suspensions consecutively rather than concurrently and how this would be viewed by the sole practitioner.

Mr. Morgan made submissions in support of the recommended penalty being consecutive but argued that a lesser suspension period for both solicitors of 4/3 months would be more appropriate since the solicitors had co-operated fully with the Society and there had been a lengthy delay.

Mr. Morgan requested that the first suspension commence February 1st, 1996.

Mr. Brown made brief submissions in reply.

There were questions from the Bench.

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

It was moved by Mr. Wilson, seconded by Ms. Curtis that the recommended penalty be adopted with the first suspension to commence on February 1st, 1996.

Carried

It was moved by Mr. Wright, seconded by Mr. Gottlieb that the joint submission of counsel originally made at the hearing be reinstated, that is, that the solicitors serve their suspensions concurrently.

Not Put

It was moved by Mr. Swaye, seconded by Mr. Carey that the solicitors be suspended for a period of 4 and 3 months to be served consecutively.

Not Put

Ms. Cronk and Mr. Armstrong agreed to prepare Reasons.

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Re: Melvin Nathan DIAMOND and Sheldon Marshall FISCHMAN (cont'd)

Counsel, the solicitors, the reporter and the public were recalled and informed of Convocation's decision that the solicitors be suspended for 6 to 5 months, the first suspension commencing February 1st, 1996 and to be served consecutively.

Counsel were advised that Reasons would be prepared.

ADMISSIONS AND MEMBERSHIP COMMITTEE (cont'd)

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The ADMISSIONS AND MEMBERSHIP COMMITTEE begs leave to report:

Your Committee met on Saturday, the 9th of December, 1995, the following being present: Ms. Bachhouse, Ms. Cronk and Ms. Ross.

Also present: M. Angevine.

B.
ADMINISTRATION

B.1. MEMBERSHIP UNDER RULE 50

B.1.1. (a) Retired Members

B.1.2. The following members who are sixty-five years of age and fully retired from the practice of law, have requested permission to continue their memberships in the Society without payment of annual fees:

John Louis Agro	Ancaster
Norman Craig Brown	London
Brian Clive Bynoe	North York
John Beaton Carrel	Thunder Bay
Margaret May Cash	London
Harvey Sydney Cooper	North York
Frederick Charles Dally	Sarnia
Benjamin Walter Doliszny	St. Catharines
William Kenneth Ebert	Port Colborne
Harold Edward Fulton	Toronto
Allan Judd	Hamilton
Kenneth Patrick Lefebvre	Brantford
Douglass Robert Peterson	Toronto
Edgar Frank Stanley Sanders	St. Thomas
William Henry Robins	Niagara

Approved

B.1.3. b) Incapacitated Members

B.1.4. The following members are incapacitated and unable to practise law and have requested permission to continue their memberships in the Society without payment of annual fees:

Lorne Marshal Alter	Vaughan
Morris Edelstein	Vaughan
Peter Richard Fairfield McGaw	Peel Region
Thomas Edward Quinlan	St. Catharines

Approved

B.1.5. (c) RESIGNATION - REGULATION 12

B.1.6. The following members have applied for permission to resign their memberships in the Society and have submitted Declarations/Affidavits in support. These members have requested that they be relieved of publication in the Ontario Reports:

- (1) David Munro Beatty of Toronto, Ontario, was called to the Bar on October 19, 1973. He states that he has never engaged in the practice of law. The 1995/96 annual fee is owing. The annual filings are up to date.
- (2) John Michael Benesh of Ottawa, Ontario was called to the Bar on April 17, 1985. He states that he has never practised law as a sole practitioner, in a firm, nor in association; therefore, having no private clients in these capacities. The 1995/96 annual fee is owing. The annual filings are up to date.

- (3) Paul Christian Bourque of Edmonton, Alberta, was called to the Bar on March 22, 1977. He states that he has not practised law in Ontario since May 1980. The first instalment of the annual fee is paid. The annual filings are up to date.
- (4) Hersh Eric Bromley of Toronto, Ontario, was called to the Bar on March 21, 1969. He declares that he has not practised law since September 1984, and that all trust funds or clients' property has been paid over or accounted for prior to his ceasing practice in 1984. The 1995/96 annual fee is owing. The annual filings are up to date.
- (5) Paul Henry Caron of Wakefield, Quebec, was called to the Bar on April 14, 1982. He declares that he ceased practising law on September 30, 1993. All trust funds and clients' property has been accounted for, and paid over to the persons entitled thereto. All client matters were completed in 1993, and arrangements made with Mr. C. Daigneault, and Mr. R. Owen, both of Ottawa, Ontario. The annual fee is paid in full. The annual filings are up to date.
- (6) Krista Lynn Colford of Fredericton, New Brunswick, was called to the Bar on February 5, 1993. She declares that she has never practised law in Ontario. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (7) Hazel Theresa Corcoran of Calgary, Alberta, was called to the Bar on February 5, 1993. She states that she ceased practising the law of Ontario on March 31, 1993. She declares that she has never handled any Ontario clients' trust funds or property. The annual fee is outstanding. The annual filings are due for November 30, 1995.
- (8) Karen Elizabeth Crombie of Halifax, Nova Scotia was called to the Bar on March 30, 1990. She states she ceased practising as a partner with the firm of McDonald & Hayden in December of 1994. She declares that she was not responsible for any trust funds or clients' property. All books and records relating to the practice carried on by Ms. Crombie in Ontario, remain with the law firm of McDonald & Hayden. The 1995/96 annual fee is outstanding. The annual filings are due for November 30, 1995.
- (9) Lori Lynn Lowther Cruickshank of Halifax, Nova Scotia, was called to the Bar on October 22, 1993. She declares that she has not practised law in Ontario, and that she has been practising law in Nova Scotia since her call to the Nova Scotia Barristers' Society on June 17, 1994. The 1995/96 annual fee is owing. The annual filings are up to date.
- (10) Peter Andrew Doig of Halifax, Nova Scotia, was called to the Bar on March 30, 1990. He states that he ceased practising Ontario law on September 30, 1994. He declares that he was not responsible for handling trust funds or other clients' property. All client matters have been completed, disposed of, or arrangements made with the law firm of Meighen Demers. The 1995/96 annual fee is outstanding. The annual filings are up to date.

- (11) Joanne Marie Dolfato of Toronto, Ontario, was called to the Bar on February 16, 1995. She states that in May 1995, she ceased practising law to pursue other employment opportunities. She declares that as an associate with the firm of Fred Tayar & Associates, she was not responsible for, nor handled any trust funds or clients' property. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (12) Mary Elisabeth Ewart of Toronto, Ontario, was called to the Bar on April 12, 1962. She declares that she has not engaged in the practice of law, except as an employee of the Ontario Legal Aid Plan since July 1984. She states that she has not been responsible for trust funds or clients' property. The annual fee is paid in full. The annual filings are up to date.
- (13) Frances Goldberg of Comox, British Columbia, was called to the Bar on February 7, 1992. She declares that she has never been in private practice in Ontario and has never handled trust funds or other clients' property. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (14) Harreson Raphael Greene of Gelderland, Nederland was called to the Bar on April 23, 1993. He states that he practised law in Ontario from April 23, 1993 through March 8, 1994. He declares that while practising law in Ontario, he acted as in-house counsel for one client -- Abitibi-Price Inc., and at no time was responsible for or handled trust funds or its property. The annual fee has been paid in full. The annual filings are up to date.
- (15) James John Patrick Hammond of Toronto, Ontario, was called to the Bar on February 16, 1995. He declares that he has not practised law since his call to the Bar, but has acted as Patient's Rights Advocate for the Ministry of Health. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (16) Katherine Elizabeth Hewson of Toronto, Ontario, was called to the Bar on April 11, 1986. She states that since her call to the Bar, she practised as a solicitor for the Ontario Labour Relations Board from April 2, 1991 to January 27, 1992 (excluding the period of June 20, 1991 to November 25, 1991 -- maternity leave). She declares that she has not been in possession of trust funds or clients' property. The 1995/96 annual fee is owing. The annual filings are up to date.
- (17) Michael Steven Krugel of Comox, British Columbia, was called to the Bar on February 25, 1977. He states that he has never been in the private practice of law in Ontario; and, that he has never handled any trust funds or clients' property. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (18) Anita Susan Levin of Toronto, Ontario was called to the Bar on April 5, 1979. She states that she ceased practising law in 1981. All trust funds or clients' property for which she was responsible, has been accounted for or arrangements made in 1981. The 1995/96 annual fee is owing. The annual filings are up to date.

- (19) Norman Douglas MacPhee of Victoria, British Columbia was called to the Bar on February 9, 1995. She declares that she has not been a practising member since her call to the Bar. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (20) Thomas David Prest of Vancouver, British Columbia, was called to the Bar on April 13, 1978. Since 1982, he has been employed exclusively by the Department of Justice, and declares that he has not handled trust funds or clients' property during that period. The 1995/96 annual fee is owing. The annual filings are up to date.
- (21) Barbara Susan Saipe of Scarborough, Ontario, was called to the Bar on March 29, 1977. She declares that she ceased practising law in August 1986. All trust funds or clients' property for which she was responsible has been accounted for or paid over to the persons entitled thereto. The 1995/96 annual fee is outstanding. She is required to file a Form 2 Certificate for November 30, 1995.
- (22) Beverley Gault Smith of Prince William, New Brunswick was called to the Bar on September 20, 1956. She is currently suspended for non-payment of the 1982/83 annual fees. She declares that she has not been in the private practice of law since 1973, and has not handled any trust funds or clients' property since leaving the practice of law in 1973. She is owing \$1500 in late filing penalties from 1994.
- (23) Duncan Bruce Smith of Toronto, Ontario, was called to the Bar on March 21, 1975. He states that he ceased practising law on March 31, 1995; and, that as a sole practitioner, he was not responsible for trust funds. All clients' property -- being original wills and powers of attorney-- has been returned to clients. The 1995/96 annual fee is outstanding. The annual filings are up to date.
- (24) Patricia Ann Sullivan of Toronto, Ontario, was called to the Bar on April 9, 1984. She declares that she ceased practising law in Ontario, on December 30, 1994. She states that all trust funds or clients' property has been accounted for, or paid over to the persons entitled thereto. The 1995/96 annual fee is owing. The annual filings are up to date.
- (25) Ronald Jeffrey White of Toronto, Ontario, was called to the Bar on February 16, 1995. He declares that he has not engaged in the practice of law since his call to the Bar. The 1995/96 annual fee is outstanding. The annual filings are up to date.

Approved

C.
INFORMATION

C.1. (a) CHANGE OF NAME

C.1.1.

<u>From</u>	<u>To</u>
Li Beng Gan	<u>Patricia</u> Li Beng Gan (Citizenship Card)
Alexandra Lev	Alexandra Lev- <u>Farrell</u> (Marriage Certificate)
Laura Elizabeth <u>Mallen</u>	Laura Elizabeth <u>Stuart</u> (Marriage Certificate)
Penny Lynn Marie <u>Warner</u>	Penny Lynn Marie <u>Rintoul</u> (Marriage Certificate)
Cindy Lou <u>Biondi</u>	Cindy Lou <u>Govedaris</u> (Marriage Certificate)
Lynda June <u>Townsend</u>	Lynda June <u>Robertson</u> (Marriage Certificate)

Noted

C.1.2. (b) STUDENT

<u>FROM</u>	<u>TO</u>
Denise Marie <u>Bolohan</u>	Denise Marie <u>Taylor Bolohan</u> (Birth Certificate)

Noted

C.2. ROLLS AND RECORDS

C.2.1. (a) Deaths

The following members have died:

Mark Raphael Krasnick British Columbia	Called April 12, 1976 Died July 5, 1994
Robert John Adamson Toronto, Ontario	Called April 19, 1985 Died July 20, 1995
William James Fraser Summers Peel Region	Called March 26, 1971 Died November 14, 1995
Philip Gerald Givens Toronto	Called September 15, 1949 Died November 30, 1995

Noted

9th December, 1995

It was moved by Ms. Ross, seconded by Ms. Cronk that the Report of the Admissions and Membership Committee be adopted.

Carried

DISCIPLINE COMMITTEE

Re: William Donald GRAY - Toronto

The Deputy Secretary placed the matter before Convocation.

Ms. Cronk withdrew for this matter.

Mr. Brown appeared on behalf of the Society and Mr. Roger Smith appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 15th June, 1994, together with an Affidavit of Service sworn 2nd August, 1994 by Ron Hoppie that he had effected service on the solicitor by registered mail on 20th June, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 6th August, 1994 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul D. Copeland, Chair
Netty Graham
Stuart Thom, Q.C.

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

Stephen Foster
for the Society

WILLIAM DONALD GRAY
of the City
of Toronto
a barrister and solicitor

Roger Smith
for the solicitor

Heard: April 18 and 19, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 12, 1993 Complaint D194/93 was issued against William Donald Gray alleging the Solicitor was guilty of professional misconduct.

The matter was heard in public on April 18 and 19, 1994 before this Committee composed of Paul D. Copeland, Chair, Netty Graham and Stuart Thom, Q.C. The Solicitor was present and was represented by Roger Smith. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

2. a) He failed to serve his client, Gladys Castro, in a conscientious, diligent and efficient manner in respect of matrimonial proceedings for which he was first retained in October, 1986;
- b) In February, 1990, he divulged confidential information relating to his client, Gladys Castro, without her authority, to opposing counsel in matrimonial proceedings.

Finding

The misconduct allegations against the Solicitor were strenuously and aggressively defended during the course of a two day hearing before the Committee. Particular 2(a) arose out of the representation provided by the Solicitor to Gladys Castro during the course of interim support proceedings brought by her husband, Jose Castro. Particular 2(b) arises out of actions taken by the Solicitor when responding to the complaint made to the Law Society which resulted in the allegation of professional misconduct contained in paragraph 2(a).

The findings of the Committee are based to a significant degree on credibility assessments on the evidence of Ms. Castro and the Solicitor. For the reasons set out in this decision, we generally accepted the evidence of Gladys Castro, and where it conflicted, rejected the evidence of the Solicitor. We found the Solicitor's evidence on important issues to be evasive, inconsistent and generally not worthy of belief.

Failure to Serve Client

The Solicitor's position, as expressed by his counsel Mr. Smith at the outset of these proceedings is that Mr. Gray was following his client's instructions to the letter throughout the handling of her matrimonial matters and that her instructions on occasion were given contrary to his advice. Mr. Smith described Mrs. Castro as the author of her own misfortunes.

We did not find that the evidence supported the Solicitor's position. We do not propose to review all of the evidence or all of the failings of the Solicitor but we will touch on the ones we find most significant in establishing that the Solicitor failed to serve his client in a conscientious, diligent and efficient manner.

Gladys Castro was married in Chile in 1969. She moved to Canada in September 1974 and at the times relevant to these matters was operating a janitorial service business in Toronto. Ms. Castro testified that she first went to see Mr. Gray concerning her business matters in 1984, and that she consulted with Mr. Gray concerning her matrimonial problems in 1986. She testified that it was on Mr. Gray's advice that she signed a document in English and Spanish, entitled (in English) Affidavit. The Affidavit is attached as Exhibit "A" to these reasons. The purported effect of this document was to transfer the condominium apartment in Chile to Mr. Castro in exchange for Ms. Castro receiving Mr. Castro's "rights and services he has with company Hi Rise Janitorial Services Limited". Mr. Gray testified that he was not retained by Ms. Castro in October of 1986 concerning her matrimonial problems and that he was not consulted regarding the Affidavit (Exhibit "A"). Mr. Gray's evidence was that he first met Ms. Castro in November of 1987 three or four days before he did her affidavit in response to an interim motion for support brought by her husband.

9th December, 1995

The Committee was not persuaded on a balance of probabilities that Ms. Castro had consulted Mr. Gray prior to the time that the Affidavit (Exhibit "A") was prepared. The Committee however rejects Mr. Gray's testimony that he was first consulted by Mrs. Castro in regard to her matrimonial problems in the latter part of November of 1987. The Solicitor at page 5 of his letter to the Law Society on February 13, 1990 stated as follows:

- (h) It should be noted that several lawyers contacted the writer prior to Mr. Peterson; it was Mr. Peterson who actually commenced court proceedings on behalf of Mr. Castro in the month of November 1987.

As well the following appears in the transcript of December 18, 1987 when Ms. Castro was cross-examined on her affidavit sworn November 26, 1987.

By Mr. Peterson (Counsel for Mr. Castro)

- Q. Okay, my last question before I leave this topic is this (Affidavit, Exhibit "A") was signed by Mrs. Castro and Mr. Castro. Does Mr. Castro at any time have independent legal counsel when this contract was entered into?

Mr. Gray:

- A. I'm not aware whether he did or not. There's been so many different lawyers.

*Transcript, Cross-Examination held December 18, 1987, p.4, ll.9-13
Tab 4, Document Book, Particular (a)*

On the 21st day of December, 1988 Mr. Justice Eberle ordered Ms. Castro to produce a number of documents concerning Hi Rise Janitorial Services Ltd. Mr. Justice Eberle's order contains the following paragraph:

2. This Court orders that the solicitor for the Applicant is prohibited from disclosing to the Applicant, Jose Emilio Castro, or any other person except Jack Marmer, C.A., any information that may reveal the names, addresses or phone numbers of the clients of Hi Rise Janitorial Services Ltd.

Ms. Castro testified that she had no meeting with Mr. Gray prior to the cross-examination on her affidavit for the motion for interim support. She said Mr. Gray told her to say I don't know and that Mr. Gray would answer for her. Mr. Gray did not examine her husband on his affidavit. Ms. Castro testified that several times she asked what the proceedings would cost. She testified that Mr. Gray said don't worry don't worry. She never gave any money to Mr. Gray and even on Mr. Gray's testimony there was no financial arrangement made between the Solicitor and Ms. Castro. Ms. Castro did not attend the motion before Master Peppiatt.

The motion for interim support came on before Master Peppiatt on the 25th day of March, 1988. Master Peppiatt's endorsement is as follows:

The Applicant is in need of financial assistance if he is to obtain separate accommodation. The parties agree that he should leave the matrimonial home and indeed the Respondent has threatened "to make arrangements to have him removed". His proposed expenses are reasonable although I have deducted the items for vacation, gifts and support of his brother which are not the responsibility of the Respondent. I have also taken into account the (word indecipherable) allegation that his income was reduced by reason of a few months vacation and I have attributed to him an income of \$30,000.00 per annum.

I am satisfied that the Respondent has the ability to pay. She and her counsel have taken the position that they have no obligation to place before me any information as to her true financial situation. Mr. Gray says the order of Eberle J prevents the Master from being given such information, a position which I charitably describe as ridiculous.

I therefore draw the inference that the Respondent has substantial income. There will be an order for interim support of \$2,500.00 on April 1, 1989 and \$1,800.00 on the first day of each succeeding month.

It is apparent that Applicant will need professional assistance in valuing the business and will likely encounter obstacles. I therefore order a payment of \$2,000.00 to Marmer & Penner for this purpose with leave to apply further.

On the day of the motion the Solicitor sent to Ms. Castro a short letter explaining what had occurred before Master Peppiatt. That letter, dated March 25, 1988 is attached as Exhibit "B" to the Committee report. The final paragraph of that letter is as follows:

Obviously the Master has made an error in awarding spousal support to your husband as well as ordering interim disbursements in view of the fact that you are deeply indebted. You will have to appeal this matter; or in the alternative wait until your husband tried [sic] to enforce the Master's interim order. At that time you will be able to establish inability to pay.

Ms. Castro testified that she called Mr. Gray after receiving that letter and that Mr. Gray suggested that she wait until the motion to enforce the support order. We find the advice given to Ms. Castro at this time was wholly inadequate. At a minimum she should have been advised that in addition to a motion to enforce the support order, her husband could enforce the order against her house and against her interest in Hi Rise Janitorial Services Ltd. The Solicitor should have clearly instructed Ms. Castro in regard to the necessity of appealing Master Peppiatt's order and at a minimum should have obtained instructions, preferably in writing, from Ms. Castro that she did not wish to appeal Master Peppiatt's order.

Mr. Castro sought enforcement of the order of Master Peppiatt in the family court. Show cause proceedings were commenced by service of a motion on Ms. Castro of June 7, 1988. The motion was heard before His Honour Judge James on July 12, 1988. Ms. Castro testified that she received a call from the Solicitor two or three days before the hearing before Judge James. The Solicitor told her to bring her house bills and to meet him at his office in order that he might photocopy the bills. She testified that she did not bring her personal tax return and offered to arrange to have it brought from her office. She testified that Mr. Gray said that would not be necessary. She testified that she had no discussion with Mr. Gray about what might happen at the hearing. Mr. Gray said "I will be with you and don't worry".

Mr. Gray's evidence on these points is that he explained to Ms. Castro on June 14 what the application was about. He explained to her that the final outcome could be jail but that that was highly unlikely. He testified that prior to July 12 his view was that you would never go to jail on a show cause hearing if you were a woman, that there were many other steps that would have to be taken. He testified that he first heard about the missing tax return was when Ms. Castro was on the stand. Later in his testimony Mr. Gray said that he was not aware her 1987 tax return had been prepared when she was on the stand at the show cause hearing. That evidence was contradicted by reference to page 6 of the Solicitor's letter to the Law Society dated February 13, 1990. In that letter Mr. Gray wrote concerning preparing Ms. Castro for the show cause hearing:

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She was also to bring with her a copy of her 1987 Income Tax Return, which she said she had at home. The writer is not able to ascertain whether Mrs. Castro deliberate [sic] or inadvertently left her copy of her 1987 Income Tax Return at [sic] prior to coming to the family court on the ;2th [sic] day of July, 1988. He never told her not to worry about having this tax return before the court.

To put it mildly the show cause hearing did not go well for Ms. Castro. The transcript of that show cause hearing was before the Committee. The following are the oral reasons of His Honour Judge James:

Master Peppiatt made an order on March 28. There has been no appeal of the order, there has been no review of the order. The order obligates Gladys Castro, the Respondent, to make payments of \$1,800.00 on the first day of each month, beginning with a payment of \$2,500.00 on April 1, 1988, and \$2,000.00 on account of an interim disbursement payable forthwith.

The total arrears as of this date are \$9,900.00

Mrs. Castro gave her evidence. I am satisfied that the \$700.00 payment from her husband to her is on account of his use of the home and for food. It is not a support payment. If it were a support payment, it would certainly confuse the issues. I am convinced that it isn't. I am also convinced that there is nothing different in the income flow from her business since the 25th of March, 1988 then for the period -I gather from the financial statement relative to her fiscal period - December 31, 1987. She has given me no reason to believe that since the date of Master Peppiatt's order she has fallen on poor financial times relative to her company.

I will enforce the order against her. The total amount to enforce is \$9,900.00. I commit her to jail for 30 days, unless the sum, or sums totalling \$9,900.00 are paid to this court.

Ms. Castro testified that that was her first notice that the \$9,900.00 had to be paid.

The transcript of the hearing before Judge James continues as follows:

Mr. Gray: Is she allowed a time frame on that?

The Court: Well ...

Mr. Peterson: Your Honour, the time frame here has been ... this has been going on since November, and not one dime has been advanced. Unless my friend is willing to negotiate some sort of advance payment for Mr. Castro to get out of that house, I really must protest anything beyond five days.

The Court: Relative to the opportunities that she would have had and the fact that today's order should have come as no surprise to her, in these circumstances I am prepared to give her time provided that within that time she undertakes in a clear and unequivocal manner to pay the amount, otherwise the order is forthwith.

Mr. Gray: I can't give that undertaking on behalf of my client.

Mr. Peterson: Sorry, Your Honour, I am a little hard of hearing.

Mr. Gray: I cannot give that undertaking on behalf of my client.

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Mr. Peterson: You cannot give the undertaking?
Mr. Gray: I cannot give that undertaking on behalf of my client.
The Court: I heard you correctly.
Mr. Gray: Yes.
The Court: The order is forthwith.

Ms. Castro was taken by a guard to a room on the second floor. The Solicitor came to her and asked her whether she would authorize him to publicize her situation on television and newspapers. Ms. Castro was handcuffed, put in a van and transported to the jail. She was sick and taken to the health facility at the jail. She was fingerprinted, photographed, her clothes were taken and she was put in a cell with three other women, a prostitute, an illegal immigrant and a woman convicted of assault. She spoke to Mr. Gray on the phone and he said he could do nothing for her until the following week. Her family tried to get her another lawyer.

At this point Mr. Gray appears to have done rather efficient work on behalf of Ms. Castro. He obtained an *ex parte* order from Mr. Justice Potts on the 14th of July and Ms. Castro was released from custody on the 15th of July, 1988. The order of Mr. Justice Potts required Ms. Castro to proceed with her appeal of the order of Judge James and that such appeal be pursued with all due diligence. The Notice of Appeal filed by Mr. Gray on behalf of Ms. Castro is dated the 21st day of July, 1988.

After Ms. Castro came out of jail she did not go home, where her husband was still living. Mr. Gray attempted before Mr. Justice Walsh to get the husband excluded from the home but was unsuccessful in that application.

Ms. Castro sought out another lawyer, Ernest Singer, to assist her with her matrimonial problems. Mr. Singer agreed to attempt to negotiate a resolution of her difficulties but he declined to go on the record as her solicitor for the appeal from the order of Judge James.

The Solicitor did not pursue the appeal with due diligence nor did he take steps to be removed as solicitor of record.

Mr. Peterson, the solicitor for Mr. Castro, served Mr. Gray with a motion returnable on the 2nd day of February, 1989 to dismiss the appeal. In response to that motion Mr. Gray filed the transcript of the show cause hearing with the court and on January 24 wrote to Mr. Peterson and advised him that the transcript had been filed. In his letter Mr. Gray included the following paragraph:

Note that you have set down a Motion returnable on the 2nd day of February, 1989; if you would telephone Mary Smith (Ms.) at 965-0580 and inform her that the motion is to be withdrawn the matter will proceed in the ordinary course.

Concerning the motion to dismiss the appeal of the order of His Honour Judge James, Mr. Gray testified that he was served with the motion on January 19, 1989. His recollection was that he phoned Mr. Peterson asking for an adjournment. He testified he phoned Mr. Singer on January 20 and left a message. He took no other steps to notify Mr. Singer or Ms. Castro of the pending motion to dismiss the appeal. Mr. Gray testified that he was not concerned about the motion to strike the appeal. There were other files he was looking after. It was not his file after September 1989. He didn't know specifically why he did not attend on the motion that day. He must have had serious other commitments. Mr. Gray was not able to attend on the motion but sent another solicitor, who had been practicing for nine years, to appear on the motion.

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The court endorsement on the motion heard February 2, 1989 is as follows:

In my view, the Respondent has disobeyed the order of Potts J. There has been no attempt to pursue the appeal with due diligence. The materials filed on the appeal, other than the Notice itself, were only filed in response to this motion. It has taken court orders to move the Applicant's case forward at every step. I find this to be contemptuous behaviour. The appeal is dismissed pursuant to Rule 61.12. A warrant is to issue for the Respondent.

On February 2, 1989 Mr. Singer was out of the country. He left for Florida on January 31. On February 2 his office became aware of the order dismissing the appeal. Mr. Singer had a discussion with his partner and his partner sent Ms. Castro's file, and Ms. Castro, to another solicitor, Esther Lenkinski.

We wish to make one last comment concerning Mr. Gray's evidence. In his testimony before us, Mr. Gray said he did not go to the jail to meet with Ms. Castro when he was preparing the material to have her released after the warrant issued by Judge James. That evidence was in accord with the evidence of Ms. Castro.

However at page 7 of Mr. Gray's letter to the Law Society he stated the following:

The writer met with Mrs. Castro at Metro West Detention Centre to have her go over the material that would be used in an *ex parte* Motion in the Supreme Court of Ontario so as to secure her release from [sic] Jail.

It was Mr. Gray's position that all of the delay tactics, refusal to cooperate with the court, refusal to pay money, refusal to provide information, was done on the express instructions of Ms. Castro, and that she understood the process and potential consequences of the course of conduct that she was following. Mr. Gray was asked whether he had written instructions to that effect. He responded that he never took written instructions from a client. We do not accept his evidence that he was instructed in the manner that he testified to. We would expect that a competent solicitor, in attempting to carry out such instructions, fraught with danger, would have clear explicit written instructions from the client for the solicitor's protection.

These days we frequently hear of obscenely high fees in matrimonial matters, fees for clients of modest means exceeding \$100,000.00. It is interesting to note that when the file was turned over to Esther Lenkinski the total fee charged by Mr. Gray including disbursements was \$1,000.00. At no time had he discussed the cost of his services nor had he received a financial retainer from Ms. Castro. One wonders how he continues to operate his practice.

We have no difficulty in finding that the Solicitor failed to serve his client, Gladys Castro, in a conscientious, diligent and efficient manner in respect of her matrimonial proceedings.

Divulging Confidential Information

A letter of complaint concerning the conduct of the Solicitor was sent to the Law Society by Catherine Binhammer of Fasken, Campbell, Godfrey on the 15th of December, 1989. The Society forwarded that letter to the Solicitor and by letter dated February 13, 1990 he replied to the Society. The Solicitor's letter is attached as Exhibit "C".

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Mr. Gray sent a copy of his nine page reply to the Society to Edmund Peterson, the solicitor for Mr. Castro. The Solicitor's letter to the Society contains a great deal of information concerning his client, none of which should have gone to Mr. Peterson. Mr. Peterson was called as a witness on behalf of the Solicitor. Mr. Peterson confirmed that there were a number of things in the letter to the Society that he was not aware of prior to reading the Solicitor's letter to the Society.

The Solicitor testified he sent the letter to Mr. Peterson because Mr. Peterson was his best witness. We find that explanation hard to believe. Judging by the lack of remorse for what befell his client, and judging by the Solicitor's attitude toward his ex-client as exhibited at this hearing, we believe we are being charitable to the Solicitor to regard his actions in sending his letter to Mr. Peterson as an oversight of his obligation to maintain solicitor/client privilege concerning information received from his client.

We find that the Solicitor, in February 1990, divulged confidential information relating to his client Gladys Castro without her authority to opposing counsel in matrimonial proceedings.

Prior Discipline

In 1984 the Solicitor was reprimanded in Committee on an allegation of professional misconduct that he failed to answer and to produce the material and information requested in the letter sent by the Law Society Audit Department.

In November of 1989 the Solicitor was suspended for a period of 60 days by Convocation on five separate counts of professional misconduct: (a) failing to reply to correspondence from the Law Society regarding a complaint made against him by another solicitor; (b) breaching his written undertaking to the Society concerning co-signing controls on his trust account, failing to deposit all trust monies into the trust account, and maintaining another trust account in a different financial institution unknown to the Society; (c) breaching the written undertaking to other solicitors to hold the sum of \$1,000.00 in trust; (d) failing to honour an agreement to protect fees of another solicitor, the agreement having been made to allow the transfer of files of a client; (e) failing to maintain books and records as required by the regulation made pursuant to the *Law Society Act*.

RECOMMENDATION AS TO PENALTY

We recommend that the Solicitor be suspended for a period of 60 days and pay \$2,000.00 in costs to the Society.

REASONS FOR RECOMMENDATION

Mr. Foster, for the Society, and Mr. Smith, for the Solicitor, jointly recommended to the Committee that the Solicitor be suspended for two months and that he pay \$2,000.00 in costs. In view of the Solicitor's prior discipline

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history, and his apparent lack of remorse, we thought that the joint submission as to penalty was at the bottom end of the penalty range for the finding of professional misconduct of failing to diligently serve his client. With some reluctance we agreed to adopt the joint submission as to penalty.

ALL OF WHICH is respectfully submitted

DATED this 15th day of June, 1994

Paul D. Copeland
Chair

Mr. Smith made submissions as to the findings of the Report and expressed concern that the discipline proceed while the E & O which arose out of the same facts was ongoing.

Mr. Smith sought an adjournment sine die until the civil matter was completed.

The Treasurer advised Mr. Smith that Convocation denied his request in September 1995.

Mr. Smith made submissions of allegations of bias with 2 of the Discipline Committee members, Ms. Graham and Mr. Strosberg and that the matter should be referred back to a new Committee.

Mr. Swaye advised that he wished to make a motion.

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

It was moved by Mr. Swaye, seconded by Mr. Gottlieb that the request to stay proceedings until the resolution of the civil proceedings be re-opened.

Lost

Counsel, the solicitor, the reporter and the public were recalled.

Mr. Smith continued with his submissions.

Mr. Brown made submissions in support of the Report being adopted and that there was no basis for Convocation to set aside the findings of fact.

There were questions from the Bench.

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

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

Carried

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

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 60 days and pay costs in the amount of \$2,000.

There were no submissions.

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The recommended penalty was voted on and adopted the suspension to commence February 1st, 1996.

CONVOCATION ROSE AT 12:50 P.M.

Confirmed in Convocation this *23* day of *February*, 1996


Treasurer