

22nd June, 1995

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 22nd June, 1995  
9:30 a.m.

PRESENT:

Treasurer (Paul S. A. Lamek), Aaron, Adams, Backhouse, Banack, Bobesich, Carey, Carpenter-Gunn, Cole, Cronk, Curtis, Elliott, Finkelstein, Furlong, Goudge, Lax, Lerner, MacKenzie, Marrocco, S. O'Connor, Puccini, Richardson, Ross, Sachs, Scott, Sealy, Stomp, Swaye, Thom, Topp, Wilson and Wright.

The reporter was sworn.

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IN PUBLIC

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Mr. Brown, Senior Counsel-Discipline introduced Mr. Harry Black, Q.C. who would be acting as Duty Counsel.

The Secretary read out those matters on which Mr. Gavin MacKenzie, the former Senior Counsel of Discipline would not be participating. They are:

Gerald Bruce Fox  
Martin Harold Jacobs  
William Alexander King  
Francis Lewis Reilly  
John Rothel  
George Struk  
Jerome Samuel Ublansky

DISCIPLINE COMMITTEE

Re: David Eric HOWLETT - Niagara Falls

The Secretary placed the matter before Convocation.

Messrs. Scott and Lerner, Ms. Curtis and Ms. Richardson did not participate.

Ms. Georgette Gagnon appeared for the Law Society. No one appeared for the solicitor nor was the solicitor present.

Ms. Gagnon requested an adjournment on consent to the September Discipline Convocation as the material to be placed before Convocation had not been finalized.

Convocation granted an adjournment to the Discipline Convocation in September.

Counsel retired.

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Re: John William NICHOLSON - Hamilton

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom and Ms. O'Connor did not participate.

Mr. Brown appeared on behalf of the Law Society and Mr. Black, Duty Counsel on behalf of Mr. Jim Turnbull appeared for the solicitor. The solicitor was not present.

Mr. Brown requested an adjournment on consent to allow him time to respond to the solicitor's factum. He advised that the solicitor had given an Undertaking not to practice.

An adjournment was granted to the next Discipline Convocation in September.

Counsel retired.

Re: Pasquale IANNETTA - Windsor

The Secretary placed the matter before Convocation.

Messrs. Scott and Thom did not participate.

Mr. Michael Brown appeared for the Society and Mr. Douglas Crane appeared for the solicitor. The solicitor was not present.

Counsel for the Society advised that the transcripts had just been received and that he and counsel for the solicitor needed time to prepare Factums.

Convocation granted an adjournment to the September Discipline Convocation.

Counsel retired.

Re: Anthony Morris BUTLER - Ottawa

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Thom and Ms. Richardson withdrew for this matter.

Ms. Jane Ratchford appeared on behalf of the Society and Mr. Black appeared on behalf of the solicitor who was present.

Mr. Black requested an adjournment to the next Discipline Convocation. The solicitor expected soon to receive the needed funds to complete his books and records.

Ms. Ratchford opposed the adjournment because the solicitor failed to answer serious questions regarding his books and records.

Mr. Black made further submissions in reply that the solicitor had suffered financial hardship and believed the request was not unreasonable.

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

It was moved by Mr. Finkelstein, seconded by Mr. Topp that the adjournment be granted to the September Discipline Convocation.

Carried

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

Counsel retired.

Re: George STRUK - Brampton

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Messrs. MacKenzie and Thom and Ms. O'Connor and Ms. Curtis withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Society and Mr. Black appeared on behalf of the solicitor who was present.

Mr. Black requested an adjournment so that the solicitor could brief new counsel. The solicitor was not practising.

Counsel for the Society opposed the adjournment advising that the matter had been outstanding since October 1994.

Mr. Black made brief submissions in reply.

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

It was moved by Mr. Topp, seconded by Ms. Sachs that the adjournment be granted peremptory to the solicitor and that the solicitor provide his home address.

Carried

It was moved by Mr. Finkelstein, seconded by Mr. Adams that the adjournment be denied.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the adjournment be granted to the Discipline Convocation in September peremptory to the solicitor and that the solicitor provide his home address.

The solicitor undertook to provide his home address.

Counsel and solicitor retired.

Re: Harvey Samuel MARGEL - North York

The Secretary placed the matter before Convocation.

Mr. Scott and Mr. MacKenzie did not participate.

Mr. Michael Brown appeared for the Society and Mr. Brian Greenspan appeared for the solicitor. The solicitor was not present.

Mr. Brown requested an adjournment on consent. He advised Convocation that the solicitor would be filing a Notice of Disagreement and both counsel needed time to prepare written documentation.

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The adjournment was granted to the next Discipline Convocation in September.

Counsel retired.

Re: John ROTHEL - Timmins

The Secretary placed the matter before Convocation.

Messrs. Scott and MacKenzie and Ms. Elliott did not participate.

Mr. Neil Perrier appeared for the Society and Mr. Brian Greenspan appeared for the solicitor. The solicitor was not present.

Mr. Perrier requested an adjournment on consent to the next Discipline Convocation. He advised that another Report would be forthcoming.

Mr. Greenspan advised that the solicitor was winding down his practice and co-signing controls were in place.

An adjournment was granted to the next Discipline Convocation in September.

Counsel retired.

Re: JEROME SAMUEL UBLANSKY - North York

The Secretary placed the matter before Convocation.

Messrs. Topp, Scott and MacKenzie and Ms. Cronk did not participate.

Mr. Neil Perrier appeared for the Society and Mr. Thomas Dunne appeared for the solicitor who was present.

Convocation had before the Report of the Discipline Committee dated 22nd March, 1995, together with an Affidavit of Service sworn 12th April, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 10th April, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:



THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Netty Graham, Chair  
Laura Legge, Q.C.  
Robert Carter, Q.C.

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

Neil Perrier  
for the Society

JEROME SAMUEL UBLANSKY  
of the City  
of North York  
a barrister and solicitor

Thomas J. Dunne, Q.C.  
for the solicitor

Heard: February 21, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 2, 1992 Complaint D28/92 was issued, on March 19, 1993 Complaint D45/93 was issued, and on May 19, 1994 Complaint D122/94 was issued against Jerome Samuel Ublansky alleging that he was guilty of professional misconduct.

The matter was heard in public on February 21, 1995, before this Committee comprised of Netty Graham, Chair, Laura Legge, Q.C. and Robert Carter, Q.C. The Solicitor attended the hearing and was represented by Thomas J. Dunne, Q.C. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D28/92

2. a) He, through a company controlled by him, Sumatara Investments Ltd., participated in many syndicated mortgages in which clients had investments without fully advising his clients as to his interest or taking other steps required by Rules 5 and 23 of the Rules of Professional Conduct;
- d) The reports which he provided to clients on their investments were incomplete as they failed to set out the terms of higher-ranking mortgages, failed to set out the terms of the syndicated mortgage in which the client was a participant, and failed to set out the client's percentage interest in that mortgage;

- e) He failed to adequately serve his clients in certain cases by failing to obtain appraisals on properties in which investments were made, and failing to search title to particular properties.

Complaint D45/93

- 2. a) He misled a mortgagee, the Canadian Imperial Bank of Commerce, by letter dated January 17, 1989, when he certified that he investigated title to a property municipally known as 15 Wembley Road, Toronto, when, in fact, he had not investigated title to the said property;
- b) He misled his client, Mr. Ingleby, by not disclosing the fact that a \$150,000 investment was not properly secured by registration of a mortgage on title to a property located at 15 Wembley Road, Toronto.

Complaint D122/94

- 2. a) He breached Rule 2 and acted in a conflict of interest contrary to Rules 5 and/or 23 of the Rules of Professional Conduct by:
  - i) acting for investor clients on nine investment loan transactions in which his partner, John Freysang, either acted for the borrower or was the borrower;
  - ii) participating as an investor with his clients in five of the nine investment loans;
  - iii) with respect to mortgage loan transactions to Charfor Holdings Limited and Elizabeth Freyseng, preferring his own interests or the interest of his company, Sumatara Investments Limited, to the interest of his investor clients;
  - iv) preferring the interests of his former partner, John Freyseng, when he paid John Freyseng's companies' loans and not the loans of his investor clients which were arranged prior to the Freyseng companies' loans;
  - v) failing to certify title of mortgages to his investor clients on two investment loans;
  - vi) failing to take legal action on behalf of his investor clients on mortgages which were in default;
- b) He misrepresented to a number of investor clients that the mortgagor had a good performance record of making the mortgage payment when he knew that his own company had been making the payments on behalf of the mortgagors and that the mortgagors or the mortgagors' solicitor, John Freyseng, had been making only sporadic and irregular mortgage payments.

Evidence

Part of the Evidence before the Committee contained the following Agreed Statements of Fact:

Complaints D28/92 and D45/94

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D28/92 and D45/93 and is prepared to proceed with a hearing of this matter on February 21, 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 D28/92 and admits particulars 2(a), (d) and (e). The Solicitor has reviewed Complaint D45/93 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute a departure from the Rules of Professional Conduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 25, 1966. He has been associated with the law firm of Goodman & Carr since June, 1990.

5. For the first 15 years of his practice the Solicitor was associated with the law firm of Blaney, Pasternak, Eagleson & Watson. The Solicitor then started a practice as one of the named partners in the law firm of Watson, Ublansky & Meehan in 1980. This firm dissolved in June, 1990 when the Solicitor began his association with Goodman & Carr.

6. For the past 26 years, the Solicitor has been involved in mortgage financing transactions. The Solicitor has built up a clientele of investors throughout Ontario.

7. As a result of complaints to The Law Society of Upper Canada (hereinafter the "Society") from members of the public in connection with certain mortgage financing transactions, an audit investigator from the Society attended at the Solicitor's office to review his files. The investigator found deficiencies in the manner in which the Solicitor had conducted his mortgage practice.

Complaint D28/92 - Particulars 2(a) and (d)

8. The Solicitor, through his company, Sumatara Investments Ltd. ("Sumatara"), was participating in many syndicated mortgages in breach of Rules 5 and 23 of the Rules of Professional Conduct. The Solicitor did not advise any of his clients that he had a direct or indirect interest in any of the mortgage investments or that he was participating in the syndicate.

9. The Solicitor states that he participated in the syndicates in order to facilitate the clients' interests in the following manner. Initially, the Solicitor obtained commitments from his clients for fixed sums of money, generally in round figures, such as \$10,000 or \$25,000. In the course of carrying out the investment, there would often be a shortfall of the minimum investment for the syndicate for which the Solicitor would "make up the difference" in order to facilitate the closing of the mortgage financing transaction.

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10. The Society authorized a spot audit of the practice of the Solicitor in March, 1989. The Solicitor has fully co-operated with the Society. Following the spot audit, the investigator made certain recommendations, all of which have implemented by the Solicitor and are contained at Document Book, Tab 1.

11. The Solicitor was subject to a further investigation which gave rise to the allegations contained in Complaint D28/92. The investigation revealed, *inter alia*, deficiencies in the Solicitor's reporting letters on mortgage financing transactions. As a result of recommendations made, the Solicitor has voluntarily entered into an Undertaking dated September 3, 1991 (Document Book, Tab 2) to report to clients on mortgage financing transactions in accordance with the recommendations of the Society, which Undertaking has been honoured fully to the date hereof.

Complaint D28/92 - Particular 2(e) and Complaint D45/93 - Particulars 2(a) and (b)

12. The Solicitor has been a long-time friend to a fellow solicitor, Mr. Arnold Epstein. Mr. Epstein approached the Solicitor in October of 1988 in the hope of finding mortgage financing in the sum of \$200,000 in respect of a property at 15 Wembley Road, Toronto (hereinafter the "Property"). The Property was purchased in Mr. Epstein's wife's name, Fradell Epstein for \$260,000. The Solicitor agreed that he would not charge Epstein for his services.

13. The abstract reveals the following mortgages registered on title to the Property:

DATE	MORTGAGEE	AMOUNT
Oct. 3, 1985	CIBC	\$40,000.00
Feb. 29, 1988	Guaranty Trust (Note: assigned to TD Bank 89/01/25)	\$300,000.00

14. In an effort to obtain financing, the Solicitor met with one of his investor clients, Mr. Ingleby. At that time, the Solicitor had known Mr. Ingleby for approximately 15 years, and Mr. Ingleby had invested in mortgage financing transactions through the Solicitor for the past 5 or 6 years. Mr. Ingleby had invested approximately \$600,000 through the Solicitor in 4 or 5 separate mortgages. Mr. Ingleby agreed to loan Mr. Epstein the sum of \$150,000. Two other clients, Ms. Mildred Goldstein and Ms. Winifred Cleasby, invested \$15,000 and \$35,000, respectively.

15. The loans were to be secured by the registration of a mortgage (hereinafter the "Ingleby Mortgage") in the sum of \$200,000, which was to have been registered against the Property on October 13, 1988 prior to the advance of the \$200,000 loan. The first payment was due on November 14, 1988. The Ingleby Mortgage was to mature on October 13, 1990. Mr. Ingleby and the Solicitor will testify regarding what was to be the priority of the Ingleby Mortgage.

16. At Document Book, Tab 3 is a copy of the Solicitor's reporting letter to Mr. Epstein dated October 13, 1988 which confirm's "...that... [Mr. Epstein]... would be acting on our behalf in the certification of a valid second mortgage on the property...".

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17. Mr. Ingleby, Ms. Goldstein and Ms. Cleasby, all retained the Solicitor to protect their interests with respect to this transaction.

18. The Solicitor states that he relied on Mr. Epstein to register the Ingleby Mortgage. Though Mr. Ingleby's money was advanced on October 14, 1988, the Ingleby Mortgage was not registered on title to the Property until July 4, 1990 (Document Book, Tab 3).

19. At the time of registration, the following mortgages were registered on title to the Property:

Instrument No.	Date	Mortgagee	Amount
C.T. 745417	Oct. 3, 1985	CIBC	\$40,000
C.T. 932313	Feb. 29, 1988	Guaranty Trust	\$300,000
C.T.993391	Nov. 29, 1988	CIBC	\$185,000
C.A. 66975	Dec. 19, 1989	CIBC	\$325,000

20. Mr. Epstein supplied the Solicitor with a series of post-dated cheques for the mortgage payments for the first 12 months. The Solicitor's office, on a monthly basis, would deposit the cheques in his trust account and issue trust cheques to the three investor clients.

21. In November, 1988, the Canadian Imperial Bank of Commerce (hereinafter the "CIBC") retained the Solicitor to represent it with respect to a \$185,000 mortgage financing transaction for a second mortgage ("CIBC \$185,000 Mortgage") against the Property. The CIBC \$185,000 Mortgage was registered on title to the Property on November 29, 1988 (Document Book, Tab 4). The Solicitor reported to the CIBC by letter dated December 6, 1988 (Document Book, Tab 5).

22. By letter dated January 17, 1989 (Document Book, Tab 6), the Solicitor again reported to the CIBC.

23. In December of 1989, Mr. Epstein and the CIBC again retained the Solicitor to represent them with respect to a \$325,000 mortgage financing transaction. The \$325,000 mortgage was registered on title to the Property on December 19, 1989 (Document Book, Tab 7).

24. On December 6, 1989 the Solicitor was retained by Fradell Epstein to provide independent legal advice ("ILA") on a guaranty and postponement agreement. The Solicitor reported the ILA to the CIBC and Gowling, Strathy & Henderson by letter dated December 6, 1989 (see Tab 5).

25. In 1991, the Solicitor did write to Mr. Ingleby by letter dated April 18, 1991, and enclosed a reporting letter dated April 17, 1991 (Document Book, Tab 8).

26. As a result, Mr. Ingleby retained another solicitor, Mr. Myer Betel. Mr. Betel wrote the Solicitor by letter dated April 18, 1991 seeking explanations as to why the Ingleby Mortgage was fifth in priority. Mr. Betel subsequently notified the Law Society.

27. By letter dated April 22, 1991, Arnold Epstein reported to the Solicitor on the \$200,000 Ingleby Mortgage (Document Book, Tab 9).

28. LPIC has settled Mr. Ingleby's claim by payment in the sum of \$178,340.74.

V. PRIOR DISCIPLINE

29. The Solicitor has had no prior discipline.

DATED at Toronto, this 21st day of February, 1995."

Complaint D122/94

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D122/94 and is prepared to proceed with a hearing of this matter on February 21, 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 D122/94 and, save and except particular 2(c), admits the particulars contained therein. The Solicitor admits that the particulars provide the grounds for a finding of professional misconduct.

IV. BACKGROUND FACTS

4. The Solicitor was called to the Bar on March 25, 1966. He presently practises in association with the law firm of Cumming & Carr. From 1990 until this month, the Solicitor practised with the law firm of Goodman and Carr. Prior to 1990 he was a partner in the law firm of Blaney, McMurtry, Stapells.

5. An audit of the Solicitor's practice was conducted prior to his joining Goodman and Carr.

MORTGAGE TRANSACTIONS - BREACH OF RULES 2 AND 5.  
CLIENT LOSSES - \$596,000.00

6. From 1980 to December 1986 the Solicitor acted for investor clients of the Law Firm of Blaney, McMurtry et. al. in respect of nine mortgage loan investments. These mortgages had been arranged by the Solicitor's partner, Mr. Freyseng. The Solicitor provided all of the investors and represented their interests. Of the nine mortgages, the Solicitor states that was unaware of the identity of the borrower, except in the following mortgage loan transactions which will be later referred in the Agreed Statement of Facts as the "Tunnel Island" and "Kilarney" mortgages. The Solicitor was aware that Mr. Freyseng had an interest in each of the 5 Tunnel Island mortgage transactions. The solicitor was also aware that the Mr. Freyseng's mother, Elizabeth, was the borrower in the Kilarney mortgage transaction.

7. The Solicitor, through his company, Sumatara Investments Limited ("Sumatara"), contributed certain funds to some of the mortgage investments. The purpose of the contribution was to "top up" the mortgages, as the Solicitor describes it, such that the transactions could be completed.

8. Mr. Freyseng made mortgage payments until June, 1987. In July of 1987, Mr. Freyseng informed the Solicitor that he had run into considerable financial difficulty and ceased making timely payments. The Solicitor, and his law partner, Mr. Watson, were controlling shareholders in a company known as Birchmount Services Inc. ("Birchmount"). Birchmount kept up the payments to the investors until November 1992. Mr. Freyseng informed the Solicitor that he would make good the payments and due to that representation advanced the funds through Birchmount.

9. The Solicitor and Mr. Freyseng were partners during the period 1980 to January 31st, 1987 when the nine mortgage loans were arranged. During those years the Solicitor operated his practice out of the Mississauga branch office and Mr. Freyseng operated out of the downtown Toronto office. The Mississauga branch office maintained its own trust accounts.

10. Mr. Freyseng approached the Solicitor on several occasions representing that he had clients who required funds. Mr. Freyseng knew that the Solicitor had a number of clients with funds available for investment.

11. Mr. Freyseng advised the Solicitor that he and his associates would take care of the usual title searches and would arrange for the registration of the security for the mortgage loans. In each transaction, Mr. Freyseng represented to the Solicitor that the mortgage security was registered and delivered letters certifying title.

12. The mortgage funds from the lump sum payment were allocated by the Solicitor in consultation with Mr. Freyseng. After the distribution of the lump sum, the Solicitor delivered to Freyseng statements showing the application of the lump sum payment to the mortgage loans (Document Book, Tab 5, page 1).

13. From July 1987 to June 1990 the Solicitor received sporadic and irregular mortgage payments from John Freyseng. The Solicitor deposited these payments into the trust account and then made payments in the same amounts to Birchmount as reimbursement to Birchmount for making the mortgage payments to the investors.

14. In June 1990, Mr. Freyseng made a lump sum payment of \$503,675.00 to the Solicitor in respect of the mortgages. It should be noted that the Solicitor was unaware that Mr. Freyseng had misappropriated monies to pay down the four mortgages. From the lump sum payment, the Solicitor has reimbursed Birchmount the sum of \$126,120.22 so that there was nothing owing to Birchmount at that time. The balance of the lump sum payment of \$376,968.87 was applied to pay out certain mortgages after discussions by the Solicitor with Mr. Freyseng and Sue Naples, the firm bookkeeper. A copy of the application of the \$503,675.00 lump sum payment with schedules prepared by the Solicitor's bookkeeper is contained at Document Book, Tab 5. Mr. Freyseng received a statement detailing the application of the funds after the funds were distributed.

15. After the Solicitor became an associate with Goodman & Carr, he maintained a Mississauga office and a trust account which was administered by Ms. Naples.

16. In April 1991, John Freyseng advised the Solicitor that he was having difficulty making the mortgage payments and requested that the interest rate be lowered to 12%. He represented that should that accommodation be made, he would then be able to make the mortgage payments in a timely fashion. The Solicitor agreed to the new terms and sent letters to his investor clients advising of the agreement to lower the interest rate to 12%.

17. As at November 30th, 1992 there was \$126,516.46 due to Birchmount for making the mortgage payments to the investors and the mortgage principal still owing to investors was the sum of \$596,000.00.

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18. It is clear that Mr. Freyseng misappropriated the mortgage funds and issued false reporting letters certifying title to the property to the Solicitor under firm letterhead. The Solicitor trusted Mr. Freyseng at the time the titles were certified. At present, the following investors have not received their principal or interest since 1992:

Investor	Principal Amount
Mr. Kendall	\$ 35,000
Mrs. Rowntree	\$ 11,000
Mr. Rosen (from Koutsaris in 1989)	<u>\$100,000</u>
Total:	\$146,000 (exclusive of interest)

V. FACTS

\$125,000.00 MORTGAGE FROM CHARFOR HOLDINGS LIMITED

19. In 1980, Mr. Freyseng approached the Solicitor representing that one of his clients, Dr. Forder, required mortgage financing. The Solicitor contacted some of his investor clients and arranged a \$125,000.00 syndicated mortgage loan from eight of his clients. The Solicitor "topped up" the mortgage investment through his company, Sumatara. Mr. Freyseng advised the Solicitor that security for the loan would be five mortgages from Dr. Forder's company, Charfor Holdings Limited ("Charfor"), on five properties owned by the company which were located in Toronto (the "Charfor Mortgages").

20. The \$125,000.00 loan advance was paid from the Mississauga trust account of Blaney, McMurtry et al to the law firm's downtown Toronto trust account. Mr. Freyseng sent a reporting letter, dated January 16th 1981, to the Solicitor setting out the nature of the security for the Charfor Mortgages (Document Book - Tab 1).

21. During the course of the Law Society's investigation of John Freyseng, Mr. Freyseng admitted to the auditor that he had never registered any of the Charfor Mortgages against title on the properties. Dr. Fordor subsequently informed Mr. Freyseng that he did not require the \$125,000.00 financing. Mr. Freyseng used the loan proceeds for his own benefit, that he made the mortgage payments to the Solicitor. The Solicitor was not aware that the mortgage transaction transactions were fraudulent.

22. The Solicitor did not search title to the properties on which the mortgages were purportedly registered on title. The auditor did locate two notes in the Solicitor's file (Document Book - Tab 2), which showed that he had requested copies of the registered mortgage documents from Mr. Freyseng in 1981 and in 1984. By letter dated February 4, 1983, the Solicitor reported to two of the investors, Mr. and Mrs. Brian Rodway. Copies of the two reporting letters contained at (Document Book - Tab 3) are representative of the reporting letters sent to all eight investors. In the reporting letters the Solicitor stated "*in our opinion you have a good and valid share in this mortgage.*" The Solicitor gave his opinion relying on the representation of his law partner, Mr. Freyseng. The Solicitor gave his opinion without searching title and without receiving copies of the registered documents.

23. There were problems with collecting monthly payments on the Charfor Mortgages during the first year. Attached at (Document Book - Tab 4) are copies of notes located in the Solicitor's file which show that the monthly mortgage payments were in arrears and that John Freyseng personally sent in post-dated cheques purportedly on behalf of Dr. Forder.

24. In or about July of 1987, monthly payments on the Charfor Mortgages fell into arrears.



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25. In June 1990, when Mr. Freyseng made the \$503,675.00 lump sum payment in June 1990 (Document Book - Tab 5), the Solicitor paid off Sumatara's \$7,000.00 "top up". What are later described as the "Tunnel Island" mortgages were paid down from the lump sum payment.

26. In April of 1991, Mr. Freyseng met with the Solicitor to request a deduction in the interest rate on the mortgage loan. The Solicitor agreed to reduce the interest rate to 12%.

27. Subsequent to John Freyseng meeting with the Solicitor in April 1991 which resulted in an agreement to reduce the interest rate to allow Mr. Freyseng to continue to make the mortgage payments, the Solicitor sent out letters to the investors to advise them of the agreement. Attached as (Document Book - Tab 6) is a sample copy of a letter dated April 17th 1991 to Mr. Peter McGavin, which was sent to all the investors, in which the Solicitor stated "*having regard to the past good payment performance, we have agreed to lower the [interest rate to 12% effective this payment.....*". (Document Book - Tab 5) confirms that Birchmount, and not the mortgagor, had been making the mortgage payments on this mortgage and therefore the past payment record had not been good.

**\$85,000.00 LOAN TO JOHN FREYSENG AND KEN LANE**

28. In 1981, Mr. Freyseng and Mr. Lane approached the Solicitor to arranged an \$85,000.00 loan. The Solicitor supplied the investors and represented their interests with respect to the loan transaction. The Solicitor was unaware that Mr. Freyseng had a personal interest in the transaction. Security for the loan was to be a re-assignment of a \$100,000.00 mortgage assignment held by Mr. Freyseng and Mr. Lane from the Lady Isabella Nursing Home on lands owned by the nursing home in the North Bay area ("Timco Mortgage"). The mortgage had been assigned from the original mortgagee, Timco Consultants Inc. ("Timco") to John Freyseng and Ken Lane.

29. Attached as (Document Book - Tab 8) is a copy of the \$100,000.00 mortgage to Timco, as (Document Book - Tab 9), is a copy of the assignment from Timco to John Freyseng and Ken Lane, as (Document Book - Tab 10), is a copy of an assignment from Freyseng and Lane to Ublansky in trust and as (Document Book - Tab 11), is an abstract of title of the encumbered property. The Solicitor relied on Mr. Freyseng to make good on his promise that the assignment of the mortgage would be registered. Mr. Freyseng never registered the assignment. It is clear that the assignment of the mortgage from Freyseng and Lane to Ublansky in trust was never registered.

30. Attached is a copy of the Solicitor's instructions to Mr. Freyseng as (Document Book - Tab 12). The auditor did not locate title search notes or title search documents in the Solicitor's files. Mr. Freyseng reported to the Solicitor (Document Book - Tab 13). There were no copies of registered documents included in the reporting letter. According to the abstract of title the assignment of the mortgage to J. Ublansky in trust was never registered.

31. The Solicitor reported to his investor clients stating "*in our opinion you have a good and valid share in the mortgage*" (Document Book - Tab 14). The Solicitor did not further request copies of the registered documents until 1984 from Mr. Freyseng. The registered instruments were never sent to the Solicitor (Document Book - Tab 2). The Solicitor relied on Mr. Freyseng in making his report to the investors. The Solicitor gave his opinion without certifying title or receiving a copy of the registered assignment.

32. When the mortgage payments ceased, the Solicitor through his company, Birchmount, made the mortgage payments to the investors. When Mr. Freyseng made a \$503,675.00 payment to the Solicitor in June 1990, the mortgage was brought into good standing by reimbursing Birchmount for the payments which the company had made on Mr. Freyseng's behalf but none of the \$503,675.00 was applied to the principal due on the \$85,000.00 loan. As set out above, the \$503,675.00 lump sum payment was distributed after the Solicitor had discussions Mr. Freyseng and Ms. Naples.

33. In April of 1991, Mr. Freyseng met with the Solicitor to request a deduction in the interest rate on the mortgage loan. The Solicitor agreed to reduce the interest rate to 12%.

34. In April 1991, after John Freyseng and the Solicitor agreed that the interest rate would be reduced to 12% per annum, the Solicitor sent a letter to his investors stating that the mortgagor had a good performance record of making the mortgage payments. Attached as (Document Book - Tab 15) is a sample copy of a letter dated April 17th 1991 from the Solicitor to his investor client, Helma Bonfield, as representative of the letters sent to all the investors who participated in this mortgage. The letter notified the investors that "... *having regard to his good past payment performance, we have agreed to lower the [interest] rate to 12% effective this payment...*". The schedules of the mortgage payments made by Birchmount (Document Book - Tab 5) shows that the mortgagors were not making the regular monthly mortgage payments.

\$25,000.00 MORTGAGE FROM WALKER, KELLY & CLEAVER INC.

35. In 1983, the Solicitor acted in a conflict of interest for investor clients who provided a \$25,000.00 loan to Mr. Freyseng's company, Walker, Kelly & Cleaver Inc. A second mortgage was registered in favour of the Solicitor in trust as security against the title of 6-8 McTague Street in Guelph, Ontario (the "McTague St. Mortgage"). The mortgage was guaranteed by Mr. Freyseng. Mr. Freyseng signed the mortgage as president of Walker, Kelly & Cleaver Inc. Attached is a copy of the McTague St. Mortgage as (Document Book - Tab 16) and a copy of the Solicitor's reporting letter to an investor as (Document Book - Tab 17) in which he discloses that Mr. Freyseng guaranteed the mortgage. In this case, the title search documents and a copy of the registered mortgage had been sent to the Solicitor by Mr. Freyseng. The Solicitor states that he did not review the mortgage which was prepared by Mr. Freyseng at the downtown office and therefore was unaware that Mr. Freyseng signed as an officer.

36. The property was to be sold in November 1985 and the mortgage was to be paid from the sale proceeds. On December 12, 1985, the Solicitor signed a discharge of the \$25,000.00 mortgage (Document Book - Tab 18), which was then delivered to Mr. Freyseng. The Solicitor left for a vacation and upon return to his office, Mr. Freyseng advised him that the property had not been sold and he requested that the \$25,000.00 McTague Street Mortgage be extended. The Solicitor obtained approval from the investors to extend the mortgage to March 4th, 1986. The Solicitor, however, did not request that Mr. Freyseng return the executed discharge.

37. Mr. Freyseng acted on the sale of the property which closed in December 1985. Unbeknownst to the Solicitor, he registered the discharge of the mortgage without satisfying the mortgage debt. Mr. Freyseng misappropriated the sale proceeds and continued to make the mortgage payments to the Solicitor.

22nd June, 1995

38. During the Law Society's investigation of Mr. Freyseng, he told the auditor the following:

*He is an officer and director of Walker, Kelly & Cleaver Inc. The sole shareholder of the company was Mr. Walker. The \$25,000.00 loan proceeds was used to renovate the property which was a rental property. He mislead the Solicitor by advising him that the owner had changed his mind, that he no longer wished to sell the property and that he wanted to have the mortgage extended. The Solicitor was not aware that the sale had closed. He misused some of the sale proceeds which should have been used to pay the mortgage. Mr. Walker has relocated somewhere in the United States and his whereabouts is unknown. He made the mortgage payments to the Solicitor.*

39. The \$25,000.00 McTague St. Mortgage loan was not repaid from the \$503,675.00 lump sum payment which was received by the Solicitor in June 1990.

40. In April of 1991, Mr. Freyseng met with the Solicitor to request a deduction in the interest rate on the mortgage loan. The Solicitor agreed to reduce the interest rate to 12%.

41. Subsequent to the John Freyseng meeting with the Solicitor in April 1991 which resulted in an agreement to reduce the interest rate to allow Mr. Freyseng to continue to make the mortgage payments, the Solicitor sent out letters to the investors to advise them of the agreement. Attached as (Document Book - Tab 19) is a sample copy of a letter dated April 18th, 1991, to Mr. Alexander Christie as representative of the letters sent to the investors. The letter notified the investors that "... having regard to his good past payment performance, we have agreed to lower the [interest] rate to 12% effective this payment...". (Document Book - Tab 5) confirms that since June 1987 that the mortgagor had not been making the monthly mortgage payments.

42. The Solicitor told the auditor that he did not ask for the discharge back because he trusted that Mr. Freyseng would hold it in his file until it was required to be registered in March 1986 when the extension granted on the mortgage ended.

#### MORTGAGES FROM TUNNEL ISLAND HOLDINGS LTD. ("TUNNEL ISLAND")

Mortgage Loan	"A"	\$157,500.00
	"B"	\$150,000.00
	"C"	\$ 52,000.00
	"D"	\$184,500.00
	"E"	\$ 62,500.00

43. In 1986, John Freyseng approached the Solicitor for financing on a development in which he had some interest, known as Tunnel Island near the Kingston. Five loans were arranged from the Solicitor's investor clients to Tunnel Island. The five loans commonly described as Tunnel Island loans "A" to "E" were secured by mortgages as set out in the Chart at Appendix "A".

44. The Solicitor's company, Sumatara, "topped up" \$17,000.00 in the Tunnel Island \$150,000.00 loan B, and \$35,400.00 in the Tunnel Island \$184,500.00 loan (loan D). At (Document Book - Tab 20) are copies of reporting letters to Sumatara.

22nd June, 1995

45. Tunnel Island loan A matured on March 26th, 1987 and Tunnel Island loans B to E matured on December 1st, 1987. The Solicitor was not John Freyseng's partner when these loans matured. John Freyseng ceased making the mortgage payments in June 1987. Birchmount commenced making the mortgage payments in July 1987 to the investors. The Solicitor did not take any legal action on the Tunnel Island mortgages.

46. In June 1990, when Mr. Freyseng made his \$503,675.00 lump sum payment, Tunnel Island loans A, C, D and E were paid and \$27,000.00 was applied to the reduction of the principal owing on Tunnel Island loan B. The balance due on Tunnel Island loan B is \$123,000.00 plus interest.

47. Subsequent to John Freyseng meeting with the Solicitor in April 1991 which resulted in an agreement to reduce the interest rate to allow Mr. Freyseng to continue to make the mortgage payments, the Solicitor sent out letters to the investors to advise them of the agreement. Attached as (Document Book - Tab 21) is a copy of a letter dated April 18th 1991 to Norm Aubin which is representative of the letters sent to all the investors who participated in the mortgage investments. In the letter he states that *"having regard to his past good payment performance, we have agreed to lower the rate to 12%, we have agreed to lower the [interest] rate to 12% effective this payment ...."* (Document Book - Tab 5) confirms that Birchmount, and not the mortgagor, commenced making the mortgage payments after June 1987.

48. At (Document Book - Tab 22) are copies of Mr. Freyseng's reporting letters to the Solicitor with copies of a \$210,000.00 mortgage, a General Security Agreement and a declaration of John Freyseng, all of which described Mr. Freyseng as the principal shareholder of Tunnel Island.

49. The Solicitor stated in his letter (Document Book - Tab 7) that in June 1990, Mr. Freyseng instructed him as to which loans the \$503,675.00 lump sum payment was to be applied. When the auditor asked him why he had not taken legal action against Mr. Freyseng for non-payment of the mortgages, he stated in the same letter (Document Book - Tab 7) that John Freyseng was his partner, that he continued to make periodic payments, and that John Freyseng assured him that further payments and documentation would be forthcoming. The Solicitor continued to make the mortgage payments on Tunnel Island loan B to his investor clients for almost five years after the mortgage went into default.

#### MORTGAGE LOAN TO ELIZABETH FREYSEND ( THE "KILARNEY MORTGAGE")

50. In December 1986, Mr. Freyseng approached the Solicitor to find investor clients to advance \$250,000.00 to Elizabeth Freyseng. The loan was secured by a \$250,000.00 syndicated mortgage on Elizabeth Freyseng's residence at 17 Kilarney Road, Toronto. Elizabeth Freyseng is John Freyseng's mother and is presently 85 years of age. She relied on Mr. Freyseng to take care of her investments. Mr. Freyseng agreed to personally guaranty the mortgage. Attached at (Document Book - Tab 23) is a copy of the \$250,000.00 mortgage which was guaranteed by John Freyseng.

51. Sumatara "topped up" \$5,000.00 into the investment loan. Attached is a copy of the Solicitor's reporting to Sumatara as (Document Book - Tab 24).

52. John Freyseng ceased making payments to the Solicitor in June 1987 and Birchmount commenced making the payments in July 1987. The mortgage came due in December 1987. In June of 1990, John Freyseng made the \$503,675.00 lump sum payment, the \$5,000.00 interest of Sumatara was paid. Birchmount made the mortgage payments to the investors until November 1992. No legal action had been taken against the mortgagor, even though the mortgage had been in default for almost 5 years.

22nd June, 1995

53. In April 1991 after Mr. Freyseng and the Solicitor agreed to reduce the interest rate on the mortgage to 12% per annum, the Solicitor sent a letter to the investors to advise them of the agreement. He also stated in the letters that, *"having regard to his past good payment performance, we have agreed to lower the rate to 12%, we have agreed to lower the [interest] rate to 12% effective this payment...."*. Attached as (Document Book - Tab 25) is a copy of a letter dated April 18th 1991 sent to Michael and Wanda Beza, investors. This letter is representative of the letters sent to the investors who participated in this mortgage investment. The schedules (Document Book -Tab 5) of the payments received on the mortgages shows that Birchmount, and not the Solicitor, made the mortgage payments after June 1987.

54. Mrs. Freyseng acknowledges that she signed the mortgage documentation at the request of her son. However, Mrs. Freyseng relied on her son with respect to all her investments. Mr. Freyseng received the proceeds of the mortgage without his mother's knowledge or consent or the knowledge of the Solicitor.

55. By letter dated December 2 or 3, 1992, an example of which is contained at Document Book, Tab 26, the Solicitor advised all of his investor clients that there were irregularities with respect to certain mortgage transactions handled by Mr. Freyseng, and suggested that they may wish to seek independent legal advice.

#### VI. PRIOR DISCIPLINE

56. The Solicitor has had no discipline.

DATED at Toronto this 21st day of February, 1995."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Jerome Samuel Ublansky be suspended for a period of nine months and that he be ordered to pay the Society's costs in the amount of \$5,000.00.

#### REASONS FOR RECOMMENDATION

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Counsel for the Law Society and for the Solicitor made the above noted recommendation as to penalty by way of a Joint Submission which was accepted by the Committee as falling within the appropriate range for the misconduct found.

This recommended penalty is meant to reflect the gravity of the misconduct and to send a clear message to the Solicitor and to the profession that the Society deals with these matters very seriously. Except that there was no dishonest intent on the part of the Solicitor to defraud his clients, he would be looking at a penalty of disbarment.

This Solicitor is certainly guilty of misleading his clients and of allowing himself to become the dupe of unscrupulous lawyer, Mr. John Freyseng. This matter clearly sets out the pitfalls a solicitor gets into when he continually acts in a conflict of interest and fails to fully advise and protect his clients. The conduct here goes beyond being grossly negligent. The Solicitor obviously preferred his partner, Mr. Freyseng's interests over his clients when he knew the situation Mr. Freyseng was in and had been in for some time.

22nd June, 1995

The reason that disbarment is not being sought or recommended is because the Solicitor did not stand to gain anything personally from these transactions and there was no motive on his part to engage in the misconduct found. The Solicitor, in fact, was using his own funds to keep the whole thing afloat, completely trusting his partner, Mr. Freyseng, to be able to make the payments and put the mortgages in good standing again at a later date. He did, however, very seriously mislead his clients during this time.

In mitigation, the Solicitor has no previous discipline history. After the Law Society became aware of the Solicitor's misconduct, the Solicitor has taken much time and effort in co-operating with the Society. He has spent in the area of 450 billable hours to another solicitor, whose sole practice is mortgage enforcement and is trying to recover as much as he can for the clients to minimize their damages. This last effort has taken almost all of his time over the last two years and he has basically voluntarily withdrawn from the practice of law for that period of time. He no longer accepts any mortgage work and refers all those matters to his partners.

In a character letter received in evidence from Stephen H. Aarons, Q.C. he states:

"I believe that Jerry was probably overly trusting but, that Jerry never intended to harm anyone. I would trust Jerry with any amount of money and I do not believe that Jerry's honesty has ever been in question. Jerry put a lot of faith in John Freyseng and I would also have trusted John Freyseng, had the situation not come to light."

In all of the above circumstances, the Committee feels and recommends that the joint submission as to penalty be adopted.

Jerome Samuel Ublansky was called to the Bar on the 25th day of March, 1966.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of March, 1995

Netty Graham  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Ms. Ross, seconded by Mr. Cole that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 9 months and pay the Society's costs in the amount of \$5,000.

Both counsel made submissions in support of the recommended penalty.

There were questions from the Bench.

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

The motion on the recommended penalty was adopted.

22nd June, 1995

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 9 months and pay costs in the amount of \$5,000.

Counsel and the solicitor retired.

Re: William Alexander KING - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. MacKenzie withdrew for this matter.

Ms. Kathryn Chalmers appeared for the Society and Mr. Black appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 5th May, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 31st May, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Ian Blue, Q.C.  
Netty Graham

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

Kathryn Chalmers  
for the Society

WILLIAM ALEXANDER KING  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: February 28, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 16, 1994 Complaint D179/94 was issued against William Alexander King alleging that he was guilty of professional misconduct.

The matter was heard in public on February 28, 1995, before this Committee comprised of Clayton C. Ruby, Chair, Ian Blue, Q.C. and Netty Graham. The Solicitor attended the hearing and represented himself. Kathryn Chalmers appeared on behalf of the Law Society.

DECISION

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

Complaint D179/94

2. a) The Solicitor acted in a situation of conflict or potential conflict of interest in acting for both the lender and borrower in a loan transaction on April 2, 1992 in which Larry Kelln was the lender and Toronto Purchase Group Inc., a company wholly owned by Steven Peck, was the borrower and in acting for the lender when he had also loaned funds to the borrower without adequate disclosure and obtaining the requisite consent or having the client obtain independent legal advice.
- b) The Solicitor failed to obtain adequate security when he knew or ought to have known that the lender was relying on him to do so and contrary to assurances to the lender that the "deal was the same" as earlier ones.
- c) The Solicitor failed to take the steps necessary to ensure that the "security" that was obtained was of any value to the lender by reviewing the financial position of the borrower to assess the value of the promissory note; registering the Assignment of Leases and confirming the availability of the G.S.T. rebate.
- d) The Solicitor failed to advise the client/lender that he had made a personal loan to the borrower and had taken as security a second mortgage on the home of Steven Peck which had been a source of similar security for the lender in the first loan transaction. He also failed to advise the lender that this loan was in default which would or could have been relevant to the lender in deciding whether to advance the funds.
- e) The Solicitor failed to report to the client/lender which reports may have given the lender more information concerning the risks involved in the loan transactions and made him demand confirmation of adequate security in regard to the loan in question.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D179/94 and is prepared to proceed with a hearing of this matter on February 28th, 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 admits the facts as hereinafter stated.

### IV. FACTS

4. The Solicitor is a sole practitioner in the City of Toronto, and his practice includes corporate, commercial, real estate and estate law.

#### Loan From Larry Kelln to Toronto Purchase Group Inc., April 2, 1992

5. The Solicitor acted for Larry Kelln (and his brother Dennis who passed away in April, 1992) since 1975. At that time, the Kelln brothers operated Highland Equipment Limited and The Brothers Kelln Inc. The solicitor was the corporate lawyer for both of these companies and acted for them when the Kellns diversified and incorporated or purchased other companies. The Solicitor also acted for the Kellns in buying and selling homes and investing in mortgages.

#### Prior Loan History

6. The Solicitor was contacted in July, 1989 by an account manager from the Royal Bank whom he had dealt with before who advised that an account of his required short-term financing which the Bank would not provide.

7. The Solicitor met with Steven Peck who advised that his company, 741171 Ontario Ltd., operating as Toronto Purchase Group, leased vehicles to police departments as undercover vehicles. The leases had to be short-term since the vehicles had to be changed frequently.

8. Toronto Purchase Group required a short term loan of \$250,000.00 for the purchase of vehicles to be leased to the Metropolitan Toronto Police.

9. The Solicitor contacted Dennis Kelln and inquired as to whether the Kellns would be interested in advancing the funds. The Kellns advised the Solicitor that they wanted as much security as they could get. They agreed to advance the funds for 60 days at an interest rate of 25% per annum with a 10% penalty on the outstanding balance beyond the due date. They also received \$1,000.00 from the borrower at the time of the advance.

10. As security, the Solicitor obtained the following:

- (i) a promissory note from Peck, Peck's common law wife and 741171 Ontario Ltd. operating as Toronto Purchase Group (Document Book, Tab 1);
- (ii) an Assignment of Leases made by 741171 Ontario Limited operating as The Toronto Purchase Group to the Metropolitan Toronto Police (Document Book, Tab 2);
- (iii) financing statements registered under the P.P.S.A. for each of the vehicles under the Assignment of Leases (Document Book, Tab 3); and
- (iv) a second mortgage registered on the residence of Steven Peck and his common law wife (Document Book, Tab 4).

11. No appraisal was done on the residence of Steven Peck and his common law wife. No financial statements were provided for Toronto Purchase Group although the Solicitor did obtain a cash flow chart.

12. There was no written communication between the Solicitor and the Kellns with respect to the loan terms and the security provided. The paper work was left to the Solicitor. The Solicitor did not report to the Kellns after the closing of the transaction or forward any of the loan and security documentation to the Kellns.

13. The borrower had not retained counsel. Therefore, the Solicitor also acted for the borrower on the transaction preparing a resolution for the company authorizing the loan. The Solicitor did not advise or obtain a consent from the Kellns with respect to acting for the borrower. The borrower paid the legal fees.

14. The Solicitor was given a copy of letter from the President of the Police Credit Union stating that it would provide financing once the Credit Union's by-laws were changed. Ultimately, the Credit Union did not provide financing and the loan went into default. The Solicitor commenced Power of Sale proceedings. The loan, including interest and penalties, was subsequently repaid over the next year and a half with the final payment in early December, 1990.

15. The Solicitor subsequently worked for the borrower on other matters including negotiations for a line of credit with Tuckahoe Leasing Limited which helped in part to repay the loan from the Kellns. As part of the agreement with Tuckahoe, Tuckahoe took first security on the vehicles purchased and an assignment of the leases.

16. The Solicitor also acted for the borrower in negotiating a line of credit with Hitachi Credit Canada Inc. in September, 1991 when the borrower ran into problems with Tuckahoe Leasing Limited as the line of credit had been exhausted. Hitachi took over Tuckahoe's position and agreed to a further line of credit.

17. The Solicitor, through his self-directed R.R.S.P., loaned the borrower \$35,000.00 in November, 1991 for an unrelated venture. The loan was for 90 days with interest payable monthly. The Solicitor both discharged the Kelln mortgage on the Peck residence and registered one in the name of Central Guaranty Trust Company in trust for his R.R.S.P. Plan as security for the loan on November 15, 1991. He had not previously discharged the Kelln mortgage because Peck did not want to put up his home as security for either the Tuckahoe or Hitachi lines of credit (Document Book, Tabs 5 and 6).

18. In November, 1991, when the line of credit with Hitachi was at its limit, Peck's company required \$185,000 to purchase vehicles to lease to the Peel Regional Police Department. The Regional Municipality of Peel confirmed by letter dated November 12, 1991 that it would pay, under a prepayment option, the amount of \$194,594.13 with payment expected in December, 1991 (Document Book, Tab 7).

19. The Solicitor was aware that Peck's company was having financial problems and was at the limit of the Hitachi line of credit. Peck asked him to contact the Kelln's to see if they would agree to another loan.

20. The Solicitor contacted Larry Kelln (his brother was seriously ill and had no further involvement). Mr. Kelln initially refused given the default on the previous loan. The Solicitor subsequently advised Mr. Kelln over the phone of the letter from the Regional Municipality of Peel and after one or two more calls, Larry Kelln agreed to advance the funds. On November 28, 1991, Mr. Kelln advanced \$184,865.00 for one month and was to be paid a bonus of \$10,000.00 (Document Book, Tab 8).

21. The Solicitor did not feel that it was necessary to obtain security comparable to that for the first loan because of the letter from the Regional Municipality of Peel. The Solicitor advises that he did obtain a promissory note signed by Mr. Peck on behalf of the borrower and Peck personally.

22nd June, 1995

22. The Solicitor did not advise Mr. Kelln that he had a loan outstanding with the borrower or a mortgage outstanding on the Peck residence through his self-directed R.R.S.P. He did not have Mr. Kelln seek independent legal advice nor obtain a consent from Mr. Kelln to act in these circumstances.

23. There was no written communication between the Solicitor and Mr. Kelln with respect to the loan terms and the security provided. The paper work was left to the Solicitor. The Solicitor did not report to Mr. Kelln at the conclusion of the transaction or forward any of the loan and security documentation to Mr. Kelln.

24. The Solicitor also acted for the borrower on the transaction. The borrower paid the legal fees. The Solicitor did not advise or obtain a consent from Mr. Kelln with respect to acting for the borrower. The Solicitor advises that he concluded that Mr. Kelln was aware that he was acting for the borrower because he acted for the borrower in arranging the Tuckahoe line of credit which assisted the borrower in repaying the first loan and Mr. Kelln, in other conversations with the Solicitor, had made reference to the Solicitor's work for Mr. Peck.

25. The loan and bonus were paid out a few days ahead of schedule. At that time, Peck advised the Solicitor that his company required a further \$100,000.00. The Solicitor again contacted Larry Kelln who agreed to advance \$100,000.00 on January 2, 1992 with \$105,000.00 to be repaid on January 23, 1992.

26. Mr. Kelln asked if it was the same kind of deal as the previous one and the solicitor said that it was.

27. The borrower did not have a letter similar to the letter from the Regional Municipality of Peel for this transaction. The Solicitor did not advise Mr. Kelln of this.

28. As security, the solicitor obtained a promissory note signed by Mr. Peck on behalf of the borrower and Peck personally.

29. Again, the Solicitor did not discuss with Mr. Kelln the outstanding loan and mortgage referred to in paragraph 17 above, advise Mr. Kelln to seek independent legal advice or obtain a consent to act.

30. There was no written communication between the Solicitor and Mr. Kelln with respect to the loan terms and the security provided. The Solicitor did not report to Mr. Kelln after the closing of the transaction or forward any of the loan and security documentation to Mr. Kelln.

31. The Solicitor also acted for the borrower on the transaction and prepared a resolution authorizing the loan. The borrower paid the legal fees. The Solicitor did not advise or obtain a consent from Mr. Kelln with respect to acting for the borrower.

32. Mr. Kelln advanced the funds on January 2, 1992. The loan and bonus were paid out ahead of schedule (Document Book, Tab 9).

33. The mortgage on Mr. Peck's residence was due February 15, 1992. It was not paid out and the loan remains unpaid to this day.

Loan From Larry Kelln to Toronto Purchase Group Inc., April 2, 1992

34. On or about April 1, 1992, Mr. Peck again contacted the Solicitor with respect to a further loan of \$190,000.00 which he said he needed for 30 days, was similar to the preceding two loans and would be paid by a customer pursuant to a prepayment option.

35. The Solicitor did not ask Mr. Peck if he had a customer letter as in the second loan transaction. The Solicitor trusted Mr. Peck because he felt that the default and delay in repayment of the first loan had been adequately explained and the second and third loans had been paid promptly.

36. The Solicitor contacted Larry Kelln about a further loan. He asked the Solicitor if it was the same deal as before and the solicitor said that it was. At this time, Larry Kelln was occupied with his brother who was close to death and may have relied on the solicitor to look after his interests to a greater extent than was ordinarily the case.

37. Larry Kelln advanced \$190,000.00 on April 2, 1992 to Toronto Purchase Group Inc. The term was 45 days to May 14, 1992 although Mr. Kelln believed it was due in 60 days. The borrower was to repay \$200,000.00. Interest after the due date was 25% per annum plus a penalty of 5% of the original principal (Document Book, Tab 10).

38. The Solicitor obtained the following security:

- (i) a promissory note from Mr. Peck and Toronto Purchase Group Inc. (Document Book, Tab 11);
- (ii) an Assignment of Leases for all leases made by Toronto Purchase Group Inc. (Document Book, Tab 12); and
- (iii) an Assignment of G.S.T. (Document Book, Tab 13).

39. The Solicitor did not register the Assignment of Leases under the Personal Property Security Act.

40. The company had had a G.S.T. credit of \$125,000.00 and was supposed to apply for a rebate. It was subsequently discovered that this had been exhausted 18 months earlier. The Solicitor did not take any steps to confirm with Revenue Canada the status of the borrower's G.S.T. account.

41. The Solicitor did not request financial statements from Toronto Purchase Group Inc.

42. The Solicitor did not advise Mr. Kelln that his own loan to the borrower or the mortgage on the Peck residence in favour of Central Guaranty Trust in trust for the Solicitor's R.R.S.P. Plan was in default. The Solicitor advises that the interest payments had been made over the three month term of the loan but that it went into default immediately upon maturity. The Solicitor did question Mr. Peck about the matter who said he was going to pay it. The Solicitor forgot about the status of this loan at the time he was arranging the fourth loan with Mr. Kelln.

43. There was no written communication between the Solicitor and Mr. Kelln with respect to the loan terms and the security provided. The Solicitor did not report to Mr. Kelln after the closing of the transaction or forward any of the loan and security documentation to Mr. Kelln.

44. The Solicitor also acted for the borrower on the transaction. The borrower paid the legal fees. The Solicitor did not advise or obtain a consent from Mr. Kelln with respect to acting for the borrower.

45. The loan went into default. By June 29, 1992, the borrower had repaid \$110,000.00, then was petitioned into bankruptcy by Hitachi Credit Canada Inc. The petition was filed on July 31, 1992. The Notice to Creditors dated September 15, 1992 shows total liabilities of \$1,801,888.96 and total assets of NIL. Larry Kelln is shown as an unsecured creditor with a claim of \$100,000 (Document Book, Tab 14).

22nd June, 1995

46. The Solicitor knew the borrower was having financial problems but Mr. Peck had led him to believe that they were short-term cash flow problems and the bankruptcy came as a surprise.

47. On August 5, 1992, a meeting was set up at the solicitor's office between Messrs. Peck and Kelln. This was the first meeting between them. Mr. Kelln asked for the company's financial statements which were forwarded on August 11, 1992. They show, as at August 7, 1992, retained earnings of \$476.49 (Document Book, Tab 15).

48. The Solicitor was found guilty on January 14, 1991 of professional misconduct relating to legal services provided to an elderly client. In a number of instances he failed to advise the client to get independent legal advice and continued to act in matters where there was or was likely to be a conflict of interest. The Discipline Committee found that the Solicitor did not take advantage of the client but he did fail to comply in several respects with the Rules of Professional Conduct. The Solicitor was reprimanded in Convocation (Document Book, Tab 16).

Dated at Toronto this 23rd day of November, 1994."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that William Alexander King be suspended for a period of two months and that he give an undertaking that he will never act for both sides in any future transaction or matter.

#### REASONS FOR RECOMMENDATION

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The range of sentence that has been put before us in this case seems to be the appropriate range of sentence to govern and to reflect the principles which determine the appropriate penalty. It appears that the appropriate range of sentence is between two and three months suspension.

This particular penalty suggested by both counsel is at the low end of that range. A majority of this committee, not including the Chair, take the view that it is only because of the deference which they wish to show to the joint recommendation and the joint submission as to penalty that the two months suspension suggested here, being the low end, is appropriate.

Speaking for myself, I see nothing wrong with the penalty jointly proposed at all and do not rely upon any deference to a joint submission.

We are all mindful that this is the second time that there have been problems of this nature. We wish to make it clear that, using our best predictive ability, if there were to be a third time, there would be a disbarment.

We note that there is a psychiatric report before us which indicates that since January 8, 1992, there has been some two hundred and sixty hours of comprehensive psychiatric evaluation and therapy and that there have been serious problems of depression with a potential for suicide. Dr. Herschman says:

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"I noted the need to consider his desperate loneliness and the readiness to befriend both clients and myself. An engaging man, of considerable charm and knowledge, Mr. King is eager to share with, and to serve others. Gradually, we began to clarify this confusing area of professional and personal relationships with the ready blurring of boundaries which can occur in legal practice, for professional promotion often depends not only on legal skill and reputation, but on a personal involvement."

At the end, relying upon this, he expresses his certainty that Mr. King has learned from both his experience with the Law Society and from psychotherapy and I gather there is a mutual agreement to continue to focus in therapy on this difficulty.

For those reasons therefore, we accept the joint submission that there be a suspension for a two month period and recommend to Convocation that that be imposed provided there is an undertaking that in future Mr. King will never act for both sides in any transaction or matter.

William Alexander King was called to the Bar on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 5th day of May, 1995

Clayton C. Ruby  
Chair

It was moved by Mr. Topp, seconded by Mr. Carey that the Report be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Mr. Carey that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 2 months and that an Undertaking be given that he never act for both sides in any future transaction or matter.

Both counsel made submissions in support of the recommended penalty.

The motion on the recommended penalty was adopted.

Convocation granted the solicitor commencing his suspension on June 23, at 5:00 p.m.

Counsel and solicitor retired.

Convocation took a brief ten minute recess.

Re: Martin Harold JACOBS - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. MacKenzie withdrew for this matter.

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Mr. Neil Perrier appeared for the Society and Mr. Ernest DuVernet appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 6th January, 1994, together with an Affidavit of Service sworn 1st February, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 23rd January, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ian A. Blue, Q.C., Chair  
Donald H. L. Lamont, Q.C.  
Netty Graham

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

Neil Perrier and Kate Wootton  
for the Society

MARTIN HAROLD JACOBS  
of the City  
of Toronto  
a barrister and solicitor

Ernest A. DuVernet  
for the solicitor

Heard: October 20, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On May 21, 1993, Complaint D139/93, on October 6, 1993, Complaint D234/93, on February 3, 1994, Complaint D413/93, and on September 14, 1994, Complaint D123/94 were issued against Martin Harold Jacobs alleging that he was guilty of professional misconduct.

The hearing was held in public on October 20, 1994 before this Committee composed of Ian Blue, Q.C., Chairman, Donald H. L. Lamont, Q.C., and Netty Graham. Neil Perrier and Kate Wootton appeared on behalf of the Law Society. Ernest A. Du Vernet, Q. C. appeared on behalf of Mr. Jacobs.

Despite the number and the seriousness of the complaints made against him, Mr. Jacobs did not retain Mr. Du Vernet to be his counsel until shortly before the hearing and did not meet with Law Society staff to prepare Agreed Statements of Facts ("ASF's") until the day prior to the hearing. As a result of the meeting that did take place between Mr. Jacobs and Law Society staff, ASF's respecting each of the four complaints were executed at approximately one hour after the hearing was scheduled to begin. There were admissions of professional misconduct in respect of all counts and all particulars charged in the four complaints except for the following:

<u>Complaint</u>	<u>Particular</u>
D139/93	2(c)
D234/93	2(a)(iii) & (v)
D123/94	2(c)(f)

Particular 2(c)(g) was withdrawn by Mr. Perrier.

The Committee heard evidence on the contested particulars which Mr. Jacobs did not admit constituted professional misconduct. After hearing the evidence and weighing it the Committee found Mr. Jacobs guilty of professional misconduct in respect of all matters charged except the withdrawn particular. Specifically, the following particulars of professional misconduct were found to have been established:

Complaint D123/94

2. a) He failed to reply to the Law Society regarding a complaint by Bruno Di Gregorio despite letters dated October 22, 1993 and January 12, 1994 and his assurance in a telephone conversation with the Society on December 21, 1993 that he would reply;
- b) He failed to provide a reply to the Law Society regarding a complaint by Aldo Forgione despite letters dated May 25 and June 27, 1994, and telephone requests on June 15, June 17, June 20 and June 21, 1994;
- d) He failed to comply with his personal Undertaking to Angie and Thomas Strlic, and the Law firm of Di Gregorio & Associates dated May 17, 1991 in that he failed to register a discharge of mortgage;
- e) He failed to reply to Bruno Di Gregorio, a fellow solicitor, despite letters dated December 17, 1992, February 3, 1993 and April 28, 1993 and telephone requests made by the complainant's secretary, Angie, on February 10, April 28, August 4 and September 14, 1993;
- g) He has failed to account for monies withheld on a real estate transaction which closed May 24, 1990.

Since in most cases the professional misconduct was admitted it is unnecessary to quote the ASF's supporting these findings. The four ASF's before the Committee are instead attached as appendices. The Committee will, however, deal with the contested particulars listed above which it found to constitute professional misconduct on the basis of the evidence.

D139/93, paragraph 2(c)

In this particular Mr. Jacobs was charged that:

He failed to satisfy his undertaking to the Law Society dated June 12, 1991 by failing to ensure that an initial psychiatric report was provided to the Law Society within sixty days and to ensure that semi-annual reports were provided to the Law Society by a psychiatrist for a period of two years.

On June 6, 1991, Dr. L. Zoberman, a Family Physician stated that "From my limited assessment of him I do not think that [Mr. Jacobs] is depressed, nor do I think that he has any acute psychiatric or psychological problem. I have referred him on to Dr. J. Wohlgeleirnter who is a Psychiatrist, for an opinion. " Then on June 12, 1991, Mr. Jacobs executed an undertaking to the Law Society:



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To undergo treatment under the care of a psychiatrist with such frequency and duration as deemed necessary by him or her, to ensure that an initial report is provided to the Law Society by the psychiatrist within 60 days of this date, and to ensure that thereafter semi-annual reports are provided to the Law Society or until my treatment with the psychiatrist terminates.

On August 12, 1991 (materially within the sixty day period), Dr. D. S. Wohlgernter in his report stated that Mr. Jacobs was:

"a person who handles stress poorly and he would benefit from psychological treatment to help him contain stress".

On August 13, Ronald Cohen, of Discipline Counsel, wrote to Mr. Jacobs asking him to follow up, and provide information about his doing so, on Dr. Wohlgernter's recommendations.

When Mr. Jacobs testified at the hearing he did not attempt to contradict this evidence. It was plain that he had not complied with his undertaking. His explanation was that he, Mr. Jacobs, did not believe that what Dr. Wohlgernter told him that he, Dr. Wohlgernter, could do for him would be useful. He, therefore, did not proceed with treatment.

The Committee was at a loss to understand this explanation coming from a solicitor. The undertaking was clear. The failure to comply with it was clear. The Committee found, therefore, that failure to comply with the undertaking was professional misconduct.

D234/93, paragraph 2(a)(iii)

In this particular, Mr. Jacobs was charged that:

He failed to take steps to address a judgment against his client, Sergio Pingtore, for unpaid rent on a property at 588 Parliament Street, in the City of Toronto.

The background to this allegation was that in 1992, Mr. Jacobs was retained by Maureen Clohessy-Pingtore and her husband, Sergio Pingtore to act on their behalf with respect to the purchase of a residential property in Toronto. The closing was scheduled for September 14, 1992. On the closing date, Mr. Jacobs was advised by the mortgagee's solicitor that there was an outstanding unpaid execution against Sergio Pingtore. The judgment was registered as against Mr. Pingtore and his former roommate, Shawn Miller, as a result of arrears of rent owing on an apartment they once shared. In order to facilitate the closing, Mr. Jacobs gave his personal Undertaking to remove the execution, and held back the sum of \$4,000.00 from Mr. and Mrs. Clohessy-Pingtore in trust which represented an estimate of the amount required to pay off the execution.

By letter dated February 4, 1993 Ms. Clohessy-Pingtore filed a complaint against Mr. Jacobs with the Law Society. Ms. Clohessy-Pingtore advised the Society that she had no idea of the status of the real estate transaction or the execution against her husband. Ms. Clohessy-Pingtore advised that despite a number of telephone calls to Mr. Jacobs' office, she was unable to obtain any information from him. As of February of 1993, Ms. Clohessy-Pingtore had yet to receive a reporting letter from Mr. Jacobs. This left Ms. Clohessy-Pingtore with no knowledge as to the state of insurance on the house or the status of the Land Transfer Tax refund to which she and her husband were entitled. Under cover of letter dated February 25, 1993, the Law Society forwarded to Mr. Jacobs a copy of Ms. Clohessy-Pingtore's letter of complaint for his comments.

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By letter dated March 31, 1993, Mr. Jacobs responded to the Society about Ms. Clohessy-Pingtore's complaint. Mr. Jacobs advised that he had been attempting to negotiate a settlement of the judgment against Mr. Pingtore since the closing of the transaction.

In a telephone conversation with Ms. Carlyle of the Complaints department on May 13, 1993, Mr. Jacobs advised that he had not prepared a reporting letter and advised that now for the first time, he realized that his lack of a reporting letter in this matter caused a problem. He assured Ms. Carlyle that he would arrange a meeting with Mr. and Ms. Clohessy-Pingtore.

On July 22, 1993, Ms. Carlyle telephoned Ms. Clohessy-Pingtore and was advised that as she had still not heard from Mr. Jacobs nor had she received a reporting letter from him, she telephoned Mr. Jacobs to arrange an appointment with him. Ms. Clohessy-Pingtore advised that Mr. Jacobs cancelled the first scheduled appointment on the basis that he was ill, but eventually met with him during the week of July 12. At that time, she was supposed to pick up a package of documents, but was advised that Mr. Jacobs' secretary was ill, and therefore, the documents were not ready. She was told that the documents would be ready this week, but as of July 22, 1993, Ms. Clohessy-Pingtore had heard nothing.

Ms. Carlyle telephoned Mr. Jacobs later that same day and left a message for him to return the call. The call was not returned.

On July 30, 1993, a Law Society staff employee telephoned Mr. Jacobs' office and left a message for Mr. Jacobs to provide written confirmation by August 5, 1993 that the documents had been forwarded to Ms. Clohessy-Pingtore or the matter would be referred to the Discipline Committee. Later that day, Mr. Jacobs returned the Society's call, but no written response was ever received by the Society.

At the hearing, Mr. Jacobs attempted to describe the conversations that he had had with Mr. Pingtore and the steps he had taken in an attempt to settle the execution. It was in the Committee's view not a difficult thing to do. The judgment was a small claims judgment that did not attract interest and within Mr. Pingtore's means to settle. It required only Mr. Jacobs' attention and follow up. Mr. Jacobs' explanations were inadequate because, if supported, they amounted to a chronicle of unsustained actions that led to no result. Despite this matter being in issue for the discipline hearing the execution still had not been discharged at the time of the hearing.

In the Committee's view, this was an unalloyed failure to serve a client's needs and constituted professional misconduct.

D234/93, paragraph 2(a)(v)

In this allegation Mr. Jacobs was charged that:

He failed to take steps to defend an action against his clients, Vaughan E. Miller and John Michael Stoyka which resulted in Default Judgment being issued against them.

The background to this allegation was that Ms. Vaughan Miller and John Stoyka sought advice from Mr. Jacobs about their inability to close a residential real estate transaction - the purchase of a new home from Home Sport Inc. They subsequently were sued over their failure to close. On May 17, 1990, Mr. Jacobs wrote to the solicitors for Home Sport Inc. stating that he represented Miller and Stoyka. On May 30, he received a letter from the solicitors for Home Sport Inc. stating in full.

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"This will confirm our telephone conversation of May 28, 1990 in which I agreed to extend the time for delivery of the Statement of Defence to June 11, 1990 in order to allow your clients to explore the possibility of closing this transaction.

As I stated on the phone, I will let you know if I receive information that the above-noted lot has been resold.

We look forward to hearing from you by June 11, 1990, failing which we have been instructed to proceed in default without further notice to you."

On June 12, the deadline for filing a Statement of Defence was extended to June 25 but with the warning that if a Statement of Defence had not been filed by then "we have been instructed to proceed in default without further notice to you". On June 13, Mr. Jacobs wrote to the solicitor for Home Sport Inc. indicating that his clients had ascertained that the house had been resold but without referring to the Statement of Defence deadline.

At the hearing Mr. Jacobs sought to give evidence of conversations that he had with the solicitors for Home Sport Inc. None of these purported to relate to filing a Statement of Defence. He wrote no further letters; he wrote no notes to file; he had no evidence whatsoever to corroborate his description of these conversations some four years and four months after the event. Indeed, this absence of contemporaneous evidence was a constant theme of Mr. Jacobs' evidence.

In any case Mr. Jacobs did not file a Statement of Defence and he had no agreement from the other side that he need not do so. For the next three years, nothing happened. He did not look at the file. When he spoke to Miller and Stoyka on other matters all he would say would be words to the effect "I haven't heard anything".

Then on May 9, 1993, as someone once put it, the pudding blew up on the stove. Miller learned that Home Sports Inc. had obtained a judgment against her and Stoyka for \$80,000.00 and found herself being harassed by a determined and most unpleasant bill collector. She attempted to see Mr. Jacobs and finally saw him on May 11, 1993. She noted in her book that Mr. Jacobs said "I guess I should have filed a defence".

Mr. Jacobs took no steps to attempt to set aside the default judgment. He testified that he decided that the best strategy would be to negotiate a settlement. He said that the bill collector offered to set aside the default judgment but if the judgment creditor did so, it would fight and not negotiate. In any case, Mr. Jacobs did not follow up by seeing to the setting aside of the default judgment.

Miller and Stoyka were frustrated by Mr. Jacobs' seeming inaction and frightened by the aggressive conduct of the bill collector; a writ of seizure was mailed to their door; the bill collector threatened seizing their van. They were put in contact with Peter Harvey at Holden Day Wilson by someone other than Mr. Jacobs.

Mr. Harvey, whose evidence the Committee accepts, testified that Miller and Stoyka were in legal difficulty to start with because they had failed to close a real estate purchase. He added, however, that a lot of the costs were "soft". On their behalf, he ultimately settled the \$80,000 judgment for \$25,000. Mr. Harvey said that he believed that he could have negotiated a substantially lower settlement had a defence been filed and energetically pressed and had default judgment not been obtained.

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The Committee agrees with this. A motion to set aside a default judgment is itself an expensive proceeding. It is also a difficult order to obtain because of the need for a judicial consideration of the merits of a defence, something that does not normally occur until a summary judgment motion or a pre-trial. By failing to file a defence or to obtain the other side's consent not to do so, Mr. Jacobs prejudiced his client's interests, failed to serve them and is guilty of professional misconduct.

Mr. Jacobs' explanations at the hearing were that somehow he thought that he had an agreement with the other side not to file a Statement of Defence but there was no corroborative evidence whatsoever that justified or corroborated this view.

Accordingly, the Committee found Mr. Jacobs guilty of professional misconduct on this particular.

D123/94, paragraphs (e) and (f)

Here Mr. Jacobs was charged that:

- e) He failed to reply to Bruno Di Gregorio, a fellow solicitor, despite letters dated December 17, 1992, February 3, 1993 and April 28, 1993 and telephone requests made by the complainant's secretary, Angie, on February 10, April 28, August 4 and September 14, 1993;
- f) He has failed to reply to communications from a fellow solicitor as to whether he has fulfilled Undertakings given on May 24, 1990;

Here the Complainant is a lawyer who represented his secretary and her husband, Angie and Thomas Strlic, with respect to a real estate purchase transaction. Mr. Jacobs represented the vendors. The purchase and sale transaction closed on May 17, 1991.

The following is a chronological list of events:

May 17, 1991	Mr. Jacobs gave an undertaking to, <u>inter alia</u> , discharge a mortgage registered on title to the Property.
December 17, 1992	The Complainant wrote to Mr. Jacobs reminding him of his outstanding undertaking to discharge the mortgage and requested a reply. Mr. Jacobs failed to reply.
February 3, 1993	The Complainant wrote to Mr. Jacobs reminding him of his outstanding undertaking and demanded Mr. Jacobs' immediate attention to this matter. Mr. Jacobs failed to reply.
February 10, 1993	The Complainant's secretary, Angie Strlic, telephoned and left a message for Mr. Jacobs.
April 28, 1993	The Complainant's secretary, Angie Strlic, telephoned and left a message for Mr. Jacobs.
April 28, 1993	The Complainant wrote to Mr. Jacobs reminding him of his outstanding undertaking. He gave Mr. Jacobs seven days to register a discharge, failing which he would refer the matter to the Law Society and prepare the court application himself and request costs against Mr. Jacobs and his client. Mr. Jacobs failed to reply.

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August 4, 1993           The Complainant's secretary, Angie Strlic, telephoned and left a message for Mr. Jacobs.

September 14, 1993       The Complainant's secretary, Angie Strlic, telephone and left a message for Mr. Jacobs.

September 20, 1993       The Complainant wrote to the Law Society.

The following is a chronology of attempts by the Law Society to obtain a reply from Mr. Jacobs:

October 22, 1993       Letter to Mr. Jacobs for reply to complaint. Mr. Jacobs did not reply.

December 21, 1993       Telephone call to Mr. Jacobs. Mr. Jacobs said he would fax a reply the same day.

January 4, 1994        Telephone message left for Mr. Jacobs. Mr. Jacobs did not reply.

January 6, 1994        Telephone message left for Mr. Jacobs. Mr. Jacobs returned the call on January 7, 1994 and left voice mail message that he would call back.

January 7, 1994        Telephone message left for Mr. Jacobs. Mr. Jacobs did not reply.

January 12, 1994       Registered letter sent to Mr. Jacobs for a reply. Mr. Jacobs did not reply.

On June 12, 1991, Mr. Jacobs had entered into an undertaking with the Law Society to respond promptly to all communications from the Law Society; in the case of written communications, within seven days of the receipt of the letter and in the case of telephone communications, within three days of receipt of such communications. Mr. Jacobs, in having failed to reply to the several communications listed, has breached his undertaking.

In his testimony, Mr. Jacobs testified as did Mr. Di Gregorio, that the undertaking to discharge the mortgage still has not been fulfilled. Mr. Jacobs again described his efforts to do so, but again this description is uncorroborated and even if corroborated would not be an answer to the professional misconduct charge of failing to reply and of failing to discharge his undertakings.

Accordingly, the Committee found that Mr. Jacobs committed professional misconduct in respect of these two charges.

#### RECOMMENDATION AS TO PENALTY

---

The Committee recommends that Martin Harold Jacobs be disbarred.

#### REASONS FOR RECOMMENDATION

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In this case Mr. Jacobs has been found guilty of 42 particulars of professional misconduct all relating to:

- failing to serve his clients;
- failing to respond to communications from other solicitors;
- failing to respond to communications from the Law Society;
- practising while under suspension;
- failing to file his forms, which means that the Law Society cannot ensure that his clients' interests have been protected.

At the hearing the Chairman asked both counsel to comment on suspension instead of disbarment. Mr. Du Vernet believed suspension to be an appropriate penalty but offered no precedents in support where similar conduct had resulted in a suspension only. He indicated that one of the lawyers who Mr. Jacobs shared space with was willing to supervise Mr. Jacobs' practice after a possible suspension and that this would protect the public if a suspension were the penalty. The Committee, after refusing to adjourn the hearing to hear this evidence about which more is said below, gave Mr. Du Vernet leave to file letters evidencing this willingness, copies of which are attached as an appendix.

Mr. Perrier argued that Mr. Jacobs' conduct had gone past the point where a suspension, even a long one, would be appropriate. In support of this point and in response to the Chairman's observation that there was no suggestion that Mr. Jacobs had been dishonest, he provided the Committee with three decisions, the Bronstein, Wickham and Roy cases.

In the Natalie Bronstein case, November 15, 1993 (Copeland, Lamont and Hill) the solicitor was found guilty of breaching an undertaking in three particulars. She too had three prior discipline convictions for matters that did not involve personal dishonesty. The Committee recommended disbarment which recommendation was acted upon by Convocation on January 27, 1994. The Committee said:

"Deliberate breaches of an undertaking to the Law Society, involving a lack of cooperation with the professional governing body and the unauthorized practice of law, cannot be tolerated if the Law Society is to regulate its members in the public interest."

In the Leon Stanley Wickham case of June 14, 1994 (Carter, Moliner and Curtis, Curtis dissenting May 24, 1994) there were four separate complaints against the solicitor, each containing several particulars which bear an unhappy resemblance to the matters on which Mr. Jacobs was found guilty of professional misconduct. Wickham was found guilty on all counts. None of these particulars of professional misconduct evidenced any dishonesty and the solicitor had no discipline history. The majority of the Committee recommended a penalty of three months suspension with the suspension continuing until a list of six conditions had been met. Carole Curtis in her dissent recommended disbarment. On September 22, 1994, Convocation disbarred Mr. Wickham.

In the Norman Edward Joseph Roy case dated September 15, 1994 (Topp, Murray and Richardson) the solicitor was found guilty of fifteen particulars of professional misconduct which again are similar in kind to those that the Committee has found Mr. Jacobs guilty of. None involved dishonesty. Mr. Roy had a discipline history of five convictions which has led to suspensions and a reprimand in Convocation. The Committee recommended disbarment and Convocation disbarred the solicitor on October 26, 1994.

The Bronstein, Wickham and Roy decisions are recent, are sufficiently similar to Mr. Jacobs case that they cannot be distinguished, and are powerful messages to the profession and to the public that failure to serve clients, failure to have an acceptable standard of practice and refusal to be governed by the Law Society warrant disbarment unless there are exceptional mitigating

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circumstances. Simply put, bad lawyers endanger the public, destroy public confidence in the legal profession and through doing so, endanger the independence of the profession. Benchers will not tolerate this; such are our standards.

Mr. Jacobs' misconduct fell below acceptable standards of practice in all particulars and demonstrated total contempt of and ungovernability by the Law Society. Mr. Jacobs' conduct, in all the matters charged, has been execrable from a professional conduct perspective, has soured several members of the public who had the misfortune to deal with him on lawyers generally, has enraged the other lawyers involved in the matters, and has caused the Law Society to conclude that his persistent and consistent attitude problem of ungovernability is sufficient to disbar him.

In response to this at his hearing, Mr. Jacobs was unrepentant. He didn't express regrets about what he had done; he didn't apologize to anyone and he expressed no remorse for his actions to the Committee. Instead, on the particulars of professional misconduct that he contested, he sought to justify his conduct by evidence, which even if supported and corroborated by independent material, would be insufficient to answer the charges. He admitted that he preferred his own business interests (an investment in a restaurant that failed) to the interests of his clients. His counsel agreed that his case had "a long tail" meaning a great number of allegations.

The Committee heard no evidence that would constitute mitigating circumstances in Mr. Jacobs' case. Then there is Mr. Jacobs' Discipline history.

On October 1988, he was found guilty of professional misconduct for failing to serve clients in a conscientious, diligent and efficient manner; misleading a client; practising law under suspension; and failing to maintain books and records. He was reprimanded in Committee and ordered to pay costs in the amount of \$1,000.00.

On June 12, 1991, he was found guilty of professional misconduct for failing to reply to communications from the Society. He was reprimanded in Committee.

On April 14, 1992, he was found guilty of professional misconduct for failing to reply to communications from the Society; breach of undertaking to the Society; failing to serve a client; and failing to cooperate with the Society's insurer. Mr. Jacobs was reprimanded in Committee.

The Committee believes that Mr. Jacobs' discipline history shows that the matters on which this Committee has found him guilty of professional misconduct are part of a continuous pattern of unacceptable professional misconduct dating back prior to 1988. It also shows that Mr. Jacobs had been warned about his conduct and has been fixed with notice and knowledge of its seriousness.

For all these reasons the Committee recommends that Mr. Jacobs be disbarred.

The Committee wishes to deal with one additional point. Late on the day of the hearing Mr. Du Vernet stated that he had two additional witnesses. Both were solicitors who occupied the same office space as Mr. Jacobs. They were unavailable that day and Mr. Du Vernet sought an adjournment of the case in order to call their evidence. The Committee refused to grant the adjournment on the grounds that Mr. Jacobs had had ample notice of the hearing and of the fact that disbarment was being sought and therefore had had ample time to arrange for his

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witnesses. Mr. Du Vernet was told that if he wished to do so he could apply to Convocation to have these witnesses heard when Convocation considered the Committee's Report. The Committee also gave Mr. Du Vernet leave to file a letter after the hearing from one of the witnesses. He in fact filed two letters which the Committee has accepted, admitted and considered in reaching its decision.

The first is a letter from Robert H. Burke, Q. C. which describes Mr. Jacobs as "a very able and astute lawyer", as having "a keen perception of the essential nature of a problem and its practical solution" and as an "excellent adviser". He mentions that Mr. Jacobs is becoming more of a criminal lawyer and that he would be prepared to supervise Mr. Jacobs' practice and to undertake that Mr. Jacobs would respond to all Law Society inquiries in the future. The second letter from Allen C. Gerstl is similar in tone and content. The Committee has a difficult time reconciling these views of Mr. Jacobs with his handling of the matters on which it found him guilty of professional misconduct and is not prepared to let these views dissuade it from recommending disbarment to Convocation.

On point are the comments of Sir Thomas Bingham, M. R. in Bolton v. Law Society, [1994] 1 W. L. R. 512 (C. A. ), at p. 519, made in reference to a penalty of two years suspension which the Committee concludes are equally applicable to a penalty of disbarment:

"Because orders made by the tribunal are not primarily punitive, it follows that considerations which would ordinarily weigh in mitigation of punishment have less effect on the exercise of this jurisdiction than on the ordinary run of sentences imposed in criminal cases. It often happens that a solicitor appearing before the tribunal can adduce a wealth of glowing tributes from his professional brethren. He can often show that for him and his family the consequences of striking off or suspension would be little short of tragic. Often he will say, convincingly, that he has learned his lesson and will not offend again. On applying for restoration after striking off, all these points may be made, and the former solicitor may also be able to point to real efforts made to re-establish himself and redeem his reputation. All these matters are relevant and should be considered. But none of them touches the essential issue, which is the need to maintain among members of the public a well-founded confidence that any solicitor whom they instruct will be a person of unquestionable integrity, probity and trustworthiness. Thus it can never be an objection to an order of suspension in an appropriate case that the solicitor may be unable to re-establish his practice when the period of suspension is past. If that proves, or appears likely, to be so the consequence for the individual and his family may be deeply unfortunate and unintended. But it does not make suspension the wrong order if it is otherwise right. The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price. "

The Committee, therefore, did not consider the evidence of Mr. Burke and Mr. Gerstl sufficiently material to dissuade it from recommending disbarment.

ALL OF WHICH is respectfully submitted

DATED this 6th day of January, 1994

Ian Blue, Q. C.  
Chair



It was moved by Mr. Topp, seconded by Mr. Carey that the Report be adopted.

Mr. Perrier asked that the following amendments be made:

- (1) page 11, first paragraph under the heading Reasons for Recommendation - should be "22 particulars" not 42; and
- (2) the matter that it was agreed that there was no practising while under suspension was wrongly recorded;
- (3) the date of the Report should be "January 6, 1995" not 1994.

There were no submissions and the Report as amended was adopted.

It was moved by Ms. Elliott, seconded by Ms. Richardson that the recommended penalty of the Committee be adopted, that is, that the solicitor be disbarred.

Mr. DuVernet made submissions asking that the solicitor be permitted to resign rather than be disbarred. Counsel read a letter from the solicitor's psychiatrist Dr. Wohlgelernter and further asked that Mr. Robert Howard Burke be called to give testimony.

Robert Howard Burke was sworn in and spoke on the solicitor's behalf.

The solicitor then spoke on his own behalf.

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

There were questions from the Bench.

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

The main motion that the solicitor be disbarred was voted on and lost.

It was moved by Mr. Carey, seconded by Mr. Swaye that on the solicitor's undertaking not to practise that he be permitted to resign conditional on his complying with the demands of the Society within 30 days failing which he be disbarred.

Lost

It was moved by Mr. Finkelstein, seconded by Ms. Puccini that the solicitor be permitted to resign and that Mr. Robert Burke be given Power of Attorney.

Carried

Mr. Finkelstein would prepare Reasons.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be permitted to resign and that Mr. Burke be given Power of Attorney.

The Treasurer advised that Reasons would be prepared.

Counsel and solicitor retired.

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

CONVOCATION RESUMED AT 2:00 P.M.

PRESENT:

The Treasurer, Aaron, Adams, Backhouse, Banack, Bobesich, Carey, Carpenter-Gunn, Cole, Cronk, Curtis, Elliott, Finkelstein, Gottlieb, Lax, MacKenzie, Marrocco, Murray, S. O'Connor, Puccini, Richardson, Ross, Sachs, Scott, Stomp, Swaye, Thom, Topp, Wilson and Wright.

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IN PUBLIC

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Re: Timothy David SALOMAA - Mississauga

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Topp withdrew for this matter.

Ms. Budweth appeared for the Society and Mr. H. Nickel appeared for the solicitor. The solicitor was not present.

Ms. Budweth advised Convocation that this matter would not be concluded today and requested that it be adjourned to the Discipline Convocation in September.

The adjournment was granted to the September Discipline Convocation.

Counsel retired.

Re: David Henry CONRAD - Markham

The Secretary placed the matter before Convocation.

Mr. Scott did not participate.

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

Convocation had before it the Report of the Discipline Committee dated 10th May, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert C. Topp, Chair  
Maurice C. Cullity, Q.C.  
Earl J. Levy, Q.C.

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

Lesley M. Cameron  
for the Society

DAVID HENRY CONRAD  
of the Town  
of Markham  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: April 19, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On December 20, 1994 Complaint D347/94 was issued against David Henry Conrad alleging that he was guilty of professional misconduct.

The matter was heard in public on April 19, 1995 before this Committee comprising Robert C. Topp, Chair, Maurice C. Cullity, Q.C. and Earl J. Levy, Q.C.. The Solicitor did not attend the hearing and was not represented. Lesley M. Cameron appeared on behalf of the Law Society.

DECISION

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On the basis of the documentary and viva voce evidence presented by the Society, the following particular of professional misconduct was found to have been established:

Complaint D347/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1994, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that David Henry Conrad be Reprimanded in Convocation. The Committee recommends that the Solicitor be required to attend in person at Special Convocation, June 22, 1995, and that if he fails to do so that he be suspended indefinitely until he does attend. The Committee also recommends that the Solicitor pay Law Society costs in the amount of \$550.

REASONS FOR RECOMMENDATION

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This Solicitor in failing to appear at the hearing and thereby requiring the prosecution to hold a trial in absentia is not the first such instance of this conduct that we have seen in recent months. This trend is disturbing and Convocation in the future may need to take steps to attempt to encourage Solicitors to attend at the committee level.

At the same time, the finding of misconduct that was made in the normal course would have resulted in the Solicitor being Reprimanded in Committee and it is your Committee's view that simply because the Solicitor failed to appear at the Committee that in the absence of policy or legislation that it would be inappropriate to impose a higher penalty.

Therefore, your Committee recommends that the Solicitor be reprimanded in Convocation at the June 1995 Special Convocation. If the Solicitor fails to appear at the June 1995 Special Discipline Convocation then your Committee recommends an indefinite suspension until he does so. It is your Committee's recommendation that the Solicitor be required to attend in person at the June Special Discipline Convocation.

Your Committee also recommends costs in the sum of \$550.00 payable to the Law Society of Upper Canada within thirty (30) days of the June 1995 Special Convocation.

David Henry Conrad was called to the Bar on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 10th day of May, 1995

Robert C. Topp  
Chair

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

There were no submissions and the Report was adopted.

The recommendation of the Committee was that the solicitor be reprimanded, and that he appear in Convocation today and if he failed to appear that he be suspended indefinitely until he attended and in addition pay costs in the amount of \$550.

It was moved by Ms. Ross, seconded by Mr. Cole that the solicitor be suspended indefinitely until he appeared before Convocation and that he pay costs in the amount of \$550.

22nd June, 1995

Ms. Cameron asked Convocation to order that the costs be paid within 30 days.

The motion to suspend the solicitor and that the costs be paid within 30 days was voted on and adopted.

Counsel retired.

Re: Marshall Stephen KAZMAN - North York

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Ms. Richardson withdrew for this matter.

Ms. Kate Wootton appeared for the Society and Mr. Martin Applebaum appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 13th April, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th May, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Michael G. Hickey, Q.C., Chair  
Julaine Palmer  
Nora Richardson

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

Kate Wootton  
for the Society

MARSHALL STEPHEN KAZMAN  
of the City  
of North York  
a barrister and solicitor

Martin Irving Applebaum  
for the solicitor

Heard: December 13, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 14, 1994 Complaint D55/94 was issued against Marshall Stephen Kazman alleging that he was guilty of professional misconduct.

The matter was heard in public on December 13, 1995 before this Committee composed of Michael G. Hickey, Q.C., Julaine Palmer and Nora Richardson. The Solicitor attended at the hearing and was represented by Martin Irving Applebaum, Q.C. Kate Wootton appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D55/94

2. b) He breached an Order of Convocation by continuing to practice law while under suspension, from November 10, 1993 to March 10, 1994.

##### Evidence

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

##### "AGREED STATEMENT OF FACTS"

##### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D55/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 1994.

##### II. IN PUBLIC/IN CAMERA

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

##### III. ADMISSIONS

3. The Solicitor has reviewed Complaint D55/94 and admits the particulars contained in paragraph 2. b) therein. The Solicitor further admits that the said particulars constitute professional misconduct.

##### IV. FACTS

4. The Solicitor was called to the Bar on April 10, 1984. He practices as an associate with the law firm of Kazman & Associates.

5. On or about June 7, 1993 (Tab 1, Document Book), the Law Society forwarded to the Solicitor a Notice advising him that his Errors and Omissions Insurance Levy was due and payable for the period January 1, 1993 to December 31, 1993 on July 1, 1993. The Solicitor was further advised that if he did not pay the full amount owing by October 31, 1993, he would be suspended on November 1, 1993.

6. On or about September 27, 1993 (Tab 2, Document Book), the Law Society forwarded to the Solicitor a Final Notice advising him that his Errors and Omissions Insurance Levy was due and payable for the period January 1, 1993 and December 31, 1993. He was further advised that payment in full was required by November 1, 1993 in order to avoid suspension.

7. By registered mail dated November 2, 1993 (Tab 3, Document Book), the Solicitor was advised that his rights and privileges as a member of the Society were suspended effective November 1, 1993 for failure to pay his Errors and Omissions Insurance levy.

22nd June, 1995

8. By letter dated March 9, 1994 (Tab 4, Document Book), the Solicitor was reminded of his obligation under Section 18 of the Law Society Regulation 708 to produce books and records forthwith to any representative of the Law Society. The Solicitor was further advised that he had been suspended since November 1, 1993 for failing to pay his Errors and Omissions levy. The Solicitor was then advised that this matter would be referred to the Discipline department for failure to co-operate and practising under suspension.

9. The Solicitor forwarded payment to the Law Society for his Errors and Omissions levy and was reinstated on March 10, 1994.

10. The following material was obtained, on February 18, 1994 during the course of an audit conducted by the Law Society's Audit and Investigation Department, to show that the Solicitor practised while under suspension for non-payment of the Errors and Omissions levy from November 1, 1993 to March 10, 1994:

- i. Solicitor's letter to Ontario Legal Aid dated November 19, 1993 for client, J. Martin, advising that he attended at Newmarket Court that day and negotiated the withdrawal of charges against his client (Tab 5, Document Book);
- ii. Solicitor's account to Ontario Legal Aid dated November 19, 1993 for client, J. Martin (Tab 6, Document Book); and
- iii. Solicitor's letter to Ontario Legal Aid dated December 17, 1993 for client, D. Longo, requesting authorization to continue on behalf of the client (Tab 7, Document Book).

V. DISCIPLINE HISTORY

11. The Solicitor does not have a discipline history.

DATED at Toronto this      day of      , 1994."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Marshall Stephen Kazman be suspended for a period of three months.

REASONS FOR RECOMMENDATION

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The Solicitor admitted practising during November and December, 1993 after receiving notice of his administrative suspension effective November 1st, 1993 for non-payment of his errors and omissions levy for 1993. There were no mitigating circumstances and the Committee accepted the joint submission on penalty for a suspension of three months, being the equivalent of the period the Solicitor practised while under suspension plus one month. No request was made by the Society for costs.

22nd June, 1995

Marshall Stephen Kazman was called to the Bar and admitted as a Solicitor on the 10th day of April, 1984.

ALL OF WHICH is respectfully submitted

DATED this 13th day of April, 1995

Michael G. Hickey, Q.C.  
Chair

It was moved by Mr. Topp, seconded by Mr. Marrocco that the Report be adopted.

Ms. Wootten asked that the following amendments be made to the Report:

- (1) page 201 of the bound Discipline Reports - date on which the matter was heard should be "December 13, 1994" not 1995; and
- (2) page 202 of the bound Discipline Reports, under the heading Report, second paragraph, first line - date should be "December 13, 1994" not 1995.

There were no submissions and the Report as amended was adopted.

It was moved by Mr. Topp, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 3 months.

Both counsel for the solicitor made brief submissions in support of the recommended penalty. Ms. Wootten advised that the solicitor was winding down his practice and requested that the suspension be effective September 1, 1995.

Counsel, the reporter and the public withdrew.

The motion to suspend the solicitor for 3 months was voted on and adopted.

It was moved by Ms. Ross, seconded by Ms. Curtis that the suspension be effective immediately.

Lost

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 3 months effective September 1, 1995.

Counsel retired.

Re: Thomas Alan KELLY - North York

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Thom and Ms. Richardson withdrew for this matter.

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



22nd June, 1995

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st March, 1995 (marked Exhibit 1), together with the Report and an Affidavit of Service sworn 20th April, 1995 by James Gooding that he had personally served the solicitor on 15th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Mary P. Weaver, Q.C., Chair  
Stuart Thom, Q.C.  
Nora Richardson

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

Christine Schmidt  
for the Society

THOMAS ALAN KELLY  
of the City  
of North York  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: January 11, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On the 24th of August, 1994, Complaint D242/94 was issued against Thomas Alan Kelly alleging that he was guilty of professional misconduct. The matter was heard in public on the 11th day of January, 1995 before this Committee composed of Mary P. Weaver, Q.C., Chair, Nora Richardson, and Stuart Thom, Q.C. The solicitor was not in attendance at the hearing and was not represented. Christine Schmidt appeared on behalf of the Law Society.

The endorsements on the record show that this matter had been adjourned on September 27th, November 29th, December 7th, and December 13th, in 1994. The adjournments granted November 29th, December 7th, and December 13th were made peremptory to the solicitor. The adjournments on December 7th and 13th were granted on the basis of medical reports confirming that the solicitor was ill. At the hearing, the Society stated that there was no indication from the solicitor as to the state of his health at the date of the hearing and no indication from him as to whether it was his intention to appear on that date. The Committee therefore proceeded in the absence of the solicitor.

DECISION

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

2. (a) He failed to file with the Society within six months of the termination of his fiscal year ending October 31, 1993, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

EVIDENCE

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The Society filed proof of service of notice of the hearing to proceed on January 11th, 1995. On the basis of the viva voce evidence led by the Society, the Committee found that the solicitor was guilty of the misconduct set out in the complaint.

RECOMMENDATION AS TO PENALTY

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The Committee recommends a penalty as follows:

1. If the solicitor makes his filings and appears before Convocation, he be reprimanded in Convocation.
2. If the solicitor fails to make his filings by the time this matter is dealt with by Convocation, the Committee recommends a penalty of a suspension for a period of one month definitely, and thereafter indefinitely, until he completes his filings and attends before Convocation.

REASONS AS TO RECOMMENDATION

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In order to effectively govern the profession, the Society must ensure that its members are conducting their practice in accordance with the rules and regulations of the Society laid pursuant to the Law Society Act. Compliance with the rule set out in the complaint is important because the Society has no other way of determining if the solicitor is maintaining books and records and rendering proper accountings to his clients. As the solicitor is unwilling or unable to comply with the rules, the appropriate penalty is that he be suspended until such time as he has filed the required forms to the satisfaction of the Society and Convocation.

Thomas Allen Kelly was called to the Bar on the 9th day of April, 1981.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1995

Mary P. Weaver, Q.C.  
Chair

22nd June, 1995

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

There were no submissions and the Report was adopted.

Counsel for the Society read a fax received from the solicitor requesting that he be permitted to resign.

It was moved by Mr. Topp, seconded by Ms. Stomp that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 1 month definitely and thereafter indefinitely until his filings are completed.

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

The motion on the recommended penalty was adopted.

Counsel retired.

Re: Charles Howard LITMAN - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate.

Mr. Neil Perrier appeared for the Society and Ms. Janet Leiper appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 5th May, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Ian Blue, Q.C.  
Netty Graham

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

Neil Perrier  
for the Society

CHARLES HOWARD LITMAN  
of the City  
of Toronto  
a barrister and solicitor

Janet Leiper  
for the solicitor

Heard: February 28, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On February 14, 1995, Complaint D184a/94 was issued against Charles Howard Litman alleging that he was guilty of professional misconduct.

The matter was heard in public on February 28, 1995 before this Committee comprised of Clayton C. Ruby, Chair, Ian Blue, Q.C., and Netty Graham. The Solicitor attended the hearing and was represented by Janet Leiper. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D184a/94

2.   a)   He breached Subsection 8(c) of Section 14 of the Regulation by transferring money in the amount of \$30,359.54 from trust to general without fee billings or other written notifications first being delivered to the clients;
- b)   He has breached an Order of Convocation by continuing to practise law while under suspension during the period December 1, 1992 until April 8, 1993;
- c)   He signed another solicitor's name to a Statutory Declaration without authority and attempted to register the said document at the Registry Office;
- d)   He failed to provide a reply to the Law Society regarding a complaint by Marta Dungo, despite a registered letter dated October 21, 1992, and telephone requests on March 26, April 5, April 19 and April 22, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I.   JURISDICTION AND SERVICE

1.   The Solicitor admits service of Complaint D184a/94 and is prepared to proceed with a hearing of this matter on February 28, 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 D184a/94 and admits the particulars contained therein. The Solicitor also admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 9, 1976. He practises as a sole practitioner.

Particular 2(a) He breached Subsection 8(c) of Section 14 of the Regulation by transferring money in the amount of \$30,359.54 from trust to general without fee billings or other written notifications first being delivered to the clients;

5. The Solicitor created credits in general by transferring money from trust to general without first delivering fee billings.

May 30, 1991 The Solicitor transferred \$ 1,950.00 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The fee billing was not posted. The member states that his client - Bieri - owes more than this amount. (Document Book - Tab 1)

May 31, 1991 The Solicitor transferred \$ 1,500.00 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he did not know why he had transferred this money re - Syd Mur Holdings Ltd. (Document Book - Tab 2)

Aug. 1, 1991 The Solicitor transferred \$ 3,202.25 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The fee billing was not posted. The member states that his client - Serrano - owes more than this amount. (Document Book - Tab 3)

Sept. 1, 1991 The Solicitor transferred \$ 500.00 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Werger Holdings Inc. (Document Book - Tab 4)

Sept. 10, 1991 The Solicitor transferred \$ 341.49 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Werger Holdings Inc. (Document Book - Tab 5)

Sept. 10, 1991 The Solicitor transferred \$ 3,535.44 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that his client - Werger Holdings Inc. - owes more than this amount. (Document Book -Tab 6)

Oct. 1, 1991 The Solicitor transferred \$ 104.10 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1993. The member states that he does not remember this file for his client - Werger Holding Inc. (Document Book - Tab 7)

22nd June, 1995

Oct. 1, 1991      The Solicitor transferred \$ 70.64 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Werger Holdings Inc. (Document Book - Tab 8)

Oct. 1, 1991      The Solicitor transferred \$ 1,949.87 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Werger Holdings Inc. (Document Book - Tab 9)

Oct. 1, 1991      The Solicitor transferred \$ 2,049.30 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member had already taken fees in the amount of \$ 880.70 as shown on the Statement of Trust. The member states that his client - Werger Holdings Inc.- owes more money than this. (Document Book - Tab 10)

Jan. 31, 1992      The Solicitor transferred \$ 6,258.96 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that his client - Garwood Properties - owes more than this amount. (Document Book - Tab 11)

Jan. 31, 1992      The Solicitor transferred \$ 850.00 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that his client - Werger Holdings Inc. - owes more than this amount. (Document Book -Tab 12)

Mar. 5, 1992      The Solicitor transferred \$ 1,270.00 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Policelli. (Document Book - Tab 13)

Jun. 30, 1992      The Solicitor transferred \$ 147.51 from trust to general creating a credit in general. The fee billing was prepared and dated June 7, 1993. The posting was backdated to March 31, 1992. The member states that his client - Chapman & Kay re: Wood - owes more than this amount. (Document Book - Tab 14)

Nov. 5, 1992      The Solicitor transferred \$ 5,350.00 from trust to general creating a credit in general. A fee billing for \$ 1,225.00 was prepared and dated March 15, 1993. A fee billing for \$ 900.00 was prepared and dated June 7, 1993; the posting was backdated to March 31, 1992. The member states that he does not remember this file for his client - Torcap. (Document Book - Tab 15).

6.      The fee billings were sent to all of the above clients in 1993. The Law Society has received no enquiries from the above clients with respect to the billings. The Solicitor states that none of the above fee billings have been assessed.

Particular 2(b) He has breached an Order of Convocation by continuing to practise law while under suspension during the period December 1, 1992 until April 8, 1993

7. The following notices were sent by the Law Society to the Solicitor indicating that his annual fees were due:

July 13, 1992	1st Notice
October 8, 1992	2nd Notice
November 17, 1992	Final Notice.

8. As the Solicitor failed to pay the said fees, he was suspended by Convocation on December 1, 1992. A registered letter from the Law Society dated December 2, 1992 was sent to the Solicitor at his office at 40 King St. W. indicating that his rights and privileges were suspended for non-payment of annual fees.

9. The Solicitor moved offices from 40 King St. W. to 345 Wilson Ave. on November 1, 1992 and has stated that he was not aware of the December 2, 1992 suspension letter.

10. On December 4, 1992, the letter was signed for by a staff member at 40 King St. W. The Solicitor does not recognize the signature but believes it could have been that of a receptionist for that space, which is shared by many companies.

11. The Solicitor subsequently provided the Law Society with a change of address in February, 1993.

12. In March of 1993, a colleague of the Solicitor called him saying that he had heard the Solicitor had been suspended for non-payment of his annual fees. The Solicitor then called the Law Society who also advised that he had been suspended for non-payment. The Solicitor immediately sent funds to the Law Society to put himself in good standing.

13. The Solicitor paid his annual fees and was reinstated on April 8, 1993.

14. During the period, December 1, 1992 to April 8, 1993, the Solicitor continued to practice law.

Particular 2(c) He signed another solicitor's name to a Statutory Declaration without authority and attempted to register the said document at the registry office.

15. On or about July 27, 1990, Samuel S. Marr was retained by the Solicitor in connection with mortgage collection proceedings on behalf of his client, Syd-Mur Holdings on a property situated at 16 Breckonwood Crescent, in the City of Markham.

16. The Solicitor prepared Notices of Sale, which Mr. Marr executed.

17. On or about March 28, 1991, Mr. Marr obtained a Writ of Possession and instructed the Sheriff to evict the mortgagor. The Solicitor entered into settlement negotiations with the mortgagor on behalf of his client and instructed Mr. Marr to cancel the eviction.

18. In about May, 1991, on the Solicitor's instructions, Mr. Marr drafted and forwarded to the Solicitor, Minutes of Settlement. The Minutes of Settlement were executed by the parties.

22nd June, 1995

19. The file was held in abeyance until about May, 1992, when the Solicitor contacted Mr. Marr and advised that the mortgagor had breached the settlement terms and instructed him to obtain a new Writ of Possession.

20. In about October, 1992, Mr. Marr obtained a new Writ of Possession and pursuant to Writs of Seizure and Sale, funds were obtained by the Sheriff and forwarded to the Solicitor. Mr. Marr's retainer in this matter was ended.

21. On or about February 18, 1993, Mr. Marr's secretary, Anna Cafarelli, received a telephone call from "Charles" of the Registry Office at Newmarket who advised that they had in their possession an affidavit (Tab 16, Document Book), being used in conjunction with the sale of the property referred to above, which had purported to have been signed by Mr. Marr, although it had not been commissioned. As a result of this telephone call, Ms. Cafarelli telephoned the Solicitor and left a message for him to return the call. Ms. Cafarelli did not hear back from the Solicitor.

22. On or about February 23, 1993 Mr. Marr received a telephone call from "Charles" of the Registry office who advised him of the affidavit. Mr. Marr did not recall signing this document and subsequently telephoned the Solicitor regarding this matter. The Solicitor advised Mr. Marr that he, being Mr. Marr, had in fact signed the affidavit, but had simply neglected to commission Mr. Marr's signature. The Solicitor advised Mr. Marr that he would attend at the Registry Office to commission the affidavit.

23. On or about March 9, 1993, while speaking on another matter, Mr. Marr asked the Solicitor whether he had attended at the Registry Office to sign the affidavit. The Solicitor responded that he had not.

24. As a result of his concerns regarding this matter, Mr. Marr had an associate attend at the Registry Office on March 11, 1993 to obtain a copy of the affidavit. Mr. Marr examined the document and confirmed that the signature purporting to be his name on the affidavit was not his.

25. Under cover of letter dated March 15, 1993 (Tab 17, Document Book), Mr. Marr forwarded to Mr. Stephen Traviss, Senior counsel - Professional Conduct, copies of his letter to the Solicitor of March 12, 1993 and the Solicitor's letter to him of March 15, 1993.

26. On March 16, 1993, the Solicitor spoke with Mr. Stephen Traviss, Senior counsel and advised that it was he who had wrongfully signed the name of Mr. Marr on the document. Mr. Traviss suggested that the Solicitor consider retaining counsel in this matter.

27. Under cover of memorandum dated March 17, 1993 (Tab 18, Document Book), Mr. Traviss forwarded to Scott Kerr, Assistant Secretary, a copy of Mr. Marr's letter of March 15, 1993 with enclosures. Mr. Traviss advised that in a telephone conversation with the Solicitor on March 16, 1993, he informed Mr. Traviss that he wrongfully signed the name of Mr. Marr on the affidavit.

Particular 2(d) He failed to provide a reply to the Law Society regarding a complaint by Marta Dungo, despite a registered letter dated October 21, 1992 and telephone requests on March 26, April 5, April 19, and April 22, 1993.

28. The Solicitor represented Doreen Litowitz on a mortgage to Marta Dungo on a property at 2 Prescott Court. Mrs. Dungo was represented by Lawrence Gold.

29. The mortgage transaction closed on or about November 2, 1990.



30. On or about October 30, 1991, the property was sold under Power of Sale.

31. For several months after the sale, Mrs. Dungo requested an accounting from the Solicitor for the proceeds from the sale. Through her solicitor, Mrs. Dungo eventually received a Statement of Funds (Tab 19, Document Book) from the Solicitor which showed that he had deducted the sum of \$6105.86 towards his fees and disbursements. Mrs. Dungo was not satisfied with the Solicitor's accounting and requested that he provide her with an itemized Statement of Account. At that time the Solicitor did not provide an accounting to Mrs. Dungo.

32. As a result, by letter dated May 25, 1992 (Tab 20, Document Book), Mrs. Dungo filed a complaint against the Solicitor with the Law Society.

33. Under cover of letter dated June 22, 1992 (Tab 21, Document Book), the Law Society forwarded to the Solicitor a copy of Mrs. Dungo's letter of complaint. The Solicitor was requested to provide his comments to same within a period of two weeks. No response was received.

34. On July 7, 1992, a Law Society staff member telephoned the Solicitor and left a message on his answering machine for him to return the call. The call was not returned. A copy of the handwritten telephone notes are at Tab 22, Document Book.

35. On July 20, 1992, a Law Society staff member telephoned the Solicitor and left a message on his answering machine for him to return the call. A copy of the handwritten telephone notes are at Tab 23, Document Book.

36. Later that day, the Solicitor returned the Society's call and advised a Law Society staff member that he would forward his response by the latest the following day. No response was received. A copy of the handwritten telephone notes are at Tab 24, Document Book.

37. By registered mail dated August 4, 1992 (Tab 25, Document Book), the Law Society reminded the Solicitor of its letter of June 22, 1992, which remained unanswered. The Solicitor was reminded of his professional obligation to respond to communications from the Law Society. The Solicitor was requested to provide his response to the Society within seven days, or the matter would be referred to the Chair of the Discipline Committee for instructions. The letter was returned marked "unclaimed".

38. A further letter was sent to the Solicitor by registered mail dated September 9, 1992 (Tab 26, Document Book), enclosing a copy of the Society's August 4, 1992. There is also an acknowledgement of receipt card attached. The Solicitor was reminded of his professional obligation to respond to communications from the Law Society. The Solicitor was requested to provide his response to the Society within seven days, or the matter would be referred to the Chair of the Discipline Committee for instructions. No response was received.

39. The matter was considered by the Chair and Vice-Chairs of the Discipline Committee on October 8, 1992, who conditionally authorized the issuance of a formal Complaint based on the Solicitor's failure to respond to communications from the Society.

40. On October 15, 1992, a Law Society staff member telephoned the Solicitor to advise him of the Discipline Committee's disposition of this matter. A message was left on the Solicitor's answering machine for him to return the call. A copy of the handwritten telephone notes are at Tab 27, Document Book.

41. Later that day, the Solicitor returned the Society's call and advised that he had forwarded his response to the Society. A copy of the handwritten telephone notes are at Tab 27, Document Book.

42. By letter dated October 15, 1992 (Tab 28, Document Book), the Solicitor responded to the Society's correspondence regarding Mrs. Dungo's complaint. The Solicitor advised that Mrs. Dungo was a judgment debtor to his client and the amount outstanding at the time was about \$65,000.00. The Solicitor advised that he had not accounted for his fees, as the action was not over. The Solicitor advised that if Mrs. Dungo agreed to be examined as a judgment debtor and once his client exhausted her legal remedies against her, he would be prepared to provide Mrs. Dungo with a final accounting.

43. By registered and ordinary mail dated October 21, 1992 (Tab 29, Document Book), the Law Society reminded the Solicitor that in accordance with both the Mortgage Act and the Solicitors Act, Mrs. Dungo had a right to assess his account. As a result, the Solicitor was advised that the Society had some difficulty in accepting the Solicitor's reluctance in accounting for his fees. The Solicitor was requested to provide the Society with an accounting for his fees and disbursements.

44. On March 26, 1993, a Law Society staff member telephoned the Solicitor and left a message for him to return the call. The call was not returned. A copy of the handwritten telephone notes are at Tab 30, Document Book.

45. On April 5, 1993, a Law Society staff member telephoned the Solicitor regarding this matter. The Solicitor advised that he would review his file and forward a response to the Society. No response was received. A copy of the handwritten telephone notes are at Tab 30, Document Book.

46. On April 19, 1993, a Law Society staff member telephoned the Solicitor and left a message for him to return the call. The call was not returned. A copy of the handwritten telephone notes are at Tab 30, Document Book.

47. On April 22, 1993, a Law Society staff member telephoned the Solicitor and left a message on his answering machine for him to forward his response to the Society by April 29, 1993 or a registered letter would be sent to him. The call was not returned and a response was not received. A copy of the handwritten telephone notes are at Tab 30, Document Book.

48. The matter was again considered by the Chair and Vice-Chairs of the Discipline Committee on June 10, 1993, who authorized the issuance of a formal Complaint based on the Solicitor's failure to respond to communications from the Society.

49. By letter dated August 27, 1993 (Tab 31, Document Book), the Law Society requested additional information from Mrs. Dungo in order to proceed with the issuance of the formal Complaint. Mrs. Dungo provided the requested information to the Law Society's inquiries by letter dated October 15, 1993 (Tab 32, Document Book).

50. On March 16, 1994, a formal Complaint was sworn against the Solicitor for his failure to respond to the Law Society.

51. By letter dated November 29, 1994, the Solicitor provided an accounting to the Law Society (Tab 33, Document Book - account). The accounting has been forwarded to Mrs. Dungo.

V. DISCIPLINE HISTORY

52. On August 25, 1987 the Solicitor was found guilty of professional misconduct for failing to reply to Law Society communications and for failing to file for his fiscal year ended February 28, 1985. The Solicitor was reprimanded in Committee and ordered to pay \$500 in costs.

DATED at Toronto, this 28th day of February, 1995."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Charles Howard Litman be suspended for a period of two months and that he be ordered to pay Law Society costs in the amount of \$1000.00. The Committee further recommends that the Solicitor be required to participate in the Professional Standards Practice Review programme.

REASONS FOR RECOMMENDATION

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We looked at the professional misconduct engaged in by the solicitor and we are truly impressed by the breadth and variety of it. It is true that some of it reflects technical breaches; in particular, for example, count (a) reflects nothing improper apart from the transferring of money from trust to general without fee billings and there was no suggestion that the work was not performed or that anything else improper occurred in connection with those transfers.

The second particular involving the breach of the Order of Convocation regarding his suspension is mitigated by the fact that although he ought to have known he was suspended, and like all professionals, has an obligation to know because he changed the address of his office, and did not advise the Law Society of the new address, he in fact did not know he was suspended. That is mitigating; but it is perhaps even more mitigating that when he was told by a colleague that he was in fact suspended, he immediately called the Law Society and notified them of what had happened.

The most serious of these allegations is that involving signing another solicitor's name to a statutory declaration (not sworn). In effect, the solicitor created a false document 'though not an effective one and then, when he had a conversation with the solicitor whose name appeared on that document, tried to mislead the solicitor respecting the signature.

This is truly reprehensible conduct and dishonourable.

Finally, of course, there is the very lengthy failure to respond to the Law Society regarding a complaint by Miss Dungo. The facts recounted speak for themselves respecting that.

This is a case where there has been a joint submission by both counsel and we have taken into account a medical report that has been given to us and which we have very carefully considered. Apart from that report which contains personal medical information and has been sealed by us, the joint submission would not be appropriate. With it, we think that the joint submission meets the appropriate range because it does hold out considerable hope that this solicitor will not be before a panel of the Discipline Committee again.

22nd June, 1995

Accordingly, we recommend to Convocation that the solicitor be suspended for three months, that costs of one thousand dollars (\$1,000) be paid within two months and that he participate fully in the Practice Review programme of the Law Society of Upper Canada and implement all reasonable recommendations made by them relating to his practice.

Charles Howard Litman was called to the Bar on the 9th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 5th day of May, 1995

Clayton C. Ruby  
Chair

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

Mr. Perrier asked that the following amendment be made:

- page 16, under the heading Recommendation as to Penalty, first sentence should read "that Charles Howard Litman be suspended for a period of three months..." not two months.

There were no submissions and the Report as amended was adopted.

It was moved by Mr. Marrocco, seconded by Mr. Topp that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of three months and pay costs in the amount of \$1,000 and be required to participate in the Professional Standards Practice Review programme.

Both counsel made submissions in support of the recommended penalty.

Ms. Leiper advised Convocation that the costs had already been paid.

The matter was stood down.

Re: Byron Douglas LONEY - Barry's Bay

The Secretary placed the matter before Convocation.

Mr. Scott did not participate.

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

Convocation had before it the Report of the Discipline Committee dated 22nd March, 1995, together with an Affidavit of Service sworn 12th April, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th April, 1995 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Netty Graham, Chair  
Patricia Peters, Q.C.  
Abraham Feinstein, Q.C.

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

Georgette Gagnon  
for the Society

BYRON DOUGLAS LONEY  
of the Village  
of Barry's Bay  
a barrister and solicitor

not represented  
for the solicitor

Heard: April 8, 1994 and  
January 23, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On October 6, 1993, Complaint D278/93 was issued against Byron Douglas Loney alleging that he was guilty of professional misconduct.

The matter was heard in public on April 8, 1994 and January 23, 1995, before this Committee composed of Netty Graham, Chair, Patricia Peters, Q.C. and Abraham Feinstein, Q.C. The solicitor attended the hearing and represented himself. Stephen Foster appeared on behalf of the Law Society on April 8, 1994 and Georgette Gagnon appeared on January 23, 1995.

DECISION

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

Complaint D278/93

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending September 30, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening section 16(2) of the Regulation made pursuant to the Law Society Act.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D278/93 and is prepared to proceed with a hearing of this matter on April 8, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D278/93 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 15, 1987. He practices as sole practitioner.

5. The Solicitor's fiscal year end is September 30th. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending September 30, 1992, as required by S.16(2) of Regulation 708 under The Law Society Act.

6. A Notice of Default in Annual Filing, dated April 5, 1993 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated May 8, 1993. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Society's Second Notice is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

8. The late filing fee began to accrue on May 24, 1993.

9. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated October 2, 1993. The Solicitor was advised that his name would go before Convocation on October 29, 1993 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on October 28, 1993. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's Third Notice is attached as Exhibit "C" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

10. By registered mail dated November 26, 1993, the Law Society advised the Solicitor that his rights and privileges as a member of the Society had been ordered suspended by Convocation as of November 26, 1993 as a result of non-payment of his late filing fee. A copy of the Law Society's November 26, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

22nd June, 1995

11. By letter dated December 2, 1993, the Law Society advised the Solicitor that his suspension had been terminated effective December 2, 1993 due to the fact that his discipline hearing had been adjourned to the new year. A copy of the Law Society's December 2, 1993 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

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

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

V. DISCIPLINE HISTORY

14. The Solicitor does not have a discipline history.

DATED at Ottawa this 8th day of April, 1994."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Byron Douglas Loney be Reprimanded in Convocation if his annual filings have been made by the time the matter is heard in Convocation. If the filings are not made the Committee recommends that the Solicitor be suspended indefinitely until the filings have been made.

REASONS FOR RECOMMENDATION

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The Solicitor first appeared before the Committee on April 8, 1994 regarding the complaint. The matter was adjourned in order to give the Solicitor time to make his filings and in the event that they were made prior to the re-convening of the complaint, it was the Committee's intention to reprimand the Solicitor in Committee.

On January 23, 1995 the Solicitor advised that the filings had still not been made and so the Committee had no choice but to make the above noted recommendation as to penalty.

The Solicitor is presently under an administrative suspension and advised the Committee that he was trying to arrange financing so that he could have his accounts brought up to date.

Byron Douglas Loney was called to the Bar on the 15th day of April, 1987.

ALL OF WHICH is respectfully submitted

DATED this 22n day of March, 1995

Netty Graham (for the Committee)

22nd June, 1995

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

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended indefinitely until his filings were made.

Ms. Gagnon made brief submissions in support of the recommended penalty.

The motion on the recommended penalty was adopted.

Counsel retired.

Re: Donald James MCKEE - Newmarket

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Thom withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 7th May, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Daniel J. Murphy, Q.C., Chair  
Stuart Thom, Q.C.  
Netty Graham

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

Kate Wootton  
for the Society

DONALD JAMES MCKEE  
of the Town  
of Newmarket  
a barrister and solicitor

Not represented  
for the solicitor

Heard: November 15, 1994  
February 24, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCAION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:



REPORT

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On July 5, 1994, Complaint D199/94 was issued against Donald James McKee alleging that he was guilty of professional misconduct.

The matter was heard in public on November 15, 1994 and February 24, 1995 before this Committee composed of Daniel J. Murphy, Q.C., Chair, Stuart Thom, Q.C. and Netty Graham. Mr. McKee attended at the hearing and was not represented. Kate Wootton appeared on behalf of the Law Society.

DECISION

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

Complaint D199/94

2. a) He failed to comply with an Order of Convocation that he be suspended from the practise of law effective April 23, 1993 by continuing to practise during the period from April 23, 1993 to May 17, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D199/94 and is prepared to proceed with a hearing of this matter on November 15 and 16, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D199/94 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on April 5, 1979. He practises as a sole practitioner.
5. A Notice of Default in Annual Filing dated October 6, 1992 (Tab 1, Document Book) was forwarded to the Solicitor by the Law Society. The Solicitor did not respond to this notice.
6. By registered mail dated November 9, 1992 (Tab 2, Document Book), the Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he

was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not reply to this letter.

7. The late filing fee began to accrue on November 14, 1992.

8. By registered mail dated March 26, 1993 (Tab 3, Document Book), the Solicitor received a Third Notice of Default in Annual Filing from the Law Society. The Solicitor was advised that his name would go before Convocation on April 23, 1993 for suspension of your rights and privileges, should his late filing fee remain unpaid as of 5:00 p.m. on April 22, 1993. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that may be brought before the Discipline Committee for failure to file. The Solicitor did not respond to this notice.

9. By registered letter dated April 27, 1993 (Tab 4, Document Book), the Solicitor was advised that his rights and privileges as a member of the Society have been suspended as of April 23, 1993 for failure to pay his late filing fee. The letter was returned to the Society unclaimed by the Solicitor.

10. On or about May 17, 1993, the Solicitor paid the late filing levy. The Law Society acknowledged receipt of the payment by letter of the same date (Tab 5, Document Book).

11. On February 28, 1994, an audit was commenced by Theda Lean, an Examiner with the Audit and Investigation Department, at which time she obtained material which evidence that the Solicitor practised while under suspension for non-payment of his late filing fee from April 23, 1993 to May 17, 1993. The following documents support that the Solicitor practised during this period:

- i) Trust disbursement journal from April 1, 1993 to May 31, 1993 (Tab 6, Document Book);
- ii) Client trust ledger for client, W. Greeley (Tab 7, Document Book);
- iii) Letter to Solicitor from Mr. Hunter re: Greeley dated May 3, 1993 (Tab 8, Document Book);
- iv) Letter from Solicitor to Mr. Hunter re: Greeley dated May 5, 1993 (Tab 9, Document Book);
- v) Client ledger for clients, Luigi & Emilea Buttino (Tab 10, Document Book);
- vi) Letter to Solicitor from Mr. Fysh re: Buttino dated May 6, 1993 (Tab 11, Document Book);
- vii) Mortgage Commitment dated May 11, 1993 (Tab 12, Document Book);
- viii) Charge/Mortgage of Land prepared by Solicitor (Tab 13, Document Book);
- ix) Client trust ledger for client, G. Connolly (Tab 14, Document Book);
- x) Solicitor's Interim Report on Title and Request for Funds to Royal Trust Corporation dated April 21, 1993 (Tab 15, Document Book);

22nd June, 1995

- xi) Affidavit of Residence and Value of Consideration sworn by Solicitor on April 28, 1993 (Tab 16, Document Book);
- xii) Copy of deed registered on April 29, 1993 (Tab 17, Document Book);
- xiii) Charge/Mortgage of Land prepared by Solicitor (Tab 18, Document Book);
- xiv) Solicitor's statement of account to Mr. Connolly dated April 29, 1993 (Tab 19, Document Book);
- xv) Solicitor's reporting letter to Mr. Connolly dated May 10, 1993 (Tab 20, Document Book);
- xvi) Solicitor's covering letter to client, Royal Trust Corporation, dated May 10, 1993 enclosing a copy of the Solicitor's Final Report on Title dated April 29, 1993 (Tab 21, Document Book);
- xvii) Client trust ledger for clients, S. Strong and K. Strong, (Tab 22, Document Book);
- xviii) Solicitor's statement of account to Mr. & Mrs. Strong dated April 15, 1993 (Tab 23, Document Book);
- xix) Solicitor's letter to Mr. Tomlinson dated April 26, 1993 (Tab 24, Document Book); and
- xx) Solicitor's reporting letter to Mr. & Mrs. Strong dated April 26, 1993 (Tab 25, Document Book).

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

"SUPPLEMENTARY AGREED STATEMENT OF FACTS

PRIOR SUSPENSIONS

1. The Solicitor has been previously suspended from the Law Society for non-payment of fees, late filing fees and insurance premiums, as follows:

Date of Suspension	Reason for Suspension	Date of Reinstatement
April 23/93	Non-payment of the late filing penalty	May 17/93
May 24/91	Non-payment of E & O Levy	N/A
Nov. 23/90	Non-payment of E & O Levy	Dec. 21/90
Nov. 27/87	Non-payment of E & O Levy	Dec. 3/87
Feb. 27/87	Non-payment of Annual Fees	May 6/87
Nov. 28/86	Non-payment of E & O Levy	N/A
Feb. 27/86	Non-payment of Annual Fees	March 11/86
Nov. 22/85	Non-payment of E & O Levy	Nov. 29/85
May 24/85	Non-payment of E & O Levy	May 29/85
May 25/84	Non-payment of E & O Levy	May 31/84
May 27/83	Non-payment of E & O Levy	June 2/83

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

#### DISCIPLINE HISTORY

The Solicitor was found guilty of professional misconduct on March 11, 1992 for failure to reply to the Society and reprimanded in Committee. The Solicitor was further found guilty of professional misconduct on April 7, 1992 and reprimanded in Committee for his failure to reply to the Society. On June 10, 1992 the Solicitor was issued an "invitation to attend" and attended before Committee.

#### FINDING OF PROFESSIONAL MISCONDUCT

Both the Solicitor and Counsel for the Law Society agreed that the Solicitor did practise law during the period April 23, 1993 to May 17, 1993. The Committee agrees.

It was also agreed by both the Solicitor and Counsel for the Law Society that the Solicitor did not receive the registered letter dated April 27, 1993 advising him that his rights and privileges as a member of the Society had been suspended as of April 23, 1993 for failure to pay his late filing fee. The letter was returned to the Society unclaimed by the Solicitor. The Solicitor testified and made the following points:

1. He had difficulty getting registered mail and he wrote the Law Society of Upper Canada on January 3, 1992 advising them to send his mail by ordinary mail. He swore that he did not intentionally fail to pick up his registered mail. The Committee believes him on this issue.
2. That he was not aware of his suspension until May 14, 1993 when he made a routine call to the Law Society's Advisory Service and was told that he was under suspension.

3. He immediately obtained a certified cheque and sent the same to the Law Society and the Solicitor was reinstated on May 17, 1993. The certified cheque was dated May 14, 1993.
4. The Solicitor acknowledged receiving the Notice of Default on Annual Filing dated October 6, 1992, the Law Society's registered letter to the Solicitor dated November 9, 1992 and the third Notice of Default dated March 26, 1993.

The third Notice of Default that the Solicitor acknowledges receiving clearly states that his name will go before Convocation on the 23rd of April, 1993. It is true that section 36 of the Law Society Act is permissive and uses the words "Convocation may".

When the Solicitor was questioned under oath about his prior discipline record he only recalled appearing before a Committee once when in fact he appeared before a Law Society Committee three times (March 11, 1992, April 7, 1992 and June 10, 1992). The Committee finds it difficult to believe that the Solicitor would only have remembered one of these attendances. The Solicitor acknowledged during cross examination that he had been suspended on 10 occasions since 1983 albeit for the non-payment of annual fees and/or E.&O. Levy and not for non payment of the late filing penalty.

The Committee while acknowledging that the Solicitor did not receive the registered letter dated April 27, 1993, does accept the submissions of the Counsel for the Law Society that the Solicitor should have known that he was under suspension on April 23, 1994. In the alternative, he was recklessly and wilfully blind to his suspension given the background and circumstances detailed above and in particular the prior notices that he received both for this suspension and previous suspensions. This is sufficient to fix him with actual notice: Regina v Naqlik (1991), 65 C.C.C. (3d) 272 at 290 (Ont. C.A.).

The Committee therefore finds professional misconduct to be made out with respect to the Complaint.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Donald James McKee be suspended for a period of 21 days commencing on July 1, 1995.

#### REASONS FOR RECOMMENDATION

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The decision in this matter was rendered by the Committee on December 2, 1994 and, on February 24, 1995, the Committee heard submissions as to penalty. After reviewing this matter, the Committee has decided that Donald James McKee should be suspended from the practice of law for twenty-one (21) days commencing July 1, 1995. The reasons for the Committee's decision are as follows:

1. The Solicitor was suspended from practising law for failure to pay a late filing fee.
2. His annual filings are current.
3. While the Solicitor was technically under suspension from April 23, 1993, to May 17, 1993, his certified cheque was delivered to the Society on May 14, 1993.

22nd June, 1995

4. The Solicitor did not receive the registered letter dated April 27, 1993, and probably did not know that he was practising while under suspension even though the Committee found that in this regard he was reckless.

5. The Committee is aware of the *Laan* case where Convocation found that in most cases a solicitor should be penalized for practising while under suspension in addition to the time of his actual suspension. The Committee notes that the facts in this case are substantially different from the facts in the *Laan* case and are of the view that a 21 day suspension is appropriate in these circumstances.

Donald James McKee was called to the Bar on the 5th day of April, 1979.

ALL OF WHICH is respectfully submitted

DATED this 27th day of April, 1995

Daniel J. Murphy  
Chair

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

Ms. Wootton asked that an amendment be made as follows:

- page 3 of the Report, paragraph 10 - should read "On or about May 14, 1993...." not May 17.

There were no submissions and the Report as amended was adopted.

It was moved by Mr. Carey, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 21 days commencing July 1, 1995.

Both counsel and the solicitor made brief submissions in support of the recommended penalty.

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

It was moved by Ms. Curtis, seconded by Mr. Finkelstein that the solicitor be suspended for a period of 21 days plus a month.

It was moved by Mr. MacKenzie, seconded by Ms. Ross that the solicitor be suspended for a period of 2 months.

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

The solicitor made further brief submissions regarding the circumstances of his inability to pay the late filing fee.

Ms. Wootton made brief submissions in reply.

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

The Curtis/Finkelstein motion to suspend the solicitor for 21 days plus a month was voted on and lost.

22nd June, 1995

The MacKenzie/Ross motion to suspend the solicitor for 2 months was withdrawn.

The motion on the recommended penalty was adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to suspend the solicitor for a period of 21 days commencing July 1, 1995.

Counsel and solicitor retired.

Re: David John MCMURRAY - Kingston

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Topp and Ms. Richardson withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 12th May, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Donald Lamont, Q.C. Chair  
Maurice Cullity, Q.C.  
Nora Richardson

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

Audrey Cado  
for the Society

DAVID JOHN MCMURRAY  
of the City  
of Kingston  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: March 8, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On October 13, 1994, Complaint D274/94 was issued, and on January 13, 1995, Complaint D464/94 was issued, against David John McMurray alleging that he was guilty of professional misconduct.

The matter was heard in public on March 8, 1995 before this Committee comprised of Donald Lamont, Q.C., Chair, Maurice Cullity, Q.C. and Nora Richardson. The Solicitor attended the hearing and represented himself. Audrey Cado appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D274/94

2. a) He failed to file with the Law Society since he began practising as a sole practitioner in May 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

##### Complaint D464/94

2. a) He failed to reply to the Law Society's requests that he provide books and records for his practice further to an attempted audit examination on February 14, 1994, despite letters dated March 4, 1994, April 25, 1994, September 9, 1994 and October 25, 1994.

##### Evidence

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

#### "AGREED STATEMENT OF FACTS"

##### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D274/94 and D464/94 is prepared to proceed with a hearing of these matters on March 8, 1995.

##### II. IN PUBLIC/IN CAMERA

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

##### III. ADMISSIONS

3. The Solicitor has reviewed Complaints D274/94 and D464/94 and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.



IV. FACTS

4. The Solicitor was called to the Bar on April 15, 1987. He began practising as a sole practitioner in May of 1992. He was suspended on November 1, 1994 as a result of his failure to pay his annual fee.

Complaint D274/94

Particular 2(a) Failure to file his Forms 2 and 3

5. The Solicitor began practising as a sole practitioner in May of 1992.

6. The Solicitor has established a fiscal year end of April 30th. The Solicitor has not filed for the fiscal years ended April 30, 1993 and April 30, 1994 as required by S. 16(2) of Regulation 708 under the Law Society Act.

7. A Notice of Default in Annual Filing, dated June 1, 1994 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts.

8. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated July 5, 1994. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on or about July 13, 1994. A copy of the Society's Second Notice and Acknowledgement of receipt of a registered item is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

9. The late filing fee began to accrue on July 22, 1994.

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

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

Complaint D464/94

Particular 2(a) Failure to reply to the Law Society

12. A Law Society examiner attended at the Solicitor's home on February 14, 1994 to review his books and records. The Solicitor advised the examiner that he did not maintain books and records as his practice was almost nonexistent. He stated that he practised employment and labour law and that he'd had approximately six clients within the last two years. He stated that he does not have a trust account or a general account. The examiner requested the Solicitor provide her with his personal bank statements for the months of November, 1993 and December, 1993. The Solicitor indicated that he had received no fees during that period and that the only deposit would be a bank loan. The Solicitor did not produce for the examiner the requested Bank statements. The Solicitor did produce for the examiner his day book. The day book indicated two entries for December, 1993. The examiner advised the Solicitor that she would report their conversation to her manager and that she may be required to contact him further with respect to his practice. A copy of the examiner's handwritten notes, dated February 14, 1994, are attached as Exhibit "C" to this Agreed Statement of Facts.

13. By letter dated March 4, 1994, the Law Society requested the Solicitor produced the following documentation:

- photocopies of duplicate deposit slips;
- photocopies of cashed cheques;
- photocopies of bank statements;
- name, address, and telephone number of the potential client that contacted him in December, 1993;
- details of how he was supporting yourself;
- books and records maintained for the practice.

The Solicitor was requested to provide this information within one month of the date of this letter. A copy of the Law Society's March 4, 1994 letter is attached as Exhibit "D" to this Agreed Statement of Facts. No response was received.

14. By letter dated April 25, 1994, the Law Society forwarded to the Solicitor a copy of its March 4, 1994 letter. The Solicitor was requested to provide his response at his earliest convenience. A copy of the Law Society's April 25, 1994 letter is attached as Exhibit "E" to this Agreed Statement of Facts. No response was received.

15. By letter dated September 9, 1994, the Law Society forwarded to the Solicitor a copy of its April 25, 1994 letter. The Solicitor was requested to provide his response forthwith. A copy of the Law Society's September 9, 1994 letter is attached as Exhibit "F" to this Agreed Statement of Facts. No response was received.

16. By registered mail dated October 25, 1994, the Law Society forwarded to the Solicitor a copy of its March 4, 1994, April 25, 1994 and September 9, 1994 letters. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should he fail to provide a full and complete written response within fifteen days, the matter would be referred to the Discipline Committee. The Law Society's October 25, 1994 letter was signed for and delivered on or about November 1, 1994. A copy of the Law Society's October 25, 1994 letter and Acknowledgment of receipt of a registered item card are attached as Exhibit "G" to this Agreed Statement of Facts. No response was received.

V. DISCIPLINE HISTORY

17. The Solicitor does not have a discipline history.

DATED at Toronto this 8th day of March, 1995."

RECOMMENDATION AS TO PENALTY

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There was no alternative to making a finding of Professional Misconduct in accordance with the Agreed Statement of Facts.

There were no claims against Mr. McMurray.

22nd June, 1995

We did not see the point in recommending a period of suspension. The Solicitor is suspended now for non-payment of the annual fee. Mr. McMurray hopes to be able to file as required.

If the Solicitor's filings are completed before this matter is heard in Convocation we think the appropriate penalty should be a reprimand in Convocation. If he fails to file by the time this is heard in Convocation the Committee recommends that David John McMurray be suspended indefinitely until satisfactory filings have been made.

#### REASONS FOR RECOMMENDATION

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Mr. McMurray told the Committee that it was always his intention to comply. The fact is that he simply cannot pay for the services of an accountant. He is supported by his wife. He has had very few clients. Mr. McMurray did not have a trust account.

We accepted the Agreed Statement of Facts and found Mr. McMurray guilty of professional misconduct for the two complaints D274/94 and D464/94.

David John McMurray was called to the Bar on the 15th day of April, 1987.

ALL OF WHICH is respectfully submitted

DATED this 12th day of May, 1995

Donald H. L. Lamont, Q.C.  
Chair

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

There were no submissions and the Report was adopted.

Ms. Wootton advised that the solicitor's filings had not been completed. She asked that a further condition be added to the recommended penalty that the solicitor reply to the Law Society concerning his books and records.

It was moved by Ms. Puccini, seconded by Mr. Cole that the solicitor be suspended for a period of 1 month and thereafter indefinitely until the filings were made and the solicitor replied to the Law Society.

Carried

Counsel and solicitor retired.

#### RESUMPTION OF THE HOWARD CHARLES LITMAN MATTER

Mr. Perrier expressed concern over whether the psychiatrist's letter which was distributed to the Benchers should be received in camera.

The public withdrew and Convocation went in camera.

It was moved by Mr. Topp, seconded by Mr. Marrocco that the psychiatrist's report be received in camera.

Carried

The public was recalled.

22nd June, 1995

The recommendation was adopted, that is, that the solicitor be suspended for a period of 3 months, pay costs in the amount of \$1,000 and be required to participate in the Professional Standards Practice Review programme.

Counsel and solicitor retired.

Re: Allan Vincent MILLS - Hamilton

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Messrs. Thom and Swaye and Ms. Richardson withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 28th April, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 1st June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair  
Stuart Thom, Q.C.  
Nora Richardson

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

Christine Schmidt  
for the Society

ALLAN VINCENT MILLS  
of the City  
of Hamilton  
a barrister and solicitor

not represented  
for the solicitor

Heard: February 7, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On October 17, 1994, Complaint D249/94 was issued against Allan Vincent Mills alleging that he was guilty of professional misconduct.

This matter was heard in public on February 7, 1995 before this Committee composed of Lloyd Brennan, Q.C., Chair, Stuart Thom, Q.C. and Nora Richardson. The Solicitor attended the hearing and represented himself. Christine Schmidt appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D249/94

2. a) He failed to reply in a full and satisfactory manner to the Law Society regarding inadequacies discovered in his books and records during an audit examination on September 27, 1993, despite letters dated November 1, 1993, December 1, 1993 and April 14, 1994.

##### Evidence

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

##### "AGREED STATEMENT OF FACTS"

##### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D249/94 and is prepared to proceed with a hearing of this matter on January 11, 1994.

##### II. IN PUBLIC/IN CAMERA

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

##### III. ADMISSIONS

3. The Solicitor has reviewed Complaint D249/94 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

##### IV. FACTS

4. The Solicitor was called to the Bar on April 13, 1978. He practiced as a sole practitioner until his suspension on November 1, 1994 as a result of his failure to pay his annual fee.

5. A Law Society examiner attended at the Solicitor's office on May 12, 1993, September 7, 1993 and September 27, 1993 to review his books and records.

6. On September 27, 1994, the examiner provided the Solicitor with a copy of her Report, dated September 27, 1993. A copy of the examiner's report is attached as Exhibit "A" to this Agreed Statement of Facts.

7. The Solicitor executed an Acknowledgement, dated September 27, 1993, in which he agreed to ensure that the deficiencies contained in his books and records would be corrected forthwith in order to comply with the Law Society's Regulation 708 and with the Rules of Professional Conduct. A copy of the Acknowledgement is attached as Exhibit "B" to this Agreed Statement of Facts.

22nd June, 1995

8. By letter dated November 1, 1993, the Law Society forwarded to the Solicitor an article on the spot audit programme and a pamphlet setting out sections 13 to 18 of Regulation 708. The Law Society requested the Solicitor to:

- review his clients' general ledger account in credit balance. The Solicitor was requested to prepare and forward to the Society, within one month of the date of this letter, a listing of credit balances in general as at May 31, 1993, identifying client accounts, showing amounts of credits, dates incurred, the reasons for each credit balance arising, and the disposition of each. The Solicitor was also requested to prepare and deliver fee billings for amounts earned to offset credits, and transfer to the trust account amounts unearned.
- remit to the Society, within 20 days of the effective date of his trust comparison, copies of the listing of trust obligations, the trust bank reconciliation, and the trust bank statement for each trust bank account and for each month ended September 30, 1993 to September 30, 1994 inclusive.
- ensure in the future that deposit slips for his practice bank accounts are properly detailed showing the source of money received and on whose behalf money is deposited.
- correct the difference and reconciling items on the monthly trust comparisons for the 12-month period preceding the auditor's visit and report to the Society that he had done so within one month from the date of this letter.
- confirm with the Society, in writing within one month of the date of this letter, that he had taken the necessary action to ensure that any overdrawn trust accounts that occur are corrected no later than the month following their occurrence.
- forward to the Society a copy of the next regular monthly trial balance of the clients' trust ledger showing the balances remaining after his review of the listing of trust ledger account balances.

The Solicitor was requested to acknowledge receipt of this letter and confirm with the Law Society that he was in compliance with sections 14 and 15 of Regulation 708 and the Rules of Professional Conduct. A copy of the Law Society's November 1, 1993 letter is attached as Exhibit "C" to this Agreed Statement of Facts. No reply was received.

9. By letter dated December 1, 1993, the Law Society forwarded to the Solicitor a copy of its November 1, 1993 letter. The Solicitor was requested to provide his response forthwith. A copy of the Law Society's December 1, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts. No reply was received.

10. By registered mail dated April 14, 1994, the Law Society forwarded to the Solicitor a copy of its November 1, 1993 and December 1, 1993 letter. The Solicitor was reminded of his obligation to reply to the correspondence from the Law Society. The Solicitor was advised that should he fail to provide a full and complete written response within fifteen days, the matter would be referred to the Discipline Committee. The Law Society's April 14, 1994 letter was signed for and delivered on or about April 22, 1994. A copy of the Law Society's April 14, 1994 and Acknowledgement of receipt of a registered item card is attached as Exhibit "E" to this Agreed Statement of Facts.

22nd June, 1995

11. By letter dated June 6, 1994, the Solicitor advised the Law Society that he has been unable to respond to its correspondence as he has been unable to pay his accountant. The Solicitor stated that he expected to be in receipt of funds, from other business, in a couple of weeks. The Solicitor stated that upon receipt of those funds, he would satisfy his accountant's demands and enlist his co-operation in satisfying the Society's demands. A copy of the Solicitor's June 6, 1994 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

12. To date, the Solicitor has not provided the Law Society with a full and complete written response to its November 1, 1993 letter.

V. DISCIPLINE HISTORY

13. The Solicitor does not have a discipline history.

DATED at Toronto this 7th day of February, 1995."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Allan Vincent Mills be Reprimanded in Convocation if a satisfactory reply to the Society has been received, failing which, the Committee recommends that the solicitor be suspended for one month definite and continuing thereafter until a full and complete written response has been received satisfactory to the Society.

REASONS FOR RECOMMENDATION

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The Committee's finding of professional misconduct was based upon the solicitor's admission. He had written to the Society in June of 1994 explaining that he had failed to reply because he could not pay an accountant to correct the inadequacies in his books and records.

At the time of the hearing those inadequacies had not been addressed and he had not yet replied as required. He hopes to be able to do so before the matter reaches Convocation. It seemed reasonable to us that he be reprimanded in Convocation if by then he has been able to have his books and records put in order and to provide the reply to the Society's letter of November 1, 1993. If the reply is not then at hand, a penalty of one month's suspension is called for, to be followed by indefinite suspension until he is able to fulfil his responsibilities regarding his books and records.

This is not a case in which costs should be borne by the solicitor.

Allan Vincent Mills was called to the Bar on the 13th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 28th day of April, 1995

Lloyd Brennan, Q.C.  
Chair

22nd June, 1995

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

Ms. Cameron asked that the following amendment be made:

- page 3 of the Report, paragraph 6, beginning of sentence should read "September 27, 1993" not 1994.

There were no submissions and the Report as amended was adopted.

Ms. Cameron advised that the solicitor had not replied to the Society.

It was moved by Mr. Topp, seconded by Mr. Carey that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 1 month definite and continue thereafter until a full and complete written response was received to the satisfaction of the Society.

Carried

Counsel retired.

Re: Francis Lewis REILLY - St. Catherines

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Messrs. Thom and MacKenzie and Ms. Richardson withdrew for this matter.

Mr. Neil Perrier appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 9th May, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair  
Stuart Thom, Q.C.  
Nora Richardson

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

FRANCIS LEWIS REILLY  
of the City  
of St. Catharines  
a barrister and solicitor

Neil Perrier  
for the Society

Richard Nabi  
for the solicitor

Heard: February 7 - 23, 1995



TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On May 19, 1993, Complaint D141/93 was issued, on February 25, 1994, Complaint D440/93 was issued and on June 9, 1994, Complaint D181/94 was issued against Francis Lewis Reilly alleging that he was guilty of professional misconduct.

The matter was heard in public with a portion held in camera on February 7, 1995 and February 23, 1995 before this Committee composed of Lloyd Brennan, Q.C., Stuart Thom, Q.C. and Nora Richardson. The Solicitor was in attendance at the hearing and was represented by Richard Andrew Nabi. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D440/93

2. a) He breached an Order of Convocation that he suspend his practice for failure to pay the Errors & Omissions Insurance levy, by practising law in the period of suspension from January 29th 1993 to date.
- b) He has failed to produce books and records in accordance with Section 18 of the Regulation.
- c) He has failed to maintain books and records in accordance with Sections 14 and 15 of the Regulation.

Complaint D181/94

2. a) He misappropriated trust funds in the amount of \$6,391.78;
- b) He misapplied trust funds in the amount of \$400.00;
- c) He misled another solicitor about settlement funds in the amount of \$6,791.78;
- d) He misled the Law Society about the settlement funds being on deposit in his general account.

Complaint D141/93

2. a) He failed to comply with a court order ordering him to personally pay fixed costs in the amount of \$500.00.
- b) He failed to provide a reply to the Law Society regarding a complaint by Edward F. Kravcik despite letters dated January 8, 1992 and March 15, 1993 and telephone requests on February 16, 1992, March 1, 1993 and March 5, 1993.

22nd June, 1995

### Evidence

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

#### "AGREED STATEMENT OF FACTS

### JURISDICTION AND SERVICE

1. The solicitor admits service of complaint 181/94 and is prepared to proceed with a hearing of this matter on January 11th, 1995.

2. The complaint is that the solicitor (a) misappropriated trust funds in the amount of \$6,391.78; (b) misapplied trust funds in the amount of \$400.00; misled another solicitor about settlement funds in the amount of \$6,791.78 and; (d) misled the Law Society about the settlement funds being on deposit in his general account.

### IN PUBLIC OR IN CAMERA

3. The solicitor will bring a motion to have this matter heard *in camera*.

### ADMISSIONS

4. The solicitor has reviewed complaint no. D181/94 and admits that the particulars therein are correct. The solicitor further admits that the said particulars constitute professional misconduct.

### FACTS

5. The solicitor was called to the bar on April 9th, 1976 and has been suspended since January 29th, 1993 for non-payment of his insurance levies.

6. The solicitor has submitted all books and records which he had available in June 1994. The solicitor states that the remainder of his books and records were seized by his landlord. The books and records which have been produced are insufficient to allow the Law Society to conduct an audit.

7. The solicitor was retained to act as counsel in a personal injury claim by A. J. Mascarin, Esq., who had been retained by the plaintiff, Mr. DiCostanzo.

8. The Defendants were represented by Robert Budgell, Esq.

9. On or about February 18th, 1993, Mr. Budgell sent the solicitor an offer to settle and a cheque in the amount of \$6,791.78 which he was to hold in escrow pending settlement.

10. On or about March 18th, 1993, the solicitor had \$20.78 on deposit in his trust account.

11. On or about March 19th, 1993, the solicitor deposited the said \$6,791.78 to his trust account.

12. On or about the same date the solicitor issued trust cheque number 24 to himself in the amount of \$5,791.78.

13. Under date of March 24th, 1993, Paul Greenwood complained to the Law Society about a \$1500.00 retainer which he had given to the solicitor and for which the solicitor had not accounted.

14. On or about March 26th, 1993, the solicitor issued trust cheque number 21 to the said Paul Greenwood in the amount of \$400.00 and he subsequently withdrew his complaint.

15. On or about March 26th, 1993, the solicitor issued trust cheque number 20 to himself in the amount of \$600.00.

16. On or about May 16th, 1993, a Law Society examiner attended on the solicitor and his bank and instituted co-signing controls on the solicitor's trust account.

17. At or about that time the solicitor did not produce any books or records for inspection or examination.

18. On or about December 16th, 1993, the solicitor was contacted by the said Mr. Budgell concerning a settlement of the DiCostanzo matter.

19. At or about that time the solicitor informed the said Mr. Budgell that the funds he had advanced were on deposit in his trust account but, could not be released to the plaintiff due to co-signing controls imposed on the solicitor by the Law Society. At the time of the statement the solicitor had already disbursed the funds from his trust account. The balance in the trust account at that time was \$20.78.

20. On or about December 16th, 1993, the said Mr. Budgell contacted the Law Society to request assistance.

21. On or about January 18th, 1994, a Law Society examiner contacted the solicitor and asked him about the funds which were supposed to be in his trust account.

22. At or about that time the solicitor advised the examiner that the money had gone into his general account and would be sent to Mr. Budgell within 24 hours. At the time of the said representation, the solicitor did not have sufficient funds in his general account to pay the money to Mr. Budgell.

23. The solicitor did not deliver the money to the said Mr. Budgell within 24 hours and made several further excuses to the Law Society for failing to do so.

24. On or about April 7th, 1994, the solicitor made full and complete restitution to the instructing solicitor, A.J. Mascarin, Esq.

25. No insurance companies, solicitors or clients have suffered a loss because of the actions of the solicitor in this case.

#### PREVIOUS SUSPENSIONS AND DISCIPLINE

26. The solicitor has previously been suspended from membership in the Law Society for failure to pay fees and insurance premiums as follows:

- a) February 27th, 1987 - Failure to pay annual fees.  
Date reinstated July 31st, 1987.
- b) February 26th, 1988 - Failure to pay annual fees.  
Date reinstated June 3rd, 1988.
- c) May 24th, 1991 - Failure to pay insurance premium.  
Date reinstated July 23rd, 1991.
- d) March 2nd, 1992 - Failure to pay annual fees.  
Date reinstated March 18th, 1992.

- e) June 5th, 1992 - Failure to pay insurance premium.  
Date reinstated June 29th, 1992.

27. On June 27th, 1994 the solicitor provided the Financial Statements at Appendix "A" attached hereto, to the Law Society.

28. On July 14th, 1992 the solicitor was found guilty of professional misconduct for failure to provide a reply to the Law Society. The solicitor was reprimanded in committee and ordered to pay the Society's costs in the amount of \$1,000.00.

29. On April 22nd, 1993, the solicitor was found guilty of professional misconduct for his failure to reply to the Law Society, his failure to meet a financial obligation in relation to the practice of law, and his failure to produce books and records for inspection by the Law Society. He was suspended for one month and the suspension was to continue thereafter until he had fulfilled his obligation to produce his books and records for inspection by the Law Society. In addition, the solicitor was to remain suspended until he had provided a response to the Law Society regarding a complaint by an employee. The solicitor was also ordered to pay the Society's costs in the amount of \$1,000.00.

30. On September 22nd, 1993, the solicitor was found guilty of professional misconduct for his failure to reply to the Law Society and for his failure to file his Forms 2/3 with the Law Society within six (6) months of the termination of his fiscal year-end. He was ordered suspended for a period of three (3) months, such suspension to take effect on completion of the outstanding suspension and thereafter until such time as the filings were made.

DATED at Fort Erie, Ontario, this 11th day of January, 1995."

"AGREED STATEMENT OF FACTS

JURISDICTION AND SERVICE

i. The solicitor admits service of complaint D440/93 and is prepared to proceed with a hearing of this matter on January 11th, 1995.

ii. The complaint is that the solicitor is guilty of professional misconduct in that he (a) breached an Order of Convocation that he suspend his practice for failure to pay the Errors & Omissions Insurance levy, by practising law in the period of suspension from January 29th, 1993 to date, (b) failed to produce books and records in accordance with Section 18 of the Regulation, and (c) failed to maintain books and records in accordance with Sections 14 and 15 of the Regulation.

IN PUBLIC OR IN CAMERA

iii. The solicitor will bring a motion to have this matter heard *in camera*.

ADMISSIONS

iv. The solicitor has reviewed complaint no. D440/93 and admits that the particulars therein are correct. The solicitor further admits that the said particulars constitute professional misconduct.

FACTS

5. The solicitor was called to the bar on April 9th, 1976 and has been suspended since January 29th, 1993 for non-payment of his insurance levies.

6. On or about October 30, 1992, the solicitor attempted to pay his Errors & Omissions Insurance levy for the July to December, 1992 period by forwarding to the Accounts Department of the Law Society his cheque in the amount of \$1,325.45.

7. On or about November 5, 1992, the Accounts Department of the Law Society attempted to cash the said cheque but found that the solicitor's bankers had frozen his account. Under date of November 17, 1992, the Law Society wrote to the solicitor requesting a replacement, certified cheque.

8. At the time the solicitor wrote the cheque and forwarded it to the Law Society the solicitor was not aware that the bank was about to freeze his account.

9. Under date of February 1st, 1993, the Law Society wrote to the solicitor advising him that he had been suspended from the 29th of January, 1993 until *inter alia* "... the necessary levy has been paid together with any other fee or levy owing to the Society ...".

10. On or about March 22, 1993, the solicitor sent a certified cheque in the amount of \$1,325.45 to the Law Society. The solicitor continued to practice law during this period thinking he would be reinstated once the levy was paid.

11. The Law Society received the solicitor's certified cheque and deposited the said cheque.

12. Under date of March 24th, 1993 the Law Society wrote to the solicitor advising that his suspension could not be lifted until he had paid a late filing penalty in the amount of \$1,500.00.

13. In the same letter the Law Society further advised the solicitor that the second instalment of the 1992/93 annual fees and the Errors & Omissions Insurance levy for the January 1st to June 30th, 1993 period were due on or before April 30th, 1993.

14. The solicitor carried on the practice of law during this period conscientiously believing his suspension would be lifted on receipt of his funds.

15. On March 4th, 1993, the solicitor appeared in Ontario Court (Provincial Division) to represent a client on a charge of theft.

16. Between January 29th, 1993 and March 4th, 1993 the solicitor performed certain work for another client.

17. The Law Society has no knowledge that the solicitor practised law while under suspension at any other times other than those reported in this statement of fact.

18. On May 6th, 1993 the solicitor was asked to produce his books and records by the examiner but was unable to do so.

19. The solicitor made arrangements for the examiner to see the books and records on May 14th, 1993.

20. On May 13th, 1993 the solicitor telephoned the examiner and cancelled the appointment for May 14th, 1993.

21. The solicitor could not produce his books and records because they were all kept on a computer which his landlord had seized for non-payment of rent.

22. In or about the month of January, 1993 the solicitor received funds from his client Paul Greenwood in the amount of \$1,500.00.

23. In or about the month of March, 1993 the solicitor billed his client Paul Greenwood for the sum of \$1,100.00 and returned the sum of \$400.00 to the said client.

24. The solicitor has submitted all books and records which he had available in June 1994. The solicitor states that the remainder of his books and records were seized by his landlord. The books and records which have been produced are insufficient to allow the Law Society to conduct an audit.

#### PREVIOUS SUSPENSIONS AND DISCIPLINE

25. The solicitor has previously been suspended from membership in the Law Society for failure to pay fees and insurance premiums as follows:

- a) February 27th, 1987 - Failure to pay annual fees.  
Date reinstated July 31st, 1987.
- b) February 26th, 1988 - Failure to pay annual fees.  
Date reinstated June 3rd, 1988.
- c) May 24th, 1991 - Failure to pay insurance premium.  
Date reinstated July 23rd, 1991.
- d) March 2nd, 1992 - Failure to pay annual fees.  
Date reinstated March 18th, 1992.
- e) June 5th, 1992 - Failure to pay insurance premium.  
Date reinstated June 29th, 1992.

26. On June 27th, 1994 the solicitor provided the Financial Statements at Appendix "A" attached hereto, to the Law Society.

27. On July 14th, 1992 the solicitor was found guilty of professional misconduct for failure to provide a reply to the Law Society. The solicitor was reprimanded in committee and ordered to pay the Society's costs in the amount of \$1,000.00.

28. On April 22nd, 1993, the solicitor was found guilty of professional misconduct for his failure to reply to the Law Society, his failure to meet a financial obligation in relation to the practice of law, and his failure to produce books and records for inspection by the Law Society. He was suspended for one month and the suspension was to continue thereafter until he had fulfilled his obligation to produce his books and records for inspection by the Law Society. In addition, the solicitor was to remain suspended until he had provided a response to the Law Society regarding a complaint by an employee. The solicitor was also ordered to pay the Society's costs in the amount of \$1,000.00.

29. On September 22nd, 1993, the solicitor was found guilty of professional misconduct for his failure to reply to the Law Society and for his failure to file his Forms 2/3 with the Law Society within six (6) months of the termination of his fiscal year-end. He was ordered suspended for a period of three (3) months, such suspension to take effect on completion of the outstanding suspension and thereafter until such time as the filings were made.

DATED at Fort Erie, Ontario, this 11th day of January, 1995."

#### "AGREED STATEMENT OF FACTS

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D141/93 and is prepared to proceed with a hearing of this matter on February 7, 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 D141/93 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 9, 1976. He practices as a sole practitioner.

Particular 2(a) - Failure to comply with a court order to pay fixed costs in the amount of \$500.00

5. By letter dated December 17, 1992, Mr. Edward F. Kravcik lodged a complaint against Mr. Reilly with the Law Society. Mr. Kravcik represents Mrs. Jean Cornish in matrimonial litigation against her husband. Mr. Reilly represents Mrs. Cornish's husband, Mr. George Gerald Cornish.

6. A Petition for Divorce was issued in February 1989. Judgment was granted on July 31, 1990. George Cornish was directed to pay to Jean Cornish the sum of \$50,000.00 and to provide possession and ownership of the personal items listed in the schedule attached to the Judgment. A copy of the Judgment is attached as Exhibit "A" to this Agreed Statement of Facts.

7. Mr. Reilly filed an appeal of the Judgment. On May 22, 1991, the appeal was dismissed for delay. Mr. Kravcik subsequently took steps to enforce the Judgment against Mr. Cornish.

8. A Contempt Motion was brought by Mr. Kravcik against George Cornish for his failure to return certain items pursuant to the Judgment. In order to resolve the outstanding matters, a Pre-Trial Conference was scheduled before Mr. Justice Dandie on September 9, 1992. Mr. Justice Dandie was of the opinion that this matter could not be dealt with by way of a Pre-Trial Conference. Mr. Justice Dandie was of the opinion that Mr. Reilly should arrange for a Special Appointment in Motions court to request a formal variation of the Judgment and file the relevant motion materials. Mr. Reilly and Mr. Kravcik immediately arranged an appointment for November 13, 1992.

9. Mr. Reilly and Mr. Kravcik attended at the motion on November 13, 1992. Mr. Reilly failed to file any materials but appeared requesting an adjournment. A copy of the Notice of Motion is attached as Exhibit "B" to this Agreed Statement of Facts.

10. Mr. Justice Dandie ordered that Mr. Reilly pay the costs of the day fixed in the amount of \$500.00 personally and forthwith. The Order was issued and entered on March 8, 1993. A copy of the Order is attached as Exhibit "C" to this Agreed Statement of Facts.

Particular 2(b) - Failure to Reply to the Law Society

11. By letter dated January 8, 1993, the Law Society forwarded to Mr. Reilly a copy of Mr. Kravcik's letter of Complaint dated December 14, 1992. Mr. Reilly was requested to provide his comments to same within a period of two weeks. A copy of the Society's January 8, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts. No reply was received.

12. On February 16, 1993, a Law Society staff employee telephoned Mr. Reilly regarding when his reply could be expected. Mr. Reilly advised that he was working on his reply and that it would be in the mail by February 19, 1993. No reply was received.

13. On March 1, 1993, a Law Society staff employee telephoned Mr. Reilly. Mr. Reilly advised that he was experiencing computer problems and that he would send his reply by facsimile by March 3, 1993, or by courier on March 4, 1993. No reply was received.

14. On March 15, 1993, Mr. Reilly telephoned the Society and advised a staff member that his secretary had been off work, but that he would send his reply to the Society by March 10, 1993. No reply was received.

15. By registered mail dated March 15, 1993, the Law Society forwarded to Mr. Reilly a copy of its January 8, 1993 letter. Mr. Reilly was reminded of his obligation to reply. Mr. Reilly advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. A copy of the Society's March 15, 1993 letter is attached as Exhibit "E" to this Agreed Statement of Facts. No reply was received.

16. By letter dated March 26, 1993, Mr. Kravcik advised that Mr. Reilly had not satisfied Mr. Justice Dandie's order. Mr. Kravcik advised that he had issued a Notice of Garnishment against Mr. Reilly directed to the Ontario Legal Aid Plan. A copy of Mr. Kravcik's March 26, 1993 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

17. A formal Complaint was sworn on May 19, 1993 and served on Mr. Reilly on May 26, 1993.

18. By letter dated May 31, 1993, Mr. Reilly responded to the Society's January 8, 1993 letter. Mr. Reilly advised that he would be making every effort to satisfy the order and to pay the \$500.00 as soon as possible. A copy of Mr. Reilly's May 31, 1993 letter is attached as Exhibit "G" to this Agreed Statement of Facts.

19. On September 9, 1993, Mr. Reilly paid Mr. Kravcik the sum of \$517.71. A copy of the Solicitor's letter dated September 9, 1993 to Mr. Kravcik is attached as Exhibit "H" to this Agreed Statement of Facts. By letter dated September 9, 1993, Mr. Kravcik confirmed with the Law Society receipt of the Solicitor's payment. A copy of Mr. Kravcik's September 9th, letter is attached as Exhibit "I" to this Agreed Statement of Facts.

#### V. DISCIPLINE HISTORY

20. On July 14, 1992, Mr. Reilly was found guilty of professional misconduct for his failure to provide a reply to the Law Society. Mr. Reilly was Reprimanded in Committee and ordered to pay the Society's costs in the amount of \$1000.00.

21. On April 22, 1993, Mr. Reilly was found guilty of professional misconduct for his failure to reply to the Law Society; his failure to meet a financial obligation in relation to the practice of law; and his failure to produce his books and records for inspection by the Law Society. A copy of the Report and Decision is attached as Exhibit "J" to this Agreed Statement of Facts.

22. Mr. Reilly was suspended for one month (commencing April 22, 1993) and the suspension to continue thereafter until he has fulfilled his obligation to produce his books and records for inspection by the Law Society and provides a response to the Law Society regarding a complaint by an employee. These conditions have not yet been fulfilled. The Solicitor was also ordered to pay the Society's costs in the amount of \$1000.00.



23. On September 22, 1993, the Solicitor was suspended for three months, to commence at the termination of his April 23, 1993, suspension. A copy of the Report and Decision is attached as Exhibit "K" to this Agreed Statement of Facts.

DATED at Toronto this 16th day of November, 1993."

#### RECOMMENDATION AS TO PENALTY

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The committee recommends in respect of the three complaints established, that Francis Lewis Reilly be suspended for a period of two years from the date of the hearing before the committee, and thereafter for so long as there are outstanding obligations to the Society. His return to practice is to be subject to further conditions: He must produce medical evidence satisfactory to the Secretary, that he is medically fit to resume practice. He must practice in a firm or in association with another member or members approved by the Law Society, and he shall not operate a trust account within three years of returning to practice.

#### REASONS FOR RECOMMENDATION

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D181/94, particular 2 (a):

On these admitted facts, Mr. Reilly used a client's money for his own purposes. No doubt he is guilty of misappropriation of the client's funds. But the facts of this case demonstrate that there should be exceptions to the general proposition that misappropriation merits termination of the solicitor's membership. Without intent to keep the client's money or "convert" it in the usual sense, he deposited trust funds to his general account. He decided to do so as a result of his banker's observation to the effect that there had to be some "activity" in the general account if the bank was to sustain him further with an operating line of credit. He was in arrears, and the bank applied the deposited funds against his arrears, leaving him unable to satisfy his trust obligation to the client.

That this was a failure of judgment is so obvious as to require no comment. It was in the literal sense a misappropriation as well, since the solicitor's intent was certainly to "use" the client's money in a misconceived attempt to satisfy the bank's requirement of action in the account.

The Law Society's counsel made a cogent and compelling argument that this case warranted termination. In such cases, a lesser penalty is justifiable only if the solicitor meets a heavy onus to show exceptional circumstances which explain the act and strongly support the submission that it is out of character and most unlikely to be repeated if the solicitor is allowed to retain his or her membership. We agree. We are satisfied that the onus is met in this case. Our finding is largely based on the medical opinion of Dr. Grant to the effect that the solicitor was suffering from depression, a recognized medical diagnosis. The illness is not a defence to the charge of misconduct, but we considered it in mitigation of the penalty which would otherwise obtain. We are satisfied that there is the requisite "nexus" between the illness and the behaviour. On the basis of Dr. Grant's report we conclude that he was "suffering from a case of severe depression by the time he attempted to establish his own practice..." and the depression prevailed through the period of the offences referred to in all the complaints before us.

22nd June, 1995

There was much evidence of the strain and pressure felt by the solicitor by reason of the unfortunate events which accompanied his return from his honeymoon trip and his having to establish a sole practice unexpectedly. We heard of the severe financial difficulties he and his wife have suffered, and of her resulting depression. It is apparent that they have both suffered and that their conditions interact with each other in very stressful ways. He has had repeated problems paying the expenses of his practice, and has been disciplined for failing to meet the requirements of the Law Society.

Mr. Nabi submitted on the solicitor's behalf that these stresses should mitigate against the usual penalty for misappropriation, termination of the solicitor's membership. We do not agree. It is exactly when the stresses are greatest, when compliance with our profession's rules of conduct are most difficult, that members must faithfully hew to the line. Those are the times when lawyers must be worthy of being "trusted to the ends of the earth", no matter what difficulties they face. The solicitor's own financial distress and other stressful facts would not have been sufficient to persuade us that this case falls within the exception. It is the evidence of clinical depression, operating at the material times, which makes the difference.

D181/94, particulars 2 (b), (c), and (d):

The misapplication of \$400 and the misleading of a colleague and of the Law Society, while serious, seem to us to fall within the scope of the penalty we are recommending to Convocation. We accept the fact of his depression and its influence on his conduct in these matters. The suspension of this solicitor for an extended period should ensure the public interest is served and should operate as a deterrent to Mr Reilly and to the profession. We are hopeful that he will continue treatment and benefit from it sufficiently to return to practice in such circumstances that he can properly observe all the requirements of a practitioner.

D141/93:

We are satisfied that the appropriate way to deal with this matter is to include it within the recommended suspension. Although Mr Reilly failed to comply with the Court's Order in a timely way, he complied eventually.

D440/93:

It is apparent from the Agreed Statement that the solicitor practised under suspension while believing that his reinstatement would proceed upon the Law Society's receiving his certified cheque, replacing one which had been dishonoured by his bank. Unfortunately a penalty was by then imposed and his obligations were not satisfied by delivery of the certified cheque. We recommend that the transgression in this complaint would be adequately penalized by its inclusion in the solicitor's suspension for two years.

Conclusion:

The solicitor testified at length and we heard extensive submissions. We recognize that the activities complained of are very serious and would warrant disbarment. Mr. Reilly's misfortunes may evoke sympathy, but that would not prevent our recommending disbarment. We are persuaded that his depressive illness prevented him from taking action that he would otherwise have taken, and was a cause of each of the situations giving rise to these complaints. In these circumstances, rather than recommend the ultimate penalty, we believe society and the profession can be properly protected by the recommended terms of suspension.

22nd June, 1995

Francis Lewis Reilly was called to the Bar on the 9th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 9th day of May, 1995

Lloyd Brennan, Q.C.  
Chair.

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

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 2 years from the date of the hearing before the Committee and thereafter for so long as there are outstanding obligations to the Society together with the conditions set out in the Report upon his return to practice.

Mr. Perrier made submissions in support of the recommendation of the committee and clarified that the outstanding obligations referred to were that the solicitor produce his books and records for an audit investigation.

The solicitor made brief submissions in support of the suspension.

The motion on the recommended penalty was adopted.

Counsel and solicitor retired.

Re: Rosemary Frances SMITH - North York

The Secretary placed the matter before Convocation.

Mr. Scott did not participate. Ms. Richardson, Ms. O'Connor and Mr. Thom withdrew for this matter.

Ms. Janet Brooks appeared for the solicitor. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 9th May, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

22nd June, 1995

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

K. Julaine Palmer, Chair  
Nora Richardson  
Stuart Thom, Q.C.

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

Janet Brooks  
for the Society

ROSEMARY FRANCES SMITH  
of the City  
of North York  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: December 14, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On April 18, 1994 Complaint D89/94 was issued against Rosemary Frances Smith alleging that she was guilty of professional misconduct.

The matter was heard in public on December 14, 1994 before this Committee composed of K. Julaine Palmer, Chair, Stuart Thom, Q.C. and Nora Richardson. The Solicitor was not present at the hearing nor was she represented. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D89.94

2. a) She failed to file with the Society within six months of the termination of her fiscal year ending March 31, 1991 and March 31, 1992, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

This case is somewhat unusual. It appears to the Committee that, after her call to the Bar on March 30, 1990, Solicitor Smith has disappeared. Although there have been numerous attempts to contact her, at a variety of addresses, both in Ontario and in the State of Washington, U.S.A. she has not replied to the Law Society. The Solicitor did not appear at the hearing before the Committee held on December 14, 1994. A prior Committee had adjourned the hearing in June, 1994, in order that a search for a death certificate of the Solicitor could be conducted.

The Committee determined that Solicitor Smith had been properly served with notice of the proceeding by registered mail at her last known address as shown by the records of the Society. That address is in Metropolitan Toronto. The letter was returned unclaimed.

Helen Pasceri, forms processor in the Membership Records Department of the Society, testified at the hearing. She stated that the Solicitor was suspended for non-compliance with filings under the insurance program on November 30, 1990. The Society arbitrarily selected a date of commencement of practice for Solicitor Smith as March 30, 1990 (the date of her call to the Bar), with a year end of March 30, 1991. Accordingly, under section 16(2) of Regulation 708 under the Law Society Act, the Solicitor's annual filings would be due before September 30, 1991. Solicitor Smith did not file any documents for her fiscal year ending March 31, 1991 nor March 31, 1992. Ms. Pasceri testified that there is no evidence that the Solicitor ever practised law in Ontario.

Ms. Brooks, who represented the Society, submitted that it is important to the Society to deal with Solicitor Smith's status, however, because at present, all the Solicitor need do to recover her good standing is to pay any outstanding fees, levies and penalties. It is of importance to the public and the profession that this Solicitor be suspended from practice until she makes any filings outstanding at the time she reapplies.

On the basis of the testimony of Ms. Pasceri and the documents before the Committee at the hearing, the Committee was prepared to recommend a finding of professional misconduct be made against the Solicitor for her failure to file for the years 1991 and 1992.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Rosemary Frances Smith be suspended indefinitely until her filings for 1991 and 1992 are made.

REASONS FOR RECOMMENDATION

The only way in which the Society can retain its position as a self-governing profession is to be able to demonstrate that it has control of its members. In the usual case, this control is demonstrated by a member's cooperation in adhering to the rules and regulations of the Society.

In the case of Solicitor Smith, she has failed to adhere to the most basic rules on which the governance of the profession is based. She has failed to file any forms required by the Society since her call to the Bar on March 30, 1990. For this reason, the Committee recommends she be suspended indefinitely, until her filings are made.

22nd June, 1995

Rosemary Frances Smith was called to the Bar and admitted as a solicitor on the 30th day of March, 1990.

ALL OF WHICH is respectfully submitted

DATED this 9th day of May, 1995

K. Julaine Palmer  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Topp, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for 1 month and indefinitely thereafter until the filings are completed.

Carried

Counsel retired.

Re: Robert Keith MURRAY - Scarborough

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Thom withdrew for this matter.

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

Convocation had before it the majority Report of the Discipline Committee dated 23rd May, 1995 and Dissent dated 9th January, 1995 together with an Affidavit of Service sworn 9th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 30th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 14th March, 1994 (marked Exhibit 2) and a letter from the solicitor (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ian Blue, Q.C., Chair  
Stuart Thom  
Netty Graham

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

Georgette Gagnon  
for the Society

22nd June, 1995

ROBERT KEITH MURRAY  
of the City  
of Scarborough  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: November 2, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

#### REPORT

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On July 4, 1994 Complaint D138/94 was issued against Robert Keith Murray alleging that he was guilty of professional misconduct.

The matter was heard in public on November 2, 1994 before this Committee composed of Ian Blue, Q.C., Chair, Stuart Thom, Q.C. and Netty Graham. The Solicitor was not in attendance at the hearing nor was he represented. Georgette Gagnon appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D138/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending January 1, 1991, January 1, 1992 and January 1, 1993, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the Regulation made pursuant to the Law Society Act.

##### Evidence

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

##### "STATEMENT OF FACTS"

1. The Solicitor was called to the Bar on March 21, 1975. He practised as a sole practitioner until his suspension on November 21, 1989 as a result of his failure to pay his Errors and Omissions Insurance Levy.

2. The Solicitor's fiscal year end is January 1st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 1, 1991, January 1, 1992 and January 1, 1993, as required by S.16(2) of Regulation 708 under The Law Society Act.

Failure to File for the Fiscal Year ended January 1, 1991

3. Notice of Default in Annual Filing, dated August 9, 1991, (Document Book, Tab 1) was forwarded to the Solicitor by the Law Society.

22nd June, 1995

4. By registered mail dated September 19, 1991, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Solicitor did not reply to the Law Society's letter. A copy of the Law Society's September 19, 1991 letter and Acknowledgment of Receipt of a Registered Item Card is contained in the Document Book, Tab 2.

5. The late filing fee began to accrue on October 4, 1991.

Failure to file for the Fiscal Year ended January 31, 1992

6. Notice of Default in Annual Filing, dated August 8, 1992 was forwarded to the Solicitor by the Law Society. The Law Society's August 8, 1992 Notice was returned by the post office marked "return to sender". A copy of the Notice of Default in Annual Filing and returned envelope are contained in the Document Book, Tab 4.

7. By registered mail dated September 11, 1992, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Law Society's September 11, 1992 letter and Acknowledgment of Receipt of a Registered Item Card is contained in the Document Book, Tab 4.

8. The late filing fee began to accrue on October 9, 1992.

Notice to File for the Fiscal Year ended January 1, 1993

9. Notice of Default in Annual Filing, dated August 11, 1993 (Document Book, Tab 5) was forwarded to the Solicitor by the Law Society.

10. By registered mail the Law Society forwarded to the Solicitor a Second Notice in Default in Annual Filing dated September 15, 1993. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Law Society's Second Notice was returned by the post office marked "moved". A copy of the Law Society's Second Notice and returned envelope are contained in the Document Book, Tab 56.

11. The late filing fee began to accrue on October 8, 1993.



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12. The Law Society conducted a motor vehicle search on or about May 25, 1994. The Law Society was provided with the Solicitor's home address of 7 Fraser Avenue, Apt. 1, Toronto, Ontario M6K 1Y7 by the Ministry of Transportation and Communications.

13. By registered mail dated May 25, 1994 the Law Society forwarded to the Solicitor a copy of the Notices of Default in Annual Filing. The Solicitor was reminded of his obligation to notify the Law Society of a change of address as well as, his obligation to make his annual filings. The Solicitor was advised that should he fail to make the required filings, the matter would be referred to the Discipline Department. The Law Society's May 25, 1994 letter was returned by the post office marked "unclaimed". A copy of the Law Society's May 25, 1994 letter and returned envelope are contained in the Document book, Tab 7.

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

15. To date, the Solicitor has not filed the required forms for the fiscal years ended January 1, 1991, January 1, 1992 and January 1, 1993.

#### V. DISCIPLINE HISTORY

16. The Solicitor was found guilty of professional misconduct and reprimanded in committee on October 10, 1990 with respect to his failure to file for the fiscal years ended January 1, 1988, January 1, 1989 and January 1, 1990.

DATED at Toronto, this 2 day of November, 1994."

#### RECOMMENDATION AS TO PENALTY

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The majority of the Committee recommend that Robert Keith Murray be disbarred.

#### REASONS FOR RECOMMENDATION

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The Committee is deeply troubled by the conduct of Robert Keith Murray reflected in this complaint. Mr. Murray is charged with failing to file the requisite forms within six months of termination of his fiscal year ending January 1st, 1991; January 1st, 1992 and January 1st, 1993. These forms are the forms required under Section 16(2) of the regulation made pursuant to the Law Society Act.

Mr. Murray has a discipline history, indicating that he was found guilty of professional misconduct and reprimanded in Committee on October 10th, 1990 with respect to his failure to having filed the requisite forms for the fiscal years ended January 1st, 1988; January 1st, 1989 and January 1st, 1990. In short, Mr. Murray has not filed his forms for six years.

Exhibit 3 was a letter filed from Mr. Murray in which he indicates to the Committee that he ceased to practise law in 1989 and had no intention of resuming practising again.

The Committee is tempted to treat Mr. Murray as a closed book and not trouble Convocation with his case. Mr. Murray's letter, however, which is an appendix to these reasons, indicates several serious matters.

22nd June, 1995

First, Mr. Murray did not close out his files in an orderly manner; instead, he had his files shredded several years ago.

Secondly, his trust account, he tells us, had a balance but rather than dealing with it in an appropriate manner, he wrote a cheque to Save The Children Canada.

Thirdly, Mr. Murray defies Convocation to disbar him. These statements again might be treated as those of a "smart-alec" or as a member with whom the Society should not be concerned.

This Committee, however, believes that if that course is taken, this Committee and Convocation would be guilty of gross neglect.

This solicitor simply has decided to close down business. The Law Society has no record of how his clients have been treated or how their money has been handled. The solicitor, by his conduct, has been completely ungovernable. The Committee believes that this conduct is not acceptable, falls below the standards of conduct of any solicitor and is grounds for disbarment.

One addendum, in saying that the solicitor had not filed for the six years, 1988 to 1993, I meant to say that he had not filed until he was disciplined in Convocation. In fact, he did file for the years 1988, 1989 and 1990.

Robert Keith Murray was called to the Bar on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of May, 1995

Ian A. Blue, Q.C.  
Chair

#### DISSENT

#### RECOMMENDATION AS TO PENALTY

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The minority of the Committee recommends that Robert Keith Murray be suspended for one month and thereafter, month to month until he has satisfied his obligations to the Society.

#### REASONS FOR RECOMMENDATION

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The solicitor, by inviting disbarment on his own terms is, in effect, resigning from the Society in complete disregard of the obligations which our rules and regulations provide, whatever takes place in the ordinary course of events.

22nd June, 1995

This is an impossible situation and the recommendation of the minority is that the solicitor be suspended for one month and thereafter, month to month until he has satisfied his financial and other obligations to the Society.

ALL OF WHICH is respectfully submitted

Dated this 9th day of January, 1995

Stuart Thom, Q.C.

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

There were no submissions and the Report was adopted.

The majority recommended penalty of the Committee was that the solicitor be disbarred and the minority Recommendation was to suspend the solicitor for a period of 1 month and thereafter and month to month until he has satisfied his obligations to the Society.

It was moved by Ms. Puccini, seconded by Mr. Cole that the majority recommendation be adopted.

Ms. Gagnon made submissions in support of the recommended penalty of disbarment in the majority Report.

It was moved by Mr. Topp, seconded by Mr. Gottlieb that the minority recommendation be adopted.

It was moved by Ms. Lax, seconded by Mr. Finkelstein that the solicitor be permitted to resign within 30 days or be disbarred.

Counsel, the reporter and the public withdrew.

The motion to disbar the solicitor was voted on and lost.

The motion to permit the solicitor to resign or be disbarred was voted on and lost.

The recommendation of the minority Report to suspend the solicitor for a period of 1 month and thereafter was voted on and adopted.

Messrs. Marrocco and Banack and Ms. Backhouse did not vote.

Counsel, the reporter and the public were recalled and informed of Convocation's decision to suspend the solicitor for a period of 1 month and thereafter, month to month until he has satisfied his obligations to the Society.

Counsel retired.

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Convocation took a brief recess and the Treasurer withdrew from Convocation as one of the ineligible Benchers listed in the Roger Carr discipline matter.

Convocation resumed with Mr. Topp as Acting Treasurer.

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Re: Roger Napier CARR - Port Hope

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and the Treasurer, Mr. Thom and Ms. Richardson withdrew for this matter.

Ms. Christina Budweth appeared for the Society and Mr. Douglas Crane appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 28th April, 1995, together with an Affidavit of Service sworn 18th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair  
Stuart Thom, Q.C.  
Nora Richardson

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

Christina Budweth  
for the Society

ROGER NAPIER CARR  
of the Town  
of Port Hope  
a barrister and solicitor

Douglas Crane, Q.C.  
for the solicitor

Heard: February 7, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On December 2, 1993 Complaint D346/93 was issued, on June 8, 1994 Complaint D346a/93 was issued and on February 6, 1995 Complaint D346b/93 was issued, against Roger Napier Carr alleging that he was guilty of professional misconduct.

A hearing was commenced on June 8, 1994. In the course of the hearing it was determined that the matter should not proceed and the exhibits were ordered sealed.

The matter was heard in public on February 7, 1995 before this Committee comprised of Lloyd Brennan, Q.C., Stuart Thom, Q.C. and Nora Richardson. The Solicitor attended the hearing and was represented by Douglas Crane, Q.C. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D346b/93

2. a) he failed to fully and candidly advise his client concerning the alteration of a Deed of Land, and to properly guard himself against becoming involved in the registration of a false document.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D346a/93 and is prepared to proceed with a hearing of this matter on February 7, 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 D346b/93 and this agreed statement of facts with his counsel, Douglas Crane, Q.C., and admits the particular contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

BACKGROUND

4. The Solicitor is 53 years of age, married and has been practising as a solicitor since his call to the Bar in 1969.

5. Following his call to the Bar, the Solicitor practised for approximately 2 years as associate counsel with the Ontario Securities Commission. He then moved to become in-house counsel at Wood Gundy in the Corporate Finance Department until 1972. In October 1972, the Solicitor left corporate practice for Port Hope and opened up a sole proprietorship there. In 1981, the Solicitor entered into a partnership with Bruce Coleman. That partnership lasted until April 1, 1992. Since that time, the Solicitor has continued his sole practice with an emphasis on corporate and real estate work, in the Port Hope/Cobourg area.

6. The Solicitor has worked on a large variety of corporate and real estate matters including severances for numerous residents in the Port Hope and Cobourg area.

7. The Solicitor co-operated fully throughout the investigation and provided detailed statements and responses to all Law Society inquiries concerning this matter.

# THE COMPLAINT

8. The Solicitor was retained by William Howard Payne in May of 1991 to represent Mr. Payne before the Committee of Adjustments of the Township of Hamilton with regard to a severance application. Mr. Payne was a long time client of the Solicitor and had in fact, been a client of the Solicitor's for approximately 20 years. The Solicitor had acted for Mr. Payne on a number of matters including severance applications.

9. Under cover of letter dated May 6, 1991, Mr. Payne submitted an Application for Consent for severance to the Township of Hamilton Committee of Adjustments. A copy of Mr. Payne's May 6 letter and enclosed Application for Consent are attached collectively as Exhibit 1 to this agreed statement of facts. Although the Application listed the Solicitor as the applicant's "solicitor or authorized agent" Mr. Payne had not, at the time of the completion of the Application, asked the Solicitor to act on the matter for him. There is no issue that the Solicitor was willing to act for Mr. Payne in this regard.

10. The proposed use as set out in Mr. Payne's Application was for "building lot for farm employee (full-time)". The name of the person to whom the land or interest in land was intended to be conveyed was listed as "Stephen Tinney".

11. Mr. Payne was a member of the Committee of Adjustments for the Township of Hamilton and was, by virtue of this office, unable to make representations for the Consent to severance on his own behalf.

12. The Solicitor agreed to represent Mr. Payne. The Solicitor appeared before the Committee of Adjustments on May 27, 1991 and represented to the Committee that Mr. Payne intended to transfer the proposed severed lot to a full-time farm hand, Stephen Tinney, on the basis of his understanding that this was to be the case. It would be Mr. Payne's evidence, which would not be disputed by the Solicitor, that he did originally intend to convey the severed lot to Mr. Tinney. Mr. Payne would not purport to have the Committee believe that he would do so free of consideration. It was Mr. Payne's intention to in effect "sell" the lot to Mr. Tinney either by deducting of a portion of the sale price from his wages or the attribution of yearly bonuses to the forgiveness of the purchase price.

13. The Application was granted. A copy of the Committee Adjustments' decision is attached to the agreed statement of facts as Exhibit 2.

14. As noted in the Township of Hamilton's Notice of Decision, the Food Land Guidelines stated that accommodation may be provided for full-time farm help. It was upon this basis that the severance to Mr. Tinney was granted.

15. The Township of Hamilton Notice of Decision also included three conditions: payment of a park levy of \$750; payment of an impost fee of \$1,500; and the rezoning of the severed lot to special rural (A-1), all of which conditions had to be completed within one year of the Decision.

16. On June 17, 1991, the Solicitor applied for a rezoning of the severed lot on behalf of Mr. Payne. On July 31, 1991, the Corporation of the Township of Hamilton issued a Notice of a By-Law rezoning the severed lot. In an explanatory note attached to the Notice, it was stated that one of the purposes of the by-law was:

to fulfil one of the conditions necessary for the creation of a lot within the area placed within the A-1 Zone. One single family dwelling house is permitted on that lot within the A-1 Zone.

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17. On July 31, 1991, the Solicitor wrote to Mr. Payne reporting on the status of his rezoning application and of the steps remaining to be fulfilled before the severance could be granted. The Solicitor stated:

In order to give effect to the severance it will be necessary to convey the property to your farm help and I would suggest that you would convey it for the full price of \$40,000 or \$50,000 and take back a mortgage for the full purchase price. Either Tinney buys the property from you for full value or he subsequently conveys it to you by way of a Quit Claim Deed. In either case, the mortgage back would be set up in such a way that if he sold the property to someone else the mortgage would become due and payable or in the event that he reconveyed the property to you, the mortgage would become merged with title and therefore disappear.

A copy of the Solicitor's July 31, 1991 letter is attached as Exhibit 3 to this agreed statement of facts. The Solicitor charged a total of \$400.00 for fees and \$561.75 for disbursements for his services up to July 31, 1991.

18. In the spring of 1991 the Royal Bank of Canada refused to renew Mr. Payne's farm line of credit. As a result, he was forced to gather funds sufficient to pay out his line of credit which was approximately \$400,000.00. In order for Mr. Payne to do so, he was required to sell almost his entire beef herd. This led to a reduced volume of work on the farm and resulted in the termination of Mr. Tinney described below.

19. As is set out in paragraph 24 below, Mr. Payne delivered a Notice of Termination to Mr. Tinney on or about November 29, 1991. Having obtained the severance for the lot, Mr. Payne was eager to preserve the severance and to benefit from it; therefore, in December 1991, Messrs. Payne, Tinney and a farm consultant named Matthew Currelly, attended at the Solicitor's office. The Solicitor understood the purpose of the meeting to be for Mr. Tinney to sign deeds both deeding the property to him and then signing a deed back to the Paynes in order that the Township requirements could be met. The Solicitor was advised that Mr. Tinney was prepared to sign such a deed and in fact he was prior to attending at the Solicitor's office.

20. However, at the meeting, which took place in the Solicitor's office, Mr. Tinney decided not to sign the deed, despite Mr. Payne's offer of \$3,000. The meeting adjourned without the deed being signed. A copy of the unsigned deed which was presented to Mr. Tinney at the meeting is attached as Exhibit 4 to this agreed statement of facts.

21. On January 3, 1992, the Solicitor wrote to Mr. Payne attaching a deed from Stephen Tinney back to the company, requesting that Mr. Tinney sign the deed. In the letter, the Solicitor wrote:

As you know, we have on file a deed from the company to Stephen Tinney, and that deed will be presented to the Township once you have paid the lot levy and had the property surveyed. We would then attend at the Registry Office and register the deed from the company to Stephen Tinney, and immediately thereafter register the deed from Stephen Tinney back to the company. This format will technically comply with the Township's requirement that the deed go into Stephen Tinney's name.

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It was and remains the position of the Solicitor that since there was no restriction on the length of time that Stephen Tinney was to hold the property, the immediate conveyance back from him to the company would apparently meet the Township's technical requirements for granting the consent. A further account for \$210 plus GST was attached. A copy of the Solicitor's January 3, 1992 letter, complete with the enclosed account is attached as Exhibit 5 to this agreed statement of facts.

22. In February, 1992, Mr. Payne executed a deed conveying the property on behalf of 861158 Ontario Limited conveying the severed lot to Mr. Tinney. A copy of the executed deed is attached as Exhibit 6 to this agreed statement of facts.

23. In March, 1992 Mr. Payne advised the Solicitor that the survey had been completed for the severed lot. The Solicitor advised Mr. Payne that he was still prepared to prepare a deed for stamping conveying the property to Tinney. The Solicitor requested that Mr. Payne sign an affidavit that Stephen Tinney was still a full time farm employee, in the event that the Township required this information. An affidavit was sworn on March 12, 1992, by Mr. Payne and commissioned by the Solicitor but was not required by the Township.

24. Mr. Payne had already given notice to Mr. Tinney of the termination of his employment by letter dated November 29, 1991 effective January 24, 1992. Following the effective date of his termination, Mr. Payne continued to employ Mr. Tinney until such time as he was able to secure alternate employment. Mr. Payne's evidence would be that while he was expecting Mr. Tinney to leave his employment shortly it was not until the evening of March 13, 1992 that Mr. Tinney advised him he had secured other employment. In fact, as Mr. Tinney stated to the police, his last day of work was March 13, 1992. The Solicitor would testify that he was not aware of the change in relationship between Mr. Tinney and Mr. Payne.

25. On April 7, 1992, the Solicitor attended before the Secretary-Treasurer of the Committee of Adjustments with a deed of Land (Exhibit 6) from 861158 Ontario Limited to Stephen Tinney and a Schedule forming page 2 stating that:

Re: 861158 Ontario Limited transfer to Stephen Tinney, Part Lot 20, Concession 6, Township of Hamilton, County of Northumberland, being Part 1, Plan 39R-6005.

26. The Solicitor presented three copies of the deed of Land with attached Schedule and received a consent stamp on all three deeds of land. One signed, stamped copy was retained by the Secretary-Treasurer.

27. The deed of land prepared by the Solicitor transferring the land from the corporation to Tinney, was prepared on Dye & Durham Limited stationary, which is the stationary used by the Solicitor.

28. After attending upon the Secretary-Treasurer, the Solicitor attended at Mr. Payne's residence to further discuss the severance at Mr. Payne's request.

29. Mr. Payne and the Solicitor had a discussion about whether the stamped deed could be changed. The Solicitor firmly advised that he could not change the deed and that all of his representations to the Township were that the property would be conveyed to Mr. Tinney. The Solicitor advised that he would not and could not alter the deed.

30. Mr. Payne also asked the Solicitor what would happen if the deed were altered, to which the Solicitor replied that if the Township heard of the alteration "they would not sit still on the matter", although the Solicitor was unsure as to what exactly the Township might do in that instance.



31. The Committee is reminded that Howard Payne was a long-standing client of the Solicitor of some 20 years, for whom the Solicitor had done a large number of transactions.

32. After the Solicitor advised Mr. Payne that he would not alter the deed, Mr. Payne pressed the Solicitor to outline, step by step, how to prepare a new deed.

33. The Solicitor advised Mr. Payne in writing what would be required of a new deed, and in fact prepared a handwritten list of how to prepare a new deed of Land, a copy of which is attached as Exhibit 7 to this agreed statement of facts.

34. After further pressing by Mr. Payne about how to change the deed, the Solicitor would testify that at the insistence of Mr. Payne, he showed Mr. Payne in draft how a new deed scheduled to a deed would have to look for a severance from 861158 Ontario Ltd. to Mr. and Mrs. Payne by Xing out the name Stephen Tinney and writing above the Xed out name the names of Mr. and Mrs. Payne. The Solicitor advised Mr. Payne that if he intended to register an altered deed he would have to do so through the offices of another solicitor. The Solicitor then left the Paynes' residence in a very excited and frustrated state. A photocopy of the Schedule attached to two photocopies of the altered deed of two different duplicate registered deeds are attached collectively as Exhibit 8 to this agreed statement of facts.

35. Mr. Payne did contact the lawyer recommended by the Solicitor, Jim Stirling, who advised Mr. Payne that prior to registering any documents on Mr. Payne's behalf, Mr. Payne would have to attend at Mr. Stirling's office. Mr. Stirling quoted a fee of \$100.00 plus disbursements.

36. Following the meeting between the Paynes and the Solicitor at the Paynes' home, the Solicitor reported to Mr. Payne on the essence of their discussions by letter dated April 9, 1992. A copy of the Solicitor's April 9, 1992 letter to Mr. Payne is attached as Exhibit 9 to this agreed statement of facts.

37. On May 13, 1992, a local conveyancer, Vivian Reynolds, commissioned Mr. Payne's Affidavit of Land Transfer Tax. The evidence as to who prepared the new deed is unclear. In Vivian Reynolds' statement to the police respecting the criminal charges against Mr. Payne which stem from the events which form the subject matter of the Complaint, she stated that she could not recall preparing the deed. The Solicitor's evidence would be that he did not prepare the deed and that he does not use Newsome and Gilbert forms. Mr. Payne would say that he, having decided not to retain Mr. Stirling, instructed the Solicitor to prepare a new deed which he did. Mr. Payne would also testify that the deed on the Newsome and Gilbert forms which was registered was **not** the deed that was provided to him by Mr. Carr. The Solicitor and the Society concede that this issue could not be resolved without a full hearing and a finding of credibility being made. The Solicitor and the Society also respectfully submit that it is not necessary for a finding of fact to be made on this issue, for the Committee to make a finding of misconduct or an appropriate disposition of the penalty in the circumstances.

38. Mr. Payne paid Vivian Reynolds a retainer of \$100.00 for services performed.

39. On May 14, 1992, at approximately 2:16 p.m., Vivian Reynolds registered an original and duplicate original deed of land with an attached Schedule with the consent stamp from the Committee of Adjustments and an Affidavit of Land Transfer Tax. The deed of land was from 861158 Ontario Limited to William Howard Payne and Lillian Pauline Mr. Payne. This was prepared on a Newsome and Gilbert forms rather than the Dye & Durham stationary used by Roger Carr. The Schedule has the names "William Howard Payne, Lillian Pauline Payne", written in.

40. On August 25, 1992, Mr. Payne was charged with one count of uttering a forged document and one count of a fraudulent registration of title, both contrary to the Criminal Code.

41. On January 14, 1993, Mr. Payne pleaded guilty to the fraudulent registration of title. Mr. Payne was fined \$650.00 and placed on eight months probation.

42. In preparation for the trial of Mr. Payne, numerous statements were taken by the investigating officer from Mr. Tinney, Matthew Currelly, Vivian Reynolds, the Secretary-Treasurer of the Committee of Adjustments and various other witnesses. The police attempted to obtain a statement from the Solicitor but the Solicitor refused to give a statement on the grounds of solicitor/client privilege.

43. The Solicitor did, however, provide a statement to Mr. Payne's criminal lawyer, Stephen Bale, which statement was subsequently forwarded to the Law Society of Upper Canada by the Solicitor.

44. On April 14, 1993, Jonathan Fedder of the Law Society of Upper Canada wrote to the Solicitor concerning an article which appeared in the January 28, 1993 edition of the Port Hope Evening Guide which reported on the guilty plea of Mr. Payne. Mr. Fedder requested that the Solicitor review the article and return any comments the Solicitor may have to Mr. Fedder within two weeks of receipt of the letter.

45. By letter dated April 20, 1993, a copy of which is attached as Exhibit 10 to this agreed statement of facts, Mr. Payne wrote to the Complaints Department of the Law Society of Upper Canada. Mr. Payne complained that the Solicitor advised him that, although "the Township wouldn't like it if they found out" it had occurred before that a stamped deed be altered to provide for a different transferee. The Solicitor denies providing this advice. According to Mr. Payne, the Solicitor advised that he could not prepare a new first page for the deed for registration although he prepared a sheet of instructions outlining how the first page of the deed should be prepared and advised Mr. Payne and his wife to attend at another lawyer's office to have the deed prepared and registered. Mr. Payne further advised that the lawyer whose name was provided by the Solicitor was "too expensive" and eventually the deed was registered by a paralegal, Vivian Reynolds.

46. By letter dated April 21, 1993, a copy of which is attached as Exhibit 11 to this agreed statement of facts, the Solicitor wrote to Jonathan Fedder of the Law Society enclosing a copy of the statement which he had earlier provided to Stephen Bale as solicitor for Mr. Payne in his criminal trial. The Solicitor also enclosed a copy of the sentence which Mr. Payne received.

47. On May 20, 1993, Jonathan Fedder of the Law Society wrote to the Solicitor advising, among other things, of the complaint letter from Mr. Payne dated April 20, 1993, a copy of which is attached as Exhibit 12 to this agreed statement of facts, asking for the Solicitor's response to the complaint. This letter indicated some concern that Mr. Fedder had concerning the plan to transfer the land to Mr. Tinney and then have him "flip it" back to Mr. Payne's company or to Mr. Payne and whether such a plan was appropriate given the Solicitor's submissions to the Committee of Adjustments.

48. On June 1, 1993, the Solicitor responded to Mr. Fedder's letter of May 20th, a copy of which is attached as Exhibit 13 to this agreed statement of facts. The Solicitor acknowledged that he was aware that Mr. Payne would not be giving the lot to Tinney. The Solicitor maintains that it was his intention throughout that should he remain involved, the lot would have to be transferred to Mr. Tinney, if only for a moment, and then transferred to Mr. Payne and his wife, thereby effecting a severance from Mr. Payne's company to Mr. Payne which would technically comply with the requirements of the consent granted by the Committee of Adjustments. As the Solicitor advised on page 2 of his letter:

The Township was not prepared to accept any other deed, other than the deed to the farm worker, Mr. Tinney, and clearly my position and advice to Mr. Payne had always been in fact the deed to Mr. Tinney would have to be registered. This is clear from my suggestion of a mortgage back for the full price, and even the deed which Mr. Payne wanted Mr. Tinney to sign, conveying the property back did not alter the fact that the conveyance to Mr. Tinney was to be made. Hence I deny any "apparent impropriety" on my part in commissioning the affidavit. It was factual and correct.

49. On June 1, 1993, the Solicitor wrote a separate letter to Jonathan Fedder, a copy of this is attached as Exhibit 14 to this agreed statement of facts, in response to Mr. Payne's complaint to the Law Society. The Solicitor stated:

Once I advised him that he would have to seek the advice of another Solicitor, it was clearly up to Mr. Payne as to what course of action he chose to follow. Mr. Payne's comment that "the lawyer suggested by me was too expensive..." but eventually the deed was registered for us by a paralegal, clearly indicates to me that the other lawyer was not prepared to prepare a deed in favour of Mr. Payne and his wife in substitution for the deed which had already been stamped by the Township of Hamilton, and accordingly Mr. Payne took the matter into his own hands, the consequences of which you have on record.

50. It is admitted by the Solicitor that he should have firmly advised Mr. Payne that the registration for a document altered after it had been stamped constituted a criminal offence. The Solicitor acknowledges that, even where a solicitor thinks that his or her client is well aware of the repercussions of an action, it is essential in each instance to fully advise the client so that no misunderstandings will arise.

#### VI. SUBMISSIONS ON PENALTY

51. Counsel for the Law Society and for the Solicitor agree that the misconduct in question is deserving of a Reprimand in Convocation and payment of the Society's costs in the amount of \$5,000.00 prior to the hearing of this matter in Convocation. The following factors are agreed upon as most relevant in the creation of this joint submission:

- (a) The Solicitor has co-operated fully with the Law Society investigation;
- (b) The Solicitor did not obtain any financial benefit from the severance other than reasonable legal fees;
- (c) The client was a long-standing client who in this instance, as a member of the Committee of Adjustments, should have been aware of the consequences of registering an altered deed, although he was entitled to be fully advised by his Solicitor;

22nd June, 1995

- (d) Evidence presented suggested that this type of conduct is out of character for the Solicitor;
- (e) The Solicitor and his wife have suffered severe emotional strain as a result of these complaints and in particular as a result of the Solicitor's own feeling of frustration and confusion over his lapse in judgment in allowing himself to become involved in this matter;
- (f) The Solicitor has saved the expense of a lengthy hearing by agreeing to a joint submission;
- (g) This is the first time the Solicitor has been before the Discipline Committee in his 25 years of practice.

DATED at Toronto, this 30th day of January , 1995."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Roger Napier Carr be Reprimanded in Convocation and that he pay the Society's costs in the amount of \$5,000.00 prior to the hearing of this matter in Convocation.

#### REASONS FOR RECOMMENDATION

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This recommendation results from a joint submission, and follows a pre-hearing conference presided over by Mr. Topp, Vice-Chair of Discipline. The present complaint replaces 346a/93, which was not before the committee, but which we understand referred to the same fact situation. The terms of the new complaint, as well as the joint submission, were the product of the pre-hearing conference.

That procedure has the promise of preventing lengthy and costly hearings in appropriate cases, and is Convocation's best hope for managing the volume of discipline work within the present legislation. We consider it our duty to give deferential consideration to a joint submission in any case, but especially so when it is the result of a pre-hearing conference. We also recognize our duty to Convocation to weigh the evidence carefully both as to the finding on the complaint before us and on the recommended penalty. We considered the facts and submissions in this case at length and with careful deliberation.

The agreed Statement of Fact includes Mr. Carr's admission of professional misconduct on the facts there set out. It is clear that he did not admit the facts originally alleged by Mr. Payne in his complaint letter of April 20 1993. It is also apparent that counsel for the Society and for the solicitor, with the opportunity afforded at the pre-hearing conference and the assistance of Mr. Topp, arrived at the wording of a complaint and an agreed statement of facts which set out as fairly as can be done the true nature of Mr. Carr's breach of his professional duty.

Mr. Carr addressed the panel. He acknowledged that his failure to advise Mr. Payne more strongly against his apparent intention to alter the deed was misconduct. He apologized, admitting that his leaving the matter in the client's hands was not up to the standards of the profession.

We were troubled by some of the background of this case, and feel it necessary to comment so that Convocation will know we addressed these matters, and in the hope these comments will assist Convocation in its deliberations.

22nd June, 1995

Mr. Payne was a long-time client of the solicitor. That fact does not mitigate the misconduct, and we wish to be clear that proper conduct of our members is no less required in dealings with the most valued of clients.

Mr. Payne was himself a member of the Committee of Adjustment from whom he sought a severance. It seems fair to observe that he was probably quite aware of its requirements in his own case and others, notwithstanding that he absented himself at the time Mr. Carr made submissions on his behalf. He was undoubtedly aware of the practice of obtaining consents to sever rural lots and later selling them for profit, in apparent frustration of the land-use legislation.

We heard about, and Mr Carr's own letter of June 1 1993 touches upon, a practice of some landowners obtaining severance consents to allow the sale of lots to raise capital or retirement funds (Document Book, Tab 13). Our first reaction was that solicitors assisting in this practice were frustrating the land-use legislation, and would evoke little sympathy from their fellow lawyers. But upon reflection we recognized that as a discipline committee we cannot presume to be judgmental on such a question. These clients seek to "avoid" the negative financial consequences of that legislation, much as most taxpayers avoid taxes when they can lawfully do so. They are entitled to the advice and assistance of our members. In such situations lawyers must of course avoid any impropriety in their own conduct. To the extent they can, they must also see that the clients' acts are not unlawful. This was Mr. Carr's failure. He refused to do what he knew he must not do himself. But he failed to advise the client adequately for the client's protection, that the client also must not attempt to effect a severance of the lot in question by registering an altered deed.

Conveyance of a lot to Mr. Tinney, a long time farm hand on Payne's farm, was a means of obtaining consent to the severance. It was known by the solicitor that the lot was to be re-conveyed to the client or a nominee. One is reminded of the "man of straw" in legal history. Mr. Tinney declined to be a part of this legal fiction, even though it appears he was offered a significant amount for allowing his name to be used. We do not believe it is a matter for the Law Society on this complaint to consider what representations could and could not be properly made to the Committee of Adjustments on the client's behalf. That was not part of the Complaint and we heard no evidence that would be pertinent to our recommendation.

We heard no evidence that Mr. Carr considered that alteration of a deed might lead to a criminal charge. That does not appear to have been part of the discussion with the client. It is clear that he refused to do it himself and warned Mr. Payne of the negative reaction of Township officials if the severance was effected other than by conveyance to the farm hand, the basis on which consent to severance had been granted. In any event the client was not told of the risk of criminal sanctions for what he eventually did.

The solicitor has practised for 25 years with no suggestion of misconduct. A brief of character references was presented on his behalf, and it is clear that he is a respected member of the profession and the community. In the small community where he resides and practises, this disciplinary proceeding will stain his reputation significantly.

22nd June, 1995

Just as a poor record must weigh against solicitors who have a discipline history, a good record must weigh in favour of those who have none. We accept the submission that this was an isolated instance, out of character for Mr. Carr. We recommend that the joint submission be accepted, and that Mr. Carr be reprimanded in Convocation and pay the balance of the Society's costs. Roger Napier Carr was called to the Bar on the 21st day of March, 1969.

ALL OF WHICH is respectfully submitted

DATED this 28th day of April, 1995

Lloyd Brennan, Q.C  
Chair

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

Ms. Budweth asked that the following amendment be made:

- page 8 of the Report, paragraph 34, third line - the word scheduled should be "schedule".

There were no submissions and the Report as amended was adopted.

It was moved by Ms. Stomp, seconded by Ms. Puccini that the recommended penalty of the Committee be adopted, that is, that the solicitor be reprimanded and pay costs in the amount of \$5,000 prior to the date of Convocation hearing this matter.

Both counsel made brief submissions in support of the recommended penalty. Convocation was advised that the costs had been made.

The motion on the recommended penalty was adopted.

The solicitor was reprimanded by the Acting Treasurer.

Counsel and solicitor retired.

The Treasurer returned to Convocation.

Re: Kristina Joanne REITMEIER - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Thom withdrew for this matter.

Ms. Georgette Gagnon appeared for the Society and Mr. Smith appeared on behalf of Mr. McLauchlin for the solicitor. The solicitor was present.

Convocation had before it the Report of the Discipline Committee dated 24th February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ian A. Blue, Q.C., Chair  
Stuart Thom, Q.C.  
Mrs. Netty Graham

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

Audrey Cado  
for the Society

KRISTINA JOANNE REITMEIER  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: November 2, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 4, 1994 Complaint D141/94 was issued against Kristina Joanne Reitmeier alleging that she was guilty of professional misconduct.

The matter was heard in public on November 2, 1994 before this Committee composed of Ian Blue, Q.C., Chair, Stuart Thom, Q.C. and Netty Graham. The Solicitor was present at the hearing and was not represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D141/94

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending July 31, 1993, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act;

Evidence

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

22nd June, 1995

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D141/94 and is prepared to proceed with a hearing of this matter on November 1 and 2, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D141/94 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 9, 1984. She is currently employed by the Children's Aid Society of Metropolitan Toronto.

5. The Solicitor's fiscal year end is July 31st. The Solicitor did not file her form 3 within six months of the fiscal year ending July 31, 1993, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. The Solicitor provided the Law Society with the following written undertaking, dated June 15, 1993:

WHEREAS I acknowledge that two prior complaints of professional misconduct were issued against me, being Complaints D225/90 and D212/91, for failing to file under similar circumstances;

WHEREAS I acknowledge that Complaints D225/90 and D212/91 were withdrawn in Committee and reduced to an Invitation To Attend;

IN CONSIDERATION of the Society withdrawing Complaints D13/93 and D153/93, and reducing these Complaints to Invitations to Attend, I KRISTINA JOANNA REITMEIER, hereby undertake and agree as follows

1. To file with the Law Society within six months of the termination of any future fiscal year in which I practise, a statutory Declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by me in the form prescribed by the Rules pursuant to section 16(2) of the Regulation made pursuant to the Law Society Act, or any superseding Act or Regulation governing filings; and
2. That this Undertaking may be filed with the Discipline Committee considering this complaint and any future discipline hearings.

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

A copy of the Solicitor's Undertaking, dated June 15, 1993 is attached as Exhibit "A" to this Agreed Statement of Facts.



22nd June, 1995

7. By letter dated January 31, 1994, the Solicitor forwarded to the Law Society a completed Form 2 for the fiscal year ended July 31, 1993. The Solicitor acknowledged her undertaking to file in a timely manner. The Solicitor stated that the form 3 would be completed and forwarded within the next two to three weeks. The Solicitor stated that the Form 3 had not yet been completed as she had not received monthly statements from her bank and that she was awaiting an explanation from her Bank as to the fluctuating balance in her trust account. A copy of the Solicitor's January 31, 1994 letter is attached as Exhibit "B" to this Agreed Statement of Facts. The Solicitor's Form 3 was not received by the Law Society.

8. A Notice of Default in Annual Filing, dated February 4, 1994 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "C" to this Agreed Statement of Facts.

9. By registered mail, the Law Society forwarded to the Solicitor a Second Notice of Default in Annual Filing dated March 7, 1994. The Solicitor was advised that she had not taken the necessary steps to bring her filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, she was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve her from the obligation to make annual filings and that she might be brought before the discipline Committee for failure to file. The Society's Second Notice was signed for and delivered on March 10, 1994. A copy of the Society's Second Notice and Acknowledgment of receipt of a registered item is attached as Exhibit "D" to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

10. The late filing fee began to accrue on March 21, 1994.

11. By registered mail, the Law Society forwarded to the Solicitor a Third Notice of Default in Annual Filing, dated August 5, 1994. The Solicitor was advised that her name would go before Convocation on September 23, 1994 for suspension of her rights and privileges should her late filing fee remain unpaid as of 5:00 p.m. on September 22, 1994. The Solicitor was reminded that the paying of the late filing fee would not relieve her from her obligation to make annual filings and that she may be brought before the Discipline Committee for failure to file. A copy of the Society's Third Notice is attached as Exhibit "E" to this Agreed Statement of Facts.

12. The Solicitor paid the late filing fee on September 22, 1994.

13. The Solicitor filed for the fiscal year ended July 31, 1993 on October 28, 1994. The filing indicated that from August 1, 1992 to July 31, 1993 there were no transactions with respect to the mixed trust account.

DATED at Toronto this 1st day of November, 1994."

#### RECOMMENDATION AS TO PENALTY

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The majority of the Committee recommend that Kristina Joanne Reitmeier be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

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The Solicitor gave a written undertaking to file with the Law Society within six months of the termination of any future fiscal year in which she practises, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by her in the form prescribed by the Rules pursuant to section 116(2) of the Regulation under the Law Society Act and agreeing that the undertaking might be filed with a Discipline Committee considering this complaint. The undertaking is applicable to the filings for the fiscal year 1993.

The undertaking referred to two complaints for failing to file reports under similar circumstances in respect of previous years. It therefore appears that the solicitor has twice before failed to file the necessary reports, is before a Discipline Committee for a third offence of the same nature and has breached an undertaking to fulfil her statutory requirements.

The Committee has considered the evidence the solicitor gave about her circumstances. She is currently a solicitor with the Metropolitan Toronto Children's Aid, she has been out of active practise for four years; there has been no activity in her trust account since the summer of 1991.

These circumstances, however, do not enable us to accede to the request that we should recommend a penalty of a reprimand in Committee, having regard to all aspects of the solicitor's conduct.

Filing the reports required by Section 16(2) of the Law Society Act is necessary in order to allow the Society to ensure that the public interest is being protected and in particular that solicitors are not in any way mishandling client funds. Solicitors are not free to decide when they may ignore their statutory obligations.

This being the third offence of not filing, aggravated by the breach of an express undertaking, the majority of the Committee considers that a reprimand in Convocation is called for and so recommends.

Kristina Joanne Reitmeier was called to the Bar on the 9th day of April, 1994.

ALL OF WHICH is respectfully submitted

DATED this 24th day of February, 1995

Ian Blue, Q.C.,  
Chair

DISSENT

RECOMMENDATION AS TO PENALTY

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The minority of the Committee recommends that Kristina Joanne Reitmeier be reprimanded in Committee.

REASONS FOR RECOMMENDATION

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The Solicitor is employed on a full time basis with the Metropolitan Childrens' Aid Society and has not practised law since January 1, 1992. This is her second appearance before a discipline panel for failing to file her required forms. However, this is not a case of blatant and purposeful disregard for the rules. The Solicitor wrote to the Society on January 31, 1993 (Exhibit "B" to the Agreed Statement of Facts) setting out her difficulty in having the "Form 3" completed. That was the date they were required and she was making the effort to show she was aware of her duty. She was very apologetic to the Committee and felt embarrassed and humiliated at finding herself in this position again.

I accept the Solicitor's apology, and in light of the fact that she does not have a practise or an active trust account, our duty to the public is not jeopardized.

In these circumstances, the "punishment should fit the crime" and this Solicitor deserves no more than a reprimand in Committee and I respectfully submit that is all that is required in this particular case.

The Solicitor was called to the Bar on April 9, 1984.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1995

(Mrs.) Netty Graham

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

Counsel for the Society asked that the following amendments be made:

- page 6, second paragraph - sentence should read that Ms. Reitmeier was called to the Bar on the 9th day of April, "1984" not 1994; and
- page 1, under the heading Decision - particular 2. a) - first word should be "she" not he.

There were no submissions and the Report as amended was adopted.

It was moved by Mr. Wilson, seconded by Ms. Cronk that the majority recommended penalty of the Committee be adopted, that is, that the solicitor be reprimanded in Convocation.

It was moved by Mr. Carey, seconded by Mr. Topp that the minority ^Recommendation as to Penalty be adopted, that is, that the solicitor be reprimanded in Committee.

Both counsel made submissions in support of the minority recommendation.

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

It was moved by Mr. Topp, seconded by Mr. Marrocco that the findings of the Committee be rejected.

Carried

22nd June, 1995

The majority and minority recommendations were not put.

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

Counsel and solicitor retired.

Re: John Michael WOOGH - Kingston

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Ms. Elliott and Ms. Richardson withdrew for this matter.

Mr. Neil Perrier appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 24th February, 1995, together with an Affidavit of Service sworn 8th March, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 1st March, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 10th April, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Lloyd Brennan, Q.C., Chair  
Nora Richardson  
Susan Elliott

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

Neil Perrier  
for the Society

JOHN MICHAEL WOOGH  
of the City  
of Kingston  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 12, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 1, 1994 Complaint D33/94 was issued and on October 7, 1993 Complaint D288/93 was issued against John Michael Woogh alleging that he was guilty of professional misconduct.

The matter was heard in public on October 12, 1994 before this Committee composed of Lloyd Brennan, Q.C., Chair, Nora Richardson and E. Susan Elliott. The Solicitor was in attendance at the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D33/94

2. a) He failed to serve his client, Linda McKenzie, in a conscientious, diligent and efficient manner in that he failed to:
  - i) keep his client reasonably informed of any steps taken with respect to her case;
  - ii) answer requests from his client for information;
  - iii) promptly render an account upon termination of his retainer;
  - iv) account to his client for funds received in trust.
- b) He failed to provide a reply to the Law Society regarding a complaint by Linda McKenzie despite letters dated September 29, 1993 and November 1, 1993 and telephone messages left on October 1, 1993, October 4, 1993, October 12, 1993 and October 14, 1993.

##### Complaint D288/83

2. a) He has failed to reply to the Law Society regarding inadequacies found during a review of his trust comparisons and during audit, despite letters dated July 31, 1992, October 16, 1992, January 7, 1993, March 15, 1993, April 26, 1993 and May 28, 1993.

##### Evidence

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

##### "AGREED STATEMENT OF FACTS"

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D288/93 and is prepared to proceed with a hearing of this matter on October 12, 1994.

#### II. IN PUBLIC/IN CAMERA

2. The parties agreed 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 D288/94 and admits the particular contained therein. The Solicitor further admits that the said particular constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He practices as a sole practitioner.

5. A Law Society representative completed a review of the Solicitor's books and records on October 17, 1990. During the review several inadequacies were discovered in the Solicitor's books and records and were set out in the examiner's report dated October 17, 1990 (Document Book, Tab 1), a copy of which was left with the Solicitor.

6. By letter dated November 26, 1990 (Document Book, Tab 2), the Law Society reminded the Solicitor of the inadequacies disclosed in the examiner's report of October 17th. The Solicitor was requested to have his accountant confirm with the Law Society that all of the inadequacies discovered had been corrected. No reply was received.

7. By letter dated January 25, 1991 (Document Book, Tab 3), the Law Society forwarded to the Solicitor a copy of its November 26th letter. The Solicitor was requested to provide a reply forthwith. No reply was received.

8. By letter dated February 26, 1991 (Document Book, Tab 4), the Law Society requested the Solicitor reply to its previous correspondence so that this matter could be resolved without involving the Discipline Committee. No reply was received.

9. By letter dated April 26, 1991 (Document Book, Tab 5), the Law Society forwarded to the Solicitor copies of its previous correspondence. The Solicitor was advised that should his reply not be received within fifteen days, the matter would be referred to the Discipline Committee. No reply was received.

10. By letter dated October 23, 1991 (Document Book, Tab 6), the Law Society requested the Solicitor have his accountant confirm that all of the inadequacies encountered during its examination of his books and records on October 17, 1990, had been corrected. The Solicitor was also advised of his requirement to forward to the Society a copy of his trust comparisons including a copy of the trust listing, a copy of the trust bank reconciliation and a copy of the bank statement for each month end from September 30, 1991 to February 28, 1992 within twenty days from the effective date of each comparison. No reply was received.

11. By letter dated February 27, 1992 (Document Book, Tab 7), the Law Society forwarded to the Solicitor a copy of its October 23, 1991 letter. The Solicitor was requested to provide his response forthwith. No reply was received.

12. By letter dated March 26, 1992 (Document Book, Tab 8), the Law Society forwarded to the Solicitor a copy of its February 27th letter. The Solicitor was requested to reply forthwith. No reply was received.

13. By registered mail dated April 27, 1992 (Document Book, Tab 9), the Law Society forwarded to the Solicitor a copy of its previous correspondence. The Solicitor was advised that should he fail to reply within fifteen days, the matter would be referred to the Discipline Committee.

22nd June, 1995

14. By letter dated May 7, 1992 (Document Book, Tab 10), the Solicitor advised the Law Society that it could expect a letter from his accountant, Santo Mazzeo, confirming that the inadequacies had been corrected. He also enclosed copies of his trust comparisons including trust listings, manual trust bank reconciliations and his bank statement from the period of September, 1992 through to February 28, 1992.

15. By letter dated July 14, 1992 (Document Book, Tab 11), Mr. Mazzeo provided, in his opinion, confirmation that the inadequacies in the Solicitor's books and records had been corrected.

16. By letter dated July 31, 1992 (Document Book, Tab 12), the Law Society advised the Solicitor of the following:

- the trust bank reconciliations he submitted indicated that a reconciling item was permitted to exist uncorrected over a period of one month. The Solicitor was requested to instruct his bookkeeper to draw his attention to the existence of such items immediately so that action could be taken to correct them in the month following their occurrence.
- his trust bank reconciliation for the month ended December 31, 1991 listed a total in the clients' trust listing of \$14,500. more than the total on his reconciliation. The Solicitor was requested to provide the Law Society with an explanation.
- he was required to have his accountant confirm that all inadequacies encountered during the examination of his books and records on October 17, 1990, had been completed.

No reply was received.

17. By letter dated October 16, 1992 (Document Book, Tab 16), the Law Society advised Mr. Mazzeo that his letter of July 14, 1992 did not meet the requirements set out in its letter of November 26th. The Society acknowledged that the Solicitor would reply to section 12 himself, however, information was still required regarding sections 4, 8, 14, and 15 of the Society's November 26, 1990 letter. The Society enclosed a copy of its November 26th letter for Mr. Mazzeo's reference. A copy of the Society's October 16th letter was forwarded to the Solicitor. No reply was received.

18. By letter dated January 7, 1993 (Document Book, Tab 13), the Law Society forwarded to the Solicitor a copy of its October 16th letter. The Solicitor was requested to provide his reply forthwith. No reply was received.

19. By letter dated March 15, 1993 (Document Book, Tab 14), the Law Society forwarded to the Solicitor a copy of its November 26, 1990 letter. The Solicitor was requested to provide the information as requested in sections 4, 8, 12, 14 and 15 of its November 26th letter. No reply was received.

20. By letter dated April 26, 1993 (Document Book, Tab 15), the Law Society forwarded to the Solicitor a copy of its March 15th letter. The Solicitor was requested to reply forthwith. No reply was received.

21. By registered mail dated May 28, 1993 (Document Book, Tab 16), the Law Society forwarded to the Solicitor copies of November 26, 1990, March 15, 1993 and April 26, 1993 letters. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should he failed to provide a full and complete written response to the Society, within fifteen days, the matter would be referred to the Discipline Committee.

22. The Solicitor replied to the Law Society by letter dated May 13, 1994.

V. DISCIPLINE HISTORY

23. The Solicitor does not have a discipline history.

DATED at Toronto this 12th day of October, 1994."

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D33/94 and is prepared to proceed with a hearing of this matter on October 12, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed this Agreed Statement of Facts and admits the facts contained herein. The Solicitor further admits that the said facts constitute professional misconduct.

IV. FACTS

4. The Solicitor is 48 years of age and was called to the Bar on March 21, 1975. He practises as a sole practitioner in Kingston, Ontario.

Particular 2(a) - Failure to Serve Client, Linda McKenzie

5. In or about December, 1992, the complainant initially met with the Solicitor for approximately 1 1/2 hours respecting a wrongful dismissal action. After the meeting, the Solicitor informed the complainant that she would be billed for \$75 for the first meeting and requested a retainer in the matter.

6. In or about early January, 1993 the complainant met with the Solicitor for a second time and the Solicitor requested that the complainant deliver further documentation and an additional retainer.

7. Also in or about January, 1993, a third meeting occurred at which time the complainant provided the Solicitor with further documentation and a further retainer. The total amount of the retainer paid to the Solicitor was the sum of \$1,075.

8. During the months of February and April, 1993, the complainant attempted to contact the Solicitor on the phone several times. The Solicitor did not return any of her calls.

9. In the first week of May, 1993, the complainant attended at the Solicitor's office without a prior appointment in an attempt to determine the status of her file. She met with the Solicitor briefly, at which time the Solicitor told her that a Statement of Claim would go out "the middle of next week".

10. In or about the last week of July, 1993, when the complainant had not heard anything further from the Solicitor due to the Solicitor's failure to communicate or proceed on her litigation file, the complainant requested that the Solicitor return her file and retainer. The Solicitor promptly delivered the file documentation to her, however, he did not return the retainer monies or render an account for fees.



22nd June, 1995

11. On August 3, 1993, the complainant called the Solicitor's office and was advised by the Solicitor's secretary that he would return her call on August 6, 1993. The Solicitor did not return her call on August 6, 1993.

12. As a result of the above, on August 10, 1993, the complainant wrote a letter of complaint to the Law Society (Appendix "A").

Particular 2(b) - Failure to Reply to the Law Society

13. By letter dated September 2, 1993, (Appendix "B"), the Law Society wrote to the Solicitor requesting a response to the letter of complaint contained in Appendix "A". There was no reply from the Solicitor.

14. On October 1, 4, 12 and 14, 1993, telephone messages were left with the secretary of the Solicitor requesting that he return the call. In each instance, the Solicitor failed to return the call (see notes of telephone conversation at Appendix "C").

15. By registered mail, a letter dated November 1, 1993 was sent to the Solicitor setting out the Law Society's numerous attempts to obtain a reply (Appendix "D"). On the second page of the letter, the Solicitor was referred to Rule 13, Commentary 3 of the Rules of Professional Conduct, which state that the lawyer has a duty to reply promptly to any communication from the Law Society. The Solicitor was informed in the concluding paragraph that if his response was not received within 14 days from the date of the letter, the matter would be referred to the Chair of Discipline for instructions to commence a formal disciplinary proceeding against him. No response was received.

16. Complaint D33/94 was sworn and served on the Solicitor in March of 1994. The Solicitor replied to the Law Society by letter dated June 1, 1994 (Appendix "E"). The Solicitor has refunded the client the sum of \$1,000.00 and offered an apology for any stress the delay may have caused her.

17. The complainant provided her comments by letter dated June 16, 1994 (Appendix "F").

V. PRIOR DISCIPLINE

18. The Solicitor has no prior discipline.

DATED at Toronto this 12th day of October, 1994.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that John Michael Woogh be reprimanded in Convocation and pay costs in the amount of \$1,000.00.

REASONS FOR RECOMMENDATION

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The evidence set forth in the Agreed Statement of Facts, including the solicitor's admissions constitute professional misconduct.

22nd June, 1995

The Solicitor is a senior lawyer who knows his duties to the Society include responding fully, in a timely manner. He also knows his duties to his clients include keeping them fully and adequately informed. He indicated to the Committee that he has no excuse for his actions other than, with respect to replying to the Society, that he had reached a point where he did not know what else he could do to satisfy their inquiries. However, he should have continued to try to satisfy the Society rather than simply ignore it.

The public harm done to the profession by the Solicitor's actions with his client, will not be soon undone. His apology was too little, too late.

The Committee wishes to impress upon this Solicitor and the profession in general that communications with the governing body and with one's clients are of great importance. Given the seriousness with which this is viewed and the fact that this Solicitor, in two disparate ways, failed to comply with such a basic principle, a reprimand in Convocation is required.

John Michael Woogh was called to the Bar on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 24th day of February, 1995

Lloyd Brennan, Q.C.

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

There were no submissions and the Report was adopted.

It was moved by Mr. Finkelstein, seconded by Mr. Carey that the recommended penalty of the Committee be adopted, that is, that the solicitor be reprimanded in Convocation and pay costs in the amount of \$1,000.

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

The solicitor made no submissions.

The motion on the recommended penalty was adopted.

Counsel and solicitor retired.

Re: John Meredith GLASSCO - Sydenham

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Ms. Richardson withdrew for this matter.

Ms. Georgette Gagnon appeared for the Society and Mr. Black, Duty Counsel appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 9th May, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd May, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

22nd June, 1995

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

K. Julaine Palmer, Chair  
Nora Richardson  
Michael G. Hickey, Q.C.

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

Georgette Gagnon  
for the Society

JOHN MEREDITH GLASSCO  
of the Town  
of Sydenham  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: December 13, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On September 22, 1994 Complaint D258/94 was issued against John Meredith Glassco alleging that he was guilty of professional misconduct.

The matter was heard in public on December 13, 1994 before this Committee composed of K. Julaine Palmer, Chair, Nora Richardson and Michael G. Hickey, Q.C. The Solicitor was present at the hearing and was not represented. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D258/94

2. a) he breached an Order of Convocation suspending his rights and privileges to practice law by continuing to practice during the period November 1, 1993 to December 31, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D258/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D258/94 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 18, 1988. He practised as a sole practitioner until June, 1993 when he became employed by the Ontario Ministry of Housing in Kingston, Ontario. From June 1993 to December 1993, the Solicitor continued to practise as a sole practitioner and work for the Ministry of Housing. In March 1994, the Solicitor returned to practise full time as a sole practitioner.

5. A Notice of Annual Membership Fees and memorandum dated June 1, 1993 (Tab 1, Document Book) was forwarded to the Solicitor. The Solicitor did not respond to this Notice.

6. A Second and Final Notice of Annual Membership Fees and memorandum dated September 23, 1993 (Tab 2, Document Book) was forwarded to the Solicitor. The Solicitor did not respond to the Second Notice and Final Notice.

7. By registered mail dated November 2, 1993 which was received in the Solicitor's office on November 13, 1993, the Solicitor was advised that his rights and privileges as a member of the Law Society had been suspended as ordered by Convocation effective November 1, 1993 for failure to pay his annual fees. The registered letter dated November 2, 1993 and Acknowledgment of Receipt Card dated November 13, 1993 and signed for in the Solicitor's office is attached at Tab 3 of the Document Book.

8. By letter dated December 13, 1993 (Tab 4, Document Book), the Solicitor forwarded payment to the Law Society in the amount of \$623.37 and advised he was taking steps to conclude his practice by the end of 1993.

9. On March 24, 1994, the Solicitor was reinstated.

10. The Solicitor was suspended from the practice of law from November 1, 1993 to December 31, 1993. The Solicitor admits that he continued to practice law from November 1, 1993 to December 31, 1993 while suspended from the practice of law as evidenced by his involvement in completing four real estate transactions as follows:

Client - Peter Leishman .

- i. Client ledger card indicating that the Solicitor received trust monies November 5, 1993 and December 1, 1993 (Tab 5, Document Book);

22nd June, 1995

- ii. Client's note to the Solicitor dated November 1, 1993 setting out his instructions (Tab 6, Document Book);
- iii. Trust account statement from October 29, 1993 to November 30, 1993 showing that the Solicitor received trust monies on November 5, 1993 and November 8, 1993 (Tab 7, Document Book);
- iv. Solicitor's trust cheque dated November 5, 1993 payable to the client in the amount of \$81,750.53 (Tab 8, Document Book);
- v. Solicitor's trust cheque dated December 1, 1993 payable to himself in the amount of \$1,221.00 for services rendered (Tab 9, Document Book);
- vi. Solicitor's general account statement from October 29, 1993 to November 30, 1993 showing monies were deposited into the account and disbursed (Tab 10, Document Book);
- vii. Solicitor's general cheque dated November 22, 1993 payable to Purolator in the amount of \$28.83 (Tab 11, Document Book);
- viii. Solicitor's general account statement from November 30, 1993 to December 31, 1993 showing monies were deposited into the account and disbursed (Tab 12, Document Book);
- ix. Solicitor's general cheque dated December 13, 1993 payable to United in the amount of \$21.63 (Tab 13, Document Book);

Client Kolodziejczak

- x. Client ledger card indicating that the Solicitor received trust monies November 5, 1993 (Tab 14, Document Book);
- xi. Solicitor's facsimile memorandum to Montreal Trust dated November 12, 1993 advising that he anticipates that the mortgage would be registered on Monday, November 15, 1993 and that he would require funds on that date (Tab 15, Document Book);
- xii. Solicitor's trust cheque dated November 16, 1993 payable to Irena Kolodziejczak in the amount of \$24,017.77 (Tab 16, Document Book);
- xiii. Solicitor's trust cheque dated November 27, 1993 payable to himself in the amount of \$2,526.39 for services rendered (Tab 17, Document Book);
- xiv. Solicitor's general cheque dated November 2, 1993 payable to Centra Gas in the amount of \$10.70 (Tab 18, Document Book);
- xv. Solicitor's general cheque dated November 2, 1993 payable to Township of Kingston in the amount of \$18.00 representing payment for a tax certificate (Tab 19, Document Book);
- xvi. Solicitor's general cheque dated November 2, 1993 payable to Township of Kingston in the amount of \$25.00 requesting information about any outstanding zoning and work orders (Tab 20, Document Book);

- xvii. Solicitor's general cheques dated November 15, 1993 payable to Minister of Finance in the amounts of \$22.00 and \$5.00 respectively (Tab 21, Document Book);
- xviii. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$50.00 (Tab 22, Document Book);
- xix. Solicitor's general cheque dated November 15, 1993 payable to Brooke Garrah in the amount of \$184.50 (Tab 23, Document Book);

Client - Rich

- xx. Client ledger card indicating that the Solicitor received trust monies on November 15, 1993 and December 3, 1993 (Tab 24, Document Book);
- xxi. Solicitor's letter to Gowling, Strathy & Henderson dated November 23, 1993 enclosing the duplicate registered deed (Tab 25, Document Book);
- xxii. Copy of deed and Affidavit of Residence and Value of Consideration registered on December 20, 1993 showing the Solicitor's name as the transferee's Solicitor (Tab 26, Document Book);
- xxiii. Solicitor's trust cheque dated November 15, 1993 payable to Gowling, Strathy & Henderson in the amount of \$4,000.00 (Tab 27, Document Book);
- xxv. Solicitor trust cheque dated November 15, 1993 payable to CIBC Mortgage Corporation, Re/Max Empire Realty Ltd. and Town of Napanee, Tax Dept. in the amounts of \$24,892.51, \$3,440.50 and \$6.39 respectively (Tab 28, Document Book);
- xxvi. Solicitor's trust cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$50.00 (Tab 29, Document Book);
- xxvii. Solicitor general cheque dated November 4, 1993 payable to Town of Napanee in the amount of \$20.00 requesting information on any outstanding zoning and work orders (Tab 30, Document Book);
- xxviii. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$5.00 (Tab 31, Document Book);
- xxix. Solicitor's general cheque dated November 4, 1993 payable to Town of Napanee in the amount of \$10.00 representing payment for a tax certificate (Tab 32, Document Book);
- xxx. Solicitor's general cheque dated November 4, 1993 payable to Lennox Condominium Corporation No. 7 in the amount of \$50.00 representing payment for an estoppel certificate (Tab 32, Document Book);
- xxxi. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$50.00 representing the fee for registering the deed (Tab 33, Document Book);

Client - Fazal

- xxxii. Client ledger card indicating that the Solicitor received trust monies on November 5, 1993 (Tab 34, Document Book);
- xxxiii. Solicitor's letter to Ontario Hydro dated November 2, 1993 advising that he is the Solicitor for the purchaser and requesting that the hydro meter be read on the closing date of November 15, 1993 (Tab 35, Document Book);
- xxxiv. A copy of the deed and Affidavit of Residence and of Value of Consideration registered on November 15, 1993 showing the Solicitor as the transferee's solicitor (Tab 36, Document Book);
- xxxv. Solicitor's trust cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$415.00 representing payment of the Land Transfer Tax (Tab 37, Document Book);
- xxxvi. Solicitor's trust cheque dated November 15, 1993 payable to Trousdale & Trousdale in the amount of \$68,070.98 (Tab 38, Document Book);
- xxxvii. Solicitor's general cheques dated November 15, 1993 payable to Township of Loughborough in the amount of \$25.00 each (Tab 39, Document Book);
- xxxviii. Solicitor's general cheque dated November 15, 1993 payable to Brooke Garrah in the amount of \$75.50 (Tab 40, Document Book);
- xxxix. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$5.00 representing payment for a subsearch (Tab 40, Document Book);
- xl. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$50.00 representing payment for registering the deed (Tab 41, Document Book);
- xli. Solicitor's general cheque dated November 15, 1993 payable to Minister of Finance in the amount of \$11.00 (Tab 41, Document Book).

11. By way of explanation, the Solicitor states that the four real estate transactions were scheduled to close between November 1, 1993 and November 15, 1993. After November 15, 1993 the Solicitor was taking follow up action regarding the four transactions, and not actively practicing.

V. DISCIPLINE HISTORY

12. The Solicitor does not have a discipline history.

DATED at Toronto this 13th day of December, 1994.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that John Meredith Glassco be suspended for a period of one month and pay costs in the amount of \$300.00 payable over a 3 month period.

# REASONS FOR RECOMMENDATION

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At the time these particulars of complaint occurred, the Solicitor was winding down his private practice. From June 1993 he was employed full-time by the Ministry of Housing and carried on a sole practice as well. The Solicitor accepted no new client retainers after September 1993. The four real estate transactions described in paragraph 10 of the Agreed Statement of Facts were matters for old clients, all scheduled to close by November 15, 1993. The activity in the Solicitor's accounts after that date reflects follow-up activity after the closings.

The Solicitor appeared before the Committee, remorseful and apologetic. He admitted that he had not been careful enough in concluding his practice. He had delayed opening the registered mail from the Society, which was received in his office on November 13, 1993. The Solicitor's employment ended in the spring of 1994. He recommenced private practice in a new location and was reinstated by the Society in March 1994. The Solicitor described his practice as "small and somewhat fragile". The Solicitor submitted that a reprimand by this Committee would be sufficient punishment.

Ms. Gagnon, appearing for the Society, submitted that the appropriate range of penalty would be from a reprimand in Convocation to the imposition of one month suspension in addition to the period of practice while under suspension, as set out in the MacGregor decision of Convocation, dated April 22, 1993. She submitted that a suspension of a period of one month could be seen as taking into account the Solicitor's 15 days of active practice after suspension on November 1, 1993. Ms. Gagnon submitted that we should be guided by the decision of Convocation in the Fejes case of June 23, 1994 in which the Committee recommendation was adopted. Bencher S. Casey Hill, as he then was, wrote for the Committee:

Recently, Discipline Committees, with the approval of recommended penalties by Convocation, have adopted a principle referable to sanction for practicing while suspended that the subject solicitor should not be put in a better position by the disposition of the case than she/he would have been in had there been compliance with the obligation to desist from practice. This has generally resulted in the imposition of a period of suspension equal to the period during which the impugned practice occurred plus an additional one month. (...)

The Committee recognizes that the principle espoused by Convocation is sound in terms of the need to effect deterrence and to impose a proportional penalty. However, the principle should not become an inflexible, irreducible tariff. Otherwise, the imposition of penalty is reduced to slavery to a mathematical formula without consideration of individual circumstances or the principle of the totality of the penalty.

On balance, the Committee believes that the principles set out in MacGregor, as modified by Fejes, can be served by recommending that the Solicitor serve a period of suspension of one month, together with payment of expenses to the Society of \$300.00, payable over a 3-month period. However, we have not forgotten, nor do we wish the profession to forget the stern warning of Convocation in the Laan decision (March 24, 1994):

The public interest in clients only being represented by solicitors who are not suspended is paramount. Convocation views this on-going problem seriously and in the future solicitors can expect to be dealt with accordingly.



John Meredith Glassco was called to the Bar and admitted as a solicitor on the 18th day of April, 1988.

ALL OF WHICH is respectfully submitted

DATED this 9th day of May, 1995

K. Julaine Palmer  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Ms. Puccini, seconded by Mr. Cole that the recommended penalty of the Committee be adopted, that is, that the solicitor be suspended for a period of 1 month and pay costs in the amount of \$300 over a 3 month period.

Mr. Black sought a lesser penalty of a reprimand in Convocation.

Counsel for the Society supported the recommended penalty.

Mr. Black made brief submissions in reply.

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

The motion on the recommended penalty was voted on and lost.

It was moved by Mr. Carey, seconded by Mr. Cole that the solicitor be reprimanded in Convocation with no costs.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded and pay no costs.

The solicitor was reprimanded by the Treasurer.

Counsel and solicitor retired.

Re: Leslie GOLDSTEIN - Toronto

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Mr. Topp, Ms. Lax and Ms. Richardson withdrew for this matter.

Ms. Christina Budweth appeared for the Society and Mr. D. Squires on behalf of Mr. Goodman appeared for the solicitor who was present.

22nd June, 1995

Convocation had before it the Report of the Discipline Committee dated 12th May, 1995, together with an Affidavit of Service sworn 29th May, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 18th May, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd June, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul D. Copeland, Chair  
Joan Lax  
Nora Richardson

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

Christina Budweth  
for the Society

LESLIE GOLDSTEIN  
of the City  
of Toronto  
a barrister and solicitor

David M. Goodman  
for the solicitor

Heard: April 19, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On August 12, 1994 Complaint D204/94 was issued, on September 14, 1994 Complaint D219/94 was issued and on January 13, 1995 Complaint D483/94 was issued against Leslie Goldstein alleging that he was guilty of professional misconduct.

The matter was heard in public on April 19, 1995 before this Committee comprised of Paul D. Copeland, Chair, Joan Lax, and Nora Richardson. The Solicitor attended the hearing and was represented by David M. Goodman. Christina Budweth appeared on behalf of the Law Society.

DECISION

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Based on three separate sets of Agreed Statement of Facts, the Solicitor was found guilty of professional misconduct on the following particulars:

Complaint D204/94

2. a) He failed to provide a reply to the Law Society requesting information in an ongoing investigation of the complaint of Hugo J. Albel despite letters dated February 1, 1994 and April 13, 1994 and telephone requests on March 11, 1994 and March 31, 1994;

22nd June, 1995

- b) While representing his client, Judith Pemberton, between March 1987 and the spring of 1994, in connection with a personal injury action against Ontario Hydro, he failed to serve her in a conscientious, diligent and efficient manner in that he:
  - i) failed to proceed with her matter in a timely manner;
  - ii) failed to respond to letters dated January 9, 1991 and September 30, 1991 and telephone communications on March 17, 1992, March 18, 1992 and May 4, 1992 from her husband;
  - iii) failed to keep her reasonably informed about the status of the matter;
  - iv) failed to inform her that the said action had been dismissed on January 5, 1989.
- c) He prejudiced his client's, Judith Pemberton, rights by failing to advise her of his negligence and by failing to report the matter to his insurer;
- d) He failed to respond to letters to him dated September 1, 1988 and October 18, 1988 from Ontario Hydro which required a reply;
- e) He misled his client, Judith Pemberton, and the District Court of Ontario about the status and/or events which occurred in the course of the action.
- f) He failed to reply to the Law Society in the course of its investigation despite letters to him dated January 27, 1994 and March 28, 1994 and telephone requests made on March 10, 1994, March 11, 1994 and March 15, 1994.

Complaint D219/94:

- 2. a) He failed to provide a reply to the Law Society regarding a complaint by Svetlana Zaleskaia despite letters dated March 4, 1994 and June 17, 1994 and telephone messages left on May 2, 1994, May 16, 1994 and June 8, 1994.

Complaint D483/94

- 2. a) He failed to reply to communications from solicitor, Theodore H. Rachlin, requesting the release of his client's file, despite a Direction dated May 5, 1994 and letters dated May 10, 1994, May 27, 1994 and June 21, 1994;
- b) He failed to reply to the Law Society regarding a complaint by T.H. Rachlin despite letters dated August 31, 1994 and October 11, 1994 and telephone messages left on September 28, 1994 and October 6, 1994;
- c) He failed to reply to communications from solicitor, Ronald C. Wright, requesting the release of his client's file, despite an Authorization dated June 1, 1994 and letters dated June 2, 1994, June 17, 1994 and June 21, 1994;
- d) He failed to reply to the Law Society regarding a complaint by Ronald C. Wright despite letters dated August 18, 1994 and October 11, 1994 and telephone messages left on September 1, 1994, September 8, 1994, September 12, 1994 and September 14, 1994;

- e) He failed to fulfil a financial obligation to Micro-Tech Reporting Inc. in the amount of \$1,359.97 pursuant to an invoice dated November 4, 1993;
- f) He failed to reply to the Law Society regarding a complaint by Leslie Graham-Williams despite letters dated September 20, 1994 and November 18, 1994 and telephone messages left on October 7, 1994, October 17, 1994, October 19, 1994 and October 26, 1994;
- g) He failed to reply to communications from solicitor, Gary Neinstein, requesting the release of his clients' file, despite an Authorization and Direction dated August 4, 1994 and letters dated August 5, 1994, September 15, 1994 and September 19, 1994.
- h) He failed to reply to the Law Society regarding a complaint by Gary Neinstein despite letters dated October 14, 1994 and November 18, 1994 and telephone messages left on October 26, 1994 and November 9, 1994.

Evidence:

In regard to complaint D204/94 the agreed facts were as follows:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D204/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D204/94 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor is 41 years of age. He was called to the Bar on May 9, 1979 and practises as a sole practitioner in Toronto.

Particular 2a) - Failure to Reply

5. By letter dated December 17, 1993 Hugo Albel complained to the Law Society regarding the Solicitor's conduct during the course of litigation.

6. By letter dated February 1, 1994 the Society wrote to the Solicitor, enclosing a copy of the letter of complaint and requesting his comments. A copy of the Society's February 1, 1994 letter complete with enclosure is attached as Exhibit 1 to this agreed statement of facts. The Solicitor did not reply.

22nd June, 1995

7. On March 11, 1994 a staff member of the Society telephoned the Solicitor's office requesting a reply to the earlier letter sent. The Solicitor did not return the call.

8. On March 31, 1994 a further telephone call was placed to the Solicitor's office by a staff member of the Society. A message was left for the Solicitor to return the call and he did not do so.

9. On April 13, 1994, the Society sent a registered letter to the Solicitor outlining its previous attempts to contact him and requesting a reply to the communications within seven days. A copy of the Society's April 13, 1994 letter is attached as Exhibit 2 to this agreed statement of facts. The Solicitor did not reply.

10. To date, the Solicitor has not replied nor has he provided an explanation or sought an extension of the time in which to reply.

Particular 2b) - Judith Pemberton

11. In February 1986, the complainant, Judith Pemberton commenced an action against Ontario Hydro as a result of personal injuries allegedly suffered by her when a branch from a tree in a park on property owned by Ontario Hydro fell near and on her. Ms. Pemberton was originally represented in the litigation by solicitor Gregory Regis. During the course of Mr. Regis' retainer pleadings were exchanged.

12. The Solicitor was retained to take over carriage of the file sometime in late 1986 or 1987. A status hearing of the matter was held on October 13, 1987 and an Order was made by Mr. Justice Coe that the matter be listed for trial by July 4, 1988. On Wednesday, July 6, 1988 the Solicitor obtained a Consent Order extending the time for placing the action on the trial list to Wednesday, January 4, 1989. A copy of the Solicitor's Motion Record in support of the motion to extend the time is attached as Exhibit 3 to this agreed statement of facts. Although the Motion Record was prepared on July 4, 1988 it is not until July 5, 1988 that the Solicitor delivered a Notice of Change of Solicitor's, formalizing his representation of the plaintiff.

13. On September 1, 1988 Ontario Hydro wrote to the Solicitor enquiring as to the status of the motion and requesting that he contact Ontario Hydro to schedule Examinations for Discovery. The letter also requested various information requested by Hydro in October of 1987 be provided. The Solicitor did not reply. By letter dated October 18, 1988 Ontario Hydro sought a response to its September 1 correspondence. Ontario Hydro also advised that if the matter did not proceed shortly it would take steps to dismiss the plaintiff's claim. The Solicitor did not respond and counsel for Ontario Hydro attended at the court office to obtain a copy of the July 6, 1988 order.

14. On January 5, 1989, by Order of the Registrar, the plaintiff's action was dismissed for failure to have it placed on the trial list. A copy of the Order is attached as Exhibit 4 to this agreed statement of facts.

15. In February 1989, an articling student in the offices of Ontario Hydro attended at the court office and determined that the matter had been dismissed. On March 17, 1989, Ontario Hydro served the Solicitor with the January 5, 1989 order.

16. Ms. Pemberton was completely unaware of the sequence of events set out in paragraphs 11-15.

17. By letter dated May 3, 1989 the Wellington Insurance Company, corresponded with Mrs. Pemberton about an automobile accident in regard to which the Solicitor had also been retained to act for Mrs. Pemberton. The date of the accident was August 28, 1987. A copy of Wellington's letter of May 3, 1989 is attached as Exhibit 5 to this agreed statement of facts.

18. On August 25, 1989, the Solicitor issued a Statement of Claim in the District Court of Ontario regarding the matter referred to in paragraph 17 above. The Solicitor met with the Pembertons in order to prepare the Statement of Claim.

19. During the period August 1989 to January 1991 the Pembertons attempted to telephone the Solicitor on a number of occasions regarding the status of both matters. The Solicitor did not respond to their telephone messages. Accordingly, by letter dated January 9, 1991 Mr. Pemberton wrote to the Solicitor enquiring as to the status of their matters. A copy of the Mr. Pemberton's letter is attached as Exhibit 6 to this agreed statement of facts. The Solicitor did not reply.

20. Mr. Pemberton wrote to the Solicitor again by letter dated September 30, 1991, a copy of which is attached as Exhibit 7 to this agreed statement of facts. This letter was sent by way of registered mail. The Solicitor did not reply. Finally, by letter dated May 12, 1992 Mrs. Pemberton complained to the Law Society regarding the Solicitor's conduct in the carriage of both files on their behalf. A copy of Mrs. Pemberton's letter of complaint is attached as Exhibit 8, absent enclosures, to this agreed statement of facts. The Solicitor admits that the chronology as set out by Mrs. Pemberton in her letter of complaint accurately reflects his failure to serve the Pembertons during the course of his retainer.

21. By letter dated May 25, 1992 the Society wrote to the Solicitor providing a copy of Mrs. Pemberton's complaint and requesting his comments in respect thereof. The Solicitor responded by letter dated July 13, 1992, a copy of which is attached as Exhibit 9 to this agreed statement of facts. By letter dated July 17, 1992 the Solicitor was advised that his letter of response had been forwarded to Mrs. Pemberton for additional comment. Mrs. Pemberton wrote to the Law Society with additional comments by letter dated September 9, 1992. A copy of her letter was forwarded to the Solicitor under cover of correspondence dated September 30, 1992, a copy of which complete with enclosure is attached as Exhibit 10 to this agreed statement of facts. The Solicitor did not respond to the Law Society's letter although a number of telephone calls were exchanged, as a result, the Society wrote to the Solicitor again on June 15, 1993, a copy of which letter is attached as Exhibit 11. This Solicitor did not reply.

22. The Society wrote to the Solicitor again by letter dated September 7, 1993, a copy of which is attached as Exhibit 12 to this agreed statement of facts. The Solicitor admits that the chronology of events set out in that letter is accurate.

23. The Solicitor replied by letter dated September 22, 1993, a copy of which is attached as Exhibit 12 to this agreed statement of facts. The Solicitor brought a motion to set aside the Order of the Deputy Registrar dismissing the action in September of 1993. A copy of the Motion Record is attached as Exhibit 13 to this agreed statement of facts.

24. The Solicitor admits that his Affidavit in support of the motion omitted several crucial material facts particularly in the chronology between paragraphs 15 and 16 in which the Solicitor fails to reveal the attempts by counsel for Ontario Hydro to reschedule Discoveries and his failure to respond to Ontario Hydro's September 1 and October 18, 1988 letters. Ontario Hydro opposed the Solicitor's motion and prepared a Responding Motion Record, a copy of which is attached as Exhibit 14 to this agreed statement of facts.

25. In February of 1994 Mrs. Pemberton wrote to the Society advising that she had heard nothing from the Solicitor since the July 1992 communication forwarded to her by the Law Society. Mrs. Pemberton confirmed that she and her husband had made numerous attempts to contact the Solicitor and determine the status of their actions. A copy of Mrs. Pemberton's February 8, 1994 letter is attached as Exhibit 15 to this agreed statement of facts. The Solicitor admits that he failed to advise Mrs. Pemberton that the action had been dismissed and failed to inform her that he had brought a motion in an attempt to reinstate the action. The Society responded to Mrs. Pemberton's letter and also corresponded further with the Solicitor by letter dated March 28, 1994, a copy of which is attached as Exhibit 16 to this agreed statement of facts.

26. Mrs. Pemberton finally retained new counsel in July of 1994, Michael Head. Mr. Head corresponded with the Solicitor in July of 1994 seeking release of Mrs. Pemberton's file. In his letter Mr. Head Undertook to honour the Solicitor's account for outstanding disbursements. Mr. Head did not receive a response to his July 5, 1994 letter and; accordingly, he wrote to the Society by letter dated August 15, 1994 a copy of which is attached as Exhibit 17 to this agreed statement of facts. The Solicitor admits that the facts as set out in Mr. Head's letter to the Society are accurate particularly in that the Statement of Claim in the action of Pemberton v. Gorton was never served.

27. The Solicitor's motion to set aside the Order of the Deputy Registrar was dismissed on Wednesday, September 29, 1993 by the Honourable Mr. Justice Coe.

DATED at Toronto this 30th day of January, 1995."

In regard to complaint D219/94 the agreed facts were as follow:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D219/94 and is prepared to proceed with a hearing of this matter on December 13 and 14, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D219/94 and this agreed statement of facts and admits the particular contained therein. The Solicitor also admits that the facts alleged in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor is 41 years of age. He was called to the Bar on May 9, 1979 and practises as a sole practitioner in Toronto.

5. By letter dated February 1, 1994, the Solicitor's former client, Svetlana Zaleskaia, complained to the Society about the Solicitor's conduct in regard to his representation of her on a divorce matter. A copy of Mrs. Zaleskaia's letter of complaint complete with enclosures is attached as Exhibit 1 to this agreed statement of facts.

6. By letter dated March 4, 1994, the Society corresponded with the Solicitor providing him with a copy of the letter of complaint and requesting his reply in writing to the complaint within two weeks. A copy of the Society's March 4, 1994 letter absent enclosures is attached as Exhibit 2 to this agreed statement of facts. The Solicitor did not reply.

7. On May 2, 1994 a staff member of the Society spoke with the Solicitor's secretary, Patricia and left a message for the Solicitor to return the call. The Solicitor did not reply.

8. On May 16, 1994 the same staff member telephoned the Solicitor's office and again spoke with Patricia. Again a message was left and the Solicitor did not return the call.

9. On June 8, 1994 the same staff member of the Society spoke with Patricia again. The staff member confirmed that the Solicitor had received her prior two messages. A further message was left. The Solicitor did not return the call. The staff member's notes of her various calls to the Solicitor's office is attached as Exhibit 3 to this agreed statement of facts.

10. By letter dated June 17, 1994 the Society wrote to the Solicitor requesting a response to the letter of complaint and reminding the Solicitor of the previous attempts to contact him. The Solicitor was advised that should his reply not be received within seven days the matter would be referred to the Chair of Discipline. A copy of the Society's June 17, 1994 letter, complete with registered mail receipt card evidencing receipt is attached as Exhibit 4 to this agreed statement of facts.

DATED at Toronto this 30th day of January, 1995."

In regard to complaint D483/94 the agreed facts were as follows:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D483/94 and is prepared to proceed with a hearing of this matter on January 31 and February 1, 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 D483/94 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 9, 1979. He practises as a sole practitioner in Toronto.

Particular 2a) He failed to reply to communications from solicitor, Theodore H. Rachlin, requesting the release of his client's file, despite a Direction dated May 5, 1994 and letters dated May 10, 1994, May 27, 1994 and June 21, 1994;



22nd June, 1995

5. On October 31, 1988, Mrs. Zafiro Theofilaktidis was involved in a motor vehicle accident. The Solicitor initially represented her with respect to injuries arising out of the accident. Mrs. Theofilaktidis retained solicitor, Theodore H. Rachlin to assume carriage of this matter. On May 5, 1994, the client signed a Direction requesting the Solicitor to forward the file to Rachlin & Wolfson. By letter dated May 10, 1994, Mr. Rachlin enclosed the Direction and requested the client's file from the Solicitor. A copy of Mr. Rachlin's letter and the Direction signed by the client are at Tab 1 of the Document Book.

6. By letter dated May 27, 1994 (Tab 2, Document Book), Mr. Rachlin made a further request for the file and reminded the Solicitor that he had written to him previously on May 10, 1994 and left a telephone message on May 25, 1994. The Solicitor did not respond to this letter.

7. By letter dated June 21, 1994 (Tab 3, Document Book), Mr. Rachlin again requested a response from the Solicitor to his previous letters. The Solicitor was advised that unless his response was received within five days, the matter would be referred to the Law Society. The Solicitor did not respond to this letter.

8. By letter dated July 4, 1994 (Tab 4, Document Book), Mr. Rachlin wrote to the Law Society complaining about the Solicitor's lack of response to his letters requesting the client's file.

Particular 2b) He failed to reply to the Law Society regarding a complaint by T.H. Rachlin despite letters dated August 31, 1994 and October 11, 1994 and telephone messages left on September 28, 1994 and October 6, 1994;

9. On August 9, 1994 and August 12, 1994, a staff member of the Society called the Solicitor and on each occasion left a message for him to return her calls. The Solicitor did not return the calls. A copy of the handwritten notes of the telephone messages left for the Solicitor is at Tab 5 of the Document Book.

10. By letter dated August 31, 1994 (Tab 6, Document Book), the Law Society wrote to the Solicitor enclosing a copy of the letter of complaint. The Solicitor was requested to provide his comments to the Society within a period of two weeks. The Solicitor did not respond to this letter.

11. On September 28, 1994 and October 6, 1994, another Society staff member telephoned the Solicitor and left a message on each occasion asking that he return her calls. The Solicitor did not return her calls. A copy of the handwritten notes of the telephone messages left for the Solicitor is at Tab 7 of the Document Book.

12. By registered letter dated October 11, 1994 (Tab 8, Document Book), the Law Society wrote to the Solicitor reminding him of his professional obligation to respond to communications from the Society. The Solicitor was requested to provide his response within a period of seven days, or the matter would be referred to the Chair of the Discipline Committee for further instructions.

13. By letter dated October 18, 1994 (Tab 9, Document Book), the Solicitor apologized for the delay in responding. The Solicitor requested a further 13 days to provide his response to the Law Society. The Solicitor did not provide his response.

14. To date, the Solicitor has not responded to the Law Society, nor has he released Theofilaktidis' file to Mr. Rachlin.

22nd June, 1995

Particular 2c) He failed to reply to communications from solicitor, Ronald C. Wright, requesting the release of his client's file, despite an Authorization dated June 1, 1994 and letters dated June 2, 1994, June 17, 1994 and June 21, 1994;

15. Mr. Mamais retained the Solicitor to represent him with respect to his motor vehicle accident claim. In or about mid to late May, 1994, the client spoke with Mr. Wright about the difficulties he had been experiencing with the Solicitor. Mr. Wright was retained to assist the client in retrieving the client's file from the Solicitor.

16. On June 1, 1994, the client signed an Authorization directing the Solicitor to transfer the file to Morris/Rose/Ledgett. By letter dated June 2, 1994, with enclosed Authorization, Mr. Wright requested the Solicitor to contact his office to make arrangements for the transfer of the file. A copy of Mr. Wright's letter and the Authorization signed by the client are at Tab 10 of the Document Book.

17. By facsimile dated June 17, 1994 (Tab 11, Document Book), Mr. Wright requested a response to his letter to the Solicitor dated June 2, 1994. The Solicitor did not respond to this facsimile.

18. By letter dated June 21, 1994 (Tab 12, Document Book), Mr. Wright requested a response to his letters to the Solicitor dated June 2, 1994 and June 17, 1994. The Solicitor was advised that if his immediate response is not received, he would be contacting the Law Society. The Solicitor did not respond to this letter.

19. By letter dated July 6, 1994 (Tab 13, Document Book), Mr. Wright wrote to the Law requesting assistance in obtaining a response from the Solicitor.

Particular 2d) He failed to reply to the Law Society regarding a complaint by Ronald C. Wright despite letters dated August 18, 1994 and October 11, 1994 and telephone messages left on September 1, 1994, September 8, 1994, September 12, 1994 and September 14, 1994;

20. By letter dated August 18, 1994 (Tab 14, Document Book), the Law Society wrote to the Solicitor enclosing a copy of the letter of complaint. The Solicitor was requested to provide his comments to the Society within a period of two weeks. The Solicitor did not respond to this letter.

21. On September 1, 1994, September 8, 1994, September 12, 1994 and September 14, 1994, a Society staff member telephoned the Solicitor and each time left a message for him to return the calls. The Solicitor did not return the telephone messages. A copy of the handwritten notes of the telephone messages left for the Solicitor is at Tab 15 of the Document Book.

22. By registered letter dated October 11, 1994 (Tab 16, Document Book), the Law Society wrote to the Solicitor reminding him of his professional obligation to respond to communications from the Society. The Solicitor was requested to provide his response within a period of seven days, or the matter would be referred to the Chair of the Discipline Committee for further instructions.

23. By letter dated October 18, 1994 (Tab 9, Document Book), the Solicitor apologized for the delay in responding. The Solicitor requested a further 13 days to provide his response to the Law Society. The Solicitor did not provide a response.

24. To date, the Solicitor has not responded to the Law Society, nor has he released Mr. Mamais' file to Mr. Wright.

Particular 2e) He failed to fulfil a financial obligation to Micro-Tech Reporting Inc. in the amount of \$1,359.97 pursuant to an invoice dated November 4, 1993.

25. On November 2, 1993, Micro-Tech Reporting Inc. provided reporting services to the Solicitor in regard to a six hour cross-examination. The Solicitor requested the transcript be prepared on an expedited basis. On November 4, 1993, Micro-Tech Reporting Inc. forwarded an invoice to the Solicitor in the amount of \$1,359.97 which was due and payable upon receipt. The Solicitor did not pay the invoice. A copy of the Workslip dated November 2, 1993 signed by the Solicitor and the invoice dated November 4, 1993 are at Tab 17 of the Document Book.

26. On December 2, 1993 and March 29, 1994, messages were left for the Solicitor at his office regarding the outstanding account. The Solicitor did not return the calls. A copy of the handwritten notes of the telephone messages are at Tab 17 of the Document Book.

27. On May 4, 1994, an employee of Micro-Tech left a message for the Solicitor with "Patricia" of his office. The Solicitor did not return the call. A copy of the handwritten notes of the telephone message is at Tab 17 of the Document Book.

28. On June 1, 1994, the Micro-Tech bookkeeper called the Solicitor's office and left a message with "Patricia". By facsimile dated June 1, 1994, Micro-Tech Reporting Inc. forwarded a further copy of the invoice dated November 4, 1993 and requested payment forthwith. The Solicitor did not pay the invoice. A copy of the handwritten notes of the telephone message and letter dated June 1, 1994 are at Tab 18 of the Document Book.

29. On June 22, 1994, the bookkeeper left a message for the Solicitor. The Solicitor did not return the call. A copy of the handwritten notes of the telephone message is at Tab 19 of the Document Book.

30. On June 30, 1994, the bookkeeper left a further message with Patricia for the Solicitor requesting that he contact Micro-Tech Reporting Inc. The Solicitor did not return the call. A copy of the handwritten notes of the telephone message is at Tab 20 of the Document Book.

31. By letter dated July 6, 1994 (Tab 21, Document Book), Ms. Leslie Graham-Williams, President of Micro-Tech Reporting Inc., reminded the Solicitor of his duty to fulfil his financial obligation. The Solicitor was advised that this was the final request before contacting the Law Society. The Solicitor did not respond to the final request for payment.

32. By letter dated August 9, 1994 (Tab 22, Document Book), Ms. Graham-Williams wrote to the Law Society complaining about the Solicitor's failure to honour the outstanding account.

Particular 2f) He failed to reply to the Law Society regarding a complaint by Leslie Graham-Williams despite letters dated September 20, 1994 and November 18, 1994 and telephone messages left on October 7, 1994, October 17, 1994, October 19, 1994 and October 26, 1994;

22nd June, 1995

33. By letter dated September 20, 1994 (Tab 23, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Ms. Graham's letter of complaint. The Solicitor was requested to provide his comments to the Society within a period of two weeks. The Solicitor did not respond to this letter.

34. On October 7, 1994, October 17, 1994, October 19, 1994 and October 26, 1994, a staff member of the Society telephoned the Solicitor and on each occasion left a message for him to return her calls. The Solicitor did not return her calls. A copy of the handwritten notes of the telephone messages left for the Solicitor is at Tab 24 of the Document Book.

35. By registered letter dated November 18, 1994 (Tab 25, Document Book), the Law Society wrote to the Solicitor reminding him of his professional obligation to respond to communications from the Society. The Solicitor was requested to provide his response within a period of seven days, or the matter would be referred to the Chair of the Discipline Committee for further instructions. The Solicitor did not respond to this letter.

36. To date the Solicitor has not responded to the Law Society, nor has he paid the outstanding account to Micro-Tech Reporting Inc.

Particular 2g) He failed to reply to communications from solicitor, Gary Neinstein, requesting the release of his client's file, despite an Authorization and Direction dated August 4, 1994 and letters dated August 5, 1994, September 15, 1994 and September 19, 1994.

37. On December 2, 1989, Mr. & Mrs. Papafrangos were involved in a motor vehicle accident. They had initially retained the Solicitor to act on their behalf in late 1989 or early 1990.

38. Mr. Gary Neinstein was retained to take over the clients' file on or about August 4, 1994 from the Solicitor with respect to their motor vehicle accident. On August 4, 1994, the clients signed an Authorization and Direction requesting the Solicitor to forward the file to Messrs. Gluckstein, Neinstein. By letter to the Solicitor dated August 5, 1994, Mr. Neinstein enclosed the Authorization and Direction and requested the clients' file from him. A copy of Mr. Neinstein's letter and the Authorization and Direction signed by the clients is at Tab 26 of the Document Book.

39. By letter dated September 15, 1994 (Tab 27, Document Book), Mr. Neinstein requested the Solicitor to transfer the file to his office. The Solicitor did not respond to this letter.

40. By letter dated September 19, 1994 (Tab 28, Document Book), Mr. Neinstein reminded the Solicitor of the letters he had sent to him dated August 5, 1994 and September 15, 1994. The Solicitor was advised that if Mr. Neinstein was not in receipt of the file by September 21, 1994 at 4:30 p.m., he would report the matter to the Law Society. The Solicitor did not respond to this letter.

41. By letter dated September 23, 1994 (Tab 29, Document Book), Mr. Neinstein wrote to the Law Society setting out the attempts made by him to obtain the clients' file from the Solicitor.

Particular 2h) He failed to reply to the Law Society regarding a complaint by Gary Neinstein despite letters dated October 14, 1994 and November 18, 1994 and telephone messages left on October 26, 1994 and November 9, 1994.

22nd June, 1995

42. By letter dated October 14, 1994 (Tab 30, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Neinstein's letter of complaint. The Solicitor was requested to provide his comments to the Society within a period of two weeks. The Solicitor did not respond to this letter.

43. By letter dated October 21, 1994 (Tab 31, Document Book), Mr. Neinstein advised the Law Society that the Solicitor was jeopardizing his client's case by not co-operating.

44. On October 26, 1994, a staff member of the Society telephoned the Solicitor and left a message for him to call her. On November 9, 1994, the same staff member telephoned the Solicitor and was advised that the Solicitor had moved. The receptionist advised Ms. Riches that she would continue taking messages as the Solicitor picked them up from her. A copy of the handwritten notes of the telephone messages is at Tab 32 of the Document Book.

45. By registered letter dated November 18, 1994 (Tab 33, Document Book), the Law Society wrote to the Solicitor reminding him of his professional obligation to respond to communications from the Society. The Solicitor was requested to provide his response within a period of seven days, or the matter would be referred to the Chair of the Discipline Committee for further instructions. The Solicitor did not respond to this letter.

46. To date, the Solicitor has not responded to the Law Society, nor has he released the client's file to Mr. Neinstein. Mr. Neinstein, however, advised that he obtained part of the file, being the, pleadings and medical reports, from opposing counsel. He further advised that discoveries are scheduled to proceed on February 5, 1995.

V. DISCIPLINE HISTORY

47. The Solicitor does not have a discipline history.

DATED at Toronto this 30th day of January, 1995."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Leslie Goldstein be granted permission to resign.

REASONS FOR RECOMMENDATION

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Mr. Goldstein, through his counsel, indicated that he was seeking permission to resign his membership in the Society. Ms. Budweth, for the Society, did not object to that result. It was agreed between counsel that the Solicitor had recently recognized that he was verging on being ungovernable. He had failed to reply over a long period of time and his conduct in relation to certain clients, and in particular Ms. Pemberton, is unacceptable. We were advised that on the last occasion the matter was before the Discipline Committee, the Solicitor gave an undertaking not to practice. The Solicitor's files have been turned over to Mr. Goodman who has been either personally handling the files

22nd June, 1995

or arranging for their transfer elsewhere. Ms. Budweth has advised us that the Staff Trustee has been involved in the winding up of Mr. Goldstein's practice, and that that is proceeding in a satisfactory manner. Ms. Budweth indicated that she had canvassed the issue as to whether there are any possible trust defalcations in Mr. Goldstein's practice. Mr. Goodman, who has reviewed the files, has undertaken that there are no such problems and the complaints concerning Mr. Goldstein do not reflect that type of problem.

On the day before the discipline hearing, and on the day of the discipline hearing, replies were received from the Solicitor to the various complaints. Those replies in effect acknowledged the misconduct allegations made against Mr. Goldstein.

We were advised that all of the files requested by other solicitors have now been delivered, save and except the file requested by Mr. Neinstein. We were advised that that file is ready to be turned over and is in the possession of Mr. Goodman. Mr. Goodman has advised us that he has taken over approximately 15 or 16 files, and that while there are time delays apparent in those files, none of the time delays have done grave prejudice to the clients' cases.

We are advised that Mr. Goldstein has commenced on another career and no longer wishes to practise law. We advised Mr. Goldstein that while the findings of professional conduct were serious, this Committee would not, by way of penalty for this misconduct, require him to cease practising law. We would, in all likelihood, have ordered a short suspension with the requirement that the Solicitor undertake to respond promptly to all correspondence from the Law Society.

In view of the Solicitor's express desire to leave the practice of law, we recommend that the Solicitor be granted permission to resign from the Society. We presume that the Solicitor will be prepared to execute a resignation from the Society at the time that this matter comes before Convocation and that it will not be necessary for this Committee to recommend that, if the Solicitor fails to resign from the Society, he should be disbarred.

Leslie Goldstein was called to the Bar and admitted as a solicitor to the Supreme Court of Ontario on the 9th day of May, 1979.

ALL OF WHICH is respectfully submitted

DATED this 12th day of May, 1995

Paul D. Copeland  
Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Carey, seconded by Ms. Stomp that the recommended penalty of the Committee be adopted, that is, that the solicitor be granted permission to resign.

Both counsel made submissions in support of the recommended penalty.

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

22nd June, 1995

The motion on the recommended penalty was adopted.

It was moved by Mr. Finkelstein, seconded by Mr. MacKenzie that the solicitor be suspended for a period of 3 months.

Not Put

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

Counsel and Mr. Goldstein retired.

Re: Gerald Bruce FOX - Newmarket

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Ms. Lax and Messrs. Thom and MacKenzie withdrew for this matter.

Ms. Christina Budweth appeared for the Society and Mr. Black appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 18th May, 1995, together with an Affidavit of Service sworn 9th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 30th May, 1995 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 15th June, 1995 (marked Exhibit 2). The Report of the Discipline Committee dated 8th May, 1995, together with an Affidavit of Service sworn 6th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th May, 1995 was marked Exhibit 3, together with the Acknowledgement, Declaration and Consent signed by the solicitor on 15th June, 1995 marked Exhibit 4. Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

Report dated May 18, 1995

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton Ruby, Chair  
Roger Yachetti  
Hope Sealy

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

Christina Budweth  
for the Society

GERALD BRUCE FOX  
of the Town  
of Newmarket  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: August 16, 1994

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On September 21, 1993, Complaint D272/93 was issued against Gerald Bruce Fox alleging that he was guilty of professional misconduct.

The matter was heard in public on August 16, 1994, before this Committee composed of Clayton Ruby, Chair, Roger D. Yachetti, Q.C. and Hope Sealy. The Solicitor was not present nor was he represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D272/93

2.    a)    He failed to attend at a motion returnable in Provincial Court on January 7, 1993, without advising either the court or the opposing solicitor on a timely basis that he would be absent, as a result of which costs of \$250.00 were assessed against him, personally.
- b)    He has failed to provide a reply to the Society regarding a complaint by Warren G. Skinner despite letters dated June 21, July 9 and August 10, 1993.
- d)    He has failed to provide a reply to the Society regarding a complaint by Angela Rossini despite letters dated April 28 and August 10, 1993.

Evidence

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

"AGREED STATEMENT OF FACTS"

I.    JURISDICTION AND SERVICE

1.    The Solicitor admits service of Complaint D272/93 and is prepared to proceed with a hearing of this matter on August 16 and 17, 1994.

II.   IN PUBLIC/IN CAMERA

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

III.   ADMISSIONS

3.    The Solicitor has reviewed Complaint D272/93 and this agreed statement of facts and admits particulars (a), (b), and (d) contained therein. The Solicitor also admits that the facts alleged in particulars (a), (b), and (d) of the complaint supported by the facts as hereinafter stated constitute professional misconduct.



IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He has been suspended from the practice of law since February 5, 1993 through discipline.

5. The Solicitor acted for a Mrs. Cote in a matrimonial matter ongoing in Provincial Court. Mrs. Cote was a respondent in an action instituted by her husband. As part of the Solicitor's involvement in the matter, he prepared and filed responding documents and attended a brief court appearance.

6. The husband, David Cote, was represented by solicitor Warren G. Skinner. Mr. Skinner brought a motion, returnable January 7, 1993 seeking interim support for Mr. Cote.

7. Although properly served with the date of the motion, the Solicitor had not appeared in court by 10:30 a.m. for a 10:00 a.m. motion. Mr. Skinner telephoned the Solicitor's office and left a message advising that he would be seeking costs if the Solicitor did not appear.

8. The case was called on the motions list at 11:00 a.m. on January 7, 1993. At or about the time the case was called, duty counsel arrived in court with a letter which the Solicitor had transmitted to the courthouse indicating that he would not be attending due to eye trouble and due further to the fact that the Solicitor was taking the position that he had not been properly retained.

9. As a result of the Solicitor's failure to attend the motion particularly in the absence of an attempt to remove himself from the record, Judge Dunn awarded costs of \$250 against the Solicitor, personally.

10. Mr. Skinner complained of the Solicitor's conduct by letter dated February 25, 1993. The Society forwarded a copy of Mr. Skinner's letter to the Solicitor under cover of correspondence dated March 31, 1993, copies of both documents are attached collectively as Exhibit 1 to this agreed statement of facts.

11. Although the Society had telephone contact with the solicitor in which he indicated he would reply to Mr. Skinner's complaint, as well as several others, the Solicitor did not provide a response to the Society's March 31, 1993 letter about Mr. Skinner's complaint; accordingly, the Society corresponded with the Solicitor again by letter dated May 13, 1993, a copy of which is attached as Exhibit 2 to this agreed statement of facts.

12. The Solicitor responded by letter dated May 14, 1993, a copy of which is attached as Exhibit 3 to this agreed statement of facts. In this letter the Solicitor advised of the disconnection of his telephone lines.

13. The Solicitor also provided a letter dated May 4, 1993, received in the offices of the Law Society May 14, 1993, a copy of which is attached as Exhibit 4 to this agreed statement of facts.

14. The Society corresponded with the Solicitor again on June 21, 1993 explaining why the Solicitor's letter of May 4, 1993 did not adequately address the issues as set out in the Society's earlier correspondence. A copy of the Society's June 21, 1993 letter is attached as Exhibit 5 to this agreed statement of facts. The Solicitor admits the truth of the contents of Mr. Skinner's April 6, 1993 letter enclosed therewith.

15. The Solicitor wrote to the Society on June 29, 1993 to advise of his change of address. He did not address the issues raised in the Society's June 21, 1993 letter. As a result of the information provided by the Solicitor respecting his new address, the Society corresponded with the Solicitor again by letter dated July 9, 1993, a copy of which is attached as Exhibit 6 to this agreed statement of facts. The Solicitor did not reply.

16. The Society corresponded with the Solicitor again by letter dated August 10, 1993, a copy of which is attached as Exhibit 7 to this agreed statement of facts, the Solicitor did not reply, nor has he responded to date.
17. Angela Rossini retained the Solicitor to act for her in a matrimonial dispute over custody of her six year old daughter in February 1992.
18. Mrs. Rossini found the Solicitor's name in the Yellow Pages and attended at his office which was then located at 69 David Drive, Newmarket.
19. The Solicitor agreed to act for Mrs. Rossini and attended with her in court on a number of custody applications. During the first appearance, Mrs. Rossini's husband was granted temporary custody of their daughter and despite frequent court attendances the custody remained with Mr. Rossini.
20. In February, 1993, Mrs. Rossini decided to seek new counsel, Kathryn Wright.
21. Mrs. Rossini complained to the Law Society respecting the Solicitor's handling of her matter by letter dated April 1, 1993. A copy of the letter of complaint was forwarded to the Solicitor under the Society's letter of April 28, 1993, copies of which are attached collectively as Exhibit 8 to this agreed statement of facts.
22. The Solicitor did not respond but did correspond with the Society by letter dated June 29, 1993 advising of a change in address.
23. The Society corresponded with the Solicitor again by letter dated August 10, 1993, a copy of which, complete with registered mail receipt card, is attached as Exhibit 9 to this agreed statement of facts.
24. To date the Solicitor has not replied to the Society regarding Mrs. Rossini's complaint.

V. PRIOR DISCIPLINE

25. The Solicitor received a reprimand in committee on August 11, 1983 regarding his failure to reply, failure to co-operate with a fellow solicitor, prejudicing former employees and clients and having caused a false reporting letter to be sent to a client.
26. The Solicitor received a reprimand in committee on November 24, 1986 regarding the misapplication of client monies, failure to keep a client advised on an appeal, failure to service a client in a conscientious, diligent and efficient manner, failure to reply to the Society and breach of his written undertaking to the Society.
27. The Solicitor a received a reprimand in Convocation and was ordered to pay the Society's costs of \$750 on May 24, 1990 regarding his failure to reply to the Law Society.
28. A complaint was issued against the Solicitor on June 9, 1992 regarding his failure to reply to the Law Society and failure to file for the fiscal year ended January 31, 1991. At the set date on July 21, 1992 this matter was set to proceed on September 15, 1992. The matter was adjourned to September 29, 1992 at the Solicitor's request as he was unable to have his Forms 2/3 filed by September 15, 1992. At the Solicitor's request the matter was adjourned to November 11, 1992 as the Solicitor had not recovered from his eye surgery. Another formal complaint was issued against the Solicitor on October 19, 1992 due to the Solicitor's failure to reply to the Law Society and his failure to honour a financial obligation to Tippet-Richardson Limited. The first complaint was set to proceed on November 11, 1992. On November 11, 1992, at the

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Solicitor's request, both complaints were adjourned to November 17, 1992, as the Solicitor had not recovered from his eye surgery. On November 17, 1992, the Solicitor was found guilty of professional misconduct with respect to all particulars. The committee referred the matter to Convocation. The matters were heard by Convocation on January 28, 1993. Convocation suspended the Solicitor for three months commencing February 5, 1993 and indefinitely thereafter until his year end January 31, 1991 filings are made, and ordered him to pay costs of \$1,500.

29. On June 22, 1993, the Solicitor was found guilty of professional misconduct respecting three new complaints. On November 9, 1993, the Committee dealt with the issue of penalty. The Committee will recommend to Convocation that the Solicitor be suspended for a period of three months definitely and indefinitely thereafter until all filings are up to date and all replies made to the Society. As well the termination of the indefinite suspension is contingent upon the Solicitor providing the Society with an opinion of a fully qualified psychiatrist that he is capable of returning to the practice of law. After the termination of the Solicitor's suspension his first year of practice must be in association with a solicitor approved by the Law Society. The Solicitor will be required, upon his return to private sole practice, to enrol in the Practice Review Program. Finally, it will be recommended that the Solicitor be required to pay the Society's costs in the amount of \$1,500. The committee has not yet issued its written report.

DATED a Toronto this 22nd day of April, 1994."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Gerald Bruce Fox be disbarred or be permitted to resign if he offers his resignation five days prior to the date on which Convocation deals with this matter.

#### REASONS FOR RECOMMENDATION

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This Committee has been given a copy of the Report of the Discipline Committee dated the 6th day of January, 1993, and that was approved by Convocation which is Convocation's last dealing with this issue.

A complaint was issued against the Solicitor on June 9, 1992 regarding his failure to reply to the Law Society and failure to file for the fiscal year ended January 31, 1991. At the set date on July 21, 1992 this matter was set to proceed on September 15, 1992. The matter was adjourned to September 29, 1992 at the Solicitor's request as he was unable to have his Forms 2/3 filed by September 15, 1992. At the Solicitor's request the matter was adjourned to November 11, 1992 as the Solicitor had not recovered from his eye surgery. Another formal complaint was issued against the Solicitor on October 19, 1992 due to the Solicitor's failure to reply to the Law Society and his failure to honour a financial obligation to Tippet-Richardson Limited. The first complaint was set to proceed on November 11, 1992. On November 11, 1992, at the Solicitor's request, both complaints were adjourned to November 17, 1992, as the Solicitor had not recovered from his eye surgery. On November 17, 1992, the Solicitor was found guilty of professional misconduct with respect to all particulars. The committee referred the matter to Convocation. The matters were heard by Convocation on January 28, 1993. Convocation suspended the Solicitor for three months commencing February 5, 1993 and indefinitely thereafter until his year end January 31, 1991 filings are made, and ordered him to pay costs of \$1,500.

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It is important to stress at the outset that we are keenly aware that the Solicitor is not charged explicitly with being ungovernable. We have carefully considered the issue of whether that precludes a recommendation to Convocation of disbarment and we have concluded that as a matter of principle it does not, although the cases in which it would be appropriate to recommend a penalty as serious as disbarment when ungovernability that is not explicitly charged will be few. In this case, we have been assured that the Solicitor has been told that the Society will be asking today for a recommendation that he be disbarred and he has chosen not to appear to contest that request.

In these circumstances, and his discipline history, we think he has had adequate notice of the issues with which now we propose to deal.

The discipline history is appalling. The Solicitor has essentially failed to file any of the required forms since the year end of January 1990. There have been no replies to the complaints set out in Exhibit 10 of the Agreed Statement of Facts in this case and no replies respecting this complaint.

These complaints in themselves are serious. The mere fact that they are charged only as "failed to reply" and "failed to attend at a motion" does not mean that the complaints themselves are not grave. In this case, the failure to attend frustrated an important court hearing. The failure to attend was without excuse. It resulted in costs personally assessed against the Solicitor.

The complaint of Ms. Rossini, the validity of which is not assumed, is a serious one. A member of the public alleges inadequate service to her by a member of the profession. Her case involved the custody of a child, a matter which surpasses all others in importance to a mother. The suggestion is squarely that she has lost custody of that child because of the Solicitor's handling of the case. We are unable to assure her that this is not so.

The Law Society must be in a position to assure the public that those whom they permit to practise law in fact are both capable of and willing to provide service to the public, of a character, consistent with the obligations of the profession.

With respect to Mr. Fox, we are no longer in a position to make that assurance to the public. The governing body would be remiss in its duty to the public if it were to continue to allow Mr. Fox, by his membership, to let the public believe that he is providing service at or near a standard which is acceptable.

We simply cannot warrant his continued ability to deliver legal services and in our view, he ought not to be permitted to deliver them in the future.

We note in previous Reports that there has been a suggestion that there may be a psychiatric problem that is the cause of Mr. Fox's difficulties. That suggestion comes only from Mr. Fox. There has been no evidence brought on this date or any other to support that suggestion.

Those circumstances, and in the absence of any evidence today, (despite the fact that he was offered the names of psychiatrists in April of this year by Ms. Budweth and was urged to respond to the Rossini complaint and the Skinner complaint in a timely way) bespeak someone about whom one can say only: he is not amenable to our jurisdiction.

We have no alternative as the body responsible to the public of Ontario than to recommend his disbarment. We do, however, say this: if Mr. Fox chooses to attend before Convocation or to contact the Society's counsel and put in writing in a timely way his intention to ask permission to resign, we see no reason why Convocation ought not to accept such a request.

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The object is to see that Mr. Fox no longer practises law. We do not need to go further.

Gerald Bruce Fox was called to the Bar on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 18th day of May, 1995

Clayton Ruby,  
Chair

Report dated May 8, 1995

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Chair  
Joan Lax  
Stuart Thom, Q.C.

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

Christina Budweth and Neil Perrier  
for the Society

GERALD BRUCE FOX  
of the Town  
of Newmarket  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: May 18, 1992  
June 22, 1993  
November 9, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On December 1, 1992, Complaint D198/92 was issued, on January 6, 1993, Complaint D8, 1993 was issued and on January 29, 1993 Complaint D29/93 was issued against Gerald Bruce Fox alleging that he was guilty of professional misconduct.

The matter was heard in public on May 18, 1993 and June 22, 1993 before this Committee composed of Thomas G. Bastedo, Chair, Stuart Thom, Q.C. and Joan L. Lax. Neither the Solicitor nor counsel for the Solicitor were in attendance. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D198/92

2. a) He failed to provide a reply to the Law Society regarding a complaint by Joan M. Cassell despite letters dated September 15, 1992 and October 20, 1992 and telephone messages left on October 13, 1992 and October 16, 1992.
- b) He failed to provide a reply to the Law Society regarding a complaint by Alexandra Tzanakos despite letters dated September 15, 1992 and October 20, 1992 and telephone messages left on October 13, 1992 and October 16, 1992.
- c) He failed to provide a reply to the Law Society regarding a complaint by James Risebrough despite letters dated September 30, 1992 and October 28, 1992 and telephone messages left on October 21, 1992 and October 26, 1992.

Complaint D8/93

- a) He failed to provide the Law Society with a reply regarding inadequacies discovered during a spot audit despite letters dated July 7, 1992, August 7, 1992, September 9, 1992 and telephone messages left on October 8, 1992 and October 16, 1992.

Complaint D29/93

- a) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1992, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act;
- b) He failed to provide a reply to the Law Society regarding a complaint by David Hooper despite letters dated November 11, 1992 and December 16, 1992, and telephone requests on November 26, 1992 and December 4, 1992.
- c) He failed to account to his client, David Hooper, for funds entrusted to him regarding his lawsuit.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D198/92, D8/93 and D29/93 and is prepared to proceed with a hearing of these matters on February 16 and 17, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D198/92, D8/93 and D29/93 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaints together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He has been suspended from the practice of law for nonpayment of his Errors and Omission levy since November 2, 1992.

Complaint D198/92

Particulars 2a), 2b) and 2c)

5. By letter dated August 24, 1992, (Document Book, Tab 1) Joan M. Cassell advised the Law Society incorrectly that she had retained the Solicitor to represent her regarding her divorce. The retainer was with respect to a separation agreement but when the client moved to Alberta in the spring of 1992 she retained Alexandra Tzanakos, a solicitor with the firm Kenney & Company. Despite several attempts by Ms. Tzanakos, the Solicitor has failed to provide her with Ms. Cassell's file. Ms. Cassell requested the Law Society's assistance in having her file transferred to Ms. Tzanakos.

6. By letter dated September 1, 1992, (Document Book, Tab 4) Alexandra Tzanakos, a solicitor with the firm Kenney & Company, advised the Law Society that she had been retained by Joan Cassell to assume carriage of her divorce from the Solicitor. Despite communications with the Solicitor on June 11, 1992, July 20, 1992, July 30, 1992, August 13, 1992 and August 27, 1992, the Solicitor had failed to turn over Ms. Cassell's file or provide any type of reply to Ms. Tzanakos requests. Ms. Tzanakos requested the Law Society assist her in obtaining a reply and/or Ms. Cassell's file from the Solicitor.

7. By letter dated September 10, 1992, (Document Book, Tab 7) James Risebrough advised the Law Society that he had retained the Solicitor, through Legal Aid, during the month of March 1992 regarding a civil litigation matter with the Toronto Dominion Bank. After numerous meetings and telephone calls with the Solicitor, the Solicitor advised the client that he was of the opinion that the contemplated claim would be unsuccessful. Mr. Risebrough requested the Law Society assist him in obtaining the return of his file.

8. By letters dated September 15, 1992, (Document Book, Tab 2, 5, and 8, respectively) the Law Society forwarded to the Solicitor a copy of the respective letters of complaint. The Solicitor was requested to provide his comments to the same within three weeks. No reply was received.

9. A Law Society staff employee left telephone messages for the Solicitor at his office on October 13, 1992 and October 16, 1992 requesting he return the calls. The calls were not returned.

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10. By registered mail dated October 20, 1992, (Document Book, Tabs 3, 6, and 9, respectively) the Law Society forwarded to the Solicitor a copy of the respective letters of complaint. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should replies not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

11. The Solicitor has not requested an extension to reply. The Solicitor has advised the Law Society that the death of his father in January, 1992 was a severe blow to his outlook on life; he acknowledges that his work suffered while he grieved. The Solicitor underwent eye surgery for a partially detached retina on October 2, 1993, and experienced a period of convalescence for several weeks thereafter. The Solicitor underwent further eye surgery in April, 1993.

Complaint D8/93

Particular 2a)

12. On June 8, 1992, a Law Society Examiner completed her spot audit of the Solicitor's books and records and provided the Solicitor with a copy of her report (Document Book, Tab 10). The Solicitor signed an Acknowledgement (Document Book, Tab 11) on June 8, 1992, which stated:

I/We acknowledge receipt of a Law Society report on the deficiencies in my/our law practice's books and records. I/WE have discussed the deficiencies with the Law Society's representative and understand the requirements of the Regulation respecting books and records. I/We will ensure that the deficiencies are corrected forthwith in order to comply with the Regulation. I/We agree to ensure that these deficiencies are corrected forthwith and will comply with the Law Society's Regulation 573 (section 14 and 15) respecting books and records, henceforth.

13. By letter dated July 7, 1992, (Document Book, Tab 12) the Law Society provided the Solicitor with a pamphlet setting out sections 13 to 18 of Regulation 573. The Solicitor was reminded

that he had been provided with a copy of the Law Society examiner's report, dated June 8, 1992, which had disclosed several inadequacies discovered during a spot audit on May 14, 1992, May 20, 1992 and June 8, 1992. The Law Society requested the Solicitor:

- analyze and transfer to his trust account any money received and deposited to his general account which was unearned at the date of his review as required by subsection 1 and 3 of section 14. The Solicitor was requested to provide the Law Society, within one month of the date of this letter, a copy of his detailed analysis.
- institute a strict procedure to ensure that billings are prepared, delivered, entered and posted before transfers are made from trust to general on account of fees earned as required by subsection 9(c) of section 14. The Solicitor was requested to confirm, in writing, that this procedure had been put in place.
- institute a fees record which would meet the requirement of subsection 1(g) of section 15. The solicitor was requested to confirm with the Law Society, in writing, that such a record was operating.



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- personally review each completed trust comparison to ensure that uncorrected errors or differences are not carried to a succeeding month in accordance with subsections 1(h) and 2(a) of section 15. The Solicitor was requested to institute the differences on the monthly trust comparisons for the 12-month period preceding the auditor's visit. The Solicitor was requested to report to the Law Society on his findings within one month from the date of this letter.
- review his clients' general ledger accounts in credit balances. The Solicitor was requested to prepare and forward to the Law Society, within one month of the date of this letter, a list of credit balances in general as at April 30, 1992, identifying client accounts, showing amounts of credits, dates incurred, the reason for each credit balance arising, and the disposition of each. The Solicitor was requested to prepare and deliver fee billings for amounts earned to offset credits, and transfer to the trust account amounts unearned.
- ensure that in the future the trust bank reconciliations properly detailed all outstanding or reconciling items in accordance with section 1(h) of section 15.

The Solicitor was requested to acknowledge receipt of this letter, in writing, and to confirm with the Law Society that he had taken the necessary action to correct the aforementioned deficiencies.

No reply was received.

14. By letter dated August 7, 1992, (Document Book, Tab 13) the Law Society forwarded to the Solicitor a copy of its July 7, 1992 letter. The Solicitor was requested to reply forthwith. No reply was received.

15. By registered mail dated September 9, 1992, (Document Book, Tab 14) the Law Society forwarded to the Solicitor a copy of its letters dated July 17, 1992 and August 7, 1992. The Solicitor was advised that should a reply not be received within fifteen days, the matter would be referred to the Discipline Committee. No reply was received.

16. A Law Society staff employee left telephone messages for the Solicitor at his office on October 8, 1992 and October 16, 1992 requesting he return the calls. The calls were not returned.

17. The Solicitor has not requested an extension to reply. The Solicitor has advised the Law Society that the death of his father in January 1992 was a severe blow to his outlook on life; he acknowledges that his work suffered while he grieved. The Solicitor underwent eye surgery for a partially detached retina on October 2, 1993, and experienced a period of convalescence for several weeks thereafter. The Solicitor underwent further eye surgery in April, 1993.

Complaint D29/93

Particular 2a)

18. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 31, 1992, as required by S.16(2) of Regulation 573 under The Law Society Act.

19. A Notice of Default in Annual Filing, (Document Book, Tab 15) dated August 8, 1992 was forwarded to the Solicitor by the Law Society.

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20. By registered mail dated September 11, 1992, (Document Book, Tab 16) the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that when this levy amounted to \$1,500.00 he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. No reply was received.

21. The late filing fee began to accrue on October 9, 1992.

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

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

Particulars 2b) and 2c)

24. David Hooper retained the Solicitor in May, 1992 to represent him regarding several matters. One of these matters required the Solicitor to defend Mr. Hooper and Mr. Hooper's company, S.M.O. Systems Inc., in an action brought by AAA Triple A. Mr. Hooper provided the Solicitor with a monetary retainer in the amount of \$800.00. Mr. Hooper terminated his retainer with the Solicitor on August 27, 1992.

25. The Solicitor would testify that he has not spoken with Mr. Hooper since their last meeting in the Solicitor's office when Mr. Hooper advised the Solicitor to "watch over your shoulder. You might get hit by a low-flying plane" after being informed that the fees and disbursements exceeded the amount of the retainer. Mr. Hooper would deny having made this remark.

26. The Solicitor provided David and Rita Hooper with a Statement of Receipt and Disbursements of Trust Funds, (Document Book, Tab 17) dated July 22, 1992 which stated:

Holdback for anticipated fees	
in connection with the	
AAA Triple A lawsuit	\$800.00

27. By letter dated October 20, 1992 (Document Book, Tab 18) the Solicitor advised David and Rita Hooper that he would deducting from the \$800.00, his account for the balance of services rendered subsequent to his most recent account. The Solicitor advised that he would make an effort to have the account delivered to David and Rita Hooper by the end of the week.

28. By letter dated October 28, 1992, (Document Book, Tab 19) Mr Hooper advised the Law Society of the aforementioned and that to date, he had not received an account from the Solicitor nor the balance of the retainer.

29. By letter dated November 11, 1992, (Document Book, Tab 20) the Law Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks. No reply was received.

30. A Law Society staff employee left a telephone message for the Solicitor at his office on November 26, 1992 requesting he provide a response to the Law Society's letter dated November 11, 1992 by December 1, 1992 at 5:00 p.m. The Law Society staff employee also stated that should the Solicitor be unable to reply by that date, he was requested to return the call. No reply was received and the call was not returned.

31. A Law Society staff employee left a telephone message for the Solicitor at his office on December 4, 1992 advising that should a reply or a returned telephone call not be received, a registered letter would be mailed on December 7, 1992. No reply was received and the call was not returned.

32. By registered letter dated December 16, 1992, (Document Book, Tab 21) the Law Society forwarded to the Solicitor a copy of its November 11, 1992 letter. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. No reply was received.

33. The Solicitor has not requested an extension to reply. The Solicitor has advised the Law Society that the death of his father in January, 1992 was a severe blow to his outlook on life; he acknowledges that his work suffered while he grieved. The Solicitor underwent eye surgery for a partially detached retina on October 2, 1993, and experienced a period of convalescence for several weeks thereafter. The Solicitor underwent further eye surgery in April, 1993.

#### V. DISCIPLINE HISTORY

34. The Solicitor has been suspended from the practice of law since November 2, 1992 regarding non-payment of his Errors and Omissions levy.

35. The Solicitor received a reprimand in committee on August 11, 1983 regarding his failure to reply, failure to co-operate with a fellow solicitor, prejudicing former employers and clients and having caused a false reporting letter to be sent to a client.

36. The Solicitor received a reprimand in committee on November 24, 1986 regarding the misapplication of client monies, failure to keep a client advised on an appeal, failure to service a client in a conscientious, diligent and efficient manner, failure to reply to the Society and breach of his written undertaking to the Society.

37. The Solicitor received a reprimand in convocation and ordered to pay costs of \$750.00 on May 24, 1990 regarding his failure to reply to the Law Society.

38. Complaint D98/92 was issued against the Solicitor on June 9, 1992 regarding his failure to reply to the Law Society and failure to file for the fiscal year ended January 31, 1991. At a set date on July 21, 1992 this matter was set to proceed on September 15, 1992. The matter was adjourned to September 29, 1992 at the Solicitor's request as he was unable to have his Forms 2/3 filed by September 15, 1992. At the Solicitor's request the matter was adjourned to October 13, 1992 due to the Solicitor's recent eye surgery. At the Solicitor's request the matter was adjourned to November 11, 1992 as the Solicitor had not recovered from his eye surgery. Another formal complaint, D166/92, was issued against the Solicitor on October 19, 1992 due to the Solicitor's failure to reply to the Law Society and his failure to honour a financial obligation to Tippet-Richardson Limited. Complaint D166/92 was set to proceed on November 11, 1992.

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On November 11, 1992, at the Solicitor's request, both Complaints were adjourned to November 17, 1992 as the Solicitor still had not recovered from his eye surgery. On November 17, 1992 the Solicitor was found guilty of professional misconduct with respect to all particulars. The committee referred the matter to convocation. The Complaints were heard by Convocation on January 28, 1992. Convocation suspended the Solicitor for three months commencing February 5, 1993 and indefinitely thereafter until his year end January 31, 1991 Filings are made, and ordered him to pay costs of \$1,500.00.

DATED at Toronto this 3rd day of May, 1993.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that the Solicitor's right to practise be suspended until all replies which are the subject of the complainant are satisfactorily dealt with, and until the form 2/3 filings are up-to-date. The Solicitor does not oppose this recommendation and the recommendation is therefore on consent. At the end of the period of time when the replies are up-to-date and made, and the form 2/3 filings are also up-to-date, the Solicitor shall be suspended for a period of three months. After the three month suspension has been completed then, in accordance with the agreement between the Solicitor and the Law Society, the Solicitor shall submit an opinion from a fully qualified psychiatrist as to his capability of returning to the practice of law. The Society may retain its own psychiatrist (other than Dr. Andrew Malcolm, who has been disqualified by agreement between the Society and the Solicitor), to examine the Solicitor. If, in the opinion of the Solicitor's psychiatrist, which opinion is concurred in by the Society either through simply stating that the Society does concur, or alternatively after having had the Solicitor examined by a psychiatrist, the Solicitor is deemed to be capable of practising law, then the Solicitor may return to the practice of law under various terms and conditions.

In the Solicitor's first year of practice the Solicitor will practise in association with a solicitor approved by the Society; alternatively, if the Solicitor is employed in a legal capacity, that arrangement shall be acceptable to Senior Counsel of Discipline; second, if the Solicitor does intend to return to private sole practice, he must enrol in the Practice Review Program and work with that department to create a practice plan before the return to practice and after six months, again meet with the Practice Review officer who shall then evaluate the success of the return to private practice.

In the event that there is any dispute between the Solicitor and the Society over the effecting of any of these terms, then either the Society or the Solicitor may ask that this matter be reconvened before a discipline panel for determination, it being understood that the discipline panel delivering this decision is not seized any further with this matter. Last, as a condition to the Solicitor's re-entering the practice of law, he must pay the Society's costs in the amount of \$1,500.00.

#### REASONS FOR RECOMMENDATION

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This matter came on before the Committee on the 18th day of May, 1993, and proceeded by way of an Agreed Statement of Facts. In that Agreed Statement of Facts, by paragraph 3, the Solicitor admitted the particulars in the complaints and agreed that the facts as set out in the Agreed Statement constituted professional misconduct. Unfortunately, at the initial hearing, the Solicitor did not appear.

22nd June, 1995

The Committee adjourned the matter on May 18th to June 22nd, 1993 in order to give to the Solicitor a second opportunity to attend. Between May 18th and June 22nd the Solicitor was served with a letter from counsel for the Law Society outlining to the Solicitor what had occurred at the Committee meeting on May 18th, and adjourned the matter to June 22nd. By letter dated June 21st, the Solicitor stated that he would not be appearing. The Committee then tentatively came to the conclusion that the Solicitor was ungovernable, and in the absence of any representations by the Solicitor, would have recommended to Convocation that the Solicitor be disbarred. However, the Committee determined that the Solicitor should be given one final opportunity to appear before the Committee, and once again adjourned the matter. In fairness there appeared to be some confusion as to the expectations of the Solicitor stemming from his signing of the Agreed Statement of Facts, and the Committee unanimously was of the view that the Solicitor be given a third opportunity to attend and make submissions. On September 9, 1993 the Solicitor did attend before the Committee.

The objective of the recommendation is to give the Solicitor every opportunity to reinstate himself in the practice of law, while at the same time giving to the public the assurance that the Solicitor can function in his practice as a useful member of the legal profession. The Society and the Solicitor jointly submitted to the Committee the appropriate recommendation as to penalty, although there was some issue as to whether the suspension should be in the range of six to twelve months, and whether the suspension was to run concurrently with the administrative suspension. The Committee is of the view that the suspension imposed through its recommendation is sufficient in the circumstances of this case, having regard to the conditions laid down by the Committee in their recommendations providing for the re-entry of the Solicitor into an effective legal practice.

Gerald Bruce Fox was called to the Bar and admitted as a solicitor on the 21st day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 8th day of May, 1995

Thomas G. Bastedo,  
Chair

Ms. Budweth asked that the following amendments be made:

- Report of May 8, 1995 - page 10, second last line - should read "January 28, 1993" not 1992;
- Report of May 18, 1995 - page 4, between paragraphs 16 and 17 to insert a heading "Particular (d) - Failure to Reply"

It was moved by Ms. Puccini, seconded by Ms. Stomp that the Reports dated May 8 and 18, 1995 be adopted.

There were no submissions and the Reports as amended were adopted.

It was moved by Ms. Backhouse, seconded by Mr. Murray that the recommended penalty as set out in the Report dated May 18, 1995 be adopted, that is, that the solicitor be disbarred or be permitted to resign if he offered his resignation 5 days prior to the date of Convocation hearing this matter.

Both counsel made submissions in support of the recommended penalty.

22nd June, 1995

The motion on the recommended penalty was adopted.

The solicitor was granted permission to resign.

Counsel and solicitor retired.

Re: Jeffrey Mark LEVY - Thornhill

The Secretary placed the matter before Convocation.

Mr. Scott did not participate and Ms. O'Connor and Mr. Thom withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 10th December, 1993, together with an Affidavit of Service sworn 20th January, 1994 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th December, 1993 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 23rd June, 1994 (marked Exhibit 2). The Report of the Discipline Committee dated 6th April, 1995, together with an Affidavit of Service sworn 12th April, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th April, 1995 was marked Exhibit 3 and the Acknowledgement, Declaration and Consent signed by the solicitor on 27th April, 1995 was marked Exhibit 4. Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them were waived.

The Reports of the Discipline Committee are as follows:

Report dated April 6, 1995

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Marie Moliner, Chair  
Shirley O'Connor  
Stuart Thom

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

Christina Budweth  
for the Society

JEFFREY MARK LEVY  
of the Town  
of Thornhill  
a barrister and solicitor

Walter Fox  
for the solicitor

Heard: May 11, 1994  
July 13, 1994  
August 18, 1994  
August 22, 1994  
March 10, 1995

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On September 15, 1993, Complaint D242/93 was issued and on March 30, 1994, Complaint D52/94 was issued against Jeffrey Mark Levy alleging that he was guilty of professional misconduct.

The matter was heard in public on May 11, 1994, July 13, 1994, August 18, 1994, August 22, 1994 and March 10, 1995 before this Committee composed of Marie Moliner, Chair, Shirley O'Connor and Stuart Thom, Q.C. Mr. Levy was in attendance at the hearing and was represented by Walter Fox. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

"AGREED STATEMENT OF FACTS - D242/93"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D242/93 and is prepared to proceed with a hearing of this matter on February 1 and 2, 1994.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D242/93 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 29, 1977. He practices as a sole practitioner in the City of Toronto. The Solicitor has been suspended since November 1, 1993 for non-payment of the annual fee.

5. The Solicitor's fiscal year end is November 30. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending November 30, 1992, as required by S.16(2) of Regulation 573 under The Law Society Act.

6. A Notice of Default in Annual Filing, dated June 2, 1993 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "A" to this Agreed Statement of Facts. The Solicitor did not respond to this correspondence.

7. By registered letter dated July 7, 1993, a Second Notice of Default in Annual Filing was forwarded to the Solicitor. The Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due

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dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. A copy of the Society's July 7, 1993 Notice is attached as Exhibit "B" to this Agreed Statement of Facts. The letter was returned marked "moved".

8. The late filing fee began to accrue on July 23, 1993.

9. On July 29, 1993, by registered mail, the Law Society forwarded to the Solicitor a copy of its Second Notice of Default in Annual Filing. A copy of the registration slip is attached as Exhibit "C" to this Agreed Statement of Facts.

10. On August 4, 1993, the Solicitor telephoned the Society and advised a staff member that he would submit his annual filings in September. The Law Society staff employee requested that the Solicitor confirm same in writing. A copy of handwritten notes of the telephone conversation with the Solicitor is attached as Exhibit "D" to this Agreed Statement of Facts. The Law Society did not receive any correspondence from the Solicitor.

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

12. To date, the Solicitor has not yet mailed the required forms.

#### V. DISCIPLINE HISTORY

13. On October 14, 1993, the Solicitor was found guilty of professional misconduct for failing to produce his books and records for examination by the Law Society. The matter is pending Convocation.

DATED at Toronto this 11th day of May, 1994."

#### "AGREED STATEMENT OF FACTS - D52/94

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D54/94 and is prepared to proceed with a hearing of this matter on August 18, 1994.

#### II. IN PUBLIC/IN CAMERA

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

#### III. ADMISSIONS

3. The Solicitor has reviewed Complaint D52/94 and this agreed statement of facts with his counsel, Walter Fox, and admits the particular 2(a) contained therein. The Solicitor also admits that the facts alleged in the complaint particular 2(a) supported by the facts as hereinafter stated constitute professional misconduct. The Solicitor does not admit particular 2(b).



IV. FACTS

4. The Solicitor is 43 years of age. He was called to the Bar on March 29, 1977. During the course of his practice the Solicitor has, from time to time, practised in association with other lawyers; however, recently, and until an Undertaking not to practice given on January 26, 1994 the Solicitor had a sole practice.

5. In 1985, Catherine Young retained the Solicitor, and on her behalf the Solicitor retained an American law firm, Pretyl & Erwin, to act on her behalf in a class action suit to recover damages for personal injuries caused to her as a result of her use of the Dalkon Shield in the period 1971 to 1972. Ms. Young's injuries included pelvic inflammatory disease which resulted in sterility and required her to have a partial hysterectomy.

6. Ms. Young is presently 43 years of age. She is employed as a singer/entertainer on cruise ships and in exclusive hotels in the Far East. Ms. Young had not been acquainted with him prior to her contact in this lawsuit. The Solicitor did not require a cash retainer from Ms. Young; however, a written retainer whereby the Solicitor and the American law firm were engaged was executed by Ms. Young.

7. In 1989, following Ms. Young's retainer of the Solicitor to act for her on the Dalkon Shield matter, she was dismissed from her employment with the Regent Holidays Cruise Line and retained the Solicitor to commence a wrongful dismissal action on her behalf. Ms. Young met with the Solicitor in this regard in late March 1989 at which time she provided him with a \$500.00 cash retainer. Over the next two years, Ms. Young estimates she provided the Solicitor with approximately \$1,000 to \$1,300 dollars as additional retainer monies. Ms. Young understood that the Solicitor had issued a Statement of Claim on her behalf and; in fact, in July 1990, Ms. Young and the Solicitor had a discussion about discoveries in the litigation. The Statement of Claim was in fact issued and delivered by the Solicitor to a process server for service. The document was not served because of the Solicitor's outstanding account with the process server. Ms. Young has retrieved the issued Claim but the time for service has now expired.

8. During a period of her unemployment between her dismissal from Regent Holidays and her re-employment in January of 1990 in Hong Kong Ms. Young incurred significant debts to American Express on a card issued to Petrie Reed, Ms. Young's mother. Ms. Young also retained the Solicitor to "deal with" American Express commencing in approximately July 1990. Ms. Young did not have the funds to repay American Express and was hoping for the settlement of her Regent Holidays matter to make the American Express re-payment. Part of Ms. Young's claim against Regent Holidays was reimbursement of the American Express debt which she claims was the direct cause of these significant debts.

9. Throughout the period January 1990 well into 1991 Ms. Young was travelling in Hong Kong and Cyprus in pursuit of her employment.

10. In or about early October 1991 the Solicitor telephoned Ms. Young to advise that the Dalkon Shield litigation had been settled. Ms. Young confirmed their telephone conversation by letter dated October 4, 1991, a copy of which is attached as Exhibit 1 to this agreed statement of facts. During the telephone conversation the Solicitor asked Ms. Young to provide him with an additional \$1,500 retainer for the Regent Holiday litigation. Ms. Young agreed to do so.

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Accordingly, in the October 4, 1991 letter Ms. Young instructed the Solicitor to open a trust account for her at any Royal Bank Branch and authorized the Solicitor, as a result of his request during their telephone conversation, to take \$1,500 in fees for the Regent Holidays litigation from those funds. Ms. Young also purported by the letter to give the Solicitor what she characterized as a "limited power of attorney" to open the bank account on her behalf, collect the settlement funds, deposit them into her account and remove the \$1,500 retainer.

11. Ms. Young's next communication from the Solicitor was by way of facsimile transmission of October 21, 1991 a copy of which is attached as Exhibit 2 to this agreed statement of facts. Ms. Young responded to the Solicitor's request by letter dated October 22, 1991 a copy of which is attached as Exhibit 3.

12. At the Solicitor's request, Ms. Young also faxed a direction regarding the Solicitor's authority to Pretyl & Erwin. A copy of Ms. Young's October 24, 1991 facsimile transmission to Pretyl & Erwin is attached as Exhibit 4 to this agreed statement of facts.

13. Having not heard from the Solicitor following the course of communication in Exhibit 2,3 and 4, Ms. Young communicated with him by facsimile transmission of November 19, 1991, a copy of which is attached as Exhibit 5 to this agreed statement of facts. The Solicitor responded by letter dated November 27, 1991 which set out the actions taken on Ms. Young's behalf following receipt of the Dalkon Shield settlement funds. A copy of the Solicitor's November 27, 1991 letter is attached as Exhibit 6 to this agreed statement of facts.

14. Attached to this agreed statement of facts as Exhibit 7 is a copy of two pages of the Central Guaranty Bank account #55-011296, Bathurst-Eglinton Branch (U.S. dollars), ostensibly opened for Ms. Young's benefit and referred to in the Solicitor's letter Exhibit 6. The first items of the passbook indicate that \$37,187.08 was deposited. The withdrawals on November 26, 1991 are set out on the trust reconciliation which forms a part of Exhibit 6.

15. In early December 1991, the Solicitor telephoned Ms. Young in Cyprus and arranged to borrow \$5,000.00 from her to purchase an engagement ring for his fiancée, Barbara Black. The Solicitor promised Ms. Young the loan would be for a short period of time for a return of \$1,000.00. The source of the loan was to be her Dalkon Shield settlement. During a discussion regarding the propriety of this arrangement, the Solicitor acknowledged that it would be improper for him to borrow funds from Ms. Young, his client, and suggested that he could actually borrow the money from Ms. Young's mother with funds provided to her, the mother, by Ms. Young.

16. Ms. Young agreed and confirmed the agreement in a facsimile transmission dated December 16, 1991, a copy of which is attached as Exhibit 8 to this agreed statement of facts. The Solicitor and the Society are agreed that the transactions noted on December 16, December 16 and December 17, 1991 of Exhibit 7, totalling \$5,000 represents the \$5,000 borrowed by the Solicitor from Ms. Young.

17. The Solicitor never spoke to or dealt with Ms. Young's mother in any manner regarding the loan transaction and in fact removed the monies directly from the Central Guaranty account set up for Ms. Young's benefit.

18. Ms. Young returned from Cyprus on or about January 16, 1992. She telephoned the Solicitor who indicated he did not have the money to repay her immediately but that he would in fact borrow the funds to make the repayment.

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19. On January 17, 1992, the Solicitor withdrew \$4,000 in cash from the Central Guaranty account. This amount was converted into a \$4,520 money order (number 09220) which was given to Ms. Young on or about that date. This transaction is reflected in the passbook Exhibit 7. The passbook shows a further no book withdrawal on February 7, 1992 of \$2,000. The Solicitor converted this money into a money order in the amount of \$2,319 and provided it to Ms. Young on or about this date.

20. During the period December, 1991 to April, 1992 further activity took place in the Central Guaranty account which the Society alleges constitutes misappropriation of Ms. Young's funds. Documents regarding all of the impugned transactions, provided by Central Guaranty on the written authority of the Solicitor, are attached collectively as Exhibit 9 to this agreed statement of facts. During the period March to October, 1992 the Solicitor made a number of payments to Ms. Young in repayment of the amounts removed from her trust account. There remains an outstanding matter of the retainers provided by Ms. Young to the Solicitor in the context of the Regent Holidays' action which Ms. Young alleges are owing and which the Solicitor acknowledges are as yet unaccounted for. Copies of the cheques provided by the Solicitor to Ms. Young are attached collectively as Exhibit 10 to this agreed statement of facts. The Solicitor paid to Ms. Young 12,689.00(Cdn) during the period January 1992 to October 1992. The Solicitor acknowledges that, leaving aside the issue of the retainer taken, as at November 26, 1991 there was \$13,934.78 in the Central Guaranty account to which Ms. Young was entitled.

21. During the period March to July 1992 Ms. Young was pressing the Solicitor, strenuously, for payment of the balance of the funds owing to her. In addition to the funds repaid by the series of cheques attached as Exhibit 10, Ms. Young was claiming and continues to claim the charges set out in a letter of July 20, 1992 a copy of which is attached as Exhibit 11 to this agreed statement of facts. The Solicitor responded by letter dated July 24, 1992 a copy of which is attached as Exhibit 12 to this agreed statement of facts. Ms. Young responded and demanded further funds by way of letter dated August 7, 1992, a copy of which is attached as Exhibit 13 to this agreed statement of facts.

22. Ms. Young complained to the Law Society about the Solicitor's conduct by letter dated November 2, 1992. She sent further information provided by letter dated December 4, 1992. Copies of both letters are attached collectively as Exhibit 14 to this agreed statement of facts. A copy of Ms. Young's letter of complaint was provided to the Solicitor who responded by letter of February 10, 1993 a copy of which is attached as Exhibit 15 to this agreed statement of facts. Contrary to the information set out in the Solicitor's reply to the Law Society, the Solicitor cannot at this time recall providing Ms. Young with an account for monies provided on a retainer in regard to the Regent Holidays litigation. The Solicitor also admits that contrary to Ms. Young's understanding he never served a copy of the Statement of Claim upon the defendant in that action.

23. The Solicitor also admits that although the account at Central Guaranty is variously characterized in the written material, including correspondence to the Law Society, as a trust account, this was not in fact a trust account.

DATED at Toronto this 18th day of August, 1994."

REASONS FOR DECISION

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I. Borrowing Money from a Client: Particular 2(a) of Complaint D52/94

The Committee accepts the facts set out in the Law Society's statement of facts in relation to Particular 2(a), which is admitted by the Solicitor (borrowing money from a client). Accordingly, a finding of misconduct has been entered in relation to that particular.

II. Misappropriation of Funds: Particular 2(b) of Complaint D52/94

The Solicitor does not admit to the allegation of misappropriation in particular 2(b) and testified at the hearing contesting this allegation.

It is the finding of this Committee that there is evidence to support a finding that the Solicitor is guilty of misappropriating a sum of money from Catherine Young, the same client from whom he admits borrowing money.

The Committee accepts the facts relating to Particular 2(b) as set out in the Law Society's factum. These facts are attached and summarized below:

The Solicitor successfully represented his client, Catherine Young, on a Dalkon Shield suit. The client, employed as a cruise ship entertainer, was frequently out of the country and had instructed the Solicitor, in writing (note attached), to deposit the settlement in a Royal Bank account so that she could access it from Cyprus where she was located. Contrary to these instructions, the Solicitor placed the funds in a general account (hereinafter called the Young account), in his name only, at Central Guaranty where he had other personal accounts. He did not inform his client that he had not followed her express written instructions to place the money in a trust account at a Royal Bank. (A copy of the client's instructions to the Solicitor is attached).

The Solicitor withdrew approximately \$3,800 from the Young account over a period of 6 weeks. The Solicitor also deposited funds into this account. As a result, Counsel for the Law Society advised the Committee that it was not possible to pinpoint the precise amounts which were 'misappropriated'.

Much time was spent during the hearing trying to determine the Solicitor's intent when withdrawing funds from the Young account. The Solicitor's position is that he was borrowing money. Counsel for the Society characterized the withdrawals as misappropriation.

In evidence, the Solicitor admitted that he did not follow his clients instructions to place the settlement funds in a trust account at a Royal Bank. He admitted that he ignored the client's urgent faxes asking for an explanation about the location of the settlement funds. He further admitted that he did not indicate to Central Guaranty that the funds were to be placed in trust for a client. The Solicitor also admitted that he withdrew funds without permission from the Young account.

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Oral and documentary evidence was introduced confirming that Catherine Young did not authorize any withdrawals, that she repeatedly requested that the Solicitor return the funds he had taken, and that the whole purpose behind her request that the funds be placed in a Royal Bank account was to allow her to withdraw funds internationally, via Barclay's Bank.

The Solicitor's explanation is that these withdrawals were loans which he is still in the process of paying back.

We cannot accept the Solicitor's explanation. He has admitted that he knew he was removing funds from a client's account without permission but denies any intention to steal from his client. He explained that a previous loan from Ms. Young led him to assume that these transactions could also be characterized as loans. As noted above, the Solicitor has admitted misconduct in relation to the previous loans.

The Solicitor's evidence about the account and the 'loans' was vague and, at times, inconsistent. We did not find him to be a credible witness. On the other hand, we found the evidence of his client, Catherine Young, to be honest and forthright. She testified that her personal relationship with the Solicitor led her to feel sorry for him.

The Committee is of the view that this is a clear case of misappropriation, despite attempts by the Solicitor to present the facts as a series of unauthorized loans. In our view, the first step in the misappropriation occurred when the Solicitor blatantly ignored his client's requests and, contrary to her instructions, placed the funds in his own financial institution. His subsequent withdrawals from that account crystallized the misappropriation. Much time was spent by both sides trying to identify the extent of, or lack of, personal gain by the Solicitor. In our view, the misappropriation does not hinge on whether or not the Solicitor derived personal gain from the unauthorized use of funds.

We rely on the case of Sommers, 553 A.2d (N.J. 1989) where the Supreme Court of New Jersey said:

"Misappropriation is any unauthorized use by the lawyer of clients' funds entrusted to him .... whether or not he derives any personal gain or benefit therefrom."

We heard the Solicitor's evidence that he was 'borrowing' and not 'stealing'. We disagree. The case of Spencer Black v the Law Society of Upper Canada is helpful in that it establishes that misappropriation is not limited to 'simple theft cases'. In the Black case, the Committee stated:

"In determining that the Solicitor's conduct constituted misappropriation and not merely a breach of rule 7, the Committee was of the view that the Solicitor's assertion of an intention to repay when he took the funds for his own use was not, by itself, exculpatory. Misappropriations commonly begin with a professed intention to repay."

The Committee further stated:

"a finding of misappropriation required a finding that the Solicitor knew the taking was improper or was at least wilfully blind to its impropriety", and "the facts require a finding of misappropriation whether or not the Solicitor intended to return the funds."

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Black was subsequently disbarred for being "wilfully blind to the fact that he was improperly appropriating his client's funds for his own purpose."

Mr. Levy knew he was using his clients' money for his own purposes in blatant disregard of his clients' express written instructions. The fact that the Solicitor paid some of the money back and intends to continue to pay the client back does not persuade us that he was borrowing and not stealing money. We prefer to characterize these repayments as restitution.

Accordingly, we find the Solicitor guilty of misappropriation. The amount misappropriated is not clear and ranges from estimates of \$2,200 to \$3,800.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Jeffrey Mark Levy be disbarred.

#### REASONS FOR RECOMMENDATION

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This Committee has found Jeffrey Mark Levy guilty of professional misconduct on two counts. He admitted misconduct by borrowing \$5,000 from his client and was found guilty of misappropriation of funds in an amount estimated between \$2,200 and \$3,800 from his client, Catharine Young.

The circumstances surrounding both events combined with the Solicitor's lack of appreciation of his actions, require the misconduct to be viewed in the most serious light.

The loan was obtained from a reluctant client who questioned the propriety of the loan. In response, the Solicitor indicated to her that it was not professional misconduct to borrow money from a client. In evidence, the Solicitor acknowledged that the loan was contrary to the rules. Nonetheless, he still did not appear to appreciate the inappropriateness of requesting a loan from a client.

As noted, the face value of the misappropriation does not appear to warrant the most serious of penalties. In several other cases of misappropriation of similar amounts, solicitors have been suspended for 3-6 months. Despite these cases, the Society urged us to consider disbarment in light of evidence of the Solicitor's ungovernability.

The Solicitor ignored the client's written instructions and, without telling her, misappropriated funds by depositing her money into his own bank contrary to her instructions. He did this knowing that Ms. Young needed the money, that he was putting it out of her reach, and that it was money obtained in settlement of a long overdue personal injury action. Having done so he ignored her repeated requests for the return of the money. While it is unclear exactly what happened with the money, there is some evidence that the solicitor used it to purchase traveller's cheques.

In the view of the Committee, the facts which are before us in the Levy matter are clearly distinguishable from the misconduct found in cases referred to us where a lesser penalty than disbarment was imposed (Milloy, Benaiah, and Zinko). The two mitigating principles which can be drawn from these decisions are first, that the solicitor clearly accepted responsibility for culpable conduct and secondly, that the conduct was an aberration stemming from personal problems. These factors are completely absent from the case before us.

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It is the position of the Society that the solicitor is ungovernable. We agree. We cannot protect the public if he returns to practice. This Committee had an opportunity to observe Mr. Levy at several appearances throughout this hearing. Apart from having made restitution to his client, there is no indication that he appreciates the consequences of his actions. He does not appear to understand that his conduct was wrong and he has shown no remorse. In evidence before us he was evasive and attempted to mislead us. His general demeanour can be characterized as without remorse, ambiguous and arrogant. We do not have the benefit of any character evidence which might place him in a more sympathetic light.

Just prior to the conclusion of the hearing, and without notice to the Society or apparently his own counsel, the solicitor advised us that he had just recently consulted a psychiatrist. No request was made for an adjournment at that point. The panel invited the Solicitor's counsel to take a brief adjournment to obtain instructions from his client. After consultation, counsel advised the panel that he was not taking a position as to whether or not there should be an adjournment of the hearing to allow his client to obtain a psychiatric report. Despite counsel's position and with prompting from the panel, the Solicitor indicated that he was requesting an adjournment.

The panel invited submissions on the issue of whether or not there should be an adjournment. Counsel for the Society took the position that the Committee had adequate evidence to make a decision on penalty and that if a psychiatric report were forthcoming, it could be submitted to Convocation. Again, counsel for the Solicitor took no position. The Solicitor spoke on his own behalf and while he was unclear as to why we should grant him an adjournment, he implied that he was seeking assistance to help him cope with stress.

As noted above, the Committee has had a number of opportunities to observe the Solicitor in the course of these proceedings. We have found him to be ungovernable and evasive. Most importantly, we have concluded that even at this point, he is unable to appreciate his culpability in the conduct in issue before us. We believe that a psychiatric report would be of no assistance to us and for these reasons, we declined to grant the adjournment.

It is the view of the Committee that the request, made at the last minute, 7 months after the conclusion of the evidence on the misconduct, is primarily aimed at seeking to delay the proceedings further.

On all of the evidence before us, and in the absence of any extenuating circumstances, we believe it is in the public interest that the Solicitor be disbarred.

Jeffrey Mark Levy was called to the Bar on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 6th day of April, 1995

Marie Moliner,  
Chair

22nd June, 1995

Report dated December 10, 1993

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

J. James Wardlaw, Q.C., Chair  
Denise Bellamy  
Netty Graham

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

Christina Budweth  
for the Society

JEFFREY MARK LEVY  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: June 30, 1993  
October 14, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 16, 1993, Complaint D76/93 was issued against Jeffrey Mark Levy alleging that he was guilty of professional misconduct.

The matter was heard in public on June 30, 1993 and October 14, 1993 before this Committee composed of J. James Wardlaw, Q.C., Denise Bellamy and Mrs. Netty Graham. Mr. Levy attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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The following particulars of professional misconduct were found to be established:

Complaint D76/93

2. (a) he has failed to produce his books and records despite repeated appointments and requests by the Society that he provide the books and records he is required to maintain in accordance with Section 14 and 15 of the Regulation to the Law Society for examination.

Evidence

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



"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D76/93 and is prepared to proceed with a hearing of this matter on June 29 and 30, 1993.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D76/93 and admits the particular contained therein. The Solicitor also admits that the particular in the complaint together with the facts as hereinafter set out constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 29, 1977. He practices as a sole practitioner.

5. A Law Society examiner attended at the Solicitor's office, unannounced, on August 16, 1992. The Solicitor was unavailable. The examiner left her card with the Solicitor's receptionist along with a request that the Solicitor contact her.

6. On August 25, 1992, the Solicitor contacted the examiner by leaving a message for her at the Society advising that he would be on holidays until September 8, 1992.

7. On September 8, 1992, the examiner contacted the Solicitor by telephone and an appointment was arranged for September 10, 1992 for an examination of his books and records.

8. On September 10, 1992, the Solicitor contacted the examiner to cancel the appointment. The Solicitor advised the examiner that he was ill. The appointment was re-scheduled for September 17, 1992.

9. On September 17, 1992, the examiner attended at the Solicitor's office to commence an examination of his books and records. The examiner completed the audit questionnaire with the Solicitor and was advised that his books and records were with his accountant. The Solicitor advised the examiner that due to his illness he was scheduled for tests at the hospital. He stated that he would contact her once he was released from the hospital.

10. On October 21, 1992 and October 22, 1992, the examiner left telephone messages for the Solicitor at his office requesting he return the calls. The calls were not returned.

11. On October 26, 1992, the examiner spoke with the Solicitor by telephone. The Solicitor advised the he would deliver his books and records to the Law Society by October 27, 1992. The books and records were not delivered.

12. The examiner left a telephone message for the Solicitor at his office on November 2, 1992 requesting he return the call. The call was not returned.

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13. By letter dated November 3, 1992, the examiner advised the Solicitor that she had been instructed to make an examination of his books and records in accordance with section 18 of the Regulation of the Law Society Act. The Solicitor was advised that should above average time be consumed in the examination caused by inadequacies in the records or complications in the production of the records for examination, audit costs could be assessed against him. The Solicitor was requested to contact the examiner immediately, to arrange a date for the examination. A copy of the Law Society's November 3, 1992 letter is attached as Exhibit "A" to this Agreed Statement of Facts.

13. On November 4, 1992, the Solicitor left a telephone message for the examiner at the Law Society advising that he was going back into hospital. The Solicitor stated that his bookkeeper required a week to put his books in order and that he would have the same delivered to the Society as soon as possible.

14. The Solicitor delivered a bag containing some books and records to the Society on November 17, 1992.

15. On December 18, 1992, the examiner reviewed the Solicitors documents and returned the same to the Solicitor, along with her letter dated December 18, 1992. In the letter of December 18, 1992, the Solicitor was provided with a list of material required to complete the audit. The Solicitor was requested to bring his books and records up to date and to supply all of the material listed on the attached sheet as soon as possible. The examiner requested the Solicitor contact her within the next few days to advise as to when his books will be updated. A copy of the Law Society's December 18, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts.

17. On December 23, 1992, the Solicitor left a telephone message for the examiner at the Law Society advising that he was out of town until January 4, 1993.

18. On January 4, 1993, the examiner spoke with the Solicitor by telephone. The Solicitor advised that he was no longer at his office as he had been asked to leave. The Solicitor advised the examiner that he would contact her by telephone on January 6, 1993.

19. On January 6, 1993, the examiner spoke with the Solicitor by telephone. The Solicitor advised that he was arranging for a new office and would call her next week.

20. On January 14, 1992, the examiner spoke with the Solicitor by telephone. The Solicitor advised that his books and records were with his accountant and that he would call next week.

21. On January 19, 1993, the examiner contacted the Solicitor's accountant. The accountant advised that he had not received the Solicitor's books and records.

22. On January 19, 1993, the examiner left a telephone message for the Solicitor at his office requesting he return the call. The call was not returned.

23. On January 20, 1993, the examiner spoke with the Solicitor by telephone. The Solicitor advised that his books and records were being delivered to his accountant. A tentative appointment was arranged for the examiner to meet with the Solicitor on January 26, 1993.

24. On January 26, 1993, the examiner attended at the Solicitor's to examine his books and records. The Solicitor was not at the office. The examiner left her card with the another solicitor with a request that the Solicitor contact her.

22nd June, 1995

25. On January 27, 1993, the examiner attended at the Solicitor's office. The Solicitor's books and records were not available for examination. The Solicitor's existing trust account was frozen. A new trust account was opened with co-signing controls.

26. By letter dated March 24, 1992, the examiner confirmed her telephone conversation with the Solicitor regarding the updating of his books and records. He was requested to contact the examiner as soon as possible once his books and records were available for examination. A copy of the Law Society's March 24, 1992 letter is attached as Exhibit "C" to this Agreed Statement of Facts.

27. The Solicitor spoke with the examiner by telephone on April 1, 1993. The Solicitor advised that he was meeting with his bookkeeper the next day. He advised the examiner that he had no new trust accounts and no old trust accounts that he had not told her about.

28. By letter dated April 14, 1993, the examiner confirmed her telephone conversations with the Solicitor regarding the updating of his books and records. He was requested to contact the examiner as soon as possible once his books and records were available for examination. A copy of the Law Society's April 14, 1993 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

29. To date, the Solicitor has not made his complete books and records available for examination.

V. DISCIPLINE HISTORY

30. The Solicitor has no previous discipline record.

DATED at Toronto this 28th day of June, 1993."

RECOMMENDATION AS TO PENALTY

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The Committee recommends a suspension of four months, to continue thereafter, until such time as the Audit Department of the Society is satisfied the books and records are up to date and in satisfactory order.

REASONS FOR RECOMMENDATION

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The Committee heard the evidence of the Solicitor on June 30, 1993. The hearing was adjourned on that date to a date to be fixed, but in any event not later than September 28, 1993 to allow the Solicitor to put his books and records in order.

The hearing was not in fact reconvened until October 14, 1993. The Solicitor did not deliver any books and records until that date. A cursory inspection at that time showed a great many deficiencies. In addition, a client complaint has been received and records, not yet produced, are required for that account.

The Solicitor gave additional excuses which the Committee does not accept as being reasonable. It appears that most of the delay in producing such records is procrastination on the part of the Solicitor.

22nd June, 1995

Your Committee briefly considered a more serious penalty but rejected it. There is no evidence of dishonesty. Most of the Solicitor's practice is criminal work. He appears not to know how to set up and keep proper accounts. The recommendation is given to impress on him the need to learn how to do so and to keep proper books of account in the future.

Jeffrey Mark Levy was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 10th day of December, 1993

J. James Wardlaw, Q.C,  
Chair

It was moved by Ms. Puccini, seconded by Mr. Cole that the Reports be adopted.

Ms. Budweth asked that the following amendments be made:

- Report of April 6, 1995 - page 3., paragraph 10, first line - should be "August 4, 1994" not 199;
- Report of April 6, 1995 - first paragraph, second last line - should be \$13,934.78 "U.S".

There were no submissions and the Reports as amended were adopted.

It was moved by Mr. Finkelstein, seconded by Ms. Ross that the recommended penalty of the Committee in the Report dated April 6, 1995 be adopted, that is, that the solicitor be disbarred.

There were brief submissions by counsel and Duty Counsel in support of the recommended penalty.

There were questions from the Bench.

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

The motion on the recommended penalty was adopted.

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

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22nd June, 1995

The following discipline matters were not reached and were put over to the September Discipline Convocation.

Anthony William KLYMKO  
Stephen Anthony LANDAU  
Yaroslav MIKITCHOOK

CONVOCATION ROSE AT 6:00 P.M.

Confirmed in Convocation this                      day of                      , 1995

Treasurer