

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 21st January, 1999
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Adams, Angeles, Armstrong, Arnup, Backhouse, Carey, Carpenter-Gunn, Chahbar, Cole, Copeland, Crowe, Gottlieb, MacKenzie, Manes, Millar, Puccini, Stomp, Swaye, Topp and Wright.

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The reporter was sworn.

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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DISCIPLINE

Ms. Lesley Cameron, Senior Counsel-Discipline introduced Ms. Kelley McKinnon who acted as Duty Counsel.

Re: William BROWN - Bowmanville

The Secretary placed the matter before Convocation.

Messrs. Carey, Wright and Chahbar withdrew for this matter.

Mr. Hugh Corbett appeared for the Law Society. No one appeared for the solicitor nor was the solicitor present.

21st January, 1999

Mr. Corbett requested an adjournment on behalf of the solicitor on consent to the next Discipline Convocation in March.

The adjournment was granted.

Re: David WALFISH - Toronto

The Secretary placed the matter before Convocation.

Ms. Stomp and Ms. Backhouse withdrew for this matter.

Ms. Amanda Worley appeared on behalf of the Society and Mr. Alan Gold appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 19th November, 1998, together with an Affidavit of Service sworn 1st December, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 24th November, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th December, 1998 (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

Philip M. Epstein, Q.C., Chair
Tamara K. Stomp
Shirley O'Connor

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

Amanda Worley
for the Society

DAVID WALFISH
of the City
of Toronto
a barrister and solicitor

Alan Gold
for the solicitor

Heard: October 27, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 26, 1998 Complaint D5/98 was issued against David Walfish alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27, 1998 before this Committee composed of Philip M. Epstein, Q.C., Chair, Tamara Stomp and Shirley O'Connor. The Solicitor attended the hearing and was represented by Alan Gold. Amanda Worley appeared on behalf of the Law Society.

DECISION

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

Complaint D5/98

2. a) In the period October 1988 to December 1988, in a real estate transaction involving the sale of the property municipally known as 351 Sammon Avenue in East York (the "Property"),
 - (i) the Solicitor acted in a conflict of interest by acting for the vendor, Elizabeth Middleton, as well as the intermediary purchaser, Billie Ellen Steinberg, and the purchaser, Janet Tetzlaff, without disclosing this conflict of interest to Ms. Middleton and advising her to seek independent legal advice; and
 - (ii) the Solicitor acted in a conflict of interest by acting for the purchaser, Janet Tetzlaff, as well as the intermediary purchaser, Billie Ellen Steinberg, and the vendor, Elizabeth Middleton, without disclosing this conflict of interest to Ms. Tetzlaff and advising her to seek independent legal advice;
- b) In the circumstances of particular (a) above, the Solicitor placed himself in a situation of further conflict and preferred the interests of his intermediary purchaser client, to those of his vendor client by:
 - (i) revealing only to his intermediary purchaser client the fact that he was also acting for both the vendor and the purchaser;
 - (ii) failing to disclose to his vendor client the fact that the Property was being "flipped" at a substantial profit;
 - (iii) failing to disclose to his vendor client the fact that the intermediary purchaser was his daughter; and
 - (iv) ensuring that the profit from the sale of the Property was paid to his family members.
- c) In the circumstances of particular (a) above, the Solicitor placed himself in a situation of further conflict and preferred the interests of his intermediary purchaser client, to those of his purchaser client by:
 - (i) revealing only to his intermediary purchaser client the fact that he was also acting for both the vendor and the purchaser;

- (ii) failing to disclose to his purchaser client the fact that the Property was being “flipped” at a substantial profit;
- (iii) failing to disclose to his purchaser client the fact that the intermediary purchaser was his daughter; and
- (iv) ensuring that the profit from the sale of the Property was paid to his family members.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D5/98 and is prepared to proceed with a hearing of this matter on a date to be agreed upon.

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. Complaint D5/98 was issued on May 26, 1998 against the Solicitor, alleging the following acts of professional misconduct:

- (a) In the period October 1988 to December 1988, in a real estate transaction involving the sale of the property municipally known as 351 Sammon Avenue in East York (the “Property”),
 - (i) the Solicitor acted in a conflict of interest by acting for the vendor, Elizabeth Middleton, as well as the intermediary purchaser, Billie Ellen Steinberg, and the purchaser, Janet Tetzlaff, without disclosing this conflict of interest to Ms. Middleton and advising her to seek independent legal advice; and
 - (ii) the Solicitor acted in a conflict of interest by acting for the purchaser, Janet Tetzlaff, as well as the intermediary purchaser, Billie Ellen Steinberg, and the vendor, Elizabeth Middleton, without disclosing this conflict of interest to Ms. Tetzlaff and advising her to seek independent legal advice;
- (b) In the circumstances of particular (a) above, the Solicitor placed himself in a situation of further conflict and preferred the interests of his intermediary purchaser client, to those of his vendor client by:
 - (i) revealing only to his intermediary purchaser client the fact that he was also acting for both the vendor and the purchaser;
 - (ii) failing to disclose to his vendor client the fact that the Property was being “flipped” at a substantial profit;

- (iii) failing to disclose to his vendor client the fact that the intermediary purchaser was his daughter; and
 - (iv) ensuring that the profit from the sale of the Property was paid to his family members.
- (c) In the circumstances of particular (a) above, the Solicitor placed himself in a situation of further conflict and preferred the interests of his intermediary purchaser client, to those of his purchaser client by:
- (i) revealing only to his intermediary purchaser client the fact that he was also acting for both the vendor and the purchaser;
 - (ii) failing to disclose to his purchaser client the fact that the Property was being "flipped" at a substantial profit;
 - (iii) failing to disclose to his purchaser client the fact that the intermediary purchaser was his daughter; and
 - (iv) ensuring that the profit from the sale of the Property was paid to his family members.

4. The Solicitor has reviewed Complaint D5/98 and admits particulars 2(a)(b)(c) contained therein. Further, the Solicitor admits the facts in the within Agreed Statement of Facts.

IV. FACTS

Background

5. The Solicitor was called to the Bar in November 1940 and practises as a life member sole practitioner in Toronto.

The Sammon Avenue Transaction

6. Billie Ellen Steinberg is the married daughter and client of the Solicitor. Ms. Steinberg is a real estate prospector in that she is in the business of buying and flipping property. The Solicitor has participated in six transactions with his daughter over the years in which he has acted as either agent and/or solicitor on the transaction. One such transaction involved the property municipally known as 351 Sammon Avenue in East York (the "Sammon Avenue Property").

7. Elizabeth Middleton, also known as Elizabeth Leclair, was a long standing client of the Solicitor. In 1988, Ms. Middleton approached the Solicitor and advised him that she wanted to sell her home quickly because she wanted to move into a retirement home. Ms. Middleton was unsophisticated when it came to business dealings. She was currently living at the Sammon Avenue Property. Ms. Middleton told Mr. Walfish that she thought her home was worth about \$70,000.00 and asked him whether he knew any purchaser who would be interested in buying it.

8. The Solicitor did not recommend to his client, Ms. Middleton, that she obtain an appraisal on the home.

9. The Solicitor contacted his daughter and client, Ms. Steinberg, who offered to buy the Sammon Avenue Property home for \$67,000.00.

10. The Solicitor accordingly prepared an Agreement of Purchase and Sale naming Ms. Middleton as the vendor and Ms. Steinberg as the purchaser and, listing a purchase price of \$67,000.00. The transaction was scheduled to close on November 30, 1988. A copy of the Agreement of Purchase and Sale, which was executed by the parties on October 6, 1988, is attached at Tab 21 of the Document Book.

11. The Solicitor did not disclose to Ms. Middleton that he was also acting for Ms. Steinberg and subsequently for Ms. Tetzlaff, nor, did he recommend that Ms. Middleton obtain independent legal advise on the transaction.

12. Around the same time, the Solicitor was contacted by another long standing client, Janet Tetzlaff, who advised that she was looking for a home to buy and asked the Solicitor if he was aware of any available property. The Solicitor referred her to the Sammon Avenue Property.

13. The Solicitor drove Ms. Tetzlaff to the Sammon Avenue Property so that she can inspect the outside. In addition, Ms. Tetzlaff knocked on the door and introduced herself to Ms. Middleton. At all times, Ms. Tetzlaff believed that she was purchasing the Sammon Avenue Property from Ms. Middleton. She only learned about Ms. Steinberg's involvement five years after the transaction closed, at a time when the Solicitor was assisting Ms. Tetzlaff in arranging a second mortgage on the Sammon Avenue Property.

14. The Solicitor did not disclose to Ms. Tetzlaff that he was also acting for the vendor, Ms. Middleton, nor, did he recommend that Ms. Tetzlaff obtain independent legal advise on the transaction.

15. When Ms. Tetzlaff asked the Solicitor the price of the home, the Solicitor conferred with Ms. Steinberg and then advised Ms. Tetzlaff that the price was \$115,000.00. Ms. Tetzlaff agreed to this purchase price. The Solicitor prepared a second Agreement of Purchase and Sale naming Ms. Middleton as the vendor and Ms. Tetzlaff as the purchaser and, listing a purchase price of \$115,000.00. The transaction was scheduled to close on December 9, 1988. A copy of the second Agreement of Purchase and Sale, which was executed on November 10, 1988 by the parties, is attached at Tab 33 of the Document Book.

16. The Solicitor has advised the Law Society that he prepared the second Agreement of Purchase and Sale to exclude the intermediary purchaser, Ms. Steinberg, so that the Land Transfer Tax would not be payable twice.

17. Ms. Tetzlaff arranged her own mortgage with her employer, Dominion of Canada General Insurance Company ("Dominion"). Dominion agreed to provide Ms. Tetzlaff with a mortgage of \$80,000.00.

18. On November 29, 1988, the date prior to the closing date for Ms. Middleton's original sale of the home for \$67,000.00, the Solicitor made a cheque payable to Montreal Trust from his general account in order to discharge Ms. Middleton's first mortgage on the home. The cheque was in the amount of \$25,944.94. Attached at Tab 38 of the Document Book is a true copy of the cheque.

19. The Solicitor then made a cheque payable on December 2, 1998 to Ms. Middleton, again from his general account, to pay the balance of the funds due to her from the sale of the Sammon Avenue Property. The cheque was in the amount of \$38,687.90. Attached at Tab 38 of the Document Book is a true copy of the cheque.

20. Attached at Tab 39 of the Document Book is the Statement of Adjustments dated November 30, 1988 prepared by the Solicitor. It named Ms. Steinberg as the purchaser and Ms. Middleton as the vendor. While the Statement of Adjustments indicates that the balance due on closing by Ms. Steinberg was \$65,069.84 (purchase price of \$67,000.00 adjusted for \$2,000.00 deposit and property taxes owing), there is no indication in the Solicitor's records show that any funds were advanced by Ms. Steinberg.

21. On December 1, 1988 the Solicitor wrote to Ms. Middleton providing her with a reporting letter on the closing of the Sammon Avenue Property and enclosing his account indicating that his legal fees were \$2,000.00 in addition to disbursements. Attached at Tab 47 of the Document Book is a copy of the reporting letter and attached account, both dated December 1, 1988.

22. The Solicitor also billed Ms. Steinberg \$519.36 for his legal services as evidenced by the accounting attached at Tab 108 of the Document Book. The Solicitor did not render any account to Ms. Tetzlaff.

23. On December 8, 1988, Ms. Tetzlaff forwarded funds in the amount of \$31,552.70 in the form of a bank draft to the Solicitor, to be applied toward the purchase price. Ms. Tetzlaff had already advanced the \$5,000.00 deposit to the Solicitor. Attached at Tab 51 of the Document Book is a true copy of the bank draft receipt dated December 8, 1988.

24. On December 9, 1988, the closing date on Ms. Tetzlaff's purchase of the home for \$115,000.00, the Solicitor drew three cheques on his "household account". The Solicitor maintained a bank account described as "household account" into which he had already deposited the two sets of funds advanced by Ms. Tetzlaff and the mortgage funds advanced by Dominion. The Solicitor could not produce his books and records for this account although he produced an accounting, a copy of which is attached at Tab 108 of the Document Book.

25. The first of the three cheques drawn on the household account was a cheque in the amount of \$65,527.00 and was to reimburse the Solicitor's general account on account of the funds he had personally advanced earlier in the transaction. The Solicitor's personal funds had covered the cheque he had written to Ms. Middleton for the balance due to her on closing, the cheque he had written to Montreal Trust to discharge Ms. Middleton's mortgage and the cheque he had written on December 9, 1988 to the Treasurer of Ontario for the land transfer taxes. Attached at Tab 55 of the Document Book is a true copy of the first cheque drawn on the household account.

26. The second and third cheques drawn on the household account were each in the amount of \$25,000.00 and together represented the \$48,000.00 profit on the flip plus the \$2,000.00 in legal fees the Solicitor had charged Ms. Middleton. One cheque was payable to Ms. Steinberg, and the other cheque was payable Harvey Walfish, the Solicitor's son. Attached at Tab 55 of the Document Book is a true copy of the two cheques.

27. On December 9, 1988 title to the Sammon Avenue Property went directly from Ms. Middleton to Ms. Tetzlaff as evidenced by the Transfer/Deed which was registered as Instrument No. C52772, a copy of which is attached at Tab 54 of the Document Book.

28. Attached at Tab 52 of the Document Book is the Statement of Adjustments dated December 9, 1988 prepared by the Solicitor. It named Ms. Tetzlaff as the purchaser and Ms. Middleton as the vendor. The Statement of Adjustments indicates that the balance due on closing by Ms. Tetzlaff was \$110,050.20 (purchase price of \$115,000.00 adjusted for \$5,000.00 deposit and property taxes owing).

29. On December 23, 1988 the Solicitor wrote to Ms. Tetzlaff providing her with a reporting letter on the closing of the Sammon Avenue Property and enclosing his account indicating that he was not charging any legal fees in addition to disbursements. Attached at Tabs 59 and 60 of the Document Book is a copy of the reporting letter and attached account, both dated December 23, 1988.

Law Society's Investigation

30. By letter dated December 15, 1994 the Law Society wrote to the Solicitor and asked him questions regarding his conduct on the transaction. In response to this letter, the Solicitor's counsel, Alan Gold, wrote on the Solicitor's behalf by letter dated January 20, 1995, a copy of which is attached at Tab 134 of the Document Book. Mr. Gold advised the Law Society that it was the Solicitor's position that Ms. Middleton was disinterested in the specific identity of the purchaser and as she never asked about the \$115,000.00 figure in the closing documents, the Solicitor did not provide an explanation. Mr. Gold also confirmed that there had been no reference to independent legal advice by the Solicitor to any of his three clients.

31. By subsequent letter received from Mr. Gold on March 7, 1995, a copy of which is attached at Tab 147 of the Document Book, Mr. Gold reiterated the Solicitor's position. It was the Solicitor's position that:

"The vendor received the purchase price she wished for the property; the ultimate purchase from the intermediate purchaser paid the price she was prepared to pay for the property. Ms. Middleton was of course aware of Billie Ellen Steinberg as she signed the offer to purchase. Those parties each received precisely what they bargained for".

32. While Ms. Middleton may have been aware that a Ms. Steinberg was involved in the transaction, she did not understand that Ms. Steinberg was an intermediary purchaser who was going to turn around and "flip" the Sammon Avenue Property at a profit.

33. Further, the Solicitor admits that he did not disclose either to Ms. Middleton or Ms. Tetzlaff the fact that there was an intermediary purchaser, the fact that the intermediary purchaser was his daughter, the fact that the Sammon Avenue Property was being flipped at a profit of approximately \$48,000.00, or the fact that the profit from the sale of the Sammon Avenue Property was to be divided between his son and daughter.

34. The Law Society obtained an appraisal of the Sammon Avenue Property as at October 6, 1988, the date when the first Agreement of Purchase and Sale was signed. The appraisal showed that the Sammon Avenue Property was estimated to be worth \$103,000.00 at that time. The Law Society also obtained an appraisal as at November 10, 1988, the date when the second Agreement of Purchase and Sale was signed. The appraisal showed that the Sammon Avenue Property was estimated to be worth \$110,000.00 at that time. A true copy of the appraisals both dated April 9, 1996 are attached at Tabs 178 and 179 of the Document Book.

35. As Ms. Tetzlaff eventually paid \$115,000.00 for the Sammon Avenue Property, she paid close to fair market value and therefore suffered little financial damage as a result of this transaction. However, Ms. Middleton suffered financial damages in that she, as the original vendor, was clearly prevented from realizing \$48,000.00 extra on the sale of her home.

V. DISCIPLINE HISTORY

36. The Solicitor does not have a discipline history.

DATED at Toronto, this 18th day of August, 1998."

Note:

Paragraph 4: At the hearing Mr. Walfish through his counsel advised that he now admitted that the particulars together with the agreed facts constituted professional misconduct.

Paragraph 36: At the hearing the Committee was advised that the Solicitor had been reprimanded in Committee in 1977 for failure to honour an undertaking.

RECOMMENDATION AS TO PENALTY

The Committee recommends that David Walfish be suspended for five months effective March 15, 1999; that he pay costs to the Law Society of \$2,500; and, that prior to Convocation he produce evidence to the satisfaction of the Society that \$22,500 has been paid to Mrs. Middleton and that \$5,000 has been paid to Mrs. Tetzlaff.

REASONS FOR RECOMMENDATION

The Agreed Statement of Facts does not fully disclose all of the circumstances which gave rise to this complaint. In essence, the Solicitor, who is now 83 years of age, was approached by his client back in 1988, Elizabeth Emily Middleton, who wished to sell her home. Ms. Middleton had reached retirement age and wished to go into a retirement home and asked the Solicitor for his help in selling her modest home. She thought that the property was worth approximately \$70,000, but she was clearly unsophisticated and did not have an appraisal done of the property, nor did she appear to have any other information that would assist in determining the value of the property at that time.

Mr. Walfish clearly recognized an opportunity. The Solicitor's daughter, Billie Steinberg, was a speculator in real estate. The Solicitor had acted for her from time to time before when she had essentially bought properties for the purpose of "flipping" them. The Solicitor obviously had no difficulty in persuading Mrs. Middleton to sell her property for \$67,000 - some \$3,000 less than she thought it was worth - to the Solicitor's daughter who quickly entered into an Agreement of Purchase and Sale with Mrs. Middleton. It is an aggravating factor in this case that not only did Mrs. Middleton, as an unsophisticated vendor, offer to sell the property for less than it was worth, but that was not sufficient for Mr. Walfish and the price was reduced by a further \$3,000.

Within a very short time, Janet Tetzlaff, the long standing client of the Solicitor, a person with whom the Solicitor had had an intimate relationship from time to time, came to see the Solicitor, looking to purchase a modest property for approximately \$70,000. The Solicitor steered the client, Janet Tetzlaff, into purchasing the Middleton property from Billie Steinberg at a price of \$115,000. It is hard to say what price Tetzlaff should have paid for this property in a free and open market, but there was some appraisal evidence in the material that indicated that the property had a value of about \$103,000 at the time of the subject transaction. It appears therefore that Mrs. Middleton grossly undersold her property and that Mrs. Tetzlaff, to some degree, overpaid for her property. All of this was facilitated by the Solicitor who was helping his daughter in a speculative real estate transaction. It appears from the Solicitor's own statement that the daughter subsequently split her profit with her brother, the son of the Solicitor. We are not told what, if anything, the Solicitor received from this transaction other than legal fees, but certainly his direct family members gained, and gained rather significantly.

The Society put its case on the basis that this was a serious conflict of interest by the Solicitor. The Committee felt that not only was it a serious conflict, but that the conduct of the Solicitor clearly violated Rule 1 and Rule 3 of the Rules of Professional Conduct.

The Solicitor, in clear and blatant breach of his fiduciary duty, allowed Mrs. Middleton to grossly undersell her property and Mrs. Tetzlaff to overpay for it, all to the benefit of his own family. The conduct is shocking.

Mr. Gold, in his able argument, did not try to defend the Solicitor's conduct. He took the position that the Solicitor had been at the bar for fifty-eight years and, except for a somewhat minor discipline matter back in 1977, the Solicitor had no discipline record.

Mr. Gold, albeit very late in the day, produced a number of character letters that testified to the good character of the Solicitor. Regrettably, the character letters do not reflect the fact that the authors thereof are aware of the particular circumstances of the charge which the Solicitor faced before the Discipline Committee.

Counsel for the Society took issue with the late delivery of the character letters and lack of opportunity to investigate them, and in return Mr. Gold was prepared to stipulate that the writers of the character letters knew that the Solicitor had a discipline problem, but were unaware of the specific details.

There were some additional letters received in the character brief which cannot be properly described as character letters and we declined to admit those. (They were contained at Tabs 15, 16, 17 and 18 and will be removed from the character reference brief.)

Mr. Gold went on to argue that this was an isolated act in the face of the Solicitor's long career and that while he did not excuse the Solicitor's conduct, it should be looked at in the perspective of his very long career.

A number of cases were given to us by both sides and we did not, in the particular circumstances of this case, find any of them particularly helpful. After some discussion of the matter, counsel took a moment to consider whether they could agree upon a joint submission. Counsel for the Society and counsel for the Solicitor ultimately agreed upon a joint submission which not only had the approval of both counsel, but was also specifically approved by Mrs. Tetzlaff who attended the hearing.

There was an earlier exchange of correspondence between Mrs. Middleton's counsel and Mr. Gold, and Mrs. Middleton is receiving a sum, by way of restitution, with which she is apparently content and for which she is proffering a full release to the Solicitor.

The panel is extremely mindful that this is a joint submission by well informed counsel who have had an opportunity to consider this matter over a long period of time and have reached this joint submission after discussion on the merits. The Committee views the Solicitor's conduct as very serious. We do note, however, that it appears to be aberrational in the Solicitor's long history at the bar. Obviously, a significant suspension will be a serious blow for a person of Mr. Walfish's age.

We do leave this matter, however, with some doubt. The Solicitor was in a significant position of trust, with Mrs. Middleton, who was an elderly woman who relied upon him and in a further significant position of trust with Ms. Tetzlaff with whom he had had an intimate relationship off and on for many years. They trusted him and relied upon him and he deeply let them down. He did so to the benefit of his own children. Had there not been a joint submission, the panel would have considered a much more serious penalty.

In all of the circumstances however, we are not inclined to interfere with the joint submission. That joint submission is that the Solicitor be suspended for five months; that he pay costs to the Society of \$2,500; that he pay \$22,500 to Mrs. Middleton and \$5,000 to Mrs. Tetzlaff. The Solicitor is to give an undertaking that he will never again act for two private persons in any transactions. It is a condition of the joint submission that the funds to the Society, to Mrs. Middleton and to Mrs. Tetzlaff be paid before this matter reaches Convocation. If those monies are paid and if the undertaking is signed and delivered, then we recommend to Convocation that the Solicitor be suspended for five months effective March 15th, 1999.

David Walfish was called to the Bar on November 21, 1940.

ALL OF WHICH is respectfully submitted

DATED this 19th day of November, 1998

Philip M. Epstein, Q.C.

Ms. Worley asked that the following correction be made to the Report:

page 11, last line - that the words "for approximately \$70,000" be deleted.

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 5 months effective March 15th, 1999, pay costs in the amount of \$2,500 and that the solicitor produced evidence to the satisfaction of the Society that \$22,500 had been paid to Mrs. Middleton and that \$5,000 had been paid to Mrs. Tetzlaff.

Both counsel made submissions in support of their joint submissions made before the Discipline Committee for the recommended penalty.

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

Carried

APPLICATION FOR READMISSION

Re: Julie Evelyn AMOURGIS - Toronto

The Secretary placed the matter before Convocation.

Ms. Angeles and Mr. MacKenzie withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Society and Mr. William Trudell appeared for the applicant who was present.

Convocation had before it the Report to Convocation dated 23rd December, 1998 (marked Exhibit I). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

THE LAW SOCIETY OF UPPER CANADA

Susan Elliott, Chair
Nora Angeles
Mary Eberts

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

Christina Budweth
for the Society

JULIE EVELYN AMOURGIS
of the City
of Toronto

William M. Trudell
for the solicitor

Heard: August 21, 22 and December 18, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF THE LAW SOCIETY ACT

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

REPORT TO CONVOCATION

PANEL:

Ms. Susan Elliott
Ms. Nora Angeles
Ms. Mary Eberts

Chair
Member
Member

COUNSEL:

Ms. Christina Budweth
Mr. William M. Trudell

for the Law Society
for the Applicant

HEARING DATES:

August 21 and 22, 1997
December 18, 1997

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Nature of This Application

This is an application by former member Julie Evelyn Amourgis brought pursuant to section 46 of the Law Society Act, R.S.O. 1990, c. L. 8, for readmission to the Law Society of Upper Canada.

The Hearing

The hearing in this matter was conducted in public August 21 and 22, 1997 and December 18, 1997 before a panel composed of Susan Elliott, Chair, Nora Angeles and Mary Eberts. Throughout the hearing the Law Society was represented by Christina Budweth and the Applicant was represented by William Trudell.

Viva voce evidence was received from the Applicant and from Thomas Bastedo, Edwin A. Goodman, Ruth Grosberg, Dr. Robert Wood Hill, Edith Blake, Richard B. Jones and James G. Hodder.

In total, five exhibits were received, being:

- Exhibit 1: Joint Document Book
Exhibit 2: Materials in support of Julie Amourgis
Exhibit 3: Case report of Sigroum Office management et. Al. V. Milanis et al. Heard April 11 and 29, 1986, in which the Applicant appeared as counsel for the Plaintiff, a family company.
Exhibit 4: Document Book of the Law Society
Exhibit 5: Letter from Bruce Daley in support of the Applicant's readmission.

The Joint Document Book (Exhibit 1) contained:

1. Original complaints against the Applicant in 1985 and 1986.
2. Order of Convocation in 1982 together with Report of the Discipline Committee and Recommendation as to Penalty of the Discipline Committee re: Constantine Amourgis, the Applicant's husband.
3. Thirteen additional character references of the Applicant.
4. Report and Decision of the Discipline Committee re: *Julie Evelyn Amourgis* dated April 6, 1987 and the Order of Convocation dated April 23, 1987.
5. The Application for Readmission and medical reports also filed in the Applicant's materials.

The Materials in support of Julie Amourgis (Exhibit 2) contained:

1. Report and Decision of the Discipline Committee, Minority and Majority Decisions dated April 6, 1987 and March 12, 1987 respectively.
2. Notice of Application for Re-admission, dated March 28th, 1996.
3. Statutory Declaration of Julie Evelyn Amourgis, dated July 16, 1996.
4. Reports from Dr. Wood Hill, Dr. Murray Wilson and Caroline Kohn, psychotherapist.
5. Statutory Declaration of Edith Blake.
6. Letters from people in support of the application, including members of the bar (10), business associates (4), personal friends (5), family members (8) and past clients (4).

The Document Book of the Law Society (Exhibit 4) contained:

1. Order of The Honourable Mr. Justice Gray, dated June 10, 1987 appointing the Law Society as Trustee of the Applicant's records and files.
2. Staff Trustee's Statement of Account for Julie E. Amourgis dated March 13, 1997.
3. List of Lawyers' Fund for Client Compensation payments related to the Applicant.
4. Various letters dated 1987, 1988 and 1989 relating to obtaining client files from the Applicant.
5. Order of the Honourable Mr. Justice Sheard, dated March 13, 1997 discharging the Law Society as Trustee of the Applicant's former practice.

The Hearing Panel was satisfied that all material relevant to the application was before it for review.

General Background Facts

The Applicant was called to the bar March 26th, 1971. On April 23, 1997 she was disbarred by order of Convocation. Convocation at that time had before it both a Majority Report and a Minority Report from the Discipline Committee which heard the evidence.

The Majority Report (J.D. Ground and G.H. Lohead) recommended disbarment. The Minority Report (I.W. Outerbridge) recommended suspension for a period of 18 months.

The Majority Report indicated the then member (the Applicant) had engaged in a number of unrelated incidents and transactions and a pattern of dishonesty over a long period of time; that she defied the Society and went to great lengths to obscure the fact that her husband was engaged in practice with her following his own disbarment. The Majority was "not persuaded that Mrs. Amourgis was in terror of her husband or that her conduct could be explained or excused by her relationship with her husband."

The Minority Report felt there was no pattern of dishonesty and that the conduct needed to be viewed in light of both the ethnic community in which the member lived and worked and that the committee "ought not to be too quick to dismiss as unsatisfactory the proffered explanation of the stormy but tenacious relationship between the Solicitor and her husband."

Further details of the disbarment proceedings are set out below.

Following Convocation's adoption of the Majority Report, the Applicant appealed the decision of Convocation. This Hearing Panel had no evidence before it as to that appeal, other than that it took place and that at least one reason for pursuing the appeal was Mrs. Amourgis' belief at the time that she had been disproportionately punished for the activities of her husband and his disbarment rather than for her own actions.

The Hearing Panel heard evidence from various people, Mr. Thomas Bastedo in particular, who was a bencher at the relevant time and a classmate of the Applicant's, that the case of the Applicant's husband, Constantine Amourgis, and then of Julie Amourgis herself had been quite public and notorious in the community at large, the family law bar and the Law Society.

Outline of The Issue and Recommendation in this Readmission Hearing

The test for readmission to the Society has been stated various ways. Counsel in this hearing both referred to the Goldman decision and the test as stated therein:

"...unless the Applicant makes out a case of very special circumstances, and has shown that he has entirely purged his guilt and has in all other respects fulfilled the requirements for reinstatement the Law Society should be slow to permit restoration to the rolls. Convocation accepts that substantial and satisfactory evidence is needed to show there is no probability of the Applicant offending in the future."

Other cases have described the test in slightly different ways. All cases consistently impose a heavy onus on Applicants to show a long course of conduct since disbarment culminating in their present character being unimpeachable and that they have entirely purged their guilt.

The Applicant has been married to Constantine Amourgis since 1963, when she was 21 years old. Her disbarment involved his activities as a disbarred lawyer present in her practice. The Applicant continues to reside with her husband, which is at the crux of the issue before us.

In this case the questions of whether the Applicant has purged her guilt and is presently of unimpeachable character both lead to the question of whether by continuing to live with Mr. Amourgis, the Applicant, Mrs. Amourgis, is at risk of re-offending. If she did not reside with him, the decision to recommend readmission would have been easier, because all her other activities since disbarment show a person who has recovered from a series of tragic life events and has made her mark as a worthwhile, productive member of society.

The question of whether to recommend the readmission of this Applicant is, as it was at the time of her disbarment, reduced to an analysis of the nature of her relationship with her husband. Every witness, including the Applicant, has described the Applicant's husband as being a manipulative, domineering man with no moral compass. He is also described as charismatic and charming. Some of the witnesses have met the husband, most only know of him through the Applicant's descriptions. The nature of Mr. Amourgis' character was not disputed by the Law Society, indeed the Society appears to agree with the characterizations and be concerned about him.

The Hearing Panel has anxiously considered its recommendation given this relationship and its previous affect on the Applicant's ability to practice law in accordance with appropriate standards of conduct.

The Hearing Panel acknowledges the submission of counsel for the Law Society that as Mr. Amourgis is still "in the picture" we should have a real concern. We have had such a concern, we have considered the evidence, medical reports and professional and personal opinions and we have come to the conclusion that the Applicant should be readmitted.

The mere fact of residence with her husband, which the Applicant has satisfactorily explained, cannot overwhelm the rest of the evidence that shows the Applicant has changed her character and, over a period of approximately ten years, has led an increasingly productive and unimpeachable life.

The Hearing Panel was satisfied that if Mrs. Amourgis did not live with Mr. Amourgis, we would have no hesitation in recommending her readmission. We believe that human rights principles prevent the Society from judging and condemning someone simply on the basis of domestic choices, and require an inspection of the actual risk of harm that can fairly be said to arise from those choices. The evidence before us has demonstrated that Mrs. Amourgis has taken every reasonable step to prevent harm to clients and the public from her living with Mr. Amourgis, and that these steps are an adequate safeguard of the public interest. In light of these steps, and their prospects of success, the Hearing Panel is unwilling to condemn Mrs. Amourgis on the basis simply of an association which she is, in law and principle, entitled to maintain.

The Applicant's Disbarment

The Applicant was represented by Claude Thomson, Q.C. and Neil Smitheman at her discipline hearing held April 6, 1987. The Society was represented by Thomas Lockwood and John Twohig. The Discipline Committee issued both a Majority and Minority Report, referred to previously.

The Applicant was found guilty of the following particulars (details abbreviated) which arose from her conduct in 1984 and 1985:

(Complaint D69/85)

- (a) she did, without the express approval of Convocation... employ in relation to her practice...Constantine Amourgis, a person she knew had been disbarred...
- (b) she permitted disbarred solicitor, Constantine Amourgis, to counsel her client Victoria Saunders, in her presence to falsify a claim to the client's insurers...
- (b) she deliberately breached escrow conditions respecting the release of funds in the amount of \$25,000...by releasing said funds in part to her own benefit knowing she had not fulfilled the conditions;
- (e) ...she failed to return deposit monies (\$3,000) despite an Order of the Provincial Court requiring her to do so;

(Complaint D36/86)

- (a) ...she falsely testified under oath in the course of an assessment before Master Saunders...that her signature appeared as an endorsement on a cheque...when she knew or ought to have known that the endorsement signature was not her own but that of Constantine Amourgis...

(Unnumbered Complaint dated May 20, 1986)

- (a) She did, at a time when she knew or ought to have known that Revenue Canada Taxation had served a Requirement to Pay upon the Legal Aid Plan...attempt to induce, encourage or counsel various solicitors...to execute and file with the Legal Aid Plan various letters, Reports and accounts which were false and misleading in order to induce the Legal Aid Plan to forward payment to the said solicitors which funds were then appropriated by the said Julie Evelyn Amourgis...in furtherance of a scheme to avoid the collection process of Revenue Canada Taxation.

At the time of her original hearing, Mrs. Amourgis had no disciplinary history. According to the Reasons for Recommendation of the Majority, counsel for Mrs. Amourgis raised in the hearing the fact that his client's husband had been abusive of her, she was under pressure from him and she was influenced by her love for him and her desire to keep her family together.

The majority were "not persuaded that Mrs. Amourgis was in terror of her husband, or that her conduct can be explained, let alone excused, by her relationship with her husband and his influence upon her."

The minority report, while agreeing that the complaints were proven, believed that the extenuating circumstances asserted by the Solicitor should be considered in mitigation with respect to some of the charges. Mr. Outerbridge found that "the husband must be an impossible, insensitive, totally arrogant individual to have exposed his wife to these proceedings which he must have known would be inevitable. In addition, I believe that we must take care not to appear to be attempting to punish the husband by punishing his wife." He went on to say that four of the complaints in themselves (D69/85 (b) (c) and (e) and May 20, 1986 (a)) would not justify more than a reprimand.

Convocation adopted the Majority Report and Recommendation on April 23rd, 1987.

The Applicant's Personal and Professional Life Prior to Disbarment

Personal Life

The Applicant was born in 1941 in Toronto. She married Constantine Amourgis in 1963 when she was 21 years old. They have three children born in 1965, 1969 and 1974. Two of the children are pursuing legal careers.

Mrs. Amourgis taught school for one year before her first child was born. After her first child's birth, she enrolled in law school, at her husband's urging, graduating in 1969. Her husband began practising law in 1968 and following her articles at another firm she joined him in practice, starting in 1971.

From 1971 to 1978 the Applicant carried on a general practice with a focus in family law and civil litigation. In 1978 she began to restrict her practice to family law while her husband dealt with other areas of practice. From time to time their firm employed law students and other lawyers.

Constantine Amourgis was disbarred in 1982 for misappropriating and mishandling trust money, failing to honour a personal undertaking, preparing and maintaining deceptive letters designed to mislead the Law Society, failure to maintain up to date books and records. He misappropriated \$213,342.29 from a variety of clients and was found guilty of thirty-three charges of professional misconduct.

The Applicant testified that following her husband's disbarment she assumed control of all aspects of the practice and that it was a mess. Prior to her own disbarment, the Law Society was in auditing the books and records almost monthly for a period of six or seven months.

Mrs. Amourgis testified that at this time of her life, she was operating under a great deal of emotional stress and she was physically and mentally not well. She was isolated from her extended family and most of her friends. As a result of her husband's disbarment, she and he had become social pariahs. She says he permeated all aspects of her life and there were no boundaries between them at all. She admits the activities which led to her disbarment were her own actions, not her husband's, but says that he was an overwhelming presence in her life.

Dr. Murray Wilson's Reports

Filed in evidence were two medical reports by Dr. Murray Wilson dated January 14, 1988 and April 12, 1989. The reports indicate Dr. Wilson first saw Mrs. Amourgis as a patient in January 1986 (preceding her discipline hearing) and that "she was depressed to the point where he was sometimes fearful for her life"; she was "under stress both in a difficult marriage and in her law practice, the two being inextricably mixed." His diagnosis, which included activities following her disbarment, was of "anxiety and depression". His work with her was directed toward re-establishing self-esteem.

Dr. Wilson in his second report outlined the history of Mrs. Amourgis' early years as one of chronic conflict with a domineering mother who ostracised her following her marriage to Mr. Amourgis. Then, Mr. Amourgis dominated her and threatened her that he would take away the children if they separated. His behaviour as displayed to Dr. Wilson was that if Mrs. Amourgis attained any level of independence she would be expelled from the house. He notes that even in April of 1989 "The family lives in paranoid isolation with virtually no one having their home address or phone number, including me." His diagnosis at that time was Dependent Personality.

Family Life

Much of the time at hearing was occupied with evidence concerning the state of the Amourgis marriage and the effect of Mr. Amourgis on Mrs. Amourgis' mental health both at the time of disbarment and looking to the future should Mrs. Amourgis be readmitted.

The overwhelming evidence is that Mr. Amourgis is an extraordinarily difficult individual to be married to and that he had a profound effect on Mrs. Amourgis. Until she obtained employment as a real estate agent following her disbarment she did not have her own bank account nor did she know how to handle money - her husband did it all and his personality was such that she let him control their life in every aspect.

What kept Mrs. Amourgis married to such a difficult person was and is her belief that for the sake of the children it is better to have two parents, even though their own relationship is highly dysfunctional, than to have a divided family. This was coupled with her belief that Mr. Amourgis would turn the children against her if she left the marriage, which he had threatened to do. Other witnesses testified they counselled Mrs. Amourgis to leave her husband but that she absolutely refused to do so because of this strongly held belief in the family unit. Mrs. Amourgis testified that her own parents divorced when she was in her forties and she was deeply affected by their separation, even at that age.

Whether others would have behaved in the same fashion and whether Mrs. Amourgis' theory is right or not in her circumstances, is not relevant. What is relevant is that she persevered in her marriage through events which would undoubtedly have caused the end of most marriages and that she did so not because she loved her husband but because she loved her children; she feared her husband would follow through with his threats and turn her children against her should they divorce. On the evidence of the nature of the family relationships which existed in this family and the amount of work Mrs. Amourgis has put into establishing new family relationships, it may be that her fears were well founded at the time.

Regardless of the merit of her fears, it is accepted that the Applicant had such fears at the time of her disbarment and that she also believed an intact marriage was the best role model for her children.

Professional Life

The evidence indicates that Mrs. Amourgis had no separate professional life prior to her disbarment. Dr. Wilson described Mrs. Amourgis' professional life following Mr. Amourgis' disbarment as "like a puppet without a puppeteer". Mrs. Amourgis' own disbarment arose in large part because her husband would not leave the practice even after he was disbarred. There was no separation of family life and professional life. Mr. Amourgis dominated both spheres.

Other Significant Events Close in Time to the Disbarment

Appearance as Counsel

Although not forming the subject matter of the complaints which led to her disbarment, Mrs. Amourgis had also misled a court in 1986, about one year before her own disbarment, in the case Sigroum Office Management et al. V. Milanis et al. (1986) C.P.C. (2d) 48 (Ont. D.C.). Mrs. Amourgis was counsel for the plaintiff in an action brought to set aside a transfer on behalf of creditors of the defendant.

The plaintiff was the Amourgis family corporation, which was pursuing the action in an attempt to recover legal fees. The case involves a motion by the defendant to set aside a default judgment granted January 9, 1986. As a result of a series of procedural events in the case, the court made the following statements "The transcript discloses that Mrs. Amourgis did not advise Judge Phelan of Judge Mandel's order. This was a very serious indiscretion on the part of Mrs. Amourgis...Indeed, in this regard there is some suggestion in the transcript that Mrs. Amourgis might have led Judge Phelan to believe that a judgment had been obtained in the Harris action. Not only is it the professional responsibility of a barrister to be frank with the Court, it is his or her duty not to mislead the Court and to clarify any matters which the Court may appear to misunderstand".

This event was characterized as "sharp practice" by Ms. Budweth when she cross-examined the Applicant about it. Mrs. Amourgis allowed that she did not go as far as she should have in advising the then unrepresented defendant.

Surgery for Hysterectomy

Almost immediately following her disbarment Mrs. Amourgis entered hospital for a hysterectomy. This physical problem, coupled with her emotional state of distress was referred to by Dr. Wilson as among the contributing factors to her depression.

During her stay in the hospital, her husband visited her and three his wedding ring at her, apparently as a commentary about their marriage now that she could have no further children. Mrs. Amourgis testified that she was at that time already unlikely to have more children but the actions of her husband underscored his view of their marriage and his treatment of her.

Real Estate Licensing Course and Examination

In the summer of 1987, following her disbarment, Mrs. Amourgis studied for the real estate licensing exams and obtained her license to sell real estate. This course of study coincided in time with both her recovery from hysterectomy surgery and her avoidance of the Sheriff attending at her home to seize files for the Law Society's Staff Trustee.

When challenged by Ms. Budweth to reconcile her ability to study for this course and yet be unable to cope with requests to produce client files, Mrs. Amourgis said her life was very, very difficult and that with physical and emotional problems you can cope with some things, some days and not other things, other days. The Hearing Panel accepts this to be true.

Law Society Staff Trustee Involvement

The Law Society called Mr. Gardner Hodder, a lawyer in private practice who was involved in the staff trusteeship of the Applicant's practice since June of 1987. There was evidence that for two years following the disbarment, the Staff Trustee was trying to obtain files to wind up the Amourgis and Amourgis practice. While some of those files were formerly those of Mr. Amourgis, Mrs. Amourgis had taken over his practice on his disbarment and all the files were under her care and control.

It appears that Mrs. Amourgis believed to some extent her counsel was dealing with the requests and, to some extent she was simply unable to cope. She says she did her best but there is some evidence, by her own admission, that she was not really aware of what was happening with the files and she had a responsibility to her clients to see them properly transferred. The Trusteeship order was issued about two months following the disbarment.

The Law Society view of this time period and these events is that Mrs. Amourgis was evasive and uncooperative. Mrs. Amourgis' view is that she was in turmoil and couldn't cope. The Hearing Panel accepts the medical evidence and testimony of friends of Mrs. Amourgis as to her mental and physical state during this time period. This testimony accords with that of Mrs. Amourgis.

As to the co-operation in general with the Law Society in turning over files a letter was filed with the Hearing Panel from Gary Snider, a lawyer in North York. He wrote that before her 1987 discipline hearing Mrs. Amourgis asked him and a few other lawyers to look after many of her ongoing client files and that he did so, including meeting with Mr. Lockwood to review the files Mr. Snider was taking. He said he saw Mrs. Amourgis after her hearing and she appeared to be in a state of emotional collapse. He also visited her in the hospital following her surgery and found it was evidence she was in great distress.

Mr. Hodder's evidence was that although he initially tried to contact Mrs. Amourgis and obtain the missing files in the summer of 1987, by the fall of 1987 he had generally given up hope of obtaining them. Counsel for Mrs. Amourgis took the position that the Law Society was actively present in her office for months prior to her disbarment and that following disbarment and following her surgery she was in contact with the Society through her counsel and through personal conversations with some members of the Society's staff.

Exhibit 5 filed at the hearing was a letter from Bruce Daley, Mrs. Amourgis' counsel during this time period. Although he had no notes to support his recollection, his memory was that "At all times, Ms. Amourgis was concerned with the well being and interests of her clients and it was clear to me she had strong professional feelings in this regard." He also recalls that following the dismissal by Divisional Court of her appeal, Mrs. Amourgis withdrew to some extent from day to day problems as she was devastated by the decision.

While the Law Society did not obtain all the files from Mrs. Amourgis and had to take many steps in order to secure the balance of them, the Hearing Panel is not prepared to make any finding that those series of events in and around 1987 prove Mrs. Amourgis is at risk of re-offending or that she did not entirely purge her guilt by now.

The Applicant's Personal & Professional Life since Disbarment
Personal Life

Beginning with the real estate course shortly following her disbarment and, over a lengthy period of time up to the date of hearing, Mrs. Amourgis gradually re-built her life, both personally and professionally. The end result is that she is completely independent from her husband, although they do live under the same roof. She has established good relationships with her children by working with each of them individually and she says she no longer fears that her husband might alienate them. She says she is free from the influence of Mr. Amourgis and that they lead entirely separate lives. While the Hearing Panel believes this evidence, bolstered as it is by numerous independent observances and testimony from friends and doctors as to Mrs. Amourgis' ability to now cope with Mr. Amourgis, it remains an anomaly that they are still married and live under one roof.

Considerable time at hearing was spent testing the notion that Mrs. Amourgis would not "cave in" or revert to her former behaviour if Mr. Amourgis threatened once again to take away the children's affections or started trying to dominate her work place. Mrs. Amourgis takes the position that her husband will not be allowed to set foot in her office if she is readmitted. He is not to attend on the premises nor is he to have any client contact whatsoever. This position has been encouraged by her friends and supported by her family. Dr. Wood Hill, who is Mrs. Amourgis' current counsellor, gave evidence that he and Mrs. Amourgis had discussed various scenarios in which Mr. Amourgis might directly or indirectly "enter" the workplace (for example, by referring clients) should she be readmitted and that he was satisfied Mrs. Amourgis would rigidly adhere to a non-interference policy by her husband.

The fact that everyone, including Mrs. Amourgis, still feels it necessary to keep Mr. Amourgis at bay, as a precaution, gives the Hearing Panel some considerable concern. However, the evidence supports the conclusion that Mrs. Amourgis will not be subject to his influence should he try to exert it and that she has sufficiently developed as a person, has grown from her experiences and from her therapy sessions and counselling so that he is no longer able to dictate any aspect of her life or thinking. She is financially independent and he is not dependent on her financially. She has a separate social life and her own friends. Both Mrs. Grosberg and Dr. Wood Hill testified that they each believe that if Mr. Amourgis were to attempt to interfere in his wife's practice she would leave him.

Mrs. Amourgis' current self-assessment of her marriage and her relationship with her husband is that "I don't feel I can be the subject of emotional blackmail today as I had been at the time of my disbarment. I would like to keep the home life peaceful but that's not a priority.

Professional Life

Since her disbarment Mrs. Amourgis has worked as a real estate agent for some time and as the economy slowed down she re-entered her first career of teaching. She has been quite successful as a supply teacher. She has developed a network of contacts and has worked at establishing a good reputation as a teacher. She is a qualified French teacher in high demand.

Ruth Grosberg is a teacher of some twenty years experience who gave evidence on Mrs. Amourgis' behalf. Mrs. Grosberg is married to a lawyer and has known Mrs. Amourgis and, to some extent Mr. Amourgis, since 1969. More recently she refers teaching assignments to Mrs. Amourgis and she commented about that aspect of Mrs. Amourgis' current life. In describing Mrs. Amourgis' work as a teacher Mrs. Grosberg said Mrs. Amourgis is an ambitious and dogged worker who will take the worst schools and the most challenging students and succeed with them. She gave evidence that in her opinion Mrs. Amourgis' is an amazing teacher, totally reliable and a very good worker. Mrs. Grosberg also felt that after the period of suffering that Mrs. Amourgis has been through she would not re-offend because she would not ever want to go through such suffering again.

Evidence of Dr. R. Wood Hill

Dr. Wood Hill was called as an expert in Forensic Psychiatry. He had filed a written medical report concerning the Applicant. He first met Mrs. Amourgis in 1994 and has seen her regularly since 1996. He testified that Mrs. Amourgis never suffered from a major mental disorder such as schizophrenia and that he would not classify her now as a Dependent Personality which is now viewed more as a descriptive term and is not a recognized disorder currently.

Dr. Wood Hill has seen Mrs. Amourgis well over forty times since 1994. He has had extensive discussion with her about her marriage and her plans to try to return to practice if readmitted. In his opinion she has changed considerably from the description made by Dr. Wilson in 1988 and she has a different mental attitude. He feels she has moved from a situation akin to an abused person - physically and emotionally - to one where she makes independent judgments and decisions and relates to people on their own terms, rather than as dictated by her husband.

As to whether Mrs. Amourgis continuing to live with Mr. Amourgis is either unusual or should cause the Hearing Panel or Convocation or the public any concern, his evidence tested both under cross examination and by the Hearing Panel was quite clear:

“I’m not sure that it’s that unusual (continuing to live with her husband)...it’s not uncommon in my practice to regularly see people...remaining in what they themselves will describe as an unpleasant relationship.

I don’t believe there is a deficiency in the lady. There clearly was a major and total compromise...She was clearly a very depressed woman...depression as a clinical phenomena, can often compromise and/or see us using poor judgments

I think she is well equipped to handle an influence if it presents itself...I think this time around there’d be a whole different scenario but I can’t prove that.”

Dr. Wood Hill’s opinion was that from a psychiatric perspective there is no reason why Mrs. Amourgis could not resume the practise of law as fundamental changes have occurred in her relationship with her husband.

Dr. Hill was questioned extensively about Mrs. Amourgis’ ability to maintain her “new moral compass.” His opinion was that this was not a new moral compass but rather a return to the ethical standard with which she was raised and her family’s values. There was no evidence of any delinquent behaviour as a child and Dr. Hill felt Mrs. Amourgis possessed traditional ethical values to which she has now returned having learned to cope with Mr. Amourgis and his influence on her life. In his written report, Dr. Hill states that Mrs. Amourgis is a strict and serious woman who holds herself to a high standard of conduct. The character evidence and viva voce testimony of other witnesses, coupled with the lack of prior discipline history, all serve to reinforce Dr. Hill’s opinion. The period surrounding her disbarment was aberrant behaviour and the conduct Mrs. Amourgis now evidences is her normal state.

If Mrs. Amourgis is readmitted Dr. Wood Hill feels she should have intensive therapy for the first six months to a year since the theoretical discussions they have had about her returning to practice would then become reality. He doesn’t profess to have any concern other than that he would want to hear specific details of how things were going in the practice, to monitor it.

Report of Dr. Caroline Kohn

A written medical report from Dr. Caroline Kohn, a psychotherapist, dated November 1, 1996 was filed by the Applicant. Dr. Kohn conducted ten personal interview sessions with Mrs. Amourgis the purposes of which were to determine with Mrs. Amourgis her preparedness for reinstatement generally and specifically her ability to deal effectively with any possible attempt by Mr. Amourgis to interfere in any future legal practice.

Dr. Kohn's conclusion, based on these interview sessions, is that Mrs. Amourgis should be given the opportunity to redeem herself and practice law.

Character Evidence

Viva Voce Testimony

Two of the witnesses who gave viva voce evidence and also wrote letters in support are well known in the legal community. Both Tom Bastedo and Eddie Goodman testified on Mrs. Amourgis' behalf. Both gentlemen indicated they had virtually never given such evidence before and did not make it a habit of appearing before discipline or readmission committees of the Society.

Thomas Bastedo

Mr. Bastedo has known Mrs. Amourgis since 1966, in law school. He practices in the family law bar and was aware of her disbarment. He had not seen her since 1987, except during the last two years when Mrs. Amourgis contacted him to discuss her application and her prospects for practice.

Mr. Bastedo felt the majority report of the original disbarment hearing was in error and had not understood the situation Mrs. Amourgis was in. Mr. Bastedo testified that it was common knowledge in the family law bar and among Mrs. Amourgis' classmates that she had an unusual relationship with her husband and that he was a dominant person. Mr. Bastedo personally couldn't understand why Mrs. Amourgis stayed with her husband but said it was a not uncommon situation which he often saw in his practice. He supports her readmission based on his understanding of her life since disbarment although he acknowledges very limited direct personal contact in obtaining that understanding.

Mr. Bastedo has offered to be an advisor to Mrs. Amourgis should she be readmitted. He feels her technical legal skills and abilities will not need assistance but that if issues arise requiring advice they will be ethical practice ones. He is prepared to counsel her should she require it, with respect to these issues as they arise in a family law practice.

Edwin Goodman

Mr. Goodman gave evidence that he first met Mrs. Amourgis shortly after her disbarment through a mutual friend who was a hairdresser (and who also filed a letter in support of Mrs. Amourgis). As both Mrs. Amourgis and Mr. Goodman tried to help this woman with her own personal problems he and Mrs. Amourgis met about 100 times over 4 or 5 years. He has now known her about 8 or 9 years. Mrs. Amourgis told him about her disbarment early in their acquaintance. Mr. Goodman's opinion of Mrs. Amourgis and her ethical standards and moral fibre has developed over the period of time he has known her and it went so far as to cause him to inquire of his managing partner whether there might be space available for Mrs. Amourgis to rent in their building.

Mr. Goodman has also volunteered to be an advisor to Mrs. Amourgis, should she need assistance in any ethical issues. He is satisfied from his personal knowledge of her that she ought to be readmitted.

Edith Blake

Edith Blake also testified and filed a letter supporting the application. Mrs. Blake is a lawyer in Scarborough, called to the bar in 1965 and practising primarily in family law until recently when her practice has grown into an estate practice.

Mrs. Blake knew Mrs. Amourgis at the time of her disbarment. She describes her then as "wan, pale and pathetic". Based on her current knowledge Mrs. Blake now offers to provide office space to Mrs. Amourgis and to handle day-to-day file advice and general supervision of Mrs. Amourgis' files.

Mrs. Blake is not a close friend of Mrs. Amourgis but she is impressed by her and feels she has the necessary good character to be readmitted. While she had several reasons for supporting the readmission application, one which was interesting was Mrs. Blake's view that Mrs. Amourgis had spent of number of years "in the wilderness" and she has not only survived but has thrived.

Richard Jones

Mr. Jones is the senior insolvency counsel at his law firm and he was recently counsel to Constantine Amourgis in connection with the collection of a construction lien. He was the only witness apart from Mrs. Amourgis who had any prolonged, recent contact with Mr. Amourgis.

Mr. Jones described Mr. Amourgis' conduct as a client in disturbing fashion. After the file bean and was being handled by an associate lawyer, Mr. Jones had to step in to deal with Mr. Amourgis' behaviour with respect to management of the file in his office. He described Mr. Amourgis as persuasive, charming and extremely bright, with a very substantial understanding of the law but no solid professional ethical underpinning in law. Mr. Amourgis had a magnetic personality, was egocentric and determined to have his own way, with a level of anger underneath that determination.

Mr. Amourgis deluged Mr. Jones' office with memos to the point that Mr. Jones was worried that Mr. Amourgis was trying to "construct an insurance policy" in the event he did not succeed in the action. He finally took Mr. Amourgis aside and explained their respective roles as counsel and client in a way which persuaded Mr. Amourgis to stop this behaviour.

As a result of the success of Mr. Jones in dealing with her husband, Mrs. Amourgis called Mr. Jones to introduce herself and inquire about the possibility of obtaining practice space there should she be readmitted. Mr. Jones met with Mrs. Amourgis and discussed her husband with her from the viewpoint of her ability to practice. He was satisfied that Mrs. Amourgis would not allow Mr. Amourgis to set foot in her office, nor fax her or telephone her and so he considered whether a family law practice could co-exist with his firm's insolvency practice. Ultimately he determined their practices were incompatible and he did not offer space to Mrs. Amourgis.

Mr. Jones too is prepared to provide ongoing practice advice to Mrs. Amourgis. In fact he said he looked forward to spending an afternoon every once in a while driving to her office to chat about practice and the law. He thought his commitment would be monthly and that he would spend a day a month with Mrs. Amourgis discussing common problems such as client needs and demands of office practices, dealing with opposing counsel and such matters. He is satisfied she has discretion, judgment and ethics and should be readmitted.

Letters

Mrs. Amourgis offered a number of impressive letters as character evidence, from a wide variety of people - family, friends, colleagues and former clients. A small sample of extracts from those letters is set forth below:

Judge Pamela Thomson, who has known Mrs. Amourgis since the bar admission course and has kept in touch over the years wrote to support the application. Judge Thomson read the Convocation decision and was familiar with the grounds for disbarment. She supports Mrs. Amourgis' application.

A colleague, Florence Shuber, formerly a lawyer and presently the Principal and C.E.O. of the Toronto Montessori schools has known Mrs. Amourgis more than 20 years having first met as law students. She has been in touch with Mrs. Amourgis on several occasions during the years following her disbarment. She writes that during those years she has seen Mrs. Amourgis growth, maturity and development of inner strength. She feels Mrs. Amourgis' judgment is sound and she has a new life separate from Mr. Amourgis. She believes Mrs. Amourgis' good judgment, experiences and new found strength would be an asset to her clients.

A former real estate business colleague, A.J. Crljenko, P.Eng. Wrote that he had known Mrs. Amourgis about six years and had worked with her on many business projects together. His assessment was that she is a "quality person, and a quality professional" whom he would not hesitate in retaining or recommending to family, friends and business associates.

Mrs. Amourgis' son Peter wrote that "In a family of disbelievers, my mother patiently and slowly insisted upon high ethical and family values in my siblings and I and would often be my sounding board, as well as my example in life...please understand that it took uncommon strength to demand these standards for our family during the dark ages which followed the disbarment". He has now completed law school and believes his mother would become a lawyer of the highest integrity.

Mrs. Amourgis' sister-in-law, Ms. Maryte Racys wrote from Vancouver to confirm that Mrs. Amourgis has evolved considerably in her relationship with her husband over the past few years, and consistently makes her own judgments and decisions in an independent manner.

Practice Plans if Readmitted

Mrs. Amourgis wants to return to practice to cleanse her name and because she likes the practice of law and the kind of clients she had in practice. She feels she can make a contribution to society as a lawyer. She speaks Greek and French and so expects she might have a client base from these communities. She is aware that practising law is extremely challenging and financially difficult today.

If readmitted to practice, Mrs. Amourgis intends to share space with Edith Blake in Don Mills. Mrs. Blake testified that while she would not actively supervise any files by way of ongoing in-depth review, she would look into Mrs. Amourgis' files on occasion and see if they are being properly done. She would also be available as a mentor. Having been called in 1965 in Ontario Mrs. Blake feels she can quickly review a file and tell if it's being properly handled.

Mrs. Blake would not only share space, she would also share accounting and bookkeeping services as well as secretarial. She indicates that she would have no trouble reporting Mrs. Amourgis to the Law Society if she saw anything going wrong and that in a small office like hers, with experienced staff, the staff would soon see if there were problems. She also states it would be a condition of the arrangement that Constantine Amourgis never set foot in the office. If necessary, she will co-sign on Mrs. Amourgis' trust account.

Mrs. Amourgis has put together what her counsel has called a network or a safety net of people to support her in practice. Mr. Jones, Mr. Bastedo and Mr. Goodman have all agreed to provide advice and mentoring to Mrs. Amourgis should she need it. Mr. Jones plans to drive to Don Mills once a month to discuss practice issues with her. Dr. Wood Hill and Dr. Caroline Kohn are both available for follow up counselling if required and Dr. Hill feels some visits with him during the first six to twelve months would be a good idea.

Mrs. Amourgis would like to do family law and civil litigation - trial work. She has continued some continuing education courses and read the bar admission course materials. She is willing to upgrade her skills if required although both Mr. Bastedo and Mrs. Blake indicated they felt her basic legal skills and ability to prepare cases for trial would be unaffected by her absence from practice.

Recommendation of the Hearing Panel

The Hearing Panel recommends that Julie Evelyn Amourgis be re-admitted to membership in the Law Society of Upper Canada, on the following terms and conditions:

1. That she be assessed by staff of the Law Society with a view to determining, in accordance with the procedures for requalification adopted by Convocation, what course(s), continuing legal education, Bar Admission or otherwise, may be required to enable her to resume practice and what other steps if any she should pursue and that she not be readmitted until successfully completing any such course(s) to the satisfaction of the Director of Education of the Law Society and taking any other required steps to the satisfaction of the Secretary of the Society.
2. That she continue counselling sessions with Dr. Wood Hill for a period of twelve months from the date of her re-commencing practice and thereafter attend for counselling as may be required. The Law Society is to receive confirmation from Dr. Hill that the Applicant has commenced such counselling.
3. That she practice in association with Edith Blake and not change her practice location or association without the written permission of the Law Society.
4. That her practice be restricted to family law and civil litigation.

Reasons for Recommendation

Rehabilitation and evidence of a change of character are at the heart of any successful application for re-admission to the Law Society. The protection of the public requires a second mistake not be made in admitting a person to membership after they have already once before let down the profession and the public. It is a heavy burden on the Applicant and an equally large responsibility on the panel hearing the application, reviewing the evidence and testing the merits of the application.

The Hearing Panel is convinced that Julie Amourgis has changed, that she has purged her guilt and that her present character is unimpeachable. The evidence, in summary, all supports this change:

1. She sought professional help at the time (1986) when she was described as having a Dependent Personality and has continued with such medical help to the point where her current doctors believe she is not at risk to re-offend and has learned how to establish boundaries with her husband. The uncontroverted medical evidence is that she has a different mental attitude today than she did at the time of the disbarment and that she has undergone a positive change.
2. She has set up an impressive support network, composed of people who knew her before her disbarment as well as those who have only met her since then. The evidence from this broad range of members of the legal community and the greater community also attests to the personal growth of Mrs. Amourgis over the last decade and that she is a different person.
3. She has established herself as a respected and in demand member of another profession, teaching. She has succeeded in difficult areas within teaching and gained the admiration of her colleagues for this accomplishment showing she can successfully assume such responsibility.
4. She has separated her life from her husband's to the point where they live separate and apart under the same roof. She has moved from being his "puppet" to being an independent career woman with her own friends and her own life, not under his influence. This includes having established separate and individual relationships with each of her children who are now adults.

5. She had no prior discipline record and there is no evidence of similar problems since in and around the time of the discipline events. For a period of about ten years, to the date of hearing, there is no evidence of moral, ethical or criminal wrongdoing by the Applicant.

The Law Society opposes this application and the Hearing Panel has listened carefully to the reasons advanced by counsel for the Society. Those reasons largely resolve into two kinds of concerns. One, Mr. Amourgis is still a malignant influence on the Applicant; two, Mrs. Amourgis has not entirely accepted her misconduct and therefore has not purged her guilty or shown her conduct to be unimpeachable.

Most of the Society's evidence in support of the second proposition relates to the events which immediately preceded and post-dated the discipline hearing such as the lack of co-operation with the Staff Trustee and the behaviour by the Applicant as counsel in Sigroum. These events all occurred in the mid-1980's (1985 - 1987) and while the Hearing Panel accepts that they speak to the lack of judgment at the time, the evidence from a wide variety of witnesses is that the Applicant was under extreme stress and in depression at that time, which greatly affected her judgment and her personality. Since then she has built her life back up and no such events have occurred.

The first proposition is, as was stated at the outset, the most troubling one. The Hearing Panel is convinced that Mrs. Amourgis has taken all reasonable steps to eliminate the influence of her husband now and in the future. She has been through lengthy therapy, she has an ongoing network of professional and personal support, she has established independent relationships with her children and she has established a separate life.

In light of Mrs. Amourgis' moral rehabilitation since her disbarment, and the safeguards she has put in place to protect her clients and the public from any malign influence from Constantine Amourgis, it would be inappropriate in our judgment to refuse reinstatement simply on the basis of Mrs. Amourgis' continued marriage to Mr. Amourgis. To do so would be to assess risk to the public on the basis of the status of the applicant, and not on the basis of her own character and her own prospects for practising in accord with appropriate ethical standards. It may be that at some point in the future, Mrs. Amourgis may have to make a difficult choice between her clients' wellbeing and her association with Mr. Amourgis; on the evidence tendered before us, we have been satisfied that she has the strength of character, and the family and community supports, to make the right decision. It is not our place to force the issue now, and either make her readmission conditional upon her living separate and apart, or refusing readmission on the basis of her domestic choices. Rather, we make our decision on the basis that Mrs. Amourgis is, and has the wherewithal to continue to be, an independent moral agent.

Based on the tests in Goldman, Manek and Weisman, keeping in mind the Bolton decision and having weighed the evidence of the witnesses in this application the Hearing Panel respectfully submits that this Applicant, Julie Evelyn Amourgis, should be readmitted for the reasons set forth here.

All of which is respectfully submitted

Dated this 23rd day of December, 1998

Susan Elliott, Chair
On behalf of the Hearing Panel

Ms. Budweth asked that the spelling of Mr. Trudell's name be corrected on the first and third page of the Report.

Both counsel made submissions in support of the Report.

It was moved by Mr. Topp, seconded by Ms. Backhouse that the applicant be readmitted on the terms and conditions set out in the Report at page 15 of the Report.

Carried

Re: Adam John BULL - Toronto

The Secretary placed the matter before Convocation.

Messrs. Topp, Gottlieb and Chahbar withdrew for this matter.

Mr. Corbett appeared for the Society and Ms. McKinnon, Duty Counsel appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 3rd September, 1998, together with an Affidavit of Service sworn 24th September, 1998 by Pal Singh that he had effected service on the solicitor by registered mail on 14th September, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd October, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benches 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
Gary L. Gottlieb, Q.C.
Abdul A. Chahbar

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

Hugh Corbett
for the Society

ADAM JOHN BULL
of the City
of Toronto
a barrister and solicitor

Represented by Duty Counsel
for the solicitor

Heard: July 14, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 5, 1998, Complaint D20/98 was issued against Adam John Bull alleging that he was guilty of professional misconduct.

The matter was heard in public on July 14, 1998, before this Committee composed of Clayton C. Ruby, Chair, Gary L. Gottlieb, Q.C. and Abdul A. Chahbar. The Solicitor attended the hearing and was represented by Duty Counsel. Hugh Corbett appeared on behalf of the Law Society.

DECISION

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

Complaint D20/98

2. a) He has failed to maintain the books and records of his practice in accordance with Regulation 708 under the *Law Society Act*.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D20/98 and is prepared to proceed with a hearing of this matter on a date to be fixed by the Hearings Management Tribunal.

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. ALLEGATION OF PROFESSIONAL MISCONDUCT

- Particular 2(a) He has failed to maintain the books and records of his practice in accordance with Regulation 708 under the *Law Society Act*

IV. ADMISSIONS

3. The Solicitor has reviewed Complaint D20/98 and admits the particulars contained therein. The Solicitor admits that those particulars together with the facts set out herein constitute professional misconduct.

IV. FACTS

(i) Audit of Practice

4. The Solicitor was called to the Bar on April 11, 1986. The Solicitor practised as an "associate" of a law firm until March 20, 1992. The Solicitor then practised as an "employee" of a law firm until June 26, 1995. Effective June 26, 1995, the Solicitor assumed the status of "retired/not working". On February 12, 1996, the Solicitor resumed practising as a sole practitioner.

5. An audit of the Solicitor's practice was initiated as the result of the Solicitor failing to file a Form 2 and Form 3 Certificate within six months of his fiscal year end of November 30, 1995 for the period during which the Solicitor was practising as an "employee" of a law firm.

6. On January 2 and 6, 1997, the examiner attended at the last known address for the Solicitor's practice as stated in the Society's records. On both occasions, the Solicitor was not present so the examiner left her card with instructions for the Solicitor to contact her. As it turned out, the Solicitor had changed the location of his practice but had failed to advise the Society of the change.

7. On January 7, 1997, the Solicitor called the examiner and left a message advising the examiner of the Solicitor's new telephone number.

8. By way of letter dated January 8, 1997, the examiner wrote to the Solicitor and formally requested that the Solicitor produce the books and records of his practice for examination.

9. On January 21, 1997, the Solicitor agreed to an appointment on February 3, 1997 for the examiner to attend at the Solicitor's office and review his books and records. On the morning of February 3, 1997, the Solicitor called the examiner and cancelled the appointment. A new appointment was scheduled for February 10, 1997.

10. On February 10, 1997, the examiner met with the Solicitor in his office. Although the Solicitor was able to provide the examiner with bank statements and cancelled cheques pertaining to the Trust Account, he was unable to produce the books and records of his practice as prescribed by Regulation 708 of the *Law Society Act*. As a result, the Solicitor's trust account (the "Trust Account") was frozen and a new trust account was opened with co-signing restrictions placed on it. At the time that the Trust Account was frozen, it had a balance of \$5,046.40. The Solicitor advised the examiner that he required additional time to get his books and records in order before producing them for examination.

11. The Solicitor had opened the Trust Account at a branch of Canada Trust in July 1995. The Solicitor admits that he has not maintained trust account comparison statements since the Trust Account was opened.

12. In the seven month period between February 10, 1997 and September 10, 1997, the examiner had several telephone conversations with, and left several telephone messages for, the Solicitor with respect to setting a date on which the Solicitor would produce his books and records for examination. The examiner also sent the Solicitor letters requesting that he set a date for the production of his books and records.

13. During this period, the Solicitor indicated on several occasions that he would soon be making his books and records available for examination, but then subsequently advised the examiner after each such occasion that he required additional time to complete his books and records.

14. In particular, the Solicitor made an appointment with the examiner to produce his books and records on June 26, 1997. However, on that date, the Solicitor cancelled the appointment and advised the examiner that he required additional time.

15. After a further exchange of telephone messages and conversations with the examiner, the Solicitor next agreed to produce his books and records for examination on July 16, 1997.

(ii) Meeting with Examiner on July 16, 1997

16. On July 16, 1997, the examiner attended at the Solicitor's offices. The Solicitor produced several documents which he purported to be Trust Account comparisons and several pages of draft books and records. The examiner reviewed these documents and determined that they did not balance, that they were not in the proper format and that they did not contain the required information to permit the examiner to perform a reconciliation of the Trust Account. The Solicitor agreed to correct the deficiencies but has not done so to date. The documents which the Solicitor was able to produce were insufficient to qualify as the books and records of his practice in accordance with Regulation 708 under the *Law Society Act*. The Solicitor therefore admits that he has failed to maintain the books and records of his practice. The documents were also insufficient to permit the Law Society to perform a reconciliation of the Trust Account. Specifically, the Solicitor was unable to produce in a form acceptable to the Law Society his: (i) current monthly trust comparisons, which include a detailed trust listing and a detailed reconciliation; (ii) trust receipts journal; (iii) trust disbursement journal; (iv) clients trust ledger; (v) general receipts journal; (vi) general disbursement journal; (vii) fees book or chronological file of copies of billings.

17. During the course of his meeting with the examiner on July 16, 1997, the Solicitor admitted the following:

- (i) that he had previously paid personal expenses directly from the Trust Account by drawing upon "earned fees in trust" (ie. by taking fees for services rendered to clients for whom he held retainers in trust on account of fees, but to whom he had not yet issued and delivered a fee billing);
- (ii) that he was having difficulty assigning these "earned fees in trust" to individual client ledger cards; and
- (iii) that he had probably disbursed too much money from the Trust Account on behalf of his clients, such that the Trust Account was probably overdrawn to the extent of at least \$1,000.00.

18. By way of letter dated September 10, 1997, the examiner wrote to the Solicitor and again requested production of the Solicitor's books and records by September 18, 1997, failing which the Solicitor was advised that the matter would be referred to the Society's discipline counsel for action. The Solicitor failed to produce his books and records.

(iii) Reservation of Rights

19. The Solicitor admitted to the examiner that the Trust Account is probably overdrawn to the extent of at least \$1,000.00. The precise amount cannot be determined until such time as the Solicitor produces his books and records. Further, the Law Society has received complaints from two former clients of the Solicitor pertaining to "holdbacks" on real estate transactions to which the clients are allegedly entitled and which ought to be in the frozen Trust Account. However, the funds in the Trust Account cannot be disbursed until such time as the books and records have been produced and the respective entitlements to the funds in the Trust Account have been established.

20. The Solicitor has failed to maintain the books and records of his practice. If or when the Solicitor produces his books and records, the Solicitor acknowledges and agrees that the Society has, and expressly reserves, the right to commence any appropriate disciplinary proceedings relating to or arising out of the information disclosed in the Solicitor's books and records.

(iv) Summary

21. Despite repeated requests by the Law Society, the Solicitor failed to produce the books and records of his practice for examination. On the one occasion that the Solicitor did produce documents pertaining to his practice, the documents were insufficient both as to their nature and their content to satisfy the requirements of "books and records" within the meaning of Regulation 708 of the *Law Society Act*. In particular, the documents were insufficient to permit the Society to perform a reconciliation of the Trust Account. Based on the limited documents which were produced and the Solicitor's inability to produce the proper and complete books and records of his practice, the Solicitor admits that he has failed to maintain the books and records of his practice in accordance with Regulation 708 of the *Law Society Act*.

(v) Current Status of Filings

22. In addition to failing to make the requisite filings for his fiscal year ended November 30, 1995 which forms the subject matter of this complaint, the Solicitor has since failed to make his annual filings for his fiscal year ended November 30, 1997 and to return his Membership Information Forms for 1997 and 1998. (The Solicitor did make his annual filings for his fiscal year ended November 30, 1996.)

V. PRIOR OR CURRENT DISCIPLINE

23. The Solicitor has been administratively suspended for non-payment of his annual fees to the Law Society on four previous occasions: December 31, 1995; May 1, 1996; November 1, 1996 and October 1, 1997.

DATED at Toronto this 2nd day of June, 1998."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be reprimanded in Convocation if the books and records have been brought up to date by the time the matter is heard in Convocation.

If the books and records are not brought up to date satisfactory to the Law Society by that date, the Committee recommends that the Solicitor be suspended for one month and from month to month thereafter until he has complied.

REASONS FOR RECOMMENDATION

It is the decision of this Committee that the matter should be referred to Convocation with the understanding that if the books and records are in fact brought up to date by the time of that hearing, that Convocation should administer a reprimand itself, or if it wishes, send it back to a Committee for a reprimand.

If the books and records are not brought up to date satisfactory to the Law Society by that date, the Solicitor should be suspended for one month and from month to month thereafter.

The reasons are simple. The Solicitor has fallen upon difficult economic times. His wife and he essentially lost their jobs at the same time. She has had to move to Kingston as a result and, in the difficulties that this has caused, he has been unable to obtain the appropriate staff to get his books and records up to date.

He has been extended many, many opportunities by the Law Society to do that and in light of that, it is appropriate to find the complaint established and to make that recommendation which we do.

Adam John Bull was called to the bar on April 11, 1986.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of September, 1998

Clayton C. Ruby, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if his books and records were brought up to date failing which the solicitor be suspended for a period of 1 month and from month to month thereafter until he complied.

Mr. Corbett advised that the solicitor had complied with the production of his books and records to the satisfaction of the Society and made submissions in support of a reprimand in Convocation.

Ms. McKinnon, Duty Counsel made submissions regarding the solicitor's personal difficulties and asked that the solicitor be reprimanded in Committee.

Mr. Corbett made submissions in reply and advised he could not comment on the solicitor's personal difficulties.

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

It was moved by Mr. Swaye, seconded by Mr. Manes that the solicitor be reprimanded in Committee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Committee.

It was moved by Mr. Swaye, seconded by Ms. Backhouse that Convocation adjourn to a Committee of the whole and the solicitor be reprimanded.

Carried

The Treasurer administered the reprimand.

APPLICATION TO VARY ORDER OF CONVOCATION

Re: Stephen Lawrence CAPPE - Toronto

The Secretary placed the matter before Convocation.

Messrs. Cole and Chahbar withdrew for this matter.

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

Convocation had before it the Report of the Committee of Convocation dated 8th January 1999 (marked Exhibit 1), together with the Consent and Waiver signed by the solicitor on 18th January, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report is as follows:

THE LAW SOCIETY OF UPPER CANADA

REPORT AND DECISION

The Committee of Convocation
[Application to vary Order of Convocation]

Jane Harvey, Chair
Thomas E. Cole
Abdul A. Chahbar

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

Christina Budweth
for the Society

STEPHEN LAWRENCE CAPPE
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 2, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The COMMITTEE begs leave to report:

REPORT

The Solicitor, Stephen Lawrence Cappe, brought an an Application to vary the terms of Convocation's Order dated June 20, 1991 readmitting him to the practice of law.

21st January, 1999

The matter was heard in public on December 2, 1998 before this Committee composed of Jane Harvey, Chair, Thomas E. Cole and Abdul A. Chahbar. The Solicitor attended the hearing and represented himself. Christina Budweth appeared on behalf of the Law Society.

Order of Convocation

"CONVOCATION of the Law Society of Upper Canada, having read the Report and Decision of the Admissions Committee, in the presence of Counsel for the Society, the applicant for readmission and Counsel for the applicant for readmission, wherein the applicant was considered for readmission and having heard Counsel aforesaid;

CONVOCATION HEREBY ORDERS that the said Stephen Lawrence Calpe be readmitted to the practice of law in Ontario, on the following conditions:

- (a) his trust account be co-signed by Glen Solomon or any other person acceptable to the Society and the co-signing will remain in effect until further order of Convocation;
- (b) that he consult with the Practice Advisory Service;
- (c) that he continue to be treated by Dr. Richard Wood, Psychologist, on a quarterly basis for one year at such time a report will be submitted as to whether further treatment is required to the Admissions Committee;
- (d) that he consult on a monthly basis with Glen Solomon or any other solicitor acceptable to the Law Society to review his files and to consider any problem in his practice that might be unduly stressful.

Dated this 20th day of June, 1991."

Evidence

The following materials were filed before the Committee and are attached herewith:

Report of the Admissions Committee undated	Attachment A
Brief of Materials submitted by the Solicitor	Attachment B
Undertaking of the Solicitor dated December 2, 1998	Attachment C
Letters to the Committee from the Solicitor and Counsel for the Law Society	Attachment D

Recommendation of the Committee

The Committee recommends to Convocation that conditions (a) and (d) of the Order dated June 20, 1991 be eliminated.

Reasons for Recommendation

It has been seven years since the Solicitor was readmitted to practice with conditions. The evidence of the Solicitor shows that conditions (b) and (c) of the Order have been satisfied and he is applying for the removal of condition (a).

The evidence of the Solicitor shows that condition (a) is no longer necessary. The Law Society does not oppose the elimination of condition (a).

Subsequent to the hearing, by letter dated December 18, 1998 to the Committee, Mr. Calpe requested that the Order be further varied by the elimination of condition (d). This was not opposed by the Law Society.

21st January, 1999

Accordingly, based on the Solicitor's undertaking, we recommend to Convocation the elimination of conditions (a) and (d) from the Order of Convocation dated June 20, 1991.

ALL OF WHICH is respectfully submitted

DATED this 8th day of January, 1999

Jane Harvey, Chair

Both counsel and the solicitor made submissions in support of the Report.

It was moved by Mr. Topp, seconded by Mr. Adams that the Report be adopted and that conditions (a) to (d) ordered by Convocation on June 20th, 1991 be deleted.

Carried

Re: Philip Ebow BONDZI-SIMPSON - Ghana

The Secretary placed the matter before Convocation.

Messrs. Topp, Gottlieb and Chahbar withdrew for this matter.

Mr. Armstrong did not participate.

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

Convocation had before it the Report of the Discipline Committee dated 2nd September, 1998, together with an Affidavit of Service sworn 24th September, 1998 by Pal Singh that he had effected service on the solicitor by registered mail on 14th September, 1998 (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

Clayton C. Ruby, Chair

Gary L. Gottlieb, Q.C.

Abdul A. Chahbar

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

Catherine Braid
for the Society

PHILIP EBOW BONDZI-SIMPSON
of the County
of Ghana
a barrister and solicitor

Not Represented
for the solicitor

Heard: July 14, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 13, 1997 Complaint D336/97 was issued against Philip Ebow Bondzi-Simpson alleging that he was guilty of professional misconduct.

The matter was heard in public on July 14, 1998 before this Committee composed of Clayton C. Ruby, Chair, Gary L. Gottlieb, Q.C. and Abdul A. Chahbar. The Solicitor did not attend the hearing nor was he represented by counsel. The Committee invited Duty Counsel to act as "amicus curiae". Catherine Braid appeared on behalf of the Law Society.

DECISION

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

Complaint D336/97 (as amended)

2. (b) Between January 1, 1995 and December 1, 1995, he sexually harassed a client by making inappropriate sexual advances towards her, by inappropriately touching her and by making attempts to discuss inappropriate sexual matters with her.

[The name of the client/complainant was received *in camera* and she was referred to by her initials.]

[Particular 2(a) was withdrawn at the hearing.]

Reasons of the Majority of the Committee with respect
to its decision to proceed in absentia

In this case, the Solicitor is fully aware of the allegations against him and has been furnished with a copy of the brief and the authorities that would be relied upon by the Society if they were successful in establishing their complaint.

The difficulty is that the Solicitor is not present. In highlighting the series of correspondence between the Solicitor and the Society, I focus on the following passages as the basis of our decision.

On March 25, 1998, received by the Society April 7, 1998, at Tab 6, the Solicitor makes it clear,

"Between the time this matter was lodged with the LSUC in 1995 and the present time my fortune or occupation has changed and I have relocated, for the time being, outside Ontario.

Nevertheless, I would like to fully participate in any proceedings in this matter.

Would you kindly request an adjournment of this matter *sine die* on my behalf. Given the time span it took to investigate, my relocation, my wish to participate in any proceedings, and the fact that I'm not in fact in practice in Ontario, it is respectfully submitted that an adjournment is, on the balance of convenience and the interests of justice, appropriate."

The Hearings Management Tribunal considered and rejected the request for an adjournment *sine die*. Following that rejection, the Law Society advised the Solicitor that

"arrangements may be made to have you participate before the HMT on May 11, 1998 by telephone, for the purpose of making submissions only. Should you wish to take advantage of this option, please provide me with a telephone number where you can be reached on May 11, 1998 between the hours of 9:00 and 11:00 a.m. Daylight Savings Time. You may also, of course, retain counsel to appear before the HMT and make submissions on your behalf."

The next response from the Solicitor was dated April 28th, 1998 and received sometime thereafter:

"To be quite candid, I am not able at this time to return immediately, nor to retain counsel. I also mention that income levels in this developing country are very low and it[s] currency is not convertible. In light of these difficult realities confronting me, would you kindly: 1) retain competent counsel or provide aid for counsel to be retained for the respondent? 2) Cover the return airfare for the respondent to participate in proceedings and fully instruct counsel?"

The Law Society responded saying: "It is impossible". And they declined to provide the monies to do so. They pointed out the availability of duty counsel. There has been no attempt to take advantage of duty counsel, though Mr. Aucoin, who was present at the hearing was asked to act as *amicus curiae* and raise any point that could be raised on the Solicitor's behalf and in his interests.

The Solicitor's response dated June 29, 1998 was received by the Law Society on July 13, 1998. It says, in part,

"I am handicapped with respect to the proceedings you have slated for July 14 and 15. I regret that this matter has reached this stage - and that at this time I am abroad. The delay in instituting proceedings, if proceedings were in order, has prejudiced me.

Given the present situation at this end, I also regret the unfavourable response for financial assistance to cover retainer of counsel and my return passage to participate in proceedings and instruct counsel. But life goes on. If LSUC insists on proceeding with this matter at this time, I understand. Because life goes on. Even if I disagree, I shall understand your position.

Nevertheless - and needless to say - in the best tradition of the honourable profession, justice, fairness, due process should prevail. I am handicapped and helpless and resigned to fate. But, justice, fairness and due process shall ultimately prevail -- as life goes on."

It is clear from this correspondence and from what has been told to us, that the Solicitor left while this complaint was being investigated, but before the investigation was completed and we were also told that he did participate in that investigation and that eventually, in due course, the results of that participation will be brought forward in evidence by the Law Society.

So, it is clear that the Solicitor left Canada for Ghana while he was aware that an allegation had been made against him but before that allegation crystallized into a complaint made by the Law Society in a formal way.

The majority is of the view that the hearing must proceed. It is true that we could provide airfare and accommodation. But, we cannot say that the Law Society must do so or that an adjournment should be granted in order to make this offer. We would have preferred that the Law Society had clearly offered to pay for his full participation by telephone, but we do not think it right to impose that obligation in this case, where the Solicitor evinced no interest in telephone submissions. We are guided by the fact that the Solicitor chose to go to Ghana; the Law Society of Upper Canada did not send him there. We appreciate fully the difficulty that this places him in because, as he points out correctly, his economic difficulties in Ghana appear to be very difficult in terms of affording return airfare. Nonetheless, he, like every solicitor who is a member has an ongoing obligation to the Law Society of Upper Canada and that obligation must be paramount. He must be amenable to our disciplinary jurisdiction at all times. That is one of the obligations of membership. The Solicitor has, perhaps through no fault of his own, placed himself in a situation where he cannot meet that obligation of being amenable to the disciplinary process in person. Does it then follow that the disciplinary process must stop or delay to await a time when he is able to do that, or that we must put him in a position where he can do that despite his economic circumstances?

The majority does not think that the discipline hearing can wait. We cannot say to a complainant, "Sorry, we will not hear your complaint in a timely way because our member is in Ghana and is economically unable to pay for his return." We are guided in this conclusion by the fact that the member was offered a form of attendance by telephone on a previous occasion and did not choose to take advantage of it. We are not prepared to assume that there is no telephone available in Ghana, in the town or area known as Cape Coast. We are also guided by the fact that though he has been told on numerous occasions that a date must be set, there must be a fixed date, and that it must be reasonably soon - but some allowance was made for his inability to travel quickly - at no time has he offered anything but an adjournment *sine die* as being acceptable to him. Needless to say, to adjourn this matter without a date would not be acceptable to the administration of justice from the point of view of the Law Society as an institution. And the fact that he has never offered a date at which he could return puts us in a position that the Supreme Court of Canada referred to in a case called Darville v. The Queen, 1956, 116 CCC, page 113. In that case, the decision of the Supreme Court of Canada, there was an application for an adjournment through the absence of material witnesses. Justice Cartwright, as he was then, concurring in the result, said at page 117:

"There was no disagreement before us as to what conditions must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:

(a) that the absent witnesses are material witnesses in the case;

[Including the Solicitor: as a material witness he has a right to be present if he wishes. That condition is met.]

(b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;

[It would appear that there has been no laches or neglect in that he left when the complaint was in the offing but had not yet crystallized into a formal charge against him. That condition is met.]

(c) that there is a reasonable expectation that the witnesses can be procured at a future time to which it is sought to put off the trial."

[This, the Solicitor cannot meet. He has not shown any willingness or ability to fix a date when he can have this hearing.]

Making allowances for the fact that that case is concerned with the absence of witnesses and this is concerned not only with a potential witness, the Solicitor himself, but with his own very important right to attend the hearing of a serious allegation, we think that this approach to the problem is helpful and in all the circumstances as outlined for the reasons indicated, we would not and do not grant this adjournment.

**Finding of the Majority of the Committee
with respect to professional misconduct**

E.F. is separated from her husband at present and cares for three children, age 16, 7 and 2. She was born in Nigeria and came to Canada in 1980. She works presently as an accountant/clerk.

She consulted the Solicitor in January of 1995 regarding a case of constructive dismissal. From that, serious problems arose. Problems that had nothing to do with her legal affairs and nothing to do with the case. They had to do with the Solicitor's inappropriate and improper advances.

Let me say at the outset that we have listened carefully to E.F. She gave her evidence calmly and without any hint of rancour against the Solicitor. There was nothing in her evidence that rang false and the majority accepts her evidence. There were minor inconsistencies, which were not important, and this sort of inconsistency, we believe, is in some ways the hallmark of an honest witness.

In her first meeting with the Solicitor, the relationship was professional and appropriate. Sometime later, around March of 1995, the Solicitor began to ask questions of her, about her work, asking her how she was coping when her husband was away. (Her husband had been absent for about a nine month period in Nigeria for work purposes). She did not understand him when he asked, "How are you 'coping' when he's away?", and she asked him what he meant by that and he gave the answer, "sexually". This made her uncomfortable and she turned the conversation back to the constructive dismissal case which she had gone to him for in the first place.

Near the end of that meeting, he conveyed to her that she was a very beautiful woman and that he wouldn't mind it if she introduced some friends to him and him to some of her friends. She advised him that her friends were happily married. "What do you mean?" he asked. "You can't be sure if they're happily married or not." She said to him, "I thought you were happily married." He explained that his job took him away a lot and that he wasn't spending time with his family. If so, she wondered aloud, why would he want another person who would simply take more time away from his family. His answer: "I just want something different."

This made her feel uncomfortable because she sensed a sexual undertone to it and she feared losing him as a lawyer because if the sexual undertone continued, she would have to change lawyers and she had already changed lawyers once before. The Solicitor, she was convinced, believed in her case and she feared losing him as her counsel. All this made her anxious.

It may have been that the initial questions were innocuous. Inquiring into the background, family affairs and so forth, location of the husband, all could reasonably be said to have a bearing on the damages issues in a constructive dismissal case; but it does not matter whether she misconstrued him or not at that stage because at this point in the meeting he was clearly focusing on sexual issues that really had no bearing whatsoever upon any possible damages claim.

All this made her anxious and upset. Requests of this kind for referrals to women and introductions occurred on more than one occasion. When it turned out that she produced no friends to introduce to him, he suggested that perhaps after the case was concluded, they themselves could become friends. She enquired what that meant and was told it meant 'getting close'. She responded by confronting him with the fact that he was telling her that she would be cheating on her husband and that he would be cheating on his wife. He explained that this would be an advantage because they would have no worry about commitment to each other. He again returned to the notion that he could not understand how she could have no sex for some nine months when her husband was in Nigeria. He said that he himself had trouble understanding this. "When I make love, I come too quickly because I'm so full." This kind of explicit sexual talk shocked her. But, she did not want him to lose interest in her suit, so she tried not to upset him.

One evening in his office, on another occasion, he grabbed her by the side and held her very tightly and tried to kiss her. When she looked down, she saw a condom in his hand. He said, "Let's do it now." She was very scared and shaking. She feared rape. It may have been that that fear of rape was unfounded. We have nothing to indicate that he would have raped her. That is of course beside the point. She struggled very hard. She was pushing him back. She had been pushed back on the sofa and at one point, his hand was on her breast and his other hand was at her underwear. He said to her, "It won't be long." She said to him, "Are you going to rape me?" He answered, "Don't use that word." She held his hand down by force to prevent the assault from continuing. She said to him, "I can't do anything with you right now. I have my period. Let's do it some other time." She found it very degrading to have to talk in that way. He accused her of lying about it. "Let me feel it," he said. He did in fact feel her sanitary napkin and then believed her. He suggested to her that he was not going to put his penis inside her body. He would not need to do so because he was "full and ready to come." She declined this offer, but did promise to come back on another occasion when her period presumably would be finished. He wanted to know exactly when she would finish her period presumably to find out when she would be coming back. She was unwilling to answer. He said, "I want to know when you're coming back." She declined to give the information. Again he said, "Listen, I won't put it inside." But after her continued refusal, he let her go.

For all this, she blamed herself. "I knew it was coming", she said in evidence. She felt she shouldn't have allowed the sexual talk and she was afraid to do anything about it when it progressed beyond talk. She was afraid to get involved with the police because if she got involved with the police, she would have to tell her husband and she did not want to do so. Over the ensuing days, she couldn't eat, she was very depressed. She realized she would have to change counsel and she did not want to do it and she did not have anyone to talk about it. She began talking to herself. Finally, she consulted the family doctor who told her to confront him and transfer the file to another lawyer in the same office. She did speak to him with the intention of making that demand but as she raised the issue, he apologized and promised that it would not happen again. She did not then ask that her file be transferred.

On the next occasion when he saw her, however, he made a gesture with his hand simulating intercourse with the thumb and forefinger of the left hand forming a circle, of a vagina, and the forefinger of his right hand symbolizing a penis. At the same time as he made that gesture, he said, "When are you going to give it to me?" She understood that he meant sex. She then answered that she wanted the file transferred to another lawyer in his firm and that was done. In December of 1995, settlement of the case was effected and it was over.

Shortly thereafter, still in December 1995, she complained to the Law Society of Upper Canada.

Rule 27 provides:

Rule 27

Sexual harassment of a colleague, of staff, of clients, or of other persons, in a professional context, is professional misconduct.

COMMENTARY

1: Sexual harassment is defined as one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature,

- (i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or*
- (ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services; or*
- (iii) when submission to such conduct is made implicitly or explicitly a condition of employment; or*

- (iv) *when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of promotion, raise in salary, job security and benefits affecting the employee); or*
- (v) *when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile or offensive work environment.*

The Commentary gives examples of sexual harassment which include sexually suggestive or obscene comments or gestures, requests for sexual favours, unwanted touching and sexual assault.

We have taken into account the Solicitor's denial in writing of these charges.

The evidence in this case is clear and convincing and the testimony of E.F. provides a cogent basis for drawing the inference that Rule 27 has been breached. We find the Complaint established.

Recommendation as to Penalty and
Reasons for Recommendation of the Majority¹

Mr. Bondzi-Simpson was called to the Bar on February 9, 1993. His career with us has been short. He was and remains a citizen of Ghana where he now resides and is presently suspended for non-payment of his fees. We believe, though the information is not totally reliable, that he is teaching in Ghana at present. We know very little else.

The submissions put to us differ widely. Acting as amicus curiae, for which we thank him for upholding the finest traditions of the Bar and offering assistance, Mr. Aucoin has recommended that we reprimand the Solicitor here in Committee and adjourn, if necessary, to obtain an undertaking from him that he will not similarly re-offend in the future. Counsel for the Law Society has suggested a range of sentence as being appropriate, with the low end of that range a suspension of twelve months and the high end of that range, disbarment. She leaves it to us to pick the appropriate measure of penalty within that range.

We approached the difficult task of fixing the appropriate penalty in the absence of the Solicitor bearing in mind that the conduct involved is a grave breach of trust. It is an offence which underscores the vulnerability of clients and the need to protect clients from sexual advances of an unwanted nature. We must mark this behaviour as being very wrong.

¹ We know of no clear practice respecting the participation in Reasons for Penalty by a member who dissented from the finding that the Complaint had been established. We searched for analogies in Appellate tribunals but none were apparent. The decision to have the dissenting member accept that a finding had indeed been made - an undoubted fact - and to render an opinion on penalty was impelled by a desire to be as fair as possible to our member. Why should a dissenting Bencher be silenced on what may prove to be a crucial aspect of the case - if the majority is sustained in Convocation - merely because the Bencher disagreed on a distinct and different issue? The dissenting Bencher's views may ultimately prove to be of great assistance to the other panel members or to Convocation on the issue of penalty. Most importantly, the dissenting Bencher may prove to be the member's greatest champion and there is no persuasive reason, beyond formalism, for preventing such a contribution to the process of judgement.

The Solicitor has no previous discipline history and we must resist the temptation to make an example of him merely because similar cases are fortunately rare. We must keep anger out of our deliberations. That has, at times, been hard to do. We think we have succeeded. We think we must succeed. We bear in mind cases such as Chodos, but in the end, Chodos was a case where there were consensual sexual relations in the context of a love affair. Here, the sexual improprieties were utterly non-consensual. The gravamen of the misconduct in Chodos was that the object of the relationship was an inappropriate person, namely the wife of a client, about whom, in the course of the retainer, personal knowledge of the client's wife and the relationship with her husband was obtained.

At the same time we must mark the offence as serious by a penalty that is significant and will be understood by the public as being significant. We must also take some steps to protect the public from this particular lawyer. The facts disclose some underlying problem, probably of a psychiatric nature. It is significant that after he had the matter drawn to his attention by the client and after he apologized for his conduct, he then felt compelled to repeat the behaviour in a different form. This too speaks of an underlying psychiatric disorder. Because the Solicitor has not participated in the proceedings, we do not know more, but there is enough before us to indicate that some measure of protection is appropriate.

We have attempted to blend these objectives, at the same time, to fall within the range of sentence suggested by counsel for the Law Society. We think that a suspension for a period of eighteen months is appropriate and that that suspension should continue month to month thereafter until the Solicitor satisfies the Secretary of the Law Society that he suffers from no underlying psychiatric problems that would put the public at risk. The suspension is to commence when Convocation makes its order.

Philip Ebow Bondzi-Simpson was called to the Bar on February 9, 1993.

ALL OF WHICH is respectfully submitted

DATED this 11th day of September, 1998

Clayton C. Ruby, Chair

DISSENTING REASONS

Dissenting Reasons of the Minority with
respect to proceeding in absentia

This is a very serious matter and the Solicitor has indicated, firstly in his letter of March 25, 1998 to the Law Society, that he would like to fully participate in any proceedings. It should be noted that the alleged matters giving rise to the misconduct all appear to have taken place in 1995 and it was not until November of 1997 that the Complaint was laid and there is no indication given that any delay up to that time was in any way caused by the Solicitor. We cannot assume that the member placed himself in a position so that he would not be able to return to defend himself on misconduct charges, if they were ever made, and I feel we have to give him the benefit of the doubt and we cannot assume, as I said, that he deliberately placed himself in a position so that he would be unable to return to answer these charges.

Furthermore, his letter of April 28th, 1998 to the Law Society indicates that the income levels in a developing country where he is now situated are very low and its currency is not convertible. And in light of these difficult realities that face him, he asked that the Law Society kindly provide counsel for him and also cover the return airfare so that he would be able to participate in these proceedings. The very minimum that the Law Society can do is to offer the Solicitor return airfare so that he can return to deal with these very serious matters. I am not faulting the Law Society counsel in any way. However, in the Law Society's letter to the Solicitor of June 8, 1998 the Solicitor was advised that it is not the practice of the Law Society to cover return airfare for lawyers in the discipline process and also, with the current fiscal restraints, the Law Society is not in a position to cover these expenses. I have always been a staunch advocate for the Law Society paring its expenses to the bone. However, in a matter such as this where the misconduct charges are very serious and the Solicitor has emphatically indicated that he cannot afford the cost of return airfare, I think we should be able to offer him that. The matter, as I said, stems out of incidents that allegedly took place in 1995. It wasn't until 1997, at the end of 1997, that the misconduct charges were laid. Again, there is no indication that any delay was the fault of the Solicitor and now that he is asking that he be able to participate in these proceedings, I think there would be no substantial harm in adjourning the matters for another few months so that we could offer him return airfare to come back to answer these charges.

Finding of the Minority with respect to
professional misconduct

This is a serious charge of misconduct. I have heard the evidence, I have listened to the sole witness carefully, I judged her demeanour, I asked her some questions and I don't find that the evidence was clear and convincing. There were a number of assumptions and conclusions that were made by the witness and a number of inconsistencies in her evidence. She stated that she originally retained the Solicitor for a constructive dismissal matter and at the beginning of the professional relationship, she said that he asked her some inappropriate questions, such as what her husband was doing for a living and where he worked. I find that such questions are not necessarily inappropriate when asked in the context of a constructive dismissal matter, as I would think a solicitor would want to know what impact the constructive dismissal would have on the family financial situation and the ramifications it would have. When she gave her evidence originally, she stated that at the beginning of her professional relationship with the lawyer, her husband was out of the country. Later on, she stated that that wasn't indeed the case but that he had returned. She also stated at one point during her evidence that she knew the Solicitor was going to rape her and later on in her evidence, said that he attempted to rape her and once again, I do not find that those conclusions are warranted.

In the Solicitor's letter of response to the allegations of the witness, he stated that it was his practice to assign carriage of civil files to Mr. Matthew Fordjour of his office and not the client that asked for this to happen. That contradicts what the witness said, and when I asked her for her comment, I was not provided with a satisfactory explanation. Also, the Solicitor's letter stated that, subsequent to assigning the civil litigation file to Mr. Fordjour, the witness retained him to send a demand letter to collect payment from some people and also subsequently consulted him on an immigration matter regarding her brother who was resident in Japan. When I asked her if she had indeed retained the Solicitor on these other matters after all the matters that were alleged to have happened and the alleged misconduct occurred, her answer was not forthright or succinct.

So, in conclusion, when you have serious charges of professional misconduct as in this case and you have what I consider to be inconsistencies and nagging doubts, I don't find that the evidence is strong enough to substantiate the charge of misconduct in this matter.

Recommendation as to Penalty and
Reasons for Recommendation of the Minority

I am advised that I must accept the finding of fact by the majority and recommend an appropriate penalty, even though I dissented as to the finding of fact. I found that the evidence was not of sufficient weight and there were various inconsistencies that I found in it, so that I was not prepared to find that there was indeed misconduct.

In recommending the appropriate penalty, I do not think that a more severe disposition should be meted out to a lawyer because he is not present and not currently in practice than if he was present and currently in practice. I would also add the note that, as I indicated in my dissent as to whether there was indeed misconduct, the Solicitor indicated in a number of letters to the Law Society that he did wish to be present, but he did not have the financial means to pay for an airplane ticket and he was advised by the Society that it was not the practice of the Law Society to provide return airfare in a situation such as this, and also, because of current fiscal restraints, that the Law Society is not in a position to cover these expenses. That being said, on the basis of the majority's finding of misconduct, I would recommend a three month suspension.

And my reasons for so doing would be to indicate the serious impropriety that occurred, and a three month suspension to a sole practitioner who practises in association with other lawyers would be a very severe penalty, and would not only indicate to the Solicitor involved that such behaviour is totally inappropriate and must never be repeated again, but also such a penalty would be a deterrent to any other solicitor from even contemplating such behaviour.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of September, 1998

Gary L. Gottlieb, Q.C.

Ms. Braid advised that the solicitor was aware that the matter would proceed today and that the solicitor would not be attending.

A letter from Ms. Braid to the solicitor dated October 13th, 1998 and the solicitor's reply dated November 8th, 1998 were filed as Exhibit 2.

Both counsel and Duty Counsel made submissions.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Carey, seconded by Ms. Puccini to vacate the finding of professional misconduct and send the matter back to a new committee.

Not Put

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

Carried

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

The majority recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 18 months, such suspension to continue month to month thereafter until the Solicitor satisfies the Secretary of the Law Society that he suffers from no underlying psychiatric problems that would put the public at risk.

Ms. Braid made submissions on the majority recommended penalty excluding the psychiatric evidence.

Counsel, the reporter and the public withdrew.

It was moved by Mr. McKenzie, seconded by Mr. Millar that the solicitor be suspended for a period of 18 months to be served consecutively with the administrative suspension.

Carried

It was moved by Mr. Swaye, seconded by Ms. Angeles that the solicitor be suspended for a period of 18 months to be served concurrently with the administrative suspension and that the psychiatric condition be deleted.

Not Put

It was moved by Mr. Wright, seconded by Mr. Carey that the solicitor be suspended for a period of 6 months following the completion of the administrative suspension.

Not Put

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the Committee erred in principle by imposing the condition regarding a psychiatric report and that the penalty be concurrent with the administrative suspension. Convocation ordered that the solicitor be suspended for a period of 18 months to be served consecutively with the administrative suspension and that the psychiatric condition be deleted from the Report.

Re: Frank Andrew THERIAULT - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar and Topp withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 6th April, 1998, together with an Affidavit of Service sworn 17th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 15th April, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th May, 1998 (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

Robert C. Topp

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

Audrey Cado
for the Society

FRANK ANDREW THERIAULT
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 12, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

REPORT

On August 25, 1997 Complaint D311/97 was issued against Frank Andrew Theriault alleging that he was guilty of professional misconduct.

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

DECISION

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

Complaint D311/97

2. a) He failed to produce to the Law Society the books and records of his practice pursuant to section 18 of Regulation 708, of the Law Society Act.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D311/97 and is prepared to proceed with a hearing of this matter on November 12, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D311/97 and admits the particulars contained therein. The Solicitor admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on May 29, 1987. He practised as a sole practitioner until his suspension on December 31, 1995 as a result of his failure to pay his annual fee.

5. On August 2, 1996 a Law Society examiner attended at the Solicitor's place of residence to conduct a review of his books, records and files in accordance with section 18 of Regulation 708 of the *Law Society Act*. An individual at the rental office advised the Solicitor had moved the previous month. (Document Book, Tab 1)

6. By letter dated August 13, 1996 (Document Book, Tab 2), the Law Society advised the Solicitor an Examiner had been instructed to make a spot examination of the books and records of his practice. The Solicitor was advised the Examiner had attempted, without success, on a number of occasions to reach him at his office. The Solicitor was requested to contact the Law Society to arrange a date for the examination of his records.

7. The Solicitor provided the Law Society with his new address of 401 - 670 Parliament Street, Toronto on September 9, 1996 (Document Book, Tab 3)

8. A Law Society Examiner attended at the Solicitor's home on Parliament Street on October 11, 1996. The door was not answered. The Examiner left a copy of the Law Society's October 9, 1996 introduction letter and her business card under the door. (Document Book, Tab 4). The Solicitor did not contact the Law Society.

9. By letter dated November 26, 1996 (Document Book, Tab 5) a Law Society Examiner requested the Solicitor produce, to the Law Society, the books and records listed on an enclosed list no later than December 10, 1996. No reply was received.

10. By letter dated December 17, 1996 (Document Book, Tab 6) the Examiner forwarded to the Solicitor a copy of his November 26, 1996 letter. The Solicitor was requested to give this matter his early attention. No reply was received.

11. By registered mail, dated January 3, 1997 (Document Book, Tab 7), the Examiner forwarded to the Solicitor a copy of his November 26, 1996 and December 17, 1996 letters. The Solicitor was advised should this matter not be resolved within two weeks of the date of this letter, the matter would be referred to counsel to the Discipline Committee for action. The Law Society's January 3, 1997 letter was returned by the post office marked "unclaimed".

12. The Solicitor left a telephone message for the Examiner on his voice mail on January 6, 1997 advising he was responding to the Examiner's correspondence. The Solicitor advised he would be happy to produce his books and records however he owes \$8,000. to his former landlord who, as a result, would not release the material to him. The Solicitor advised his former secretary had done his bookkeeping. He advised the trust account was okay and that he was not trying to hide anything. The Solicitor advised he was open to the Examiners suggestions. The Solicitor advised he expected to declare bankruptcy within the next two to three months. He advised he owed \$40,000 to various people and as a result, was waiting for the first law suit to be served upon him. The Solicitor advised he expected his landlord would release his books once he made the assignment into bankruptcy. (Document Book, Tab 8)

13. The Examiner left a telephone message for the Solicitor on January 7, 1997 (Document Book, Tab 9), advising that his letter of February 5, 1996 indicated he did not intend to practice law in the future. The Examiner requested the Solicitor advise of the current state of his practice and to provide him with the name, address and telephone number of his former landlord so that he could attempt to make arrangements regarding the release of the books and records directly with the landlord. A copy of the Solicitor's February 5, 1996 letter is contained in the Document Book, Tab 10.

14. The Solicitor advised the Examiner by leaving a voice mail message on January 20, 1997 (Document Book, Tab 11) of his landlord's name, address and telephone number. The Solicitor advised last week his landlord served him with a Small Claims Court Statement of Claim. The Solicitor advised he had stopped practising on December 31, 1995. He stated he had continued to attend at a his office for a couple of months after that time in order to clear out his trust account by sending the funds back to his clients, billings and transfers. The Solicitor advised he has not retained any funds in his trust account for almost a year. The Solicitor advised he expected to make an assignment in bankruptcy on January 28 or 29, 1997. The Solicitor advised he thought that the bankruptcy may make it easier to obtain the books and records from his former landlord.

15. The Examiner spoke with the Solicitor by telephone on January 29, 1997 (Document Book, Tab 12). The Solicitor advised he was meeting with his Trustee in Bankruptcy that day. The Examiner advised the Solicitor he was attempting to obtain the books and records from the landlord. The Examiner advised the Solicitor the audit of his books and records was separate from the current disciplinary proceedings.

16. The Solicitor spoke to the J. Stanley Jenkins, a Law Society Staff Trustee, on January 31, 1997 (Document Book, Tab 13). The Solicitor advised Mr. Jenkins he moved to Toronto in November of 1995. The Solicitor advised he closed his law practice on December 31, 1995 but went into the office to tidy up a few things until he was locked out by his landlord. The Solicitor advised his active files were returned to clients however, his closed files, accounting records and any original Wills were seized by the landlord in February of 1996. The Solicitor advised that the landlord has renovated his office space and moved the files elsewhere. The Solicitor advised his former secretary was still at the office working for two lawyers who now operate his office space. The Solicitor advised between January 1991 and December, 1995 he handled criminal matters, primarily on Legal Aid. The Solicitor advised he been working with a Trustee in Bankruptcy. The Solicitor advised he would forward original Wills to another solicitor, he would place any closed files into storage or destroy them, if applicable, and he would obtain the books and records to be reviewed by the Law Society.

17. The Examiner left a telephone message for the Solicitor on February 20, 1997 (Document Book, Tab 14) requesting the Solicitor advise how the reclamation of his books and records was progressing. The Solicitor did not return the call.

18. By letter dated March 21, 1997 (Document Book, Tab 15), the Examiner requested the Solicitor advise as to when he expected to be in a position to obtain his books and records from his former landlord and produce them to him. No reply was received.

19. By letter dated April 9, 1997 (Document Book, Tab 16), the Examiner forwarded to the Solicitor a copy of his March 21, 1997 letter. The Examiner requested the Solicitor give this matter his early attention. No reply was received.

20. The Examiner left a telephone message for the Solicitor on April 9, 1997 (Document Book, Tab 17 requesting he advise if he had been able to obtain his books and records. The call was not returned.

21. By registered mail dated April 23, 1997 (Document Book, Tab 18), the Examiner forwarded to the Solicitor a copy of his March 21, 1997 and April 9, 1997 letters. The Solicitor was advised should this matter not be resolved by May 7, 1997, the matter would be referred to counsel to the Discipline Committee for action. The Law Society April 23, 1997 letter was returned by the post office marked "unclaimed".

22. To date, the Solicitor has not produced the books and records of his practice.

V. DISCIPLINE HISTORY

23. On March 31, 1996 the Solicitor was found guilty of professional misconduct with respect to his failure to file for the fiscal year ended December 31, 1994. The Discipline Committee recommended the penalty of a reprimand in Convocation should the filing be made by the time the matter reaches Convocation, failing which, that the Solicitor be suspended for one month definite and month to month thereafter until the filings is made. No recommendation was made as to costs. The matter is pending Convocation.

24. On September 17, 1996, the Solicitor was guilty of professional misconduct with respect to his failure to serve his client, Donna Langer; his having misled his client, Donna Langer; his failure to serve his client, Wayne Schlievert; and his having misled his client, Wayne Schlievert. The Discipline Committee recommended the penalty of a six month suspension and costs of \$400.00. The matter is pending Convocation

25. On April 2, 1997, the Solicitor was found guilty of profession misconduct with respect to his failure to file for the fiscal year ended December 31, 1995. The Discipline Committee recommended the penalty of a reprimand in Convocation should the filing be made by the time the matter reaches Convocation, failing which, that the Solicitor be suspended for one month definite and month to month thereafter until the filings is made, such suspension to commence upon the termination of any administrative suspension. No recommendation was made as to costs. The matter is pending Convocation.

DATED at Toronto this 11th day of November, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Frank Andrew Theriault be reprimanded in Convocation if produces his books and records prior to the matter being considered by Convocation, failing which, that he be suspended for a period of two months definite, to run concurrent with any other suspension imposed by Convocation, and month to month thereafter until the books and records are produced.

REASONS FOR RECOMMENDATION

Your committee recommends this penalty on the basis that the Solicitor has failed to comply with his duty to produce the necessary books and records to the Society. The duty of the Society to ensure that solicitors are appropriately conducting themselves is frustrated by solicitors who refuse to produce the books and records. Failing production of the books and records, there is no other option open to your Committee but to recommend a suspension of two months definite to run concurrent with any other suspension imposed by Convocation and month to month thereafter until the books and records are produced. The public interest requires a penalty of this nature.

ALL OF WHICH is respectfully submitted

DATED this 6th day of April, 1998

Robert C. Topp

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he produced his books and records failing which he be suspended for a period of 2 months definite, to run concurrent with any other suspension and month to month thereafter until the books and records were produced.

Ms. Worley and the solicitor made submissions in support of a reprimand in Convocation.

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

It was moved by Mr. Gottlieb, seconded by Mr. Swaye that the solicitor be reprimanded in Committee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Committee.

It was moved by Mr. Manes, seconded by Mr. MacKenzie that Convocation adjourn to a Committee of the whole.

Carried

The Treasurer administered the reprimand.

Re: Sidney Irving LOVAS - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar and Cole withdrew for this matter.

21st January, 1999

Mr. Glenn Stuart appeared on behalf of the Society and Mr. Edward Greenspan appeared on behalf of the solicitor who was present.

Both counsel had no objection to Mr. Topp participating.

Convocation had before the Report of the Discipline Committee dated 25th June, 1998, together with an Affidavit of Service sworn 21st July, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 13th July, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st January, 1999 (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

Thomas E. Cole, Chair
Elvio L. DelZotto, Q.C.
Hope Sealy

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

Glenn Stuart
for the Society

SIDNEY IRVING LOVAS
of the City
of Toronto

Edward Greenspan, Q.C. and
Andrew Matheson
for the solicitor

a barrister and solicitor

Heard: August 26 and 27,
October 9 and
December 5, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

The following Complaints were issued against Sidney Irving Lovas alleging that he was guilty of professional misconduct: Complaint D72/95 on November 1, 1995; Complaint D374/95 on November 29, 1995; Complaint D252/96 on October 18, 1996; and Complaint D228/97 on July 14, 1997.

The matter was heard in public on August 26 and 27, October 9 and December 5, 1997 before this Committee composed of Thomas E. Cole, Chair, Elvio L. DelZotto, Q.C. and Hope Sealy. The Solicitor attended the hearing and was represented by Edward L. Greenspan, Q.C. and Andrew Matheson. Glenn Stuart appeared on behalf of the Law Society.

DECISION

Complaint D72/95 Particular 2(a) was withdrawn on consent at the hearing and the Committee found that professional misconduct was not established with respect to particular 2(b). The agreed upon facts with respect to particular 2(b) of this Complaint are not included in the Agreed Statement set out in this report.

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

Complaint D374/95

2. a) He breached an Order of Convocation that he suspend his practice for failure to pay his Annual Fees, by continuing to practise during the period May 9, 1994 to June 6, 1994; and
- b) he failed to deposit monies received in trust for clients into a trust account at a chartered bank, Provincial Savings Office or Registered Trust Corporation as required by subsection 1 of section 14 of the Regulation.

Complaint D252/96

2. a) Between May 13, 1995 and July 27, 1995 he breached the Order of Convocation dated January 26, 1995 suspending him from the practice of law, by acting on behalf of his client, Ann-Marie Mercone; and
- b) between May 13, 1995 and June 16, 1995, on three occasions he failed to deposit monies received in trust for his client, Ann-Marie Mercone, into a trust account at a chartered bank, Provincial Savings Office or Registered Trust Corporation as required by subsection 1 of section 14, of Regulation 708.

Complaint D228/97

2. a) He breached an Order of Convocation, dated January 26, 1995, which suspended his rights and privileges as a member of the Law Society, including his right to practise law, by acting on behalf of his client Adrienne Hunt and therefore continuing to practise law throughout the period from April 21, 1996, to December 20, 1996; and,
- b) he failed to deposit monies received in trust for his client Adrienne Hunt into a trust account at a chartered bank, Provincial Savings Office or Registered Trust Corporation as required by subsection 1 of section 14 of Regulation 708 pursuant to the Law Society Act.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D72/95, D374/95, D252/96 and D228/97 and is prepared to proceed with a hearing of these matters on August 26 and 27, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D72/95, D374/95, D252/96 and D228/97 and this Agreed Statement of Facts with his counsel, Edward Greenspan, Q.C. and Andrew Matheson, and admits the particulars of Complaints D374/95, D252/96 and D228/97, in addition to the facts contained in the Agreed Statement of Facts. The Solicitor further admits that the particulars of Complaints D374/95, D252/96 and D228/97 constitute professional misconduct.

4. The parties agree that the Law Society shall not ask for findings of professional misconduct based on this Agreed Statement of Facts until after the Society has adduced its evidence in relation to particular 2(a) of Complaint D72/95, and the Solicitor has been given an opportunity to adduce evidence on his behalf.

IV. FACTS

5. The Solicitor was called to the Bar on May 20, 1977. He practised as a sole practitioner until he was suspended by Convocation on January 26, 1995. He has been suspended at all times since January 26, 1995, and remains suspended at the present time.

Complaint D374/95

Particular 2a) He breached an Order of Convocation that he suspend his practice for failure to pay his Annual Fees, by continuing to practise during the period May 9, 1994 to June 6, 1994.

20. On or about December 1, 1993, the Law Society forwarded to the Solicitor a Notice advising him that the second instalment of his Annual Fees was due and payable on January 1, 1994. The Solicitor was further advised that payment must be made within four months after the day on which payment is due to avoid suspension.

21. On or about March 21, 1994, the Law Society forwarded to the Solicitor a Final Notice advising him that the second instalment of his Annual Fees was due and payable on January 1, 1994. The Solicitor was further advised that payment must be made within four months after the day on which payment is due to avoid suspension.

22. As of May 9, 1994, the Solicitor had not made any payment towards the second instalment of his Annual Fees which had been due January 1, 1994.

23. By registered mail dated May 9, 1994 (Tab 10, Document Book), the Solicitor was advised that his rights and privileges as a member of the Society were suspended effective that day for failing to pay the second instalment of his Annual Fees. The Law Society's registered letter was signed for and delivered on May 12, 1994.

24. By letter dated June 6, 1994 (Tab 11, Document Book), the Law Society advised the Solicitor that the suspension of his rights and privileges had been terminated that day upon payment of the second instalment of his Annual Fees.

25. By letter dated June 6, 1994 (Tab 12, Document Book), David S. Foulds, Assistant Crown Attorney, provided the Law Society with a letter he had received from the Solicitor dated May 31, 1994. The Solicitor was suspended at the time the letter was prepared by the Solicitor. As a result of this information, an audit of the Solicitor's practice was authorized.

26. On February 6, 1995, Lorraine Campbell, an Examiner with the Audit and Investigation Department of the Law Society, attended at the Solicitor's office at 390 Bay Street to commence an audit. She was advised that the Solicitor no longer worked there.

27. At the request of Ms. Campbell, the Solicitor executed an undertaking, dated February 27, 1995 (Tab 13, Document Book), wherein he undertook, among other matters, to accept no trust money until he was reinstated as a member in good standing of the Law Society.

28. Ms. Campbell and the Solicitor were unable to meet until July 20, 1995, at which time the Solicitor delivered his books, records and client files to the Law Society. The following documents were obtained during the audit which establish that the Solicitor practised during the period from May 9, 1994, to June 6, 1994, when he was suspended for non-payment of his Annual Fees:

- i. Solicitor's letter dated May 31, 1994 to David Foulds, Assistant Crown Attorney (Tab 14, Document Book);
- ii. Solicitor's letter dated May 31, 1994 to client, Rocco Scolieri (Tab 15, Document Book); and
- iii. Solicitor's account dated November 18, 1994 to client, Dung Van Duong, showing that the Solicitor attended at pre-trial conference on May 31, 1994 (Tab 16, Document Book).

29. During a meeting with Ms. Campbell on July 21, 1995, the Solicitor admitted that he practised during the months of May and June 1994. The Solicitor advised that he had only worked on two files, Scolieri and Van Duong. A copy of the handwritten notes of Ms. Campbell's discussion with the Solicitor are contained at Tab 17 of the Document Book.

Complaint D374/95

Particular 2b) He failed to deposit monies received in trust for clients into a trust account at a chartered bank, provincial savings office or registered trust corporation as required by subsection 1 of section 14 of the Regulation.

30. The Solicitor maintained a trust account at the Toronto-Dominion Bank until April 1994 at which time the account had been closed. A general account was also maintained and closed in January 1994. By letter dated July 19, 1995 (Tab 18, Document Book), addressed to the Solicitor, the Toronto-Dominion Bank confirmed that both accounts were closed and had a zero balance at the time of closure.

31. During the course of the audit, Ms. Campbell noted that monies in the sum of \$1,500.00 and \$1,000.00 were received by the Solicitor from D. Van Duong in March 1994, placed in a "trust cash box" and disbursed in November 1994. The Solicitor did not deposit the trust funds into a trust account at a chartered bank or as otherwise required by subsection 14(1) of Regulation 708. A copy of the Solicitor's trust journal and trust disbursement journal for client, D. Van Duong, are contained at Tabs 19 and 20 of the Document Book.

32. Ms. Campbell also reviewed the Solicitor's general journal and noted that the Solicitor received \$7,000.00 on April 23, 1994 and \$500.00 on April 30, 1994 from his client, Rocco Scolieri, which were also placed in the "trust cash box". A statement of account was rendered on May 3, 1994, at which time the Solicitor paid himself from the "trust cash box". Other clients paid a total of \$17,300 to the Solicitor between April and November 1994, which funds were placed in the same "trust cash box". These funds were later paid to the Solicitor pursuant to fee billings to the relevant clients. A copy of the Solicitor's receipts journal is contained at Tab 21 of the Document Book.

33. On July 20, 1995, Ms. Campbell asked the Solicitor why he was not maintaining bank accounts. The Solicitor advised that he deposited the monies in a "trust cash box" to prevent his creditors from seizing these funds. A copy of the handwritten notes of the conversation with the Solicitor is contained at Tab 22 of the Document Book.

34. By letter dated July 21, 1995 (Tab 23, Document Book), the Solicitor was advised that the monies received in trust for clients were not being deposited into a trust account. In response, the Solicitor indicated that he would open a new trust account. A copy of the Solicitor's response is contained on the document of Tab 23 of the Document Book. The examiner advised the Solicitor not to open a new trust account until his membership was reinstated.

Complaint D252/96

Particular 2a) Between May 13, 1995 and July 27, 1995, he breached the Order of Convocation, dated January 26, 1995, suspending him from the practice of law, by acting on behalf of his client, Ann-Marie Mercone.

Particular 2b) Between May 13, 1995 and June 16, 1995, on three occasions he failed to deposit monies received in trust for his client, Ann-Marie Mercone, into a trust account at a chartered bank, provincial saving office or registered trust corporation as required by subsection 1 of section 14, of Regulation 708.

35. The Solicitor was retained by Ann-Marie Mercone to defend her with respect to the criminal charges laid against her. Ms. Mercone had been arrested in the early morning hours on May 13, 1995, at which time she had called the Solicitor at approximately 7:00 a.m. from the police station to help her. Prior to attending at the police station, the Solicitor picked up a cash retainer from Ms. Mercone's friend in the amount of \$1,000.00. Ms. Mercone was then released on a Promise to Appear on charges of fail to stop after accident and possession of stolen property of a value over \$5,000.00, contrary to the Criminal Code and on her own recognizance in the amount of \$300.00 on a charge of careless driving. She was scheduled to appear in court on June 5, 1995 to set a date for trial. A copy of the Promise to Appear and the Recognizance are contained at Tab 24 of the Document Book.

36. On May 16, 1995 and June 16, 1995, the Solicitor received additional cash retainers from Ms. Mercone in the amount of \$350.00 each. The Solicitor states that he provided written receipts to Ms. Mercone for each of those payments. A copy the Solicitor's trust ledger showing receipt of the funds is contained at Tab 25 of the Document Book.

37. On June 5, 1995, the matter was put over to July 7, 1995, at which time neither the Solicitor nor Ms. Mercone appeared. As a result, a Bench Warrant was issued against Ms. Mercone for her failure to appear, a copy of which is contained at Tab 26 of the Document Book. The warrant was executed on July 20, 1995, and Ms. Mercone was released on an Undertaking which provided she was to appear in court on July 27, 1995. A copy of Ms. Mercone's Undertaking Given to a Justice or a Judge is contained at Tab 27 of the Document Book.

38. On July 27, 1995, the Solicitor attended before the court to adjourn the matter to September 15, 1995 to be spoken to. A copy of the information is contained at Tab 28 of the Document Book.

39. On October 28, 1995, Ms. Mercone made a complaint to the Law Society, which was received on November 13, 1995, about the Solicitor's handling of her case while he was suspended. Ms. Mercone also provided the Law Society with a sworn statement, dated September 12, 1996, a copy of which is contained at Tab 29 of the Document Book.

40. On May 22, 1996, Janet Merkley, an Examiner with the Audit and Investigations Department, attended at the Solicitor's home to investigate an allegation that the Solicitor practised while under suspension. The Solicitor advised that he did not practise except for the Mercone matter and that he had acted as her agent, not as her solicitor. The Solicitor further advised that he received approximately \$1,700.00 from Ms. Mercone as a retainer and did not put it into a bank trust account but rather into his "trust cash box". The Solicitor did not provide Ms. Mercone an account for the monies received. The Solicitor looked for his books and documentation but was unable to locate the same. He requested at least two weeks to locate them. A copy of Ms. Merkley's notes of her attendance at the Solicitor's home is contained at Tab 30 of the Document Book.

41. The Solicitor recorded the funds received from Ms. Mercone in his books. A copy of the client ledgers and related accounting books are contained at Tab 31 of the Document Book. The Solicitor's trust account was closed in April 1994 as indicated by a letter dated July 19, 1995 from the Toronto-Dominion Bank. A copy of the letter and bank ledgers showing a nil balance are contained at Tab 18 of the Document Book.

42. The Solicitor states that he placed all cash funds received from clients in his "trust cash box" and segregated the funds in separate envelopes designated for individual clients. He further states that it was his practice to enter the receipt of these funds in the appropriate client ledger.

43. With the exception of the \$1,000.00 received in relation to Ms. Mercone on May 13, 1995, there is no evidence that the Solicitor did not properly account to his clients for the monies placed in the "trust cash box".

44. On June 26, 1996, the Solicitor obtained a Money Order payable to Ann-Marie Mercone in the amount of \$700.00. A copy of the Money Order is contained at Tab 32 of the Document Book.

45. By registered mail dated July 18, 1996 (Tab 33, Document Book), the Solicitor provided Ms. Mercone with an account dated May 13, 1995, and a Money Order in the amount of \$700.00.

46. On July 19, 1996, Ms. Merkley interviewed the Solicitor at the Law Society and he admitted that he had acted as Ms. Mercone's solicitor and not as her agent when he attended at the police station and upon receipt of the retainers. The Solicitor further advised that he had prepared the account in July 1996 but dated it for May 13, 1995.

47. On July 19, 1996, the Solicitor provided Ms. Merkley with copies of his notes showing his various appointments relating to the Mercone case during the period in which he was not entitled to practise. In particular, on May 23, 1995, the Solicitor wrote, in relation to a telephone call with an insurance adjuster, that "Anne Marie doesn't have to make any further oral/written report because I am counsel & have reported". A copy of the Solicitor's notes are contained at Tab 34 of the Document Book.

Complaint D228/97

Particular 2a) He breached an Order of Convocation dated January 26, 1995, which suspended his rights and privileges as a member of the Law Society, including his right to practise law, by acting on behalf of his client Adrienne Hunt and therefore continuing to practise law throughout the period from April 21, 1996 to December 20, 1996.

48. On or about April 21, 1996, the Solicitor was retained by Adrienne Hunt to represent her in connection with a criminal charge which had been laid against her, namely possession of stolen property of a value exceeding one thousand dollars (specifically, seven fur coats). The Solicitor states that Ms. Hunt required immediate advice as to whether to co-operate with police on the following day in relation to the apprehension of the principal offender. The Solicitor met with Ms. Hunt that day to obtain her instructions and to communicate with the police.

49. On April 22, 1996, the Solicitor reviewed the available information and spoke with the police officers involved with the case. Subsequently, Ms. Hunt provided the Solicitor with her instructions and consent to co-operate with the police. The Solicitor further negotiated with the police and communicated with his client on April 24, April 25, April 26 and May 24, 1996. The Solicitor further conducted research regarding his client's charges during this period.

50. On May 24 and November 1, 1996, the Solicitor appeared before the court as counsel for Ms. Hunt. On November 1, 1996, Ms. Hunt elected to be tried by a judge and jury, and the charges were remanded for a preliminary hearing. A copy of the Information showing the Solicitor's court appearances is contained at Tab 35 of the Document Book.

51. On December 20, 1996, the Solicitor attended court as counsel for Ms. Hunt. The Solicitor advised counsel for the Crown, Ms. Sarah Welch, and the court that he was taking issue with the wording of the Information. Discussions with the court and Ms. Welch followed, and, eventually, the matter was adjourned to January 10, 1997. A copy of the transcript of the court proceedings on that date is contained at Tab 36 of the Document Book.

52. Prior to December 20, 1996, the Solicitor also prepared written submissions for the court which he signed as "Counsel for the Accused/Defendant" (Tab 37, Document Book).

53. The Solicitor subsequently rendered an account to Ms. Hunt for legal services rendered to her during this period. A copy of his account is contained at Tab 38 of the Document Book.

54. Ultimately, the charge against Ms. Hunt was withdrawn at the request of the Crown on January 29, 1997.

55. The Law Society was advised by Ms. Welch that the Solicitor had represented Ms. Hunt during a period when he was not entitled to practice law. As a result of this information, an audit was commenced by Janet Merkley, an Examiner with the Law Society's Audit and Investigation Department. On May 7, 1997, Ms. Merkley spoke with the Solicitor regarding this matter and arranged to review the Solicitor's file.

Complaint D228/97

Particular 2b) He failed to deposit monies received in trust for his client Adrienne Hunt into a trust account at a chartered bank, Provincial Savings Office or Registered Trust Corporation as required by subsection 1 of section 14 of Regulation 708 pursuant to the *Law Society Act*.

56. On April 20, 1996 and December 20, 1996, the Solicitor received monies in trust from Ms. Hunt in the amounts of \$5,000.00 and \$1,000.00 respectively. The Solicitor placed these monies in his "trust cash box" and did not deposit them into a bank trust account, as his trust account had been closed in April 1994. On February 20, 1997, the Solicitor forwarded his account in the amount of \$3,000.00 together with a cheque in the amount of \$3,000.00, to Ms. Hunt. A copy of the Solicitor's trust receipts and disbursements journal and his fees journal showing receipt and disbursement of the funds are contained at Tabs 39 and 40 of the Document Book.

V. PRIOR DISCIPLINE

57. On August 26, 1994, the Solicitor was found guilty of professional misconduct for practising under suspension, failing to file for fiscal year ended January 31, 1993 and failing to reply to the Law Society regarding inadequacies in his books and records. On January 26, 1995, the Solicitor was suspended for three months, such suspension to continue until he replies to the Audit Department in connection with the inadequacies of his books and records and until he files his Forms 2/3. The Solicitor was also ordered to pay costs in the amount of \$2,500.00. A copy of the Order of Convocation, dated January 26, 1995, and the Report and Decision of the Discipline Committee, dated December 2, 1994, are contained at Tab 41 of the Document Book.

DATED at Toronto, this 22nd day of August, 1997"

FINDING OF THE COMMITTEE

The matter of Sidney Irving Lovas who was called to the bar on May 20th, 1977, was heard before the panel over the course of four days. An "agreed Statement of Facts" was submitted to the panel and the member, Sidney Irving Lovas, admitted that the particulars of complaints D374/95, D252/96 and D228/97 constituted professional misconduct and this panel so finds.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Sidney Irving Lovas be given permission to resign his membership in the Law Society within 30 days of the date this matter is heard by Convocation, failing which, that he be disbarred.

REASONS FOR RECOMMENDATION

The professional misconduct described in complaints D374/95, D252/96 and D228/97 is serious. Without any explanation from the member, the penalty should be disbarment. In the matter before this panel the member tendered a psychiatric report of Dr. Sturla Erling Bruun-Meyer, which report is appended *in camera* to this decision. The Panel heard testimony from Dr. Bruun-Meyer and counsel for the Law Society cross-examined the doctor. No other evidence was tendered. During the period of time of the member's misconduct, Dr. Bruun-Meyer was not seeing the member, having first been consulted in January of 1997. It was agreed by Dr. Bruun-Meyer that any information provided in forming his professional opinion came from information given by the member and the panel gives no weight nor accepts any of the information given by the member to Dr. Bruun-Meyer as being in itself evidence of those facts. In cross-examining Dr. Bruun-Meyer, counsel for the Law Society asked whether a belief is somewhat less than a firm opinion in a medical context and Dr. Bruun-Meyer indicated that it was not. I point this out only to indicate that in the medical report, as filed, Dr. Bruun-Meyer never uses the words "in my opinion" but does say "I believe". It was Dr. Bruun-Meyer's opinion, which opinion was given during cross-examination by counsel for the Law Society, that the member had latitude to make independent decisions during the period of professional misconduct and further, that the member had the ability to make a decision to meet some of his responsibilities but clearly not all. It is the Doctor's assumption that the conduct was based on an adjustment disorder. Dr. Bruun-Meyer further agreed in cross-examination that the member was able to live up to some of his responsibilities during the time period of professional misconduct. Dr. Bruun-Meyer further indicated in his cross-examination that "people who have an adjustment disorder can certainly meet some responsibilities, yes. Its not as if all capacity is gone. It is not a full and mental illness that removes all capacity. It is about variability; that's the nature of the illness. It is about unreliability, unpredictability and how people respond to situations."

In making submissions on behalf of the Law Society, Mr. Stuart advised that it was the Law Society's position that the member was ungovernable and consequently must be disbarred. Counsel for the member took the position that the appropriate penalty would be a period of suspension with a range of between one to six months.

The member has a prior discipline record. On August 26th, 1994, the solicitor was found guilty of professional misconduct for practising under suspension, failing to file for fiscal year ended January 31st, 1993, and failing to reply to the Law Society regarding inadequacies in his books and records. On January 26th, 1995, the solicitor was suspended for three months, such suspension to continue until he replies to the audit department in connection with the inadequacies of his books and records and until he files his forms 2/3. On page six under "Reasons for Recommendation" the committee in that discipline proceeding states "the solicitor does not have a prior discipline record. However, the panel was significantly concerned with his blatant disregard for his governing body. The filing of the forms is the only means available to the Law Society wherein they can ascertain that the profession is maintaining their books and records. In the case of the solicitor, the audit department has conducted an examination of the books and records, and has been trying, unsuccessfully, to have the inadequacies, uncovered during the examination, addressed. His total lack of response is unacceptable and unexplainable." The committee went on to indicate "the lack of responses to the many letters and calls from the Law Society seriously questions the ability of the Law Society to govern this member".

An issue to be considered in assessing penalty was the weight to be given to the psychiatric report, being the opinion of Dr. Brunn-Meyer. Counsel for the Law Society submitted to the panel that the psychiatric report should be given no weight or very little weight because the psychiatric report may be based on assumptions that are incorrect and therefore, the panel shouldn't give much weight to the report. It was submitted that the panel was to examine the evidence before it to determine whether or not the report was reasonable and whether we, as a panel, could then give it much weight. The panel referred to the case of *Regina v. Abbey* 138 D.L.R. (3d) 202.

Alan W. Mewett, Q. C., in his paper entitled *Expert Testimony — Admissibility and Weight*, given November 18, 1995 at page E - 5 states "This leads to one solution adopted in some jurisdictions that before the opinion can be tendered in evidence, those facts must first be proved by admissible evidence, or at the very least, which is an alternative possibility, a stipulation made that they will be tendered in evidence. Canada does not appear to have adopted this approach, preferring instead the somewhat illogical solution of admitting the opinion evidence first and then deciding whether there are facts to support it, resulting in what may appear at first glance to be the somewhat strange consequences set out by Dickson J., in *Abbey* (1982), 68 C.C.C. (2d) 394 and explained by Wilson J., in *Lavalee* (1990), 55 C.C.C. (3d) 97 at p.127 that if, at the end of the trial, there is no admissible evidence to support the opinion, while the opinion is admissible, it is entitled to no weight. As Sopinka J., asks in the same case at p.132, how can evidence be admissible yet be entitled to no weight? Rather, I think, it would be more correct to say that the opinion is conditionally admissible. Facts are not facts until the jury has found them to be so and a judge, ruling on a question of law, cannot pre-empt the jury's decision; the most she can do is to say that if the jury finds the facts proved to their satisfaction, then it may, if it chooses, accept the opinion of the expert in coming to its own conclusion, but that if the jury does not find the facts on which the opinion is based to have been proven, then the opinion is of no assistance to it in coming to its own conclusion and should be ignored. Indeed, if there is no evidence at all upon which the jury could find the facts to have been proven, then she should go further and instruct the jury that the opinion must be ignored. She must also, of course, be careful to instruct the jury that it cannot use unproven facts as evidence in the case itself".

The opinion of Dr. Bruun-Meyer is based on his identification of certain stressors which allowed him to diagnose an adjustment disorder from facts assumed by him to be correct and as described by the member in discussions with the doctor. This panel heard evidence involving another charge of professional misconduct, not found, by the panel which was part of the discipline process involving the member with the panel. During the course of receiving evidence in that complaint, the panel heard testimony which would support the panel finding as a fact that at least one stressor was evident during the time period in question of the member's professional misconduct in these three complaints. Had there been no finding of facts to substantiate the doctor's opinion, this panel would give the Doctor's report no weight and would recommend disbarment, having found that the member is ungovernable. The fact is, that this panel must give weight to the psychiatric opinion expressed. However, this panel takes the position that the report does not justify conclusively that the member was suffering from a psychiatric disorder to such an extent that he was incapable of honouring his obligations to the Law Society and in particular, in 1996, refraining from practising law while under an order of Convocation.

In view of the member's past discipline record and his blatant disregard for honouring Convocation's order suspending him, it is the opinion of this panel, and is recommended to Convocation, that this member be given permission to resign his membership in the Law Society within 30 days of the date the matter is heard by Convocation, failing which, that he be disbarred.

ALL OF WHICH is respectfully submitted

DATED this 25th day of June, 1998

Thomas E. Cole, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be granted permission to resign within 30 days, failing which that he be disbarred.

The solicitor had filed a Notice of Disagreement and in addition to the Report Mr. Stuart reviewed the additional documents filed before Convocation.

Mr. Greenspan made submissions in support of a lengthy suspension.

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

Mr. Greenspan made further submissions in reply.

There were questions from the Bench.

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

It was moved by Mr. Adams, seconded by Mr. Swaye that the solicitor be suspended for a period of 6 months.

Lost

It was moved by Mr. Manes, seconded by Ms. Stomp that the solicitor be suspended for a period of 18 months to be served consecutively to his administrative suspension.

Withdrawn

It was moved by Mr. MacKenzie, seconded by Mr. Crowe that the Committee erred in principle.

Carried

It was moved by Mr. MacKenzie, seconded by Mr. Wright that the solicitor be suspended for a period of 1 year to be served consecutively.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that there had been an error in principle in that the committee did not give sufficient weight to the mitigating circumstances. The solicitor was ordered to be suspended for a period of 1 year to be served consecutively with the administrative suspension.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:30 P.M.

CONVOCATION RECONVENED AT 2:30 P.M.

PRESENT:

The Treasurer, Adams, Angeles, Arnup, Backhouse, Carey, Carpenter-Gunn, Chahbar, Cole, Crowe, Gottlieb, MacKenzie, Manes, Puccini, Stomp, Swaye, Topp and Wright.

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IN PUBLIC

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Re: David Mark MARCOVITCH - Toronto

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Ms. Braid appeared for the Society and Mr. Marcovitch appeared on his own behalf assisted by Duty Counsel, Ms. McKinnon.

Ms. McKinnon requested an adjournment on behalf of the solicitor to the next Discipline Convocation in order to finalize the completion of his books and records.

Ms. Braid made submissions opposing the adjournment.

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

It was moved by Mr. Gottlieb, seconded by Mr. Carey that the matter be adjourned for 2 months.

Lost

21st January, 1999

It was moved by Mr. Swaye, seconded by Mr. Wright that the matter be adjourned to January 28th peremptory and that consent be obtained from the solicitor for the Law Society to deal directly with his accountant.

Carried

It was moved by Ms. Backhouse, seconded by Mr. Cole that the matter proceed.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the matter be adjourned for 1 week to January 28th and that the solicitor consent to the Law Society dealing directly with his accountant.

The matter was stood down so that Duty Counsel could contact the solicitor.

Re: Clifford Paul MOSS - Willowdale

The Secretary placed the matter before Convocation.

Ms. Carpenter-Gunn withdrew for this matter.

Ms. Worley appeared for the Society and the solicitor appeared on his own behalf assisted by Ms. McKinnon.

Ms. Worley advised that the solicitor requested an adjournment to allow additional time to complete his books and records and filings.

Ms. McKinnon made submissions in regard to the solicitor's difficulty in completing the outstanding matters.

Ms. Worley opposed the adjournment.

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

It was moved by Mr. Gottlieb, seconded by Mr. Adams that the matter be adjourned for a period of 2 months on the solicitor's undertaking that the Law Society have access to the solicitor's accountant and the books and records.

Lost

It was moved by Ms. Backhouse, seconded by Mr. Cole that Convocation proceed.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed that the matter would proceed.

Convocation had before it the Report of the Discipline Committee dated 13th August, 1998, together with an Affidavit of Service sworn 28th August, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 19th August, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st January, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Elvio L. DelZotto, Q.C., Chair
Kim Carpenter-Gunn
Gordon Z. Bobesich

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

Amanda Worley
for the Society

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

Duty Counsel
for the solicitor

Heard: March 17, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 18, 1997 Complaint D321/97 was issued against Clifford Paul Moss alleging that he was guilty of professional misconduct.

The matter was heard in public on March 17, 1998 before this Committee composed of Elvio DelZotto, Q.C., Chair, Kim Carpenter-Gunn and Gordon Bobesich. The Solicitor attended the hearing and was represented by Duty Counsel. Amanda Worley appeared on behalf of the Law Society.

DECISION

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

Complaint D321/97

2. a) He failed to report to his client, Scotiabank, despite numerous requests by telephone and in writing;
- b) He failed to reply to the Law Society concerning the complaint of Scotiabank despite letters dated March 13, 1997 and May 16, 1997 and telephone calls of April 15, 1997 and April 24, 1997;
- c) He failed to report to his client, Trimark, despite numerous requests by telephone and in writing; and
- d) He failed to reply to the Law Society concerning the complaint of Trimark despite letters dated March 20, 1997 and May 16, 1997 and telephone calls of April 15, 1997 and April 24, 1997.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D321/97 and is prepared to proceed with a hearing of this matter on March 17 and 18, 1998.

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 D321/97 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the particulars alleged in the Complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 31, 1989 and practises as a sole practitioner in Willowdale.

Particular 2(a) He failed to report to his client, Scotiabank, despite numerous requests by telephone and in writing

Particular 2(b) He failed to reply to the Law Society concerning the complaint of Scotiabank despite letters dated March 13, 1997 and May 16, 1997 and telephone calls of April 15, 1997 and April 24, 1997.

5. In 1996, the Solicitor acted for Robert & Sheila Carbrey with respect to a real estate transaction. He was also retained by Scotiabank to act on their behalf with respect to registering a mortgage on the property.

6. Scotiabank instructed the Solicitor to prepare and forward a final report on the mortgage registration. The Solicitor failed to do so.

7. On September 6, 1996, and again on September 17, 1996, October 9, 1996, October 30, 1996 and November 19, 1996, a representative of Scotiabank telephoned the Solicitor and left messages for him to call (Tab 1 of the Document Book). The Solicitor did not return any of these telephone calls.

8. On January 27, 1997, Scotiabank sent a demand for the final reporting letter to the Solicitor by facsimile transmission (Tab 2 of the Document Book). There was no response to this facsimile transmission.

9. On February 7, 1997, Scotiabank wrote to the Solicitor requiring the final reporting letter and related documents (Tab 3 of the Document Book). The Solicitor did not respond.

10. By letter dated February 19, 1997 (Tab 4 of the Document Book), Scotiabank complained about the Solicitor to the Law Society.

11. As a result, by letter March 13, 1997 (Tab 5 of the Document Book), the Law Society wrote to the Solicitor requesting his response. The Solicitor did not respond.
12. On April 15, 1997, and again on April 24, 1997 (Tab 6 of the Document Book), a staff member of the Society telephoned the Solicitor and left a telephone message for him to call. He did not return the telephone calls.
13. By letter dated May 16, 1997, sent by registered mail (Tab 7 of the Document Book), the Society wrote to the Solicitor requiring him to respond. According to the Acknowledgement of Receipt card, the letter was delivered on May 22, 1997. The Solicitor did not respond.
14. To date, the Solicitor has not provided the final reporting letter and accompanying documents to Scotiabank.
15. To date, the Solicitor has not responded to the Law Society.
 - Particular 2(c) He failed to report to his client, Trimark, despite numerous requests by telephone and in writing
 - Particular 2(d) He failed to reply to the Law Society concerning the complaint of Trimark despite letters dated March 20, 1997 and May 16, 1997 and telephone calls of April 15, 1997 and April 24, 1997.
16. In 1996, the Solicitor was retained by a client, Gorsky, with respect to a real estate purchase. He was also retained by Bayshore Trust (now known as Trimark Trust) to act on their behalf with respect to registering a mortgage on the property.
17. By letter dated August 9, 1996 (Tab 8 of the Document Book), Bayshore Trust wrote to the Solicitor requiring his final report and accompanying documentation. The Solicitor did not respond to that letter.
18. On September 9, 1996, Bayshore Trust telephoned the Solicitor and left a message respecting the final report package. The Solicitor did not return the telephone call.
19. On October 1, 1996, Bayshore Trust again telephoned the Solicitor. He returned this phone call and indicated he was ill and away from the office. He promised to call when he returned to the office. The Solicitor did not call.
20. On October 28, 1996, Bayshore Trust again telephoned the Solicitor. He returned the telephone call and indicated that he had been waiting for a document to be returned from his client. He indicated he was now in receipt of that document and he would be forwarding his final report that day. No final report was received.
21. On November 18, 1996, November 21, 1996, November 25, 1996, December 2, 1996, December 10, 1996, December 17, 1996, February 7, 1997 and February 17, 1997, Bayshore Trust telephoned the Solicitor and left messages for him to call (Tab 9 of the Document Book). The Solicitor did not return any of these telephone calls.
22. On February 19, 1997, Bayshore Trust contacted Mr. Gorsky directly, and on February 24, 1997, Bayshore Trust received directly from the clients copies of the documents requested from the Solicitor.
23. By letter dated March 12, 1997 (Tab 10 of the Document Book), Trimark Trust (as Bayshore Trust was now known) wrote to the Law Society complaining about the Solicitor.
24. As a result, by letter dated March 20, 1997 (Tab 11 of the Document Book), the Law Society wrote to the Solicitor, requiring his response. The Solicitor did not respond.

25. On April 15, 1997, and again on April 24, 1997, a staff member of the Law Society telephoned the Solicitor and left messages for him to call (Tab 6 of the Document Book). The Solicitor did not return these telephone calls.

26. By letter dated May 16, 1997 (Tab 12 of the Document Book), the Society wrote the Solicitor by via registered mail, requiring his response. According to the Acknowledgement of Receipt card, the letter was signed for and delivered on May 22, 1997. The Solicitor did not respond to the letter.

27. To date, the Solicitor has not provided his final reporting letter and original documents to Trimark Trust.

28. To date, the Solicitor has not responded to the Law Society.

V. DISCIPLINE HISTORY

29. On March 14, 1995, the Solicitor was Reprimanded in Committee and was ordered to pay \$200.00 with respect to failing to file for the fiscal year ended November 30, 1993.

30. On February 22, 1996, the Solicitor was Reprimanded in Convocation and was ordered to pay \$750.00 with respect to failing to serve his client in a conscientious, diligent and efficient manner, failing to reply to the Law Society regarding a complaint by Cara Fischer despite numerous letters and telephone messages left, failing to provide a final report to his client on a mortgage transaction despite numerous letters and telephone calls, failing to reply to the Law Society regarding a complaint of the Toronto Dominion Bank despite numerous letters and telephone messages left, failing to reply to the Law Society regarding a complaint by Brian Robinson despite numerous letters and telephone messages left.

31. On October 28, 1997, the Solicitor was suspended for 3 months and continuing indefinitely thereafter until he has made his requisite filings and produced his books and records with respect to failing to pay costs ordered by Convocation in the amount of \$750.00 and failing to reply to the Law Society regarding the cost order despite numerous letters and telephone messages left, failing to reply to communications from the Law Society regarding inadequacies disclosed during a review of books and records despite numerous letters and telephone requests made, failing to reply to the Law Society regarding a complaints by Terry Steyn, J.C. Lee and Marvin Guest despite numerous letters and telephone messages left, failing to file with the Law Society for year ending December 31, 1995 and, failing to reply to the Law Society regarding a complaint by Ms. Vukovic despite numerous letters and telephone messages left.

DATED at Toronto, Ontario, this 17th day of March, 1998.”

RECOMMENDATION AS TO PENALTY

The Committee recommends the acceptance of the joint submission as follows::

1. that Clifford Paul Moss be suspended for a period of 6 months following the present suspension provided that he:
 - a) complies to the satisfaction of Convocation with all outstanding matters stipulated in Convocation's Order dated October 28, 1997;
 - b) complies with all outstanding matters in Complaint D321/97 on or before the within matter reaches Convocation.
2. that if the Solicitor returns to the practice of law that he practise only as an employee or in association with another lawyer;

3. that he enter the Practice Review Programme on resuming practice;
4. that the Solicitor pay Law Society costs in the amount of \$200.
5. If the Solicitor fails to fulfill the requirements of 1a) and b) above before the matter reaches Convocation the Committee recommends that he be disbarred.

REASONS FOR RECOMMENDATION

The Solicitor acknowledges that he has failed to report to his clients and to the Law Society on the two occasions for which he was charged. He has been disciplined on three former occasions for failure to file and failing to serve his clients in a conscientious, diligent and effective manner. He has failed to reply to the Law Society.

The Solicitor is bordering on ungovernability, and the Committee recommends that if he fails to meet the requirements set out above before the matter is heard by Convocation that he be disbarred as ungovernable.

Clifford Paul Moss was called to the Bar on March 31, 1989.

ALL OF WHICH is respectfully submitted

DATED this 13th day of August, 1998

Elvio L. DelZotto, Q.C., Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 6 months following the present suspension together with the conditions set out in the Report relating to costs and terms upon returning to practice.

Counsel for the Society made submissions that the solicitor be disbarred.

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

Counsel, the solicitor, the reporter and the public withdrew

It was moved by Mr. Topp, seconded by Mr. Cole that the solicitor be suspended for a period of 6 months to be served consecutively to the administrative suspension and to comply with the conditions set out in the Report.

It was moved by Mr. Manes, seconded by Mr. MacKenzie that the solicitor be suspended for a period of 9 months to be served consecutively and to comply with the conditions set out in the Report.

Counsel, the solicitor, the reporter and the public were recalled and the solicitor was asked whether he would assent to the undertaking and direction to his accountant for access to the books and records which are extant.

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

The Manes/MacKenzie motion for a suspension of 9 months was voted on and lost.

The Topp/Cole motion for a suspension of 6 months was voted on and adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months to be served consecutively with the outstanding suspension and comply with the conditions set out in the Report. The requirement for costs was waived.

Re: Robert Jack FALKINS - Sault Ste. Marie

The Secretary placed the matter before Convocation.

Messrs. Topp and Swaye withdrew for this matter.

Mr. Corbett appeared for the Society and the solicitor appeared on his own behalf assisted by Duty Counsel.

Convocation had before it the Report of the Discipline Committee dated 31st August, 1998, together with an Affidavit of Service sworn 2nd October, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 30th October, 1998 (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

Richmond C. E. Wilson, Q.C., Chair

Robert P. Armstrong, Q.C.

Gerald A. Swaye, Q.C.

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

Hugh Corbett
for the Society

ROBERT JACK FALKINS
of the City
of Sault Ste. Marie
a barrister and solicitor

Duty Counsel
for the solicitor

Heard: August 18, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 12, 1998 Complaint D57/98 was issued against Robert Jack Falkins alleging that he was guilty of professional misconduct.

The matter was heard in public on August 18, 1998 before this Committee composed of Richmond Wilson, Q.C. (Chair), Robert Armstrong, Q.C. and Gerald Swaye, Q.C. The Solicitor attended the hearing and was represented by Duty Counsel. Hugh Corbett appeared on behalf of the Law Society.

DECISION

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

Complaint D57/98

2. a) He failed to reply to the Law Society despite letters to him dated January 15 and March 11, 1998 and telephone messages left for him on February 23 and March 2, 1998; and
- b) He breached an undertaking to respond to the Law Society in a timely manner.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D57/98 and is prepared to proceed with a hearing of this matter on a date to be set by the Hearings Management Tribunal.

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 D57/98 and admits the particulars contained therein. The Solicitor admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. ALLEGATION OF PROFESSIONAL MISCONDUCT

4. (a) The Solicitor failed to reply to the Law Society despite letters to him dated January 15 and March 11, 1998 and telephone messages left for him on February 23 and March 2, 1998; and
- (b) The Solicitor breached an undertaking to respond to the Law Society in a timely manner.

V. FACTS

5. The Solicitor, Robert Jack Falkins, was called to the Bar on March 22, 1974. The Solicitor is an associate in the law firm of Sarlo O'Neill in Sault Ste. Marie, Ontario.

6. The Complainant, Evan Zappacosta, is a former client of the Solicitor who retained him on or about October 15, 1996 to act on her behalf in her matrimonial proceedings.

7. By way of letter dated December 12, 1997 (Tab 1, Document Book), the Complainant filed a complaint with the Law Society concerning the Solicitor's handling of her matrimonial proceedings. The Complainant alleged, among other things, that the Solicitor had failed to respond to requests for information, had failed to act on her instructions and had generally failed to keep her apprised of the status of the matter.

8. By way of letter dated January 15, 1998 (Tab 2, Document Book), a representative of the Law Society wrote to the Solicitor and enclosed a copy of the Complainant's letter of December 12, 1997. The Society requested that the Solicitor respond to the Complainant's allegations. The Solicitor was reminded of his duty to respond promptly to the Law Society.

9. On February 23 and March 2, 1998, a representative of the Law Society left a message for the Solicitor at his offices requesting that he return the telephone call. The Solicitor failed to do so. (the record of these telephone calls is at Tab 3, Document Book)

10. By way of letter dated March 11, 1998, sent by registered and ordinary mail (Tab 4, Document Book), a representative of the Law Society wrote to the Solicitor and requested that he deliver his response to the Complainant's allegations within seven days, failing which this matter would be referred for disciplinary action. An acknowledgement of receipt card (also at Tab 4, Document Book) was returned in respect of the copy of the Society's letter sent by registered mail. The Solicitor failed to respond.

VI. DISCIPLINE HISTORY

11. On two previous occasions, a complaint of professional misconduct has been authorized against the Solicitor due to his failure to respond to communications from the Law Society concerning complaints by his clients. On July 6, 1987, in consideration for the Solicitor agreeing to the terms of an Undertaking, the Law Society withdrew the first such Complaint of professional misconduct. Pursuant to the terms of the Undertaking (Tab 5, Document Book), the Solicitor agreed, among other things, as follows:

- (1) To reply to all future correspondence from the Law Society, whether by mail, telephone or otherwise in a timely fashion.

I ACKNOWLEDGE that any breach of this Undertaking may lead to disciplinary action, and I consent to this being introduced as evidence in any future disciplinary proceedings. I have retained an executed copy of this Undertaking.

12. On November 5, 1991, the Solicitor received a Reprimand in Committee arising out of his failure to reply to the Law Society concerning a complaint by a client and his breach of the Undertaking.

VII. SUMMARY

13. In summary, the Solicitor failed to respond to written and telephone communications from the Law Society concerning a complaint by a former client. The Solicitor has previously been the subject of two formal Complaints of professional misconduct as the result of his failure to respond to the Law Society in similar circumstances. On the first occasion, the Solicitor executed an Undertaking pursuant to which he agreed to, among other things, respond to all communications from the Law Society in a timely manner. On the second occasion he received a Reprimand in Committee.

DATED at Toronto this 17th day of August, 1998.”

RECOMMENDATION AS TO PENALTY

The Committee recommends that Robert Jack Falkins be reprimanded in Convocation and that there be no order as to costs.

REASONS FOR RECOMMENDATION

This matter is the third instance where this Solicitor has not complied with requests from the Society for information arising out of matters of interest to the Society. On the two prior occasions the Solicitor received a reprimand in Committee.

This Committee met on August 18, 1998 . Evidence led before us included a letter of August 14, 1998 to the Law Society providing answers to the questions raised by the Society some seven months earlier. While the response, as yet not reviewed, may be an adequate response, it arrived much too late to deal with the issue of prompt response.

It is of interest that the August 14, 1998 letter to the Society makes no effort to explain the tardiness. Duty Counsel representing the Solicitor advised the Committee that pressure of work was his client's only explanation and that his client expressed regret.

The Committee was provided with a Curriculum Vitae of the Solicitor which was remarkable, extending back many years, but including the period of the default. His participation in the local law associations and the service clubs in his area is to be commended. The Committee concluded however, that when the Society requests information in response to its duty to protect the interests of the public, that it is unacceptable to fail to respond, acknowledge receipt, or in any way identify that the Society places any legitimate demands on the lawyer's time. Accordingly, the penalty requested by Counsel for the Society is accepted and we recommend the same.

Robert Jack Falkins was called to the Bar on March 22, 1974.

ALL OF WHICH is respectfully submitted

DATED this 31st day of August, 1998

Richmond Wilson, Q.C. (Chair)

Mr. Corbett asked that the following correction be made to the Report:

Page 5, 1st paragraph, 2nd sentence under the heading Reasons for Recommendation - delete the words "the two" and insert the word "one" so that the sentence would then read:

"On one prior occasion the Solicitor received a reprimand in Committee."

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation.

Counsel for the Society made submissions in support of the recommended penalty.

Ms. McKinnon, Duty Counsel made submissions in support of a reprimand in Committee.

There were questions from the Bench.

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

It was moved by Mr. MacKenzie, seconded by Mr. Wright that the solicitor be reprimanded in Committee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Committee.

It was moved by Mr. MacKenzie, seconded by Mr. Wright that Convocation adjourn to a Committee of the whole.

Carried

The Treasurer administered the reprimand.

Re: Michael James CLARK - Toronto

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 31st August, 1998, together with an Affidavit of Service sworn 15th September, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 11th September, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th November, 1998 (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

Philip M. Epstein, Q.C.

In the matter of
The Law Society Act

Jonathan Batty
for the Society

MICHAEL JAMES CLARKE
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 5, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 8, 1998 Complaint D39/98 was issued against Michael James Clarke alleging that he was guilty of professional misconduct.

The matter was heard in public on August 5, 1998 before Philip M. Epstein, Q.C. sitting as a single bencher. The Solicitor attended the hearing and represented himself. Jonathan Batty appeared on behalf of the Law Society.

DECISION

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

Complaint D39/98

2. a) The Solicitor failed to maintain the books, records and accounts in connection with his practice in accordance with section 15 of Regulation 708 under the *Law Society Act*; and
- b) The Solicitor failed to produce the books, records, accounts and papers in connection with his practice to the Law Society in breach of section 18(1) of Regulation 708 under the *Law Society Act*.

Evidence

Part of the evidence before the Committee consisted of an Agreed Statement of Facts. The Agreed Statement of Facts is a lengthy one and no useful purpose would be served in repeating it. The essence, however, of the complaint is set out in paragraphs 62-66, which are as follows:

62. To date, the Solicitor has failed to maintain the following books and records:

- 1) since April 1995, a formal book of original entry for his general account receipts and disbursements; and,
 - 2) since April 1995, bank statements and passbooks, cashed cheques and detailed duplicate deposit slips for his general account; and,
 - 3) since March 1997, monthly trust comparisons.
63. The Solicitor has also failed to produce to the Law Society the following books, records, accounts and papers:
- 1) a copy of his regular monthly trial balance of his client trust ledger showing the balances remaining after the review requested by the Law Society on August 1, 1997;
 - 2) a formal book of original entry for his general account receipts and disbursements;
 - 3) the Robinson Estate client file;
64. The Solicitor has failed to produce a formal book of original entry for his general account receipts and disbursements despite the following requests from the Law Society:
- 1) Visits from, and meetings with, an Examiner with the Law Society on: November 14, 1996; January 29, 1998; and, February 2, 1998.
 - 2) Letters from the Law Society dated: February 28, 1997; August 1, 1997; September 5, 1997; October 6, 1997; December 12, 1997; and, January 6, 1998.
 - 3) Telephone calls from the Law Society on March 17, 1997; March 20, 1997; April 3, 1997; April 16, 1997; July 29, 1997; September 24, 1997; and, January 28, 1998.
65. The Solicitor has failed to produce a copy of his regular monthly trial balance of his client trust ledger showing the balances remaining as directed by the Law Society by the following means on the following dates:
- 1) Letters from the Law Society dated: August 1, 1997; September 5, 1997; October 6, 1997; November 11, 1997; December 12, 1997; and, January 6, 1998.
 - 2) Telephone calls from the Law Society on September 24, 1997; and, January 28, 1998.
 - 3) A visit and meeting with an Examiner with the Law Society on January 29, 1998 and February 2, 1998.
66. The Solicitor has also failed to produce to the Law Society the Robinson Estate client file despite:
- 1) Letters from the Law Society dated: August 1, 1997; September 5, 1997; October 6, 1997; December 12, 1997; and, January 6, 1998.
 - 2) Telephone calls from the Law Society on September 24, 1997 and January 28, 1998.
 - 8) A visit from, and meeting with, an Examiner with the Law Society on January 29, 1998 and February 2, 1998.

FINDING OF THE COMMITTEE

As a result of the facts agreed to in the Agreed Statement of Facts the Committee finds that the complaint has been established and makes a finding of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Michael James Clarke be reprimanded in Convocation if his books and records are produced to the satisfaction of the Society by the time the matter is considered by Convocation, failing which, that he be suspended for one month definite and month to month thereafter until the books and records are satisfactorily produced.

The Committee further recommends that the Solicitor enroll in and complete the Practice Review Program.

REASONS FOR RECOMMENDATION

There has been a joint submission by the Society and the Solicitor that the Solicitor be reprimanded in Convocation if his books and records are produced to the satisfaction of the Society by the time the matter reaches Convocation which is not to be before October 1998. In the event that the books and records are not produced to the satisfaction of the Society by the time the matter reaches Convocation, then the joint submission is that the Solicitor be suspended for one month definite and month to month thereafter until the books and records are satisfactorily produced.

It appears that Mr. Clarke is a sole practitioner, practising primarily in criminal law in Toronto. He has had some severe business losses and financial reverses in the past few years. He was particularly affected by the significant demise of the Legal Aid Plan. When he appeared before the Committee, he gave some brief background of his personal circumstances and while it was less than fulsome, it does indicate to me that Mr. Clarke is having some trouble coping with the stresses or financial consequences of practice and needs some additional help.

Accordingly, I also recommend that in addition to the joint submission, Mr. Clarke be required to attend the Practice Review Program of the Society and to complete the program under their direction. I think this will, to some degree, assist the Solicitor in getting back on track. This additional requirement is not intended as punishment to the Solicitor, but as an attempt to reach out and give him some help that he obviously needs in reorganizing his practice. For those reasons, I accept the joint submission with the added condition and will so recommend to Convocation.

Michael James Clarke was called to the Bar on March 22, 1974.

ALL OF WHICH is respectfully submitted

DATED this 31st day of August, 1998

Philip M. Epstein, Q.C.

There were no submissions.

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

Carried

21st January, 1999

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if his books and records are produced to the satisfaction of the Society failing which he be suspended for a period of 1 month definite and month to month thereafter until the books and records are satisfactorily produced. In addition the Committee recommends the solicitor enrol in and complete the Practice Review Program.

Ms. Braid advised that the solicitor had produced his books and records to the satisfaction of the Society and submitted an Undertaking from the solicitor which was filed as Exhibit 3.

Both counsel and the solicitor made submissions in support of a reprimand in Convocation.

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

It was moved by Mr. Gottlieb, seconded by Mr. Chahbar that the solicitor be reprimanded in Committee.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Committee.

It was moved by Mr. Gottlieb, seconded by Mr. Adams that Convocation adjourn to a committee of the whole.

Carried

The Treasurer administered the reprimand.

RESUMPTION OF THE MARCOVITCH MATTER

The matter was adjourned to 9:30 a.m. on Friday, January 22nd peremptory to the solicitor.

CONVOCATION ROSE AT 4:30 P.M.

Confirmed in Convocation this 19 day of February 1999

Harvey T. Strasburg

Treasurer