

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 25th June, 1998
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Carpenter-Gunn, Carter, Chahbar, Cole, Crowe, DelZotto, Gottlieb, Marrocco, O'Connor, Puccini, Ross, Ruby, Swaye, Topp and Wilson.

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The reporter was sworn.

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IN PUBLIC

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Ms. Cameron, Senior Counsel-Discipline introduced Ms. Robyn Bell who acted as Duty Counsel.

Re: Frank Andrew THERIAULT - Toronto

The Acting Secretary placed the matter before Convocation.

Mr. Hugh Corbett appeared on behalf of the Society. The solicitor was not present.

Mr. Corbett advised that the solicitor was unable to attend Convocation because of job commitments and requested an adjournment to the Discipline Convocation in September.

Mr. Corbett did not oppose the request.

Convocation granted an adjournment to the September Discipline Convocation.

Re: Motion for an Interim Suspension - Brian Richard MADIGAN

The Acting Secretary placed the matter before Convocation.

Ms. Elizabeth Cowie appeared for the Society and Mr. Douglas Crane appeared for the solicitor who was present.

Both counsel made submissions that the solicitor be suspended pending completion of the hearing of Complaint 96/98.

The Benchers were provided with a copy of the solicitor's signed consent to an interim suspension.

It was moved by Ms. Puccini, seconded by Ms. Ross that the solicitor's rights and privileges be suspended pending completion of the hearing of Complaint 96/98.

Carried

Re: Motion for an Interim Suspension - Robert William PASKAR

The Acting Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Ms. Cowie appeared for the Society and Ms. Robyn Bell, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Ms. Bell advised that the solicitor was seeking counsel and had not had an opportunity to respond to the interim suspension order made by Convocation on June 11th, 1998. Ms. Bell requested on behalf of the solicitor an adjournment in order that he could prepare a motion to vary the order of Convocation.

The solicitor was granted leave to bring a motion to vary the order of the interim suspension imposed on June 11th, 1998. The motion is to be brought before a regularly scheduled Convocation date or another date if it can be arranged.

Re: Patrick Daniel LENNON - Hamilton

The Acting Secretary placed the matter before Convocation.

Messrs. Ruby and Wilson withdrew for this matter.

Ms. Janet Brooks appeared for the Society and Mr. Alan Cooper appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 16th June, 1998, which Report was signed and dated by Mr. Alan Cooper, counsel for the solicitor on 19th June, 1998 acknowledging that he had received the Report on behalf of the solicitor (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 19th June, 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

Clayton C. Ruby

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

Janet Brooks & Catherine Braid
for the Society

PATRICK DANIEL LENNON
of the City
of Hamilton
a barrister and solicitor

Alan D. Cooper
for the solicitor

Heard: June 11, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 21, 1997 Complaint D171/97 was issued against Patrick Daniel Lennon alleging that he was guilty of professional misconduct.

The matter was heard in public on June 11, 1998 before Clayton C. Ruby sitting as a single bencher. The Solicitor attended the hearing and was represented by Alan D. Cooper. Janet Brooks and Catherine Braid appeared on behalf of the Law Society.

DECISION

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

Complaint D171/97

2. a) Between January 1, 1991 and October 31, 1994, he recklessly prepared and certified accounts to the Ontario Legal Aid Plan for payment, as follows:
 - i) He billed for more than 24 billable hours per day on 53 separate days;
 - ii) He billed on a number of occasions, for performing more than one service on behalf of his legally-aided clients at the same time. In all, his accounts contained 15 days on which items were in conflict with another, for a total of 49.5 hours of overlapped time; and
 - iii) He double billed on 120 occasions for mileage and travel time in which he billed mileage and travel time in respect of two or more clients where only one trip was made.

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 D171/97 and is prepared to proceed with a hearing of this matter on June 11, 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 D171/97 and this agreed statement of facts with his counsel, Alan D. Cooper, and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the Complaint supported by the facts as stated below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He initially worked at the law firm of Peroczak & Winchie in Hamilton until approximately 1982. At that time, he went into partnership with Terry Winchie. Since approximately 1991, the Solicitor has practised as a sole practitioner in the City of Hamilton. The Solicitor initially became a member on the panels of the Wentworth District, Ontario Legal Aid Plan [hereinafter "OLAP"] in April, 1985 and was a member on the panels throughout the time period delineated in Complaint D171/97.

5. The Solicitor initially practised both criminal and family law. When legislative changes affecting immigration law came into effect in January, 1989, the Solicitor had his name placed on the Legal Aid panel for immigration law, specifically in the area of refugee law. He began dealing increasingly in the area of refugee law until he practised almost exclusively in this area. During the time period delineated in Complaint D171/97, from January 1, 1991 until October 31, 1994, the Solicitor practised almost exclusively in the area of refugee law. The majority of his clients were legally aided.

Particular 2(a)

Between January 1, 1991 and October 31, 1994, he recklessly prepared and certified accounts to the Ontario Legal Aid Plan for payment as follows:

- i) He billed for more than 24 billable hours per day on 53 separate days;
- ii) He billed, on a number of occasions, for performing more than one service on behalf of his legally-aided clients at the same time. In all, his accounts contained 15 days on which items were in conflict with another, for a total of 49.5 hours of overlapped time; and
- iii) He double billed on 120 occasions for mileage and travel time in which he billed mileage and travel time in respect of two or more clients where only one trip was made.

a) Billing Procedures

6. Throughout the time period delineated in Complaint D171/97, the Solicitor employed one full-time secretary and a part-time bookkeeper. The Solicitor advised the Law Society that his practise was to make some notes in his pocket diary of the dates and duration of time for which he provided legal services to clients. He would then update the dockets which were kept in each client file. Often he did not update the dockets until several days after the service was provided. The Solicitor advised the Law Society that his diaries were not always complete and that, as a result of having to rely only on his memory, he made errors in reporting the number of hours he worked. The Solicitor also advised that he was often reckless in posting the correct date for work done to the docket. The Solicitor advised the Law Society that he has not kept any of his diaries since 1991.

7. When the time came to prepare an account to OLAP for payment, the Solicitor instructed his secretary to prepare the account. His secretary would prepare the account using the information from the docket in the client file. Once completed, the draft account was provided to the Solicitor to be signed. The Solicitor advised that he conducted only a cursory review of the account, without comparing it to the docket, his diaries, any information in the client file and did not take any other steps to verify the information in the account. He signed the account, certifying its accuracy, and returned it to his secretary to submit to OLAP. On a number of occasions, there was a significant time lag between the date a service was provided by the Solicitor and the preparation of the account to OLAP for that service. The Solicitor acknowledges that he recklessly maintained the dockets in the client files and recklessly prepared the accounts to OLAP.

b) Billings by the Solicitor to Legal Aid between January 1, 1991 and October 31, 1994

8. Throughout the time period delineated in Complaint D171/97, the majority of the Solicitor's clients were Sri Lankan immigrants who claimed refugee status based on the civil war and political climate in that country. The majority of these clients were legally aided and most of the accounts submitted to OLAP included claims for preparation for and attendance at hearings. The Law Society has no evidence that the Solicitor did not perform the services for the amount of time that he claimed from OLAP other than mileage and travel time [particular 2(a) (iii)]. However, throughout the period delineated in the Complaint:

- i) the Solicitor billed for more than 24 billable hours per day on 53 separate days;
 - ii) on 15 separate days, the Solicitor billed for performing more than one service on behalf of his legally aided clients at the same time, for a total of 49.5 hours of overlap time; and
 - iii) the Solicitor double billed on 120 occasions for mileage and travel time in respect to two or more clients when only one trip was made.
- i) *Excessive Hours Billed - 53 days over 24 hours*

9. On 53 separate days between January 1, 1991 and October 31, 1994, the Solicitor billed OLAP for more than 24 billable hours per day. The hours billed by the Solicitor on these 53 days ranged from 24 hours to 44 hours, 45 minutes. A list of the 53 dates is found at pages 6 and 7 of Tab 6 of the *Document Book*. For ease of reference, a copy of this list is attached as Appendix "A" to this Agreed Statement of Facts.

10. As an example, one of the days for which the Solicitor billed for more than 24 billable hours, was June 16, 1993. This day is illustrative of the remaining 52 dates. The hours billed with respect to this date totalled 30.5 hours. The following chart summarizes the hours billed by the Solicitor to OLAP for services performed on June 16, 1993 and the information contained in his dockets for that day.

CLIENT	SERVICE RECORDED BY SOLICITOR (in his account to OLAP and in his docket)	HOURS CLAIMED BY THE SOLICITOR	
		In his Account to OLAP	In his Dockets
A. Yogarajah	- Hearing - Travel to Toronto - Travel to Hamilton	4.0 1.5 1.5	4.0 1.5 1.5
I. Rodrigo	- Review file for hearing	1.5	1.5
A. Easwaranathan	- Interview with client - Dictating & preparations of personal info & narrative	3.0 3.0	Illegible Illegible
V. Vasanthkumar	- Travel to Toronto - Hearing - Travel to Hamilton	1.5 4.5 1.5	0 4.5 0
D. Shanmuguada	- Interview with client (3:00 p.m. - 6:00 p.m.)	3.0	3.0
D. Gamarachivinthang	- Review research material	5.5	5.5
TOTAL		30.5	

Copies of the accounts for services provided to each of the clients named in the chart which were billed to OLAP by the Solicitor for June 16, 1993 are found at Tab 8 of the *Document Book*. Copies of the docket from the Solicitor's client files for each of the named clients which include June 16, 1993 are found at Tab 9 of the *Document Book*.

11. According to the Solicitor, he provided all of the services to the clients for the amount of time claimed. While he maintains that he did not inflate the accounts submitted to OLAP, the Solicitor acknowledges that billing for more than 24 hours in one day is excessive and not sustainable and demonstrates a reckless disregard to accuracy and attention in his billing practice to OLAP. The Solicitor admits to the reckless manner in which he maintained his docket, as outlined in paragraph 6 above, and, consequently, to the reckless preparation of his account to OLAP.

ii) *Overlapping Hours - 49.5 hours*

12. On 15 occasions between January 1, 1991 and October 31, 1994, the Solicitor billed two or more client accounts during the same time period, for a total of 49.5 overlapping hours. A list of the fifteen days in which the Solicitor billed overlapping hours is found at pages 30 to 34 of Tab 6 of the *Document Book*. For ease of reference, this list is attached as Appendix "B" to this Agreed Statement of Facts.

13. As an example, May 24, 1993 was one of the occasions when the Solicitor billed for two or more client accounts during the same time period. This date is illustrative of the remaining 14 dates. The following chart sets out the details of the overlapping time billed by the Solicitor on May 24, 1993:

CLIENT	SERVICE RECORDED BY SOLICITOR (in his account to OLAP and in his dockets)	HOURS CLAIMED BY THE SOLICITOR	
		In his Account to OLAP	In his Dockets
Mandranjan Velluppillai	(8:00 a.m. - 12:30 p.m.) - Prepare for hearing - Further research - Review entire file	4.5	4.5
Wigneswaran Paranthaman	(8:00 a.m. - 12:30 p.m.) - Research on updated country profile - Review of same in preparation of hearing	4.5	4.5

A copy of the account to OLAP for services performed by the Solicitor for Mandranjan Veluppillai, including services rendered on May 24, 1993, is found at Tab 10 of the *Document Book*. A copy of the account to OLAP for services rendered by the Solicitor for Wigneswaran Paranthaman, including services rendered on May 24, 1993, is found at Tab 12 of the *Document Book*. A copy of the Solicitor's dockets from the client file of Mandranjan Veluppillai, including services provided on May 24, 1993 is found at Tab 11 of the *Document Book*. A copy of the Solicitor's dockets from the client file of Wigneswaran Paranthaman, including services provided on May 24, 1993, is found at Tab 13 of the *Document Book*.

14. The Solicitor provided the following explanation for the overlapping hours. Given the incompleteness of his dockets, as outlined in paragraph 6 above, the Solicitor had to rely upon his memory as to when he performed the service and the amount of time he expended on a file. At some point, which the Solicitor cannot identify with any specificity, he was informed by OLAP that its policy had changed and that he was required to enter actual times for when the services were provided. At the time, the Solicitor was in arrears for billings to OLAP, so, in preparing those billings, he speculated as to when he provided the services. In so doing, the total amount of time spent by the Solicitor in performing the services, which was already in the dockets, did not change. Eventually, he reverted back to submitting bills to OLAP which only contained the total time spent. While there is no evidence that the Solicitor did not provide the legal services to the clients for which he billed for overlapping time, the Solicitor acknowledges that this was an improper method of responding to OLAP's request and demonstrates a reckless method of preparing accounts for payment from OLAP.

iii) Double Billing for Mileage and Travel Time - 120 occasions

15. Between January 1, 1991 and October 31, 1994, the Solicitor double billed on 120 occasions for mileage and travel time. This resulted in an overpayment to the Solicitor in the amount of \$28,349.28 plus GST. A list of these occasions is found at pages 35 to 56 of Tab 6 of the *Document Book*.

16. As an example, one of the days when the Solicitor double billed OLAP for travel and mileage was June 16, 1993. This date is illustrative of the remaining 119 occasions when the Solicitor double billed OLAP. As depicted in the chart at paragraph 10 of this Agreed Statement of Facts, the Solicitor billed OLAP for travel expenses between Toronto and Hamilton for two clients, A. Yogarajah and V. Vasanthkumar. While both of these clients had refugee hearings on June 15, 1993, the Solicitor only made one trip to Toronto. He drove to Toronto in the morning, attended both hearings and then returned to Hamilton in the afternoon.

17. The Solicitor's secretary advised that whenever there was an entry in the docket of the client's file for an immigration hearing, she included an entry for travel time and mileage between Hamilton and Toronto in the billing to OLAP. She also advised that even when there was no entry in the docket for travel time and mileage, she included it in the account to OLAP because she thought that the Solicitor had forgotten to enter travel time and mileage in the docket. The Solicitor's secretary did this without the Solicitor's instructions or knowledge.

18. The Solicitor advises that he did not compare the accounts submitted to OLAP, which his secretary prepared for his signature, to the client file or to his dockets. Furthermore, in May or June, 1995, when the Solicitor realized the errors that had been made on his accounts resulting in double billing for mileage and travel time, he did not inform OLAP about these errors. Rather, the Solicitor decided he would cease claiming for any travel time and mileage in future accounts in the hope that the overbilled accounts would eventually be offset. The Solicitor did not take any steps to determine the amount of the overpayment to him by OLAP nor did he keep a record of unclaimed travel time and unclaimed mileage once he discovered the error and ceased claiming for mileage and travel time. The Solicitor acknowledges that, if he had taken the time to check the client files and dockets against the accounts, these errors would easily have been identified and that, while not intentional, the double billing for mileage and travel time illustrates a reckless inattention to his billing practice. He further acknowledges that this recklessness was further accentuated by not informing OLAP of these errors or the resulting overpayment.

c) OLAP Investigation and Hearing

19. As a result of discrepancies in the Solicitor's accounts to OLAP, an investigation was conducted by OLAP. A copy of the Synopsis prepared by the investigator from OLAP is found at Tab 2 of the *Document Book*. As a result of the investigation, a hearing was held before Mr. Robert Holden, Director of OLAP in October, 1995, pursuant to the *Legal Aid Act* and *Regulations*, alleging various improprieties in the Solicitor's billing of OLAP during the period from November, 1993 until October, 1994. (See Tab 3 of the *Document Book*).

20. On November 1, 1995, Mr. Holden ruled that the Solicitor should be removed from the OLAP panels for a period of nine months for being "wilfully blind in preparing [his accounts to Legal Aid]." The Solicitor was also ordered to refund any money that should not have been paid to him and to pay the costs of the proceedings, which were fixed at \$2,000.00. The amount to be refunded to OLAP by the Solicitor, which was agreed to by both the Solicitor and OLAP, was \$150,525.76. This amount included overpayments to the Solicitor which occurred during the period between January 1, 1991 and October 31, 1994. While this period of time represents a broader period from that covered in the OLAP hearing, it is similar to the period of time set out in Complaint D171/97. At the present time, the Solicitor has served his 9 month suspension from the OLAP panels. Also, the amount owed to OLAP by the Solicitor was paid as a result of OLAP having offset the amount due from the Solicitor for over-billing by amounts due to him for accounts submitted to OLAP subsequent to October 31, 1994. At this time, there is no longer any monies due to OLAP by the Solicitor. A copy of the transcript of the Solicitor's testimony at the hearing is found at Tab 4 of the *Document Book*. A copy of the decision of the Director of OLAP is found at Tab 5 of the *Document Book*.

V. DISCIPLINE HISTORY

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

DATED at Toronto, this 3rd day of June, 1998."

RECOMMENDATION AS TO PENALTY

It is recommended to Convocation that Patrick Daniel Lennon be suspended for a period of nine months, and that upon his reinstatement he enrol and participate in the Practice Review Programme in accordance with the terms of his undertaking dated June 3, 1998 and pay the costs of that programme up to but not exceeding \$750.

REASONS FOR RECOMMENDATION

The matters before us are very serious. Indeed, a perusal of the relevant authorities indicate that the range of appropriate penalty, in this case, can run from a reprimand in Convocation through to disbarment. That is because of the gravity of the offence in most cases and because of the factor, present in this case, of a breach of the public trust. Moreover, it is a breach of the public trust that took place over a lengthy period of time, some three years and ten months.

What is crucial in assessing the appropriate penalty in this case is to carefully focus on what has been proved and what has not been proved. The course of conduct here has been fairly, and can only be categorized as, reckless. The mental state with which these acts are done becomes crucial in determining the level of appropriate penalty. For example, in the Kopyto case, the mental element which accompanied the acts, was characterized as, "wilful blindness", which in law is the equivalent of actual knowledge. Recklessness is a considerably different state of mind. Similarly, in the Svami and Murphy cases, one finds that there was evidence that the work which was billed was in fact not performed; whereas here, it seems clear that the work, so far as the evidence discloses, was performed though the billing for it was reckless. This is not to minimize the seriousness of the offence, but merely to accurately and fairly assess the degree of culpability of the conduct of the Solicitor which is in question. Moreover, though there is extensive psychiatric evidence before me which I will refer to later, it is important to note that it does not suggest that during the relevant time period, there was any mental illness of any kind such that would explain in a causative way why this behaviour occurred in a solicitor who had been called to the Bar on March 21st, 1975 and had had no history whatsoever of discipline since that date.

The nature of the activity can be illustrated by passages from the Agreed Statement of Facts.

"At the time the Solicitor was in arrears for billings to OLAP, so, in preparing those billings, he speculated as to when he provided the services. In so doing, the total amount of time spent by the solicitor in performing the services, which was already in the dockets, did not change. Eventually, he reverted back to submitting bills to OLAP which only contained the total time spent. While there is no evidence that the solicitor did not provide the legal services to the clients for which he billed for overlapping time, the Solicitor acknowledges that this was an improper method of responding to OLAP's request, and demonstrates a reckless method of preparing accounts for payment from OLAP."

Similarly, the explanation for travel time and mileage:

"The Solicitor's secretary advised that whenever there was an entry in the docket of the client's file for an immigration hearing, she included an entry for travel time and mileage between Hamilton and Toronto in the billing to OLAP. She also advised that even when there was no entry in the docket for travel time and mileage, she included it in the account to OLAP because she thought that the Solicitor had forgotten to enter travel time and mileage in the docket. The Solicitor's secretary did this without the Solicitor's instructions or knowledge."

And further, when he discovered the problem, the explanation given in the Agreed Statement of Facts is as follows:

"The Solicitor advises that he did not compare the accounts submitted to OLAP, which his secretary prepared for his signature, to the client file or to his dockets. Furthermore, in May or June, 1995, when the Solicitor realized the errors that had been made in his accounts resulting in double billing for mileage and travel time, he did not inform OLAP about these errors. Rather, the Solicitor had decided he would cease claiming for any travel time and mileage in future accounts in the hope that the overbilled accounts would eventually be offset. The Solicitor did not take any steps to determine the amount of the overpayment to him by OLAP, nor did he keep a record of unclaimed travel time, unclaimed mileage, once he had discovered the error and ceased claiming for mileage and travel time."

In due course, these matters were discovered by the Ontario Legal Aid Plan and a hearing was held before Mr. Robert Holden, the Director. At that time, there was an order made that the Solicitor should be removed from the panels for a period of nine months. He was ordered to refund any money that should not have been paid to him and pay the costs of those proceedings fixed at two thousand dollars. The Solicitor has presently served his nine months suspension from the OLAP panels which, given the nature of his practice, made it effectively a nine months suspension from practice. These amounts have now been offset and there are no monies owing to the Ontario Legal Aid Plan.

The Solicitor has recently been diagnosed and treated for depression and has sought professional help from Dr. B. Siegel, a psychiatrist practising in Hamilton, Ontario. It appears that his depression began with the Ontario Legal Aid Plan investigation of his billing practices. It has grown in severity. In his letter Dr. Siegel states:

“He admitted to having been very depressed in mood for an extended period of time....He said that he had experienced feelings of anxiety, and a growing sense of hopelessness and helplessness that clearly arose from the situation he was in, but was pervasive enough to affect all aspects of his life. He had found himself completely preoccupied with the accusations and filled with feelings of shame and dread....He allowed his law practice to languish. He let his secretary and bookkeeper go and did not take on any new work, so he began to run into financial difficulties and had to inject personal money into his practice in order to keep his office open. He had been suicidal during much of this period and spent a lot of his time planning how to close out his practice completely and in an orderly fashion so as not to leave any clients in the lurch and not leave his family with the added burden of having to settle his affairs. On several occasions, he made serious plans to take his own life but did not go through with these because of concern for his wife and two children. When we met, he was still struggling with all these feelings and could not honestly say that he had dropped his suicidal intent. He said that his life had become an excruciating ordeal....”

“Mr. Lennon accepted full responsibility for the recklessness he had displayed with respect to his billing practices. He cooperated fully with the investigation, signed the Agreed Statement of Facts and submitted himself without argument to the penalties imposed upon him. [In fact, there was argument respecting the severity of the penalties.] At an emotional level, he felt shocked and humiliated by the whole event, due to the inevitable loss of credibility that would ensue. He found this devastating because he had always prided himself upon being an honest lawyer who dedicated himself to the best interests of his clients and felt he was regarded by the community as a person of integrity. It seemed very ironic that his behaviour, motivated as it was by a professional ethic of doing his utmost for his clients, rather than by a selfish interest in his own gain, could make him appear to be the kind of self-serving lawyer that he himself had always disdained.”

It is important to stress that the recklessness in the billing practices was not solely at the expense of the Ontario Legal Aid Plan. Indeed, as the Agreed Statement of Facts makes clear, very often he and his interests also fell victim to the recklessness of the billing practices, so that income, which had he paid proper attention, would have rightfully been his, could not in fact ultimately be claimed. It is not possible to assess or weigh one against the other, but it is important to make it clear that this was not reckless, self-centred behaviour.

It is the view of Dr. Siegel that:

“This man does not display psychopathic tendencies.”

and:

“This man has suffered extensively and this has taken its toll. I certainly hope that the treatment of his depression will be successful and that he will survive this very traumatic time. He certainly has a lot of strengths, including his intelligence, his diverse talents, his drive and energy, his capacity for hard work and his compassion for his fellow man.”

At present, Mr. Lennon continues in the weekly sessions of psychotherapy with Dr. Siegel. It appears that she is satisfied with his progress. They have discussed a course of drug therapy, but have not yet decided to embark upon it.

In these circumstances, there is reason to hope not only that this offence will not be committed in the future, but for the reclamation of this man as an honourable and participating member of the Law Society of Upper Canada. That conclusion is reinforced by the letter of support from Catherine Cassidy which indicates that he is a person who is thought of highly in his community and who has garnered a reputation for working with socially disadvantaged people and displaying

“particular compassion and sensitivity to their plight”.

“I have seen him take the time to listen to them in circumstances where I doubt that others might have been so generous.”

Accordingly, the joint recommendation is one which makes particularly good sense in the context of this man and these infractions. I recommend therefore to Convocation that he be suspended for a period of nine months and we accept his undertaking that upon his reinstatement, he will engage in a programme with the Practice Review Programme in accordance with the terms of the undertaking filed before me and that he pay the costs of that programme up to but not exceeding seven hundred and fifty dollars (\$750).

ALL OF WHICH is respectfully submitted

DATED this 16th day of June, 1998

Clayton C. Ruby

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 9 months together with the conditions set out in the Report.

Both counsel made joint submissions in support of the recommended penalty.

Copies of character letters were distributed to the Bench which were not filed at the hearing in support of the joint submissions.

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

It was moved by Mr. Topp, seconded by Mr. Crowe that the solicitor be suspended for a period of 1 year and comply with the conditions set out in the Report upon the solicitor's return to practice.

Carried

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

The character letters were filed as Exhibit 3.

The Treasurer announced Convocation's decision that the solicitor be suspended for a period of 1 year and comply with the conditions set out in the Report.

The Treasurer advised that the solicitor's conduct would ordinarily result in disbarment except for the mitigating circumstances.

James Douglas Barnett

The matter was stood down.

Re: Gerardus Ysaak Wilfred HEDDEMA - Toronto

The Acting Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Ms. Catherine Braid appeared for the Society and Ms. Laurie Galway appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1998, together with an Affidavit of Service sworn 3rd March, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 27th February, 1998 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th June, 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

GERARDUS YSAAK WILFRED HEDDEMA
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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 14, 1996 Complaint D288/96 was issued against Gerardus Ysaak Wilfred Heddema 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 bench. The Solicitor did not attend the hearing, nor was he represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D288/96

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

RECOMMENDATION AS TO PENALTY

The Committee recommends that Gerardus Ysaak Heddema be reprimanded in Convocation if the filings are made prior to Convocation. If the filings are not made prior to the matter being heard in Convocation, the Committee recommends a thirty day suspension continuing month to month thereafter until the filings are made in full. This suspension to be concurrent with any other suspension.

REASONS FOR RECOMMENDATION

Mr. Heddema has failed to satisfy his obligations pursuant to the reporting of financial material as each and every solicitor in Ontario is required to do. The result of his failure to file is a continuing burden upon the members of the profession and causes disrepute among members of the public.

As a result of his failure to file, it is necessary to impose some penalty, and under these circumstances the above penalty is recommended.

Given the fact that Mr. Heddema was ill at one point in time and is apparently not practising at this point, I respectfully decline the Society's invitation to award costs because I fear that there is no hope of them ever being paid, and it doesn't strike me that this is an appropriate case for costs.

As well, the suspension order which was made against Mr. Heddema, in my respectful view, ought to be concurrent with any other suspension that he is under. The result we are hoping to obtain by these proceedings is to obtain his compliance with the statute and I see no purpose whatsoever in making it consecutive to any other suspension.

Gerardus Ysaak Wilfred Heddema was called to the Bar on March 22, 1991.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1998

Robert C. Topp

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if the filings were made, failing which he was to be suspended for a period of 30 days continuing month to month thereafter until the filings were made, such suspension to be concurrent with any other suspension.

Ms. Braid advised that the solicitor had completed his filings satisfactorily and both counsel made joint submissions in support of a reprimand in Convocation.

Ms. Braid advised that the solicitor was presently administratively suspended.

It was moved by Mr. Marrocco, seconded by Mr. Ross that the solicitor be reprimanded in Convocation.

Carried

The Treasurer administered the reprimand.

Re: James Douglas BARNETT - Etobicoke

The Acting Secretary placed the matter before Convocation.

Messrs. Wilson, Carter and Cole withdrew for this matter.

Ms. Cowie appeared for the Society and Mr. David Potts appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 15th April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th April, 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

David W. Scott, Q.C., Chair
William D. T. Carter
Nora Angeles

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

Amanda Worley
for the Society

JAMES DOUGLAS BARNETT
of the City
of Etobicoke
a barrister and solicitor

David A. Potts
for the solicitor

Heard: February 3, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 30, 1997 Complaint D205/97 was issued against James Douglas Manfred Leopold Schlosser Barnett alleging that he was guilty of professional misconduct.

The matter was heard in public on February 3, 1998 before this Committee composed of David W. Scott, Q.C., William D.T. Carter and Nora Angeles. The Solicitor attended the hearing and was represented by David A. Potts. Amanda Worley appeared on behalf of the Law Society.

DECISION

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

Complaint D205/97

2. a) He failed to conduct himself with courtesy and good faith toward other lawyers.

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 205/97 and is prepared to proceed with a hearing of this matter on February 3 and 4, 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 205/97 and this agreed statement of facts with his counsel and admits the particulars contained therein. The Solicitor also admits that the particular alleged in the Complaint supported by the facts as hereinafter stated constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in April 1986 and practises as a sole practitioner in Etobicoke. The Solicitor also operates a number of other law offices staffed by solicitors and support personnel.

5. On or about January 16, 1995, the Solicitor prepared a bulletin for circulation to all real estate lawyers, law clerks, receptionists and "Mel" in his offices. The bulletin was prefaced with "Most Confidential" at the top and contained a caution that "staff should not show the bulletin or talk about its contents except to other members of the J.D. Barnett team without the specific prior authorization of Douglas Barnett". The Solicitor maintains the bulletin was never acted on and only became an external document when it was "leaked" as detailed in paragraph 7 below.

6. That bulletin included a "Lawyer Death List" (Document Book, Tab 1), which states in part:

For any lawyer on this list, we must make life very hard, and screw them up any way we can. They have earned their way on the list by badmouthing our firm, being unco-operative on a deal, complaining to the Law Society about advertising, or because of some other heinous crime or insult. However, just because a lawyer is our competitor and we have no evidence that he or she has specifically targeted us or badmouthed us, this is not enough for inclusion on the Death List, since that would not be sporting. If you are not sure whether the retaliatory measure that you can take is too harsh, talk to Doug. I will take responsibility at the end of the day for this list, and for any retaliatory action taken by anyone on staff. The main purpose of retaliation is for word to spread among the legal community that if you fuck with J.D. Barnett, bad things will happen to you, so don't mess with us. Some suggestions for screw ups:

- a) *reporting them to the Law Society for an improper act;*
- b) *arrive at the Registry Office late (and at a different time than promised), as long as it doesn't jeopardize the closing;*
- c) *sending draft documents late, or not at all;*
- d) *refuse to escrow close;*
- e) *bad-mouth them to the real estate agent;*
- f) *call Sam about any unique fact situation, or for general advice on tactics.*

It is especially the case that on sales (where the other side is acting for the purchaser), we can really screw up the other side, while on purchases, we could be jeopardizing ourselves.

No matter what, we cannot jeopardize a closing, because we don't want real estate agents to think that we are going to jeopardize their deals and clients.

I will add to the screw up suggestion list, and encourage ideas from all of you.

All staff must also tell me about any lawyer who has insulted us or made life difficult so I can add their name on the list.

Finally, the word "Death" in "Death List" is not to be taken literally within the current democratic political order in Canada.

7. In addition to the complaints described below, the Law Society also became aware of the bulletin when it received a copy on April 9, 1996 from the counsel for Michele Carlson. Ms. Carlson was a former employee of the Solicitor, who at the time was being sued by the Solicitor (Document Book, Tab 2).

8. The existence of the bulletin became known to a number of members of the profession, many of whose names had been placed on the "Lawyer Death List". The existence of the bulletin was made public through no action of the Solicitor. By letter dated April 3, 1996, Brian Watson complained to the Law Society (Document Book, Tab 3). By letter dated April 19, 1996, Marek S. Malicki complained to the Law Society (Document Book, Tab 4). By letter April 25, 1996, Larry R. Plener complained to the Law Society (Document Book, Tab 5). By letter dated April 26, 1996, James Naumovich complained to the Law Society (Document Book, Tab 6) and by letter dated June 27, 1996, Martin P. Zarnett complained to the Law Society (Document Book, Tab 7).

9. As a result, the Society commenced an investigation and, by letter dated May 24, 1996, the Solicitor responded to the Society (Document Book, Tab 8) and indicated that the list was a draft document that had never been acted upon.

10. The Solicitor indicated that he verbally retracted the bulletin on or about January 17, 1995 as a result of the reaction from the J.D. Barnett team.

11. In particular, Sam Campese, a real estate lawyer who worked for the Solicitor at the head office, decided on reading the bulletin that he would not implement the bulletin. Tammy Lyons, a real estate law clerk who worked for Mr. Barnett at the Mississauga office says she was appalled when she received the bulletin and called the Solicitor to convey her concern. Leonard Lyn, another real estate lawyer who worked for the Solicitor at the head office, spoke to the Solicitor on two occasions following his receipt of the bulletin. On the first occasion, Mr. Lyn told the Solicitor that his idea was both stupid and improper and, that he had no intention of keeping or using the bulletin. On the second occasion, the Solicitor acknowledged to Mr. Lyn that the bulletin was foolish and Mr. Lyn understood that he was free to tell those in the firm to ignore the bulletin. Mr. Lyn proceeded to convey this message to Ms. Lyons and Mr. Campese.

12. In addition, the Solicitor also circulated a release to all his offices, dated April 24, 1996 (Document Book, Tab 9) stating that the bulletin had been a draft document that had never been acted upon.

13. While the Solicitor believes he sent a letter of apology to all lawyers on the "Lawyer Death List" the Society was only able to confirm that 8 of the 40 lawyers received the apology. (Document Book, Tab 10)

V. DISCIPLINE HISTORY

14. On September 25, 1997, the Solicitor was suspended for a period of one month commencing October 14, 1997 and was ordered to pay the Law Society's costs in the amount of \$5,000 with respect to failing to respond within a reasonable time to communications from his client and from another solicitor, failing to provide within a reasonable time a report to his client, failing to honour in a timely manner his Undertaking to another solicitor, failing to serve his client in a conscientious, diligent and efficient manner, permitting his name to appear as a solicitor in an advertisement run by a real estate agent and entering into a business arrangement with a real estate agent and a mortgage consultant. The Society has received notice of the Solicitor's intention to appeal Convocation's order and has consented to a stay of the order of Convocation and a stay has been granted by the Divisional Court.

DATED at Toronto, this 30th day of January, 1998.”

Finding of Committee on the Allegations of Professional Misconduct

By way of the contents of Paragraph 3 of the Agreed Statement of Facts, the Solicitor admits the particulars contained in the Complaint and that the activities in question constitute professional misconduct. Accordingly, your Committee finds the Solicitor guilty of professional misconduct on the basis of the allegations in Complaint D205/97.

RECOMMENDATION AS TO PENALTY

By way of a Joint Submission on the part of the Society and the Solicitor, your Committee was urged to accept that a reprimand in Convocation would be the appropriate penalty. Having taken all the facts and circumstances into account and notwithstanding the fact that this was a Joint Submission, your Committee is of the view that the Joint Submission ought to be rejected and a recommendation made that the appropriate penalty be a reprimand in Convocation. Your Committee recommends accordingly.

REASONS FOR RECOMMENDATION

On the assumption that the “Lawyer Death List” prepared by the Solicitor was serious and intended to be acted upon, it represents a very high order of professional misconduct indeed. The so-called “bulletin” bears careful scrutiny. Speaking of fellow lawyers, it suggests their lives must be made very hard in the conduct of their practices and that the Solicitor's firm should “screw them up any way we can.” The purpose of the retaliatory strategy against solicitors who are deemed to be uncooperative or bad-mouthing of the Solicitor's firm is “for word to spread among the legal community that if you fuck with J.D. Barnett, bad things will happen to you...” Suggestions for so-called “screw-ups” have obviously been carefully conceived. They include reporting solicitors to the Law Society, arriving at closings late, declining to send draft documents, refusing to close in escrow, and “bad mouthing” solicitors to third parties. While the “bulletin” is reproduced in part in the Agreed Statement of Facts, the complete document is found at Tab 1 of the Joint Document Book. It is important to note that it was accompanied by what is obviously a carefully selected list of solicitors and law firms, some 40 in number. A reading of the document suggests that it was carefully drafted, was intended to be taken seriously, and was the product of some thought as to what specific retaliatory measures would be effective.

The idea that a member of the Bar of this Province, with the years of education and training which lie behind him, particularly with the focus in that education and training upon ethics and professionalism, could craft such a document is frightening indeed. The reactions of lawyers who received copies of the document include descriptions such as "scandalous in content," a "flagrant breach of ethical standards," and, tellingly, indicating "a certain pathology which should be of great concern." Put simply, it is deeply troubling that a lawyer, with any sense of the profession's role and responsibility in society, could write such a document, intending that it be acted upon.

The Solicitor's response to these obvious conclusions is that, in fact, the document was not serious and was not intended to be acted upon, but, rather, was a satirical instrument, circulated in draft for comment by his staff and withdrawn when negative feedback was received. Do the facts support this interpretation of events? In the opinion of your Committee, they do not.

First of all, was the document a "draft circulated for comment" as suggested in correspondence from the Solicitor found at Tabs 9 and 11 of the Joint Document Book? The death list itself makes no reference to it being a "draft," nor did the solicitor describe it as a draft at the time, as appears from the Affidavits of Lyons, Lyn and Campese contained in the Mitigation Brief filed by counsel for the Solicitor. The suggestion that the document was a draft only surfaced some 15 months after it was communicated by the Solicitor to his staff and only when a copy was leaked to the outside, apparently by a disgruntled employee. It is your Committee's impression that the repeated description of the document as a "draft" in responding material subsequent to the complaint is more an expression of wishful thinking than reality. It is your Committee's view that at the time the document was prepared and delivered to the Solicitor's staff, he did not intend that it be a draft, rather he intended that it be acted upon. Not only is this confirmed by the absence of any reference to a provisional or draft character to the document, or any request for comment, but also by the introductory phrases, in particular the phrases which include the following:

These lists releases must be kept by all staff, independent contractors and franchisees n their Office Manual, and should be referred to from time to time to refresh the memory. I will issue a list periodically as we add or change the entries. These are confidential releases, and staff should not show these releases or talk about their contents (except to other members of the J.D. Barnett team) without the specific prior written authorization of Doug Barnet.

Issued To: All J.D. Barnett real estate lawyers, real estate law clerks, receptionists, and Mel.
Tab 1, Joint Document Book

This is hardly the language of a draft circulated for comment. It is your Committee's conclusion that the document was not intended as a draft at the time of its issuance but rather was intended to be acted upon.

The Solicitor has stated, in his responding documents, that the bulletin was "satirical" and, as suggested at Paragraph 3, Page 3, Tab A of the Joint Document Book, was really a "cathartic exercise" which the Solicitor undertook in view, apparently, of difficulties which the Solicitor was having in his own life at the time. Is the document satire? If it is, it is exceedingly well-masked. The document has all the appearances of a formal communication seriously drafted for a serious purpose. The so-called "suggestions for screw-ups" are totally lacking in satirical content as is the text of the document. The statement

Finally, the word "Death" in "Death List" is not to be taken literally within the current democratic political order in Canada

while a phrase which may have intended to be facetious in the mind of the Solicitor, does not alter the quite obvious serious purpose of the document as a whole. While the document may, indeed, have been cathartic, it is the opinion of your Committee that it was not intended to be satirical at the time that it was composed and dispatched. The Solicitor's refuge in satire is an obvious attempt to escape the consequences of a process which was intended to be serious at the time that it was undertaken and is now regretted.

Was the list withdrawn as soon as criticism of it was levelled by the Solicitor's staff? Your Committee is of the view that it was not withdrawn until there were complaints to the Law Society and, indeed, the failure to take pro-active steps to withdraw the document when criticism surfaced is further evidence of the fact that it was not intended to be satirical but was a serious process intended to be implemented.

Paragraph 10 of the Agreed Statement is to the following effect:

The Solicitor indicated that he verbally retracted the bulletin on or about January 17, 1995 as a result of the reaction from the J.D. Barnett team.

Paragraph 11 of the Agreed Statement is an expansion, by way of description, of the complaints that were made by the Solicitor's staff. The fact of the matter is that notwithstanding complaints made directly to him by his staff, the Solicitor took no pro-active steps to withdraw the document or formally acknowledge its inappropriateness until the complaints made to the Law Society many months later. The Affidavit of Leonard R. Lyn contained in the Mitigation Brief is to the effect that when Mr. Lyn, an employee of the Solicitor, received the document in question, he confronted the Solicitor, describing the document as both stupid and improper. The Solicitor reacted by telling Lyn to leave him alone. When the subject was raised later the same day, the Solicitor then acknowledged that the memo was foolish and said something to the effect "fine, tell the others if you want." Ms. Tammy Lyons in her Affidavit suggests that when she spoke to the Solicitor about the list, he indicated that he had already spoken to Mr. Lyn and was conceding that the list was a stupid idea and was to be ignored. Apart from these communications, and a similar one to Mr. Campese, all that happened at the time was that three employees confronted the Solicitor and he acknowledged, begrudgingly, that the document was inappropriate and that staff were free to ignore its dictates. This is hardly in keeping with the suggestion that the document was a draft circulated for comment or that it was intended to be satirical. In fact, if it could have been characterized in either way, the Solicitor's reaction upon being confronted with aggressive complaints about it would clearly have been to formally withdraw the document by circularizing his staff. He did not do so. The only reasonable interpretation is that he did not really accept or wish to acknowledge the unprofessional nature of the communication.

Apart from these exchanges at the time of its circulation, nothing further was done about the document until some 15 months later when the Solicitor communicated with the Law Society and with some of the persons named on the list.

For the reasons outlined above, it is the opinion of your Committee that the document was neither a draft intended for comment, nor was it intended as a form of satire. Furthermore, it was not withdrawn in any meaningful sense of the word when criticism about it surfaced.

The Solicitor complains vigorously of the unauthorized circulation of the document outside the firm by a disgruntled employee. He was quite obviously upset about this because the document reflected badly upon him and its circulation caused the difficulty which he now faces. However, the nub of the complaint is the creation of the document and its circulation to his staff, not its later unauthorized circulation to the public. How its existence was revealed is irrelevant for the purposes of this complaint.

What is highly relevant is the fact of the circulation of such a bulletin to law clerks, administrative staff and indeed solicitors. Behaviour such as this contributes directly to what we in the profession would hope is an undeserved reputation for sleaze. Its effect on impressionable employees is beyond calculation. In spite of expansive statements of regret offered by the Solicitor once third parties became aware of the list, the document's creation is sufficiently symptomatic of unprofessional and unethical thinking as to make it impossible to minimize. The circulation of the list cannot be characterized as a "minor" disciplinary event. For these reasons, your Committee is of the view that the penalty which was jointly recommended is, and would be, an inadequate expression of the profession's rejection of behaviour of this kind. Accordingly, a reprimand in Convocation is recommended.

ALL OF WHICH is respectfully submitted

Dated this 15th day of April 1998

David W. Scott, Q.C., Chair

There were no submissions.

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

Carried

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

Both counsel made submissions in support of the recommended penalty.

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

It was moved by Ms. Puccini, seconded by Mr. Topp that the solicitor be suspended for a period of 6 months commencing July 1st, 1998.

Carried

Mr. DelZotto abstained on voting.

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

Not Put

It was moved by Mr. Swaye, seconded by Mr. Marrocco that the solicitor be suspended for a period of 3 months.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months commencing July 1st.

Mr. Potts' request to make further submissions was denied.

Re: Danny BRANOFF - Windsor

The Acting Secretary placed the matter before Convocation.

Ms. Puccini and Mr. Topp withdrew for this matter.

Ms. Kathryn Seymour appeared for the Society and Ms. Jane Kelly appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 20th May, 1998, together with an Affidavit of Service sworn 29th May, 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 5th June, 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

Paul D. Copeland, Chair
Helene B. Puccini
Robert Martin

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

Kathryn Seymour
for the Society

DANNY BRANOFF
of the City
of Windsor
a barrister and solicitor

Jane Kelly
for the solicitor

Heard: April 28, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 31, 1997 Complaint D344/97 was issued against Danny Branoff alleging that he was guilty of professional misconduct.

The matter was heard in public on April 28, 1998 before this Committee composed of Paul Copeland, Chair, Helene Puccini and Robert Martin. The Solicitor attended the hearing and was represented by Jane Kelly. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

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

Complaint D344/97

2. a) He asked to view the Court's file with respect to Small Claims Court action no. 94-GS-5117, and, when the Court Clerk was not looking, he altered an important deadline date contained in the Judge's endorsement by changing the number "2" in "Aug2/96" to the number "7" in order for the date to read "Aug 7/96".

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 D344/97 and is prepared to proceed with a hearing of this matter on April 28 and 29, 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, R.S.O. 1990 c. S.22.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D344/97 and admits the particular. The Solicitor also admits that the particular, together with the facts as set out below, constitute professional misconduct.

IV. FACTS

2(a) He asked to view the Court's file with respect to Small Claims Court action no. 94-GS-5117, and, when the Court Clerk was not looking, he altered an important deadline date contained in the Judge's endorsement by changing the number "2" in "Aug 2/96" to the number "7" in order for the date to read "Aug 7/96".

4. The Solicitor was called to the Bar in April, 1976. He practises as a sole practitioner in Windsor, Ontario, primarily in the area of family litigation.

5. In or about early May, 1996, the Solicitor was retained by Mr. Julien St. Onge, the defendant in Small Claims Court action no. 94-GS-5117. The background leading up to the Solicitor being retained by Mr. St. Onge is as follows:

- a) On or about June 21, 1994, the plaintiff, Jacques Paul St. Onge, filed a Statement of Claim with the Small Claims Court in Windsor, Ontario, for the amount of \$968.55 naming his cousin, Julien St. Onge, as defendant (Document Book, Tab 1);
- b) On or about July 18, 1994, the defendant, Julien St. Onge, filed his defence. The defendant's solicitor at the time, as indicated on the Statement of Defence, was Mr. Gerald Kuzak (Tab 1);

- c) On or about September 7, 1994, a pre-trial was held at which Mr. Kuzak, on behalf of the defendant, did not appear but filed a letter requesting an adjournment. The pre-trial judge dispensed with the pre-trial and ordered that a trial date be set and that costs for failing to notify the plaintiff of the request for an adjournment of the pre-trial be set at \$50 payable by the defendant to the plaintiff (Tab 1);
 - d) A trial date was set for April 13, 1995, at which time the parties appeared without counsel. The defendant indicated that he wished to proceed without his lawyer, Mr. Kuzak. The judge ordered that the matter be put over to the next available date to give the parties an opportunity to bring witnesses to support their respective positions (Tab 1);
 - e) The next trial date was August 22, 1995. Mr. Kuzak attended on behalf of the defendant, and the plaintiff acted on his own behalf. At that time, Mr. Kuzak requested that the trial be put over again on the basis that one of the defendant's witnesses had failed to attend. The judge ordered that the trial be put over to the next available date which was to be peremptory and that the notice of trial would so indicate. The judge further ordered the defendant to pay the plaintiff forthwith \$100 for costs thrown away and ordered that if the monies were not paid on or before September 5, 1995, the defence would be struck and the action would proceed to assessment. If the monies were paid into court, then they were to remain there pending a further order (Tab 1);
 - f) The peremptory trial date of the matter was set for February 13, 1996. On that date, the plaintiff attended on his own behalf and neither the defendant, nor his solicitor, Mr. Kuzak, made an appearance. The judge ordered that the defence be struck out and entered judgment for the plaintiff for \$968.55, plus costs, plus \$30 as a pleading preparation fee, plus \$100 in costs as per the order of August 22, 1995 (Tab 1);
 - g) On or about May 3, 1996, the defendant was served with a notice of examination in relation to the judgment of February 13, 1996. The date of the examination was scheduled for July 19, 1996. The defendant claims that, until he received the notice of examination, he had not been aware that the trial had happened and that judgment had been issued against him. Mr. Kuzak in fact swore an affidavit admitting that he had failed to pay \$50.00 in costs and, accordingly, he did not receive a Notice of Trial nor did he notify the defendant of the trial date. It was in reaction to the notice of examination that the defendant, on or about May 3, 1996, retained the services of the Solicitor, Branoff, who is the subject of the herein discipline proceedings. Up to this point in the proceedings, Mr. Branoff had not been acting in any capacity on behalf of the defendant in this matter (Tabs 1 and 2).
6. On or about July 30, 1996, the Solicitor brought a motion asking for an order setting aside the Default Judgment and permitting the defendant to re-file a Statement of Defence and to proceed to trial. The transcript of the motion proceedings (which also contains a full review of the circumstances leading up to the motion) is contained at Tab 2. The motion to set aside Default Judgment was heard before His Honour Deputy Judge Richard J. Bondy who granted the motion endorsing the record as follows:

Motion

"Dan Branoff for Def.
Pl - self.

Upon reading material filed, hearing argument, extensive from Mr. Branoff & the Pl., and it appearing the defendant has a defence on the merits. Ordered that costs thrown away through time lost at work, etc. be paid by Def to Pl of \$250 in addition to the \$100 costs awarded 22 Aug/95 *on or before Aug 2/96 in which event Judg't set aside, failing which Judg't stands. Pl to have option to file new Statement of Defence.*" (emphasis added) (Tab 2, p. 19 and Tab 3)

7. On August 7, 1996, the Solicitor attended at court for the purpose of paying costs in the amount of \$350. The Solicitor asked to view the Judge's endorsement and, without the Court Clerk's knowledge, the Solicitor altered the deadline date in the endorsement by changing the "2" to a "7".

8. The court clerk on duty at the time and who dealt with the Solicitor was Dianne Rivait. In her statement, which is reproduced at Tab 4, Ms. Rivait states that she provided the court file with the judge's endorsement to the Solicitor who requested from her a piece of paper in order to be able to make some notes. Ms. Rivait indicated as follows:

"He was viewing the file and asked me for a piece of paper to copy some information onto and I gave him one. As I was filling out the TAR from the file I found that Mr. Branoff was not the solicitor on file and asked him about this. He showed me the motion forms and from there I determined that he was now on file. I had to change the information on the front of the claim form so I went to my desk for my corrector and returned to the counter. He now had his back to me and had the file in front of him at the counter that holds our counter computer which the public uses. I finished filling out the TAR, rang up the money and gave him his receipt. He had put the folder back on the counter and left the office. I reopened the file to verify for myself if the money was to be held in court and upon scanning the endorsement saw that the date had been changed from Aug 2/96 to Aug 7/96. I said out loud "He changed the date" and immediately called to my coworkers to see what I should do." (Tab 5).

9. As a result of the law clerk, Ms. Rivait, reporting the incident to her manager, Mrs. Kelly-Lalonde, a police investigation was initiated with a view to a possible charge of obstructing justice. The Solicitor was co-operative with the police and voluntarily provided a written statement to the police. Subsequent to the police investigation, no criminal charges were laid against the Solicitor. Tabs 5 - 23 contain the documents that were generated over the course of the police investigation.

10. The Solicitor's position is that he had no intention to knowingly alter any court document in order to change the Judge's Order to gain any type of advantage. It is the Solicitor's position that he always believed the date on the endorsement to read the "7th" rather than the "2nd". In his statement to the police, the Solicitor stated as follows:

At the hearing of the motion, the Judge decided there was merit to my client's defence, even though the reasons for defaulting were weak, so he granted the motion, but ordered my client to pay \$100.00 in past ordered costs plus an additional \$250.00 in costs. The Judge read his endorsement verbally. I did not get a copy of the endorsement nor did I write it down. I thought that the costs had to be paid "before August 7, 1996". Accordingly, I telephoned Mr. Kuzak on August 06, 1996, because he was responsible for the costs and asked that he give me a cheque for \$350.00 to pay into court that day.

I got to the court house on August 6, 1996 at about 4:30 p.m. and I picked a number but the office closed at 4:45 p.m. without reaching me. I then asked to speak to the Registrar, Mary Ann Kelly. I told her that I thought I might be out of time now because I did not get the cheque from Mr. Kuzak until that afternoon but then I also specified to her that I did not believe that the Judge's endorsement specified that the judgment would stand if the costs were not paid by the due date, which I thought was "before August 7, 1996", so she said to come back the next morning and they would still take my money if that were the case.

When I arrived at the court office the next morning, August 7, 1996, the clerk waiting on me found the file, and read the endorsement herself behind the counter before even bringing the file up to me. She then brought it up to me and said "yes, it looks okay as it reads you have until August 7, 1996 to pay the monies into court". I was happy to hear this and gave her the money and waited for my cash register receipt.

While waiting, I asked her if I could read and write out the endorsement on a sheet of paper, rather than photocopying it, and she handed me the file while she processed the payment.

On reading the endorsement for the first time I confirmed that it read "by August 7, 1997" rather than "before August 7, 1996", which had been my concern. However, I also noticed that by reason of the Judges handwriting that the "7" could conceivably be interpreted as a "2" and in order to avoid any confusion with regard to the date I endeavored to ensure that there could be no confusion by making the "7" a much clearer "7" than it had been made before. I have previously seen Judge's endorsements transcribed into the court computers by a clerk incorrectly when the Judge's handwriting was not clear and I was hopeful of avoiding any future confusion or error with regard to this particular file. I had no intention to change the endorsement from August 2nd to August 7th. I only intended to ensure that the date was read as August 7th and not inadvertently as August 2nd. My recollection is still that the Judge said before August 7th but it would appear that I am wrong.

I had no intention to knowingly alter any court document to change the Judge's order to extend time for payment of monies into court or for any other purpose.

DATED AT Windsor, Ontario this 26 day of September, 1996.

"Danny Branoff"

(Tab 14)

11. Also of significance among the police investigation documents was a letter written by His Honour Judge Richard J. Bondy dated March 5, 1997 in which Judge Bondy writes:

As Deputy Judge in the Small claims Court for the City of Windsor I examined my endorsement in the file in which the above party represented the defendant.

In that endorsement I allowed the defendant to a specific date for the filing of a Statement of Defence but on examining the endorsement the date had been altered. I am satisfied that I did not alter that date and that such alteration was made by some other party. (Tab 22).

12. On April 14, 1997, the Law Society received a letter from Assistant Crown Attorney, Peter Rollings, setting out the allegation against the Solicitor and the circumstances of the police investigation. Mr. Rollings indicated in his letter that he was satisfied that a charge of obstructing justice was not appropriate but that "*it appears as though the explanation offered by Mr. Branoff [the Solicitor] falls short of what was required in the circumstances*", and that he felt it was necessary to alert the Law Society to the situation "*should you feel anything could, or should, be done with respect to Professional Standards.*" Further, Mr. Rollings was asked by the Complaints Department of the Law Society if he wished to file a complaint against Mr. Branoff. He indicated that he did not (Tab 23).

13. On May 15, 1997, the Law Society wrote to the Solicitor indicating that it was in receipt of information with respect to an allegation that the Solicitor may have altered the date on a judge's endorsement, and requesting a response from the Solicitor by way of further comment and/or information (Tab 25).

14. Between May 15, 1997 and September 9, 1997, there were communications between the Law Society and the Solicitor (and/or the Solicitor's counsel, Mr. Bradie) which is reproduced at Tabs 26 - 34.

15. On or about August 1, 1997, the Law Society received a letter dated July 29, 1997 from Mr. Bradie on behalf of the Solicitor setting out some further information that the Solicitor wished the Law Society to consider in its assessment of the complaint (Tab 31). In particular, Mr. Bradie pointed out that in light of the unfortunate handling of the defendant's case, both on the Solicitor's part and on the part of Mr. Kuzak, the Solicitor had "*arranged with contributions from himself, Mr. Gerald Kuzak, the Client's original lawyer who had allowed the matter initially to go into default, and the Client who had as well contributed to the matter initially going into default, to pay the judgment in full. Accordingly, the Plaintiff has been paid in full his cost of \$300.00 together with his judgment of \$1,232.00*". In addition, Mr. Bradie pointed out to the Law Society that the Solicitor had co-operated fully with the criminal investigation to the extent of providing a statement. Finally, Mr. Bradie pointed out in his letter that the Solicitor "*who was called to the bar in 1976 has never been the subject of a reprimand or suspension by the Law Society*" and urged the Law Society to consider these latter facts as the Solicitor's efforts to mitigate his "*inadvertence*" (Tab 33).

16. On or about September 16, 1997, in response to inquiries from the Law Society, Mr. Bradie advised the Law Society that the Solicitor had no further information to provide and that the Law Society should proceed in the normal course.

V. PRIOR DISCIPLINE

17. The Solicitor has no prior discipline.

DATED at Toronto, this 28th day of April, 1998."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Danny Branoff be suspended for a period of one month and pay Law Society costs in the amount of \$2,500 payable within 60 days of the date the Solicitor resumes practice.

REASONS FOR RECOMMENDATION

The recommended penalty of one month's suspension, plus costs of \$2,500.00 was a joint submission by Law Society counsel and the Solicitor's counsel. The panel was prepared to accept this recommendation for a number of reasons which included: the fact that this was a joint submission and wherever possible, the panel would like to accept a joint submission; the Solicitor had no prior discipline record; this incident was characterized as an isolated incident and not likely to be repeated; the Solicitor had no personal gain in doing what he did; the matter was satisfactorily resolved with the client; there were a number of character letters submitted about this Solicitor which would indicate that he is highly regarded in his community as an honest solicitor and that this behaviour appeared to be out of character; the Solicitor co-operated with the police and the Law Society in resolving this matter; the Solicitor was having other personal problems at the time that this incident occurred; and, the Solicitor has practised law successfully since 1976.

This Committee would point out that the Solicitor's behaviour is considered to be a very serious infraction of a solicitor's duty to the court and to his profession. To alter a court document is inexcusable in any context and for any reason, and will not be tolerated. The courts must be able to rely upon the credibility and honesty of each lawyer at all times. Without this complete reliance our justice system cannot function as it should.

Danny Branoff was called to the Bar on April 8, 1976.

ALL OF WHICH is respectfully submitted

DATED this 20th day of May, 1998

Paul Copeland, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month and pay the Society's costs in the amount of \$2,500 payable within 60 days of the date the solicitor resumed practice.

Both counsel made submissions in support of the recommended penalty.

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

It was moved by Mr. Wilson, seconded by Mr. Marrocco that the recommended penalty be adopted.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 1 month and pay costs in the amount of \$2,500 to be paid within 60 days of the solicitor's return to practice.

Convocation consented to the suspension commencing July 25th, 1998.

Re: Amarnath Vivaswat MISIR - Mississauga

The Acting Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Jonathan Batty appeared for the Society and Ms. Bell, Duty Counsel appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 28th April, 1998, together with an Affidavit of Service sworn 15th May, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 5th May, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th June, 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

AMARNATH VIVASWAT MISIR
of the City
of Mississauga
a barrister and solicitor

Not Represented
for the solicitor

Heard: October 8, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 17, 1997 Complaint D256/97 was issued against Amarnath Vivaswat Misir alleging that he was guilty of professional misconduct.

The matter was heard in public on October 8, 1997 before Robert C. Topp sitting as a single bencher. The Solicitor did not attend the hearing nor was he represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D256/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended February 28, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Evidence

As the Solicitor failed to attend at the hearing, proceedings took place in absentia. Your Committee being satisfied that proper notice had been provided to the Solicitor.

The testimony before your Committee established that the Solicitor's filing for the fiscal year ended February 28, 1996 was not made to the Society within six months and that the Solicitor was aware of the failure to file and took no steps to correct it.

The evidence before your Committee therefore established all of the requisite elements of the offence of failing to file.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Amarnath Vivaswat Misir be reprimanded in Convocation if his filings have been made prior to Convocation, and that he pay Law Society costs in the amount of \$750 payable within sixty days. If his filings are not completed the Committee recommends that the Solicitor be suspended for a period of thirty days and indefinitely thereafter until his filings are completed to the satisfaction of the Law Society. The costs of \$750 are to be paid prior to his suspension being lifted.

REASONS FOR RECOMMENDATION

It is clear from the evidence that the Solicitor was given every opportunity to comply with his professional obligations and has chosen not to do so. It is also clear that the failure of the Solicitor to appear before the Committee in regard to this complaint demonstrates a matter of governance, and a question arises in my mind as to whether the Solicitor is in fact governable.

However, I have accepted the submissions of the Society which I find to be most reasonable under these circumstances and recommend the following penalty:

1. If his filings are made prior to Convocation, that he receive a reprimand in Convocation and that he be required to pay the costs of the Society in the sum of \$750 within sixty days.
2. If the Solicitor fails to file the requisite forms, that he be suspended for thirty days and month to month thereafter until his filings are completed to the satisfaction of the Society and costs are awarded against the Solicitor in the sum of \$750 and under these circumstances, are to be paid prior to his suspension being lifted.

Amarnath Vivaswat Misir was called to the Bar on April 7, 1982.

ALL OF WHICH is respectfully submitted

DATED this 28th day of April, 1998

Robert C. Topp

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if the filings were made, failing which the solicitor be suspended for a period of 30 days and indefinitely thereafter until the filings were completed to the satisfaction of the Society and further that costs be paid prior to the suspension being lifted.

Mr. Batty advised that the solicitor had completed his filings to the satisfaction of the Law Society.

Mr. Batty referred to the letter from Mr. Regan, Q.C. dated June 12th, 1998 in which he set out the solicitor's financial situation and a request that there be no costs.

Mr. Batty made submissions in support of a reprimand in Convocation and did not take a position on the issue of costs.

Ms. Bell made submissions in support of a reprimand in Convocation with no costs in light of the solicitor's financial difficulties.

It was moved by Mr. Ruby, seconded by Ms. Carpenter-Gunn that the solicitor be reprimanded in Convocation and that costs be deleted.

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 with no costs.

Carried

The Ruby/Carpenter-Gunn motion that the solicitor be reprimanded in Convocation and that costs be deleted was voted on and lost.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Committee and pay no costs.

Convocation turned itself into a Committee of the whole and the Treasurer administered the reprimand.

Re: Alex BORMAN - Toronto

The Acting Secretary placed the matter before Convocation.

Mr. Wilson and Ms. O'Connor withdrew for this matter.

Mr. Glenn Stuart appeared for the Society and Ms. Bell appeared on behalf of the solicitor who was present.

Convocation had before the Report of the Discipline Committee dated 15th April, 1998, together with an Affidavit of Service sworn 20th April, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 17th April, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th June, 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

David W. Scott, Q.C., Chair
Daniel J. Murphy, Q.C.
Shirley O'Connor

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

Glenn Stuart
for the Society

ALEX BORMAN
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 17, 1997 Complaint D81/97 was issued against Alex Borman alleging that he was guilty of professional misconduct.

The matter was heard in public on December 16, 1997 before this Committee composed of David W. Scott, Q.C., Daniel J. Murphy, Q.C. and Shirley O'Connor. The Solicitor attended the hearing and represented himself. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D81/97

2. a) He failed to serve his client Adelaide Capital Corporation in a conscientious, diligent and efficient manner in connection with litigation involving Cana-Drain Services Inc. and Michael Stuart Group Ltd. in relation to a loan default by,
 - i) not delivering a statement of claim, properly issued, in the trial of an issue within fifteen days as directed by the Order, dated March 14, 1995, of The Honourable Madama Justice Simmons,
 - ii) not taking any other steps to prosecute the proceeding against Cana-Drain Services Inc. and Michael Stuart Group Ltd expeditiously, thereby giving rise to motions by the defendants in that proceeding to release funds paid into Court to the credit of the action, and,

- iii) not responding to inquiries from his client or otherwise advising his clients as to the status of this proceeding;
- b) in relation to the proceeding identified in particular (a), he misled his client Adelaide Capital Corporation by advising that client that certain steps had been or would be taken in the prosecution of the proceeding when, in fact, no such steps had been taken;
- c) he failed to account to his client Adelaide Capital Corporation in a timely manner regarding the funds which he held in trust on behalf of that client, notwithstanding numerous requests for such an accounting;
- d) he failed to honour Orders of the Ontario Court (General Division) in that:
 - i) he failed to deliver a statement of claim in the proceeding identified in particular (a) within 15 days in accordance with the Order, dated March 14, 1995, of The Honourable Madame Justice Simmons, and
 - ii) he failed to pay his client Adelaide Capital Corporation the sum of \$11,131.15, pursuant to the Order, dated September 4, 1996, of the Honourable Mr. Justice Lane;
- f) he failed to reply to the Law Society in a timely manner regarding a complaint by Angus McKinnon, made on behalf of Adelaide Capital Corporation, despite numerous telephone contacts and letters dated July 9, 1996, and August 14, 1996.

Particular 2(e) with withdrawn.

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 D81/97 and is prepared to proceed with a hearing of this matter on October 29, 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 D81/97 and this agreed statement of facts and admits the particulars, with the agreed amendments as reflected in this agreed statement of facts, and facts contained therein. The Solicitor further admits that the particulars of Complaint D81/97, amended as reflected herein, and as supported by the facts stated herein, constitute professional misconduct.

IV. FACTS

Background

4. The Solicitor was called to the Bar on April 19, 1963. At all relevant times, he was a sole practitioner and continues as same currently.

5. Adelaide Capital Corporation ("ACC"), formerly known as Central Guaranty Trust Company, retained the Solicitor in or about September 1993, following the retirement of their former counsel, to pursue legal proceedings against the Michael Stuart Group Ltd. ("MSG") with respect to MSG's default on a \$1.8 million loan from Central Guaranty Trust Company. Although Central Guaranty Trust Company was restructured and continued as ACC during the period which is the subject of this agreed statement, for the purposes of these proceedings, both entities will be referred to collectively as ACC.

6. In March 1990, MSG provided ACC with various security for funds, up to a total of \$1.8 million, which were to be advanced by ACC to MSG from time to time. The security included, among other matters, a mortgage on certain lands in Mississauga which MSG was developing. The lands were the subject of a servicing agreement between MSG and the City of Mississauga. Under the terms of the servicing agreement, MSG had provided a letter of credit to the City of Mississauga in April 1990 to secure its obligations under the agreement. The letter of credit was posted by the Bank of Montreal. However, ACC was obliged to pay the Bank of Montreal any sums drawn on the letter of credit, and any funds drawn on the letter of credit were considered to be advanced by ACC under its loan agreement with MSG.

7. In January 1992, MSG defaulted on its mortgage to ACC, and ACC retained a solicitor, other than the Solicitor, to demand payment of the full amount outstanding. In April 1992, the Bank of Montreal declined to renew the letter of credit, and the City of Mississauga then drew upon then letter of credit for its full value, being \$187,952.52 at that time. Accordingly, ACC paid the full amount of the letter of credit to the Bank of Montreal and added that amount to MSG's indebtedness to it.

8. The first solicitor retained by ACC commenced an action on behalf of ACC against MSG and its guarantor in June 1993; this action was discontinued when a large number of executions against both defendants were identified. ACC's solicitor retired in June 1993, and the Solicitor assumed carriage of this matter in September 1993 when he was retained by ACC. The Solicitor completed power of sale proceedings on behalf of ACC with respect to the mortgaged land in May 1994. The power of sale recovered \$940,000, leaving in excess of \$1.4 million owing to ACC. With the concurrence of the client the Solicitor retained \$15,000 from the proceeds of the sale, in trust, for future legal expenses.

9. In July 1993, the City of Mississauga had charged approximately \$60,000 against the proceeds of the letter of credit to cover the cost of work required to correct deficiencies in the services installed by MSG. The remaining amount held by the City of Mississauga, approximately \$127,000, was subject to competing claims by ACC and Cana-Drain Services Inc. ("Cana-Drain"). After protracted correspondence from the Solicitor, the City of Mississauga brought an interpleader application with respect to these remaining funds in March 1995.

Particular 2(a) he failed to serve his client Adelaide Capital Corporation in a conscientious, diligent and efficient manner in connection with litigation involving Cana-Drain Services Inc. and Michael Stuart Group Ltd. in relation to a loan default by,

- i) not delivering a statement of claim, properly issued, in the trial of an issue within fifteen days as directed by the Order, dated March 14, 1995, of The Honourable Madame Justice Simmons,
- ii) not taking any other steps to prosecute the proceeding against Cana-Drain Services Inc. and Michael Stuart Group Ltd. expeditiously, thereby giving rise to motions by the defendants in that proceeding to release funds paid into Court to the credit of the action, and,

- iii) not responding to inquiries from his client or otherwise advising his client as to the status of this proceeding;

Particular 2(b) in relation to the proceeding identified in particular (a), he misled his client Adelaide Capital Corporation by advising that client that certain steps had been or would be taken in the prosecution of the proceeding when, in fact, no such steps had been or were taken;

Particular 2(d) he failed to honour Orders of the Ontario Court (General Division) in that:

- i) he failed to deliver a statement of claim in the proceeding identified in particular (a) within fifteen days in accordance with the Order, dated March 14, 1995, of The Honourable Madam Justice Simmons

10. The interpleader application was heard by the Honourable Madam Justice Simmons on March 14, 1995. By Order, dated March 14, 1995 (Tab 1, Document Book), Madam Justice Simmons ordered that the funds be paid into court and that there be a trial of an issue as to the entitlement to the funds as between ACC, Cana-Drain and MSG. Under the terms of this Order, ACC was to be the plaintiff in the trial of an issue and was ordered to file a Statement of Claim within 15 days.

11. The Solicitor had been retained by ACC with respect to the interpleader order and any subsequent proceedings. After the Order of March 14, 1995, ACC instructed the Solicitor to take all steps required to complete the trial of an issue. The Solicitor should have filed the Statement of Claim by March 29, 1995, being 15 days after the order was made. On March 28, 1995, the solicitor for MSG, Mr. David Sloan, wrote to the Solicitor to request the Statement of Claim. The Solicitor did not respond to Mr. Sloan and failed to file a Statement of Claim for ACC in accordance with the Order, dated March 14, 1995, of Madam Justice Simmons.

12. By letters dated April 7, 1995, and April 20, 1995, Mr. Sloan again wrote to the Solicitor to ask that he deliver a Statement of Claim on behalf of ACC. The Solicitor did not respond.

13. By letter dated May 15, 1995, Mr. Sloan confirmed that the Solicitor had not yet delivered a Statement of Claim and asked that he do so forthwith. In addition, Mr. Sloan attempted to contact the Solicitor by telephone on several occasions after May 15, 1995. The Solicitor did not respond.

14. By letter dated June 7, 1995, Mr. Sloan again asked the Solicitor to deliver the Statement of Claim and advised him that they would be obliged to bring a motion if he failed to do so. The Solicitor responded by telephone on June 20, 1995, and advised Mr. Sloan that he would be delivering the Statement of Claim.

15. By July 4, 1995, the Solicitor had still not delivered a Statement of Claim when Cana-Drain served a notice of motion to have the funds paid into Court pursuant to the order of March 14, 1995, released as a result of ACC's failure to file a Statement of Claim. The motion was first returnable on July 18, 1995.

16. The Solicitor served a copy of the Statement of Claim on Mr. Sloan on July 17, 1995. The Solicitor indicated in his covering letter that he intended to seek an adjournment of the motion for the purpose of bringing a cross-motion to extend the time for service of the Statement of Claim.

17. On July 18, 1995, the Court granted the Solicitor's adjournment request to August 1, 1995, peremptory as against ACC, and ordered ACC to pay \$500 in costs. On August 1, 1995, the motion was dismissed without prejudice to Cana-Drain bringing a further motion for summary judgment. Further costs in the amount of \$500 were awarded against ACC on that date.

18. The Solicitor did not advise ACC of the status of these proceedings at any time throughout the summer of 1995. In particular, the Solicitor did not advise ACC that he had failed to deliver the Statement of Claim as ordered, that Cana-Drain had brought a motion to have the funds released, or that an Order had been made against ACC.

19. MSG served its Statement of Defence on the Solicitor and the solicitors for Cana-Drain on August 16, 1995, and sent it to be filed with the appropriate Court office. On September 22, 1995, the Court advised Mr. Sloan that the Statement of Defence could not be filed as the Statement of Claim had not yet been filed by the Solicitor. Mr. Sloan asked the Registrar to hold his documentation for one week so that he could contact the Solicitor. He called the Solicitor on the same day and asked him to file the Statement of Claim. The Solicitor agreed to his request.

20. On September 28, 1995, Stephen Dreschel, the officer of ACC responsible for instructing the Solicitor, contacted the Solicitor to inquire as to the status of this matter. The Solicitor advised Mr. Dreschel that he had received Statements of Defence from both Cana-Drain and MSG and was attempting to obtain dates for the examinations for discovery from the other counsel involved. This assertion was incorrect insofar as dates for the examinations for discovery had not been canvassed with counsel for MSG, although he had spoken with counsel for Cana-Drain regarding his client's availability.

21. The Statement of Defence was returned to Mr. Sloan by the Registrar in early October 1995 because the Statement of Claim had not been filed by the Solicitor.

22. By letter dated October 10, 1995, Mr. Sloan advised the Solicitor that the Statement of Claim had not yet been filed and that his client was in breach of the Order of March 14, 1995.

23. On December 7, 1995, the Solicitor provided a draft affidavit of documents to Mr. Dreschel for his review. After receiving Mr. Dreschel's comments on the draft, the Solicitor provided a further draft to Mr. Dreschel on December 13, 1995. The Solicitor advised Mr. Dreschel at that time that examinations for discovery had been scheduled for January 25 and 26, 1996, and had Mr. Dreschel reserve those days in his schedule. The discoveries did not proceed on those dates and, in fact, had never been arranged with opposing counsel.

24. In early 1996, the Solicitor telephoned Mr. Sloan and advised him that ACC wished the trial of an issue to proceed. Mr. Sloan advised that he wished to proceed with discoveries, and, in turn, the trial of an issue, expeditiously but was unable to file a Statement of Defence due to the Solicitor's failure to file the Statement of Claim. The Solicitor indicated that he would look into this situation.

Particular 2(c) he failed to account to his client Adelaide Capital Corporation in a timely manner regarding the funds which he held in trust on behalf of that client, notwithstanding numerous requests for such an accounting

25. By letter, dated February 5, 1996 (Tab 2, Document Book), ACC asked the Solicitor to provide an accounting of the funds which had been held back by the Solicitor previously on account of anticipated future legal fees. The Solicitor did not reply. Mr. Dreschel attempted to contact the Solicitor by phone subsequently, but the Solicitor was unavailable until March 4, 1996, when they finally spoke. The Solicitor again assured Mr. Dreschel that he would move forward with the trial of an issue and would schedule examinations for discovery. The Solicitor asked Mr. Dreschel to tentatively reserve March 12 and 13, 1996, for these examinations. No examinations were scheduled for those dates.

26. By April 3, 1996, ACC had received no indication that the Solicitor was moving forward with the trial of an issue and had not received the accounting requested in its letter of February 5, 1996. By letter, dated April 3, 1996 (Tab 3, Document Book), ACC demanded that the Solicitor provide an accounting of the funds held in trust, and an explanation for his delay in advancing the trial of an issue, no later than April 4, 1996, failing which the file would be transferred to another law firm.

27. Consequently, by letter dated April 9, 1996, with enclosed direction (Tab 4, Document Book), ACC directed the Solicitor to forward his file to Mr. Angus McKinnon at the firm of Genest Murray DesBrisay Lamek so that firm could assume carriage of the file. ACC also demanded the return of the \$15,000 which the Solicitor had held in trust.

28. Mr. McKinnon attempted to contact the Solicitor by telephone on April 17, 18, and 19, 1996, but the Solicitor did not return these calls. By facsimile, dated April 19, 1996 (Tab 5, Document Book), Mr. McKinnon required the Solicitor to immediately arrange for the delivery of ACC's file and an accounting. The Solicitor responded to this letter and agreed to deliver the file on April 22, 1996. The Solicitor did not deliver the file by April 22, 1996.

29. By facsimile dated April 23, 1996 (Tab 6, Document Book), Mr. McKinnon confirmed to the Solicitor that neither the file nor the accounting had been delivered. He further advised the Solicitor that he had instructions to make a complaint to the Law Society concerning the Solicitor's handling of this matter.

30. On June 6, 1996, Mr. Sloan served a motion record, returnable on June 12, 1996 (Tab 7, Document Book), on the Solicitor, seeking the release of the money which had been paid into the Court pursuant to the Order of March 14, 1995. The Solicitor forwarded the motion record to Mr. McKinnon on June 7, 1996, and it was received by his firm on June 10th.

31. At all times between March 1995 and June 10, 1996, ACC believed, based on the Solicitor's representations, that the matter was proceeding normally and that the Solicitor had attended to the completion of pleadings and was making efforts to arrange examinations for discovery so that the trial of an issue could proceed. Upon receiving MSG's motion record, ACC learned that neither representation was correct.

32. The motion brought by MSG was heard by the Honourable Mr. Justice Somers on June 20, 1996. ACC opposed MSG's motion on the basis that the Solicitor's neglect had prevented it from filing the Statement of Claim. By Order, dated June 20, 1996 (Tab 8, Document Book), the Honourable Mr. Justice Somers dismissed MSG's motion and ordered ACC to pay MSG its party and party costs of the motion, as assessed, and Cana-Drain \$500 in costs, without prejudice to ACC seeking to recover those costs from the Solicitor personally, if so advised.

33. ACC brought a cross-motion, also heard on June 20, 1996, for an order, among other matters, extending the time for it to file its Statement of Claim with the Court, and an order that the Solicitor personally pay the costs of its motion and the motion brought by MSG. By Order, dated June 20, 1996 (Tab 9, Document Book), Mr. Justice Somers extended the time for ACC to file its Statement of Claim and adjourned the motion with respect to the costs being awarded against the Solicitor personally. ACC was ordered to pay MSG its costs in the motion as assessed.

34. Mr. Justice Somers delivered oral reasons with respect to the two motions before the Court on June 20, 1996 (Tab 10, Document Book). In his reasons, His Honour criticized the Solicitor's conduct in these matters and indicated that he was not prepared to make an Order against the interests of ACC as he concluded that its default had been caused solely by the actions, or inaction, of the Solicitor.

Particular 2(f) he failed to reply to the Law Society in a timely manner regarding a complaint by Angus McKinnon, made on behalf of Adelaide Capital Corporation, despite numerous telephone contacts and letters dated July 9, 1996, and August 14, 1996

35. By letter, dated April 26, 1996 (Tab 11, Document Book), Mr. McKinnon made a complaint, on behalf of ACC, to the Law Society with respect to the Solicitor's failure to respond to correspondence from his client, his failure to provide a reporting letter to his client, his failure to deliver the file to Mr. McKinnon, and his failure to account to ACC for the \$15,000 he held in trust.

36. The Law Society contacted the Solicitor on May 14, 1996, and requested that he produce ACC's file to Mr. McKinnon within two days. The Solicitor agreed to do so. The Solicitor transferred ACC's file to Mr. McKinnon on May 17, 1996.

37. The file provided to Mr. McKinnon did not, however, contain an accounting of the \$15,000 held back from the power of sale transaction. By facsimile, dated May 17, 1996 (Tab 12, Document Book), Mr. McKinnon asked the Solicitor to deliver his accounting to him forthwith. The Solicitor did not respond.

38. By letter, dated July 9, 1996 (Tab 13, Document Book), the Law Society requested the Solicitor's comments in response to Mr. McKinnon's letter of complaint within two weeks of that letter. The Solicitor did not respond.

39. On Thursday, August 1, 1996, the Law Society left a message with the Solicitor's office asking the Solicitor to call regarding the Law Society's letter of July 9, 1996. The Solicitor returned the call later the same day and left a message acknowledging receipt of the July 9th letter and indicating that he would call again on the following Tuesday (August 6th). The Solicitor did not call on August 6, 1996.

40. On Thursday, August 8, 1996, the Law Society called the Solicitor's office and left a message with the Solicitor's office for him to return the call. The message emphasized that the Law Society required the Solicitor's response as soon as possible. The Solicitor did not respond.

41. By letter, dated August 14, 1996 (Tab 14, Document Book), sent by registered mail to the Solicitor's last address according to the records of the Law Society, the Law Society advised the Solicitor that the matter would be referred to the Chair of the Discipline Committee if his response was not received within seven days. The letter was delivered and signed for on August 16, 1996. The Solicitor did not respond.

42. On August 15, 1996, Mr. McKinnon met with the Solicitor on a related matter. During this meeting, the Solicitor provided Mr. McKinnon with a trust cheque for \$4264.45 which he claimed represented the balance of ACC's trust funds after his accounts were satisfied. The Solicitor acknowledged to Mr. McKinnon that he had never forwarded accounts to ACC and that he recognized the impropriety of deducting funds without forwarding an account to the client.

Particular 2(d) he failed to honour Orders of the Ontario Court (General Division) in that:

- ...
ii) he failed to pay to his client Adelaide Capital Corporation the sum of \$11,131.15, pursuant to the Order, dated September 4, 1996, of the Honourable Mr. Justice Lane

Particular 2(e) in the alternative to 2(d)(ii), he failed to honour a financial obligation to a client in that he failed to pay his client Adelaide Capital Corporation the amounts for costs which had been incurred as a result of the Solicitor's failure to properly serve his client, which were particularized in the Order, dated September 4, 1996, of the Honourable Mr. Justice Lane

43. ACC's motion for an Order requiring the Solicitor to personally pay the costs ordered against ACC was heard by the Honourable Mr. Justice Dennis Lane on September 4, 1996. The Solicitor consented to an Order requiring him to pay ACC \$10,631.15 in respect of its costs of the motions on September 4, 1996, and June 20, 1996, and to indemnify ACC for the costs it was ordered on June 20, 1996, to pay to MSG and Cana-Drain. A copy of His Honour's Order, dated June 20, 1996, is located at Tab 15 of the Document Book.

44. The Solicitor did not pay ACC the amount owing under the Order, dated September 4, 1996, against him and did not respond to correspondence from Mr. McKinnon seeking payment of that amount. As a result, ACC was compelled to take enforcement proceedings against the Solicitor.

45. In a judgment debtor examination on October 25, 1996, the Solicitor advised ACC's solicitors that he did not have the financial means to satisfy the costs order, in the amount of \$10,631.15, owed to ACC. The Solicitor has not, to date, paid this amount and has not satisfied his undertakings he gave to ACC at the judgment debtor examination.

46. In March 1997, ACC commenced proceedings to assess the Solicitor's account. The Assessment hearing was scheduled for August 20, 1997. The day before the scheduled assessment, the Solicitor delivered to Mr. McKinnon unsigned accounts (Tab 16, Document Book) purporting to cover the period from May 15, 1995, to November 21, 1995, and purportedly supporting the \$11,267.82 which the Solicitor had held back in trust and then transferred to his general account. No accounting had been provided prior to that date.

47. The assessment of the Solicitor's accounts proceeded on August 20, 1997. The Solicitor's accounts were assessed in the amount of \$2,818.33, and, consequently, the Solicitor was ordered to repay the sum of \$8,397.52, with interest of \$902.73, and costs in the amount of \$2,000.00, for a total of \$11,300.25.

48. As a result of the assessment and the previous costs Orders against the Solicitor, the Solicitor owes ACC in excess of \$22,000, which has not to date been paid. The Solicitor states that he has no monies available to pay ACC.

V. DISCIPLINE HISTORY

49. On September 16, 1980, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society regarding a client complaint. On January 16, 1981, the Solicitor was reprimanded in Convocation for this misconduct and ordered to pay the Law Society's costs in the matter.

50. The parties agree that the matters identified in the following paragraphs 50 to 54 shall be received *in camera*.

IN CAMERA

IN CAMERA Content Has Been Removed

IN PUBLIC

Finding of Committee on the Allegations of Professional Misconduct

Based upon the admissions made in the Agreed Statement of Facts, both as to the facts and as their amounting to professional misconduct, all as set out in Paragraph 3 of the Statement, your Committee finds the Solicitor guilty of professional misconduct in respect of the following particulars:

Particular 2(a)

he failed to serve his client Adelaide Capital Corporation in a conscientious, diligent and efficient manner in connection with litigation involving Cana-Drain Services Inc. and Michael Stuart Group Ltd., in relation to a loan default by,

- i) not delivering a statement of claim, properly issued, in the trial of an issue within fifteen days as directed by the Order, dated March 14, 1995, of The Honourable Madame Justice Simmons,

- ii) not taking any other steps to prosecute the proceeding against Cana-Drain Services Inc. and Michael Stuart Group Ltd. expeditiously, thereby giving rise to motions by the defendants in that proceeding to release funds paid into Court to the credit of the action, and,
- iii) not responding to inquiries from his client or otherwise advising his client as to the status of this proceeding;

Particular 2(b)

in relation to the proceeding identified in particular (a), he misled his client Adelaide Capital Corporation by advising that client that certain steps had been or would be taken in the prosecution of the proceeding when, in fact, no such steps had been or were taken;

Particular 2(c)

he failed to account to his client Adelaide Capital Corporation in a timely manner regarding the funds which he held in trust on behalf of that client, notwithstanding numerous requests for such an accounting;

Particular 2(d)

he failed to honour Orders of the Ontario Court (General Division) in that:

- i) he failed to deliver a statement of claim in the proceeding identified in particular (a) within fifteen days in accordance with the Order, dated March 14, 1995, of The Honourable Madame Justice Simmons;
- ii) he failed to pay to his client Adelaide Capital Corporation the sum of \$11,131.15, pursuant to the Order, dated September 4, 1996, of the Honourable Mr. Justice Lane;

Particular 2(f)

he failed to reply to the Law Society in a timely manner regarding a complaint by Angus McKinnon, made on behalf of Adelaide Capital Corporation, despite numerous telephone contacts and letters dated July 9, 1996, and August 14, 1996.

RECOMMENDATION AS TO PENALTY

Your Committee recommends that the Solicitor be suspended for a period of two months provided that within the period of two months in question, he:

- (a) enrolls in Practice Review;
- (b) produces a psychiatric report confirming that he has entered a continuous course of therapy sufficient to enable him to carry on the active practice of law,

failing which the suspension shall continue indefinitely until both of such conditions are met.

REASONS FOR RECOMMENDATION

The Solicitor, as the Agreed Statement of Fact demonstrates, is 62 years old and was called to the Bar 35 years ago. As he advised us, he practises as a sole practitioner in a group akin to law chambers and is the only real estate practitioner in the group.

It is unnecessary to outline in detail the long and regrettable history of the litigation which he undertook to perform for Adelaide Capital Corporation. Suffice to say that from September 1993 until May 1996 when the file was returned to the client, he did nothing of practical value and, further, exposed his client to significant financial loss, all the while misrepresenting to his client, repeatedly, as to what was transpiring in his management of the litigation. While doing nothing, he provided his client with assurances that he was doing everything. He thereby compromised his client's position insofar as its entitlement to claim \$127,000 was concerned. He exposed his client to the payment of costs for deleterious behaviour. He failed to respond to the Law Society when requested. He withheld monies in trust on account of his own fees without rendering an account and, thereafter, when the account was rendered, and upon assessment, it was significantly reduced. Having utilized the trust fund to pay his account prior to assessment, he was unable to repay the client. Accordingly, at the present time he is indebted to the client in the amount of approximately \$22,000 for costs which the client was required to pay, costs which he was ordered to pay, and fees taken which were subsequently ordered repaid. From the point of view of the client, the retaining of the Solicitor was a disaster.

Based upon information which is now available to the Law Society through this discipline proceeding, this situation might have been anticipated. The Solicitor practised without apparent incident from 1983 to 1994, a period of approximately 11 years, during which he was in continuous psychiatric therapy for a chronic procrastination condition. As the report of Dr. M.G. Leith (Exhibit 4) points out, he was seen by Dr. Allan Tennen a minimum of twice a week from 1982 to 1984. As noted by Dr. Leith, the Solicitor was thus able to attend to the needs of his practice by reason of the therapy.

The Solicitor's condition of chronic procrastination is described in detail in Dr. Leith's report. He is quite clearly unable to manage anything other than the most routine matter unless he is in therapy. It is a good question as to whether he is really able to practise at all, although a long history in which he was free of client complaints suggests that in therapy his practice becomes quite manageable.

One thing is certain. The Solicitor is a danger to the public in purporting to practise law beyond anything other than the most routine matters in his present state. For this reason, it is the responsibility of the Law Society to ensure that the public is protected. The best manner of effecting protection of the public while at the same time permitting the Solicitor to practise law is to rely on a combination of Practice Review and psychiatric opinion. Accordingly, as a first step, it is recommended that the Solicitor be required to enroll in Practice Review. As a second step, it is recommended that he not be permitted to return to practice until the Law Society, through the Secretary, is provided with a psychiatric opinion to the effect that he is undertaking a course of therapy and is capable of conducting his practice in the future.

Accordingly, your Committee recommends that the Solicitor be suspended for a period of two months and that he, thereafter, be reinstated on the condition that he has enrolled in Practice Review and has delivered to the Secretary of the Law Society a psychiatric report in satisfactory terms attesting to his enrollment in a course of treatment and confirming that it would be appropriate for him to continue practising law, failing which the suspension shall continue until both of such conditions are fulfilled.

ALL OF WHICH is respectfully submitted

Dated this 15th day of April, 1998

David W. Scott, Q.C., Chair

Mr. Stuart asked that the following amendments be made to the Report:

- (1) page 2, the sentence before the heading Evidence - the word "with" be replaced with the word "was" so the sentence would then read:

Particular 2(e) "was" withdrawn.

- (2) page 18, 1st paragraph, 3rd line - the date "1983" be changed to "1982".

It was moved by Mr. Ruby, seconded by Mr. Carter that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 2 months provided that within the 2 months the solicitor comply with the conditions set out in the Report, failing which the suspension would continue indefinitely until the conditions were met.

Both counsel made submissions in support of the recommended penalty.

The solicitor addressed Convocation on the issue of the timing of the suspension and requested that the suspension commence July 6th, 1998 in order to complete some real estate matters.

It was moved by Mr. Topp, seconded by Mr. Marrocco that the recommended penalty be adopted with the suspension commencing July 6th, 1998.

Carried

The Treasurer advised the solicitor that he was to be suspended for a period of 2 months commencing July 6th provided that within the 2 months the solicitor comply with the following conditions:

- (1) enrol in the Practice Review program; and
- (2) produce a psychiatric report confirming that he had entered a continuous course of therapy sufficient to enable him to carry on the practise of law.

Failure to comply with the conditions the solicitor would be suspended indefinitely until the conditions were met.

Re: Thomas George RICHARDS - Toronto

The Acting Secretary placed the matter before Convocation.

Messrs. Swaye and Crowe withdrew for this matter.

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

Convocation had before it the Report of the Committee of Convocation dated 21st May, 1998 served personally on 10th June, 1998 (marked Exhibit 1), together with the Acknowledgement signed by the solicitor on 25th June, 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 Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gerald A. Swaye, Q.C., Chair
Marshall A. Crowe
Nora Angeles

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

Janet Brooks
for the Society

THOMAS GEORGE RICHARDS
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: May 21, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The COMMITTEE begs leave to report:

REPORT

This matter was heard in public on May 21, 1998, before this Committee, composed of Gerald A. Swaye, Q.C., Nora Angeles, and Marshall Crowe. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

The Solicitor seeks relief from an Order of Convocation, dated July 9, 1996, whereby the member was suspended for one month, and thereafter indefinitely until he produced proper books and records with respect to closed accounts for his law practice for the period February 1, 1995, to January 31, 1997.

The Applicant was called to the Bar on April 18, 1988, and opened up his own law office as a sole practitioner on that date. He closed his practice in Ottawa in June of 1992, and opened a practice in Owen Sound in July of 1992. He closed his practice in Owen Sound on May 31, 1995, and has not practiced law since that time.

The Member was unemployed after closing his practice in Owen Sound and could not afford to hire a Bookkeeper and Chartered Accountant to complete his filings for the year end January 31, 1995.

The Member failed to file with the Society within six months of the termination of his fiscal year, which ended on January 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public Accountant and signed by the Member in the form prescribed by the Rules.

Complaint numbered D332/95, filed on or about October 31, 1995 was brought against the member for failing to comply with the filing requirements of Section 16(2) of Regulation 708, made pursuant to the Law Society Act.

In November of 1995, the Member was able to find employment, parttime, in the Faculty of Law at the University of Ottawa. In January of 1996, he became employed on a part-time basis at Algonquin College, Faculty of Business, Continuing Education, where he taught courses in law. Due to this low income and part-time employment, the Member continued to be unable to afford to retain a Bookkeeper and Accountant in order to complete his filings.

This matter came before the Discipline Committee, in the absence of the Member on May 8, 1996, and a Decision was rendered on July 9, 1996, in which, among other things, the Member was suspended.

The Member became employed on a full-time basis on July 29, 1996, and he began turning his attention to the matter of his filings. He had begun, however, to fear that the boxes containing his books and records had been misplaced or discarded. He feared that his spouse, from whom he had been separated, had discarded them in anger due to their separation, as she had done with other of his belongings. Despite making several exhaustive searches, the Member had never been able to locate the boxes containing his books and records. In fact, a Member of the staff of the Law Society gave testimony that on or about July 30, 1997, she spoke to the wife of the Member. The wife confirmed that possibly she did throw out his records.

When the Member's employment as an Instructor of law ended in the first week of September, 1997, he immediately attended at the Society the next day to inquire as to the requirements of his reinstatement.

He was informed by Ms. Anita McCann that he must reconstruct his books and records from the bank's source documents. The Member attended at a Canada Trust branch the following day, and immediately requisitioned the same.

The Member did his best to pressure the bank to provide him with copies of the source documents, often attending at the bank day after day, and leaving telephone messages in an attempt to hasten the process, which was otherwise out of his control. The bank provided all their source documents within two weeks.

The Member retained an experienced legal Bookkeeper, once employed by the Law Society, to attempt to reconstruct his books and records to the extent that it could be done, from copies of bank source documents. In addition, a Chartered Accountant was retained to complete the Reports for filing with the Society.

The books and records so reconstructed were done to the best that the Member, Bookkeeper, and Accountant were able to do, and the reconstructed books and records, along with the requisite Reports, were filed with the Society on or about the 12th day of March, 1998, and thereafter.

Canada Trust had provided copies of all the source documents that they were able to locate and the material indicated that they could provide nothing further.

The Panel was advised that nothing more could be done in regard to the task of reconstructing the books and records of the Member. The Panel accepts this.

The Member's Bookkeeper, who has experience in reconstruction of books and records and who at one time, in fact, worked for the Law Society, provided correspondence, and amongst other things, gave her opinion that, "...I do not feel that any wrong doing has occurred."

The Chartered Accountant, retained by the Member, provided correspondence, and executed an Affidavit, stating that, among other things, in her opinion there were no "...fraudulent or irregular transactions..." during the period of February 1, 1994, to January 31, 1997.

Further, the material indicated that the credit balances remaining on the client's ledgers of some clients should not be relied upon as being correct, due to the fact of limited information, and some of the source documents made it impossible to accurately allocate certain withdrawals to specific clients.

The Chartered Accountant executed an Affidavit, sworn May 15, 1998, stating that the reconstructed trust account balanced to the penny.

The Panel, took specific note that there has never been any substantiated complaints made against the Member by any of his clients since April 18, 1988, until the present, in regard to the manner in which Trust funds were handled by the Member.

Shortly before the closing of the Solicitor's practice a highly-experienced Auditor in the employ of the Law Society, attended at the offices of the Member in Owen Sound and conducted an extensive four-day audit of his books, records, files, etc. Nothing was found to be untoward, or irregular. There was no deficiency whatsoever. The audit covered substantially the same period in which the books and records have now been reconstructed.

The Member, before the Panel, seeks reinstatement in accordance with the Application filed in this manner.

The Solicitor has brought an Application for reinstatement under Section 47 of the Law Society Act. He has indicated the following:

1. That he be found to have done all that is reasonably possible under the circumstances to reconstruct his books and records for the period of February 1, 1995, to January 31, 1997.

The Law Society takes the position that they agree with this finding. Therefore, the Panel so finds specifically that he has done all that is reasonable possible under the circumstances to reconstruct his books and records for the period of February 1, 1995, to January 31, 1997.

2. The Member asked us to find the following: That the books and records so reconstructed, though not entirely complete, satisfy the requirements for filing of such books and records for the period of February 1, 1995, to January 31, 1997.

The Law Society, however, takes exception to this finding. Both the Member and the Society agree that the books and records so reconstructed, are not entirely complete. In fact, the Society, on or about April 21, 1998, wrote the Solicitor and indicated various shortcomings in his books and records. Attached to these Reasons is a copy of a letter, dated April 21, 1998, addressed to the Solicitor (Tab 68 of the Book).

Notwithstanding the fact, however, that the books and records are not entirely complete, the Panel is satisfied, as is the Law Society that the Solicitor has done all that is reasonably possible to do under the circumstances.

3. The Solicitor is requesting that he be reinstated on such terms and conditions as are thought to be prudent by Convocation. Both the Solicitor and the Law Society are satisfied that the terms and conditions set out should be as follows:

- I. That he be required to provide the Law Society with monthly reconciliations for his Trust and General accounts and copies of his Trust and General receipt and Disbursement journals before the end of the next following month for a period of one year and thereafter for as long as it may be determined appropriate by the Secretary.

- II. That he be required to participate in the Practice Review Program and comply with any recommendations made in the course of his involvement with the Program.

4. Presently, there is being held in Trust, the sum of \$4,164.21 and the Solicitor is taking the position that those funds, in fact, belong to him, and represent unbilled work on behalf of clients.

The Law Society's position, on the other hand, is that because of the poor bookkeeping involved in regard to this matter, and because of the failure to produce all books and records (although the Panel finds that it is not necessarily the Solicitor's fault because the same cannot be done) that the funds should stay in Trust and ultimately be paid into Court to the credit of this matter into the Ontario Court (general Division) and an appropriate Order be made by the Court at that time.

Several theories were put before the Panel by the Law Society in regard to some of the bookkeeping in regard to this matter. As example, of the \$4,164.21 in Trust, they could either be his fees, they could be credits to clients, or they be stale dated outstanding Trust cheques. In fact, Exhibit "8" was filed in this matter indicating some of the various bookkeeping and in some of the instances between the amount shown by the Member and the actual balance in the Trust account there is a difference of some \$0.79 or #0.72.

The Panel was advised that there were three outstanding stale dated cheques in the total sum of \$4,009.86. The Law Society had no idea who these cheques belong to. The Solicitor indicated, that of the sum of \$4,009.86, \$2,000.00 involved a criminal matter for a Mr. Fell and, in fact, his fees were far greater than the sum of \$2,000.00. He had failed to take the \$2,000.00 from his Trust account to his General account.

Taking everything into consideration, on the balance of probabilities, it is more likely than not, that the sum of \$4,164.21, being held in Trust, belongs to the Member and not to any specific client. The Solicitor indicated that prior to the Law Society getting involved in this matter, and prior to his agreeing to the freezing of the Trust account, he could have, at any time, withdrawn those funds. He did not do so. He agreed to freeze the account.

Further, the Member went bankrupt as set out in Exhibit "9" on or about December 29, 1995. At that time, he did not show any outstanding fees as part of his bankruptcy. He gave any explanation satisfactory to the Panel as to why he did not. In any event, the one crucial issue, as far as the Panel is concerned, was that he did not know, at that time, exactly what the state of his accounts were. The Panel was satisfied with that explanation.

In summary, the Panel is satisfied that, Convocation, pursuant to Regulation 708, should allow the payment of the sum of \$4,164.21, to the Solicitor.

Regulation 708, Section 14(11) states: *"Money, other than money permitted by subsection (8) shall not be drawn from a trust account unless Convocation specifically authorizes in writing its withdrawal."*

Further, considering that there has not been a complaint by any client since 1988, and considering that there has not been any request for the Member to honour any outstanding Trust cheques in the last three years, it is more likely than not that the funds, in fact, belong to him.

Further, the Panel is satisfied that, in the event, the Convocation sees fit to permit the Member to practice, as we recommend, then, in the event that there are any outstanding funds owed by the Member, then he will have the responsibility to honour the same.

The Panel was referred to the matter of *Casher Premji Tanna*. In that case, Mr. Tanna was reinstated, on conditions. In Tanna, the Solicitor's records were misplaced when his Accountant died and the Solicitor went to India due to the death of his father. The Law Society in that case had received no complaints from clients for the relevant period. Nancy L. Backhouse, Chair of the Committee, stated:

"In our view, the Solicitor cannot reasonably do more than we have required him to do in this Decision to comply with Convocation's June 23, 1994 Order. In our view, the public interest is protected by lifting the suspension against the Solicitor with the conditions imposed on him, which were on the consent of the Solicitor."

This Committee, therefore, recommends to Convocation that the Solicitor be reinstated on the following conditions:

25th June, 1998

1. That he be required to provide the Law Society with monthly reconciliations for his Trust and General accounts and copies of his Trust and General receipt and Disbursement journals before the end of the next following month, for a period of one year and thereafter as long as it may be determined appropriate by the Secretary.
2. That he be require to participate in Practice Review Program and comply with any recommendations made in the course of his involvement with the Program.
3. That the sum of \$4,164.21 be repaid to the Solicitor.

ALL OF WHICH is respectfully submitted

DATED this 21st day of May, 1998

Gerald A. Swaye, Q.C., Chair

Ms. Brooks requested that the following corrections be made to the Report:

- (1) page 1, 2nd paragraph, sentence should be amended to read:

“The Solicitor seeks relief from an Order of Convocation, dated September 26, 1996, whereby the member was suspended for one month, and thereafter indefinitely until he filed outstanding filings.”

- (2) page 4, 4th paragraph, last sentence should be amended to read:

“The audit covered the months of August and September, 1994.”

Ms. Brooks advised that the solicitor sought relief from an Order of Convocation dated July 9th, 1997 whereby the solicitor was suspended for a period of 1 month and indefinitely thereafter until he produced his books and records with respect to closed accounts.

The recommendation of the Committee was that the solicitor be reinstated with the conditions set out in the Report.

Both counsel and the solicitor made submissions in support of the recommendation of the Committee.

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

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

The Topp/Ruby motion to adopt the Report was voted on and carried.

It was moved by Ms. Puccini, seconded by Mr. Gottlieb that the Report be amended by deleting the condition that the solicitor participate in the Practice Review program.

Not Put

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reinstated effective immediately with the following conditions:

25th June, 1998

- (1) that the solicitor be required to provide the Society with monthly reconciliations for his Trust and General accounts and copies of his Trust and General receipt and Disbursement journals before the end of the next following month, for a period of one year and thereafter as long as it may be determined appropriate by the Secretary;
- (2) that the solicitor be required to participate in the Practice Review Program and comply with any recommendations made; and
- (3) that the solicitor be repaid the sum of \$4,164.21.

Re: Barrie William CARLYLE - Toronto

The Acting Secretary placed the matter before Convocation.

Messrs. Wilson and Carter withdrew for this matter.

Ms. Cowie appeared on behalf of the Society and Ms. Bell appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 6th February, 1998, together with an Affidavit of Service sworn 24th March, 1998 that Pal Singh had effected service on the solicitor by registered mail on 18th March, 1998 addressed to 50 Cordova Avenue and 1535 Bathurst Street (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Bradley H. Wright, Chair
William D. T. Carter
Hope Sealy

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

Elizabeth Cowie
for the Society

BARRIE WILLIAM CARLYLE
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: November 4, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 14, 1997 Complaint D297/97 was issued against Barrie William Carlyle alleging that he was guilty of professional misconduct.

The matter was heard in public on November 4, 1997 before this Committee composed of Bradley H. Wright, Chair, William D.T. Carter and Hope Sealy. The Solicitor did not attend the hearing nor was he represented. Elizabeth Cowie appeared on behalf of the Law Society.

DECISION

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

Complaint D297/97

2. a) Between about June 27, 1995 and October 18, 1995 he misappropriated the amount of \$3,343.69, more or less, from his client, Stephen Du;
- b) He failed to serve his clients, Stephen Du, Helen Du and Xioatie Deng in a conscientious, diligent and efficient manner in the purchase of 88 Townsgate Dr., Thornhill, Ontario, by:
 - i) failing to obtain the searches prior to closing;
 - ii) failing to obtain searches other than title prior to closing;
 - iii) failing to register the mortgage on a timely basis; and
 - iv) failing to pay to the Treasurer of Ontario, the land transfer tax.
- c) He failed to maintain the books and records of his practice as required by S.15 of Regulation 708 made under the Law Society Act.

RECOMMENDATION AS TO PENALTY

1. The Committee recommends that Barrie William Carlyle be suspended for six months commencing at the expiration of his administrative suspension provided he appears at Convocation and provides an explanation for his actions satisfactory to Convocation, and that as a condition of resuming practice, he enroll in the Practice Review Program. If the Member fails to appear before Convocation or fails to give a satisfactory explanation, the Committee recommends that he be disbarred.

ISSUES OF SERVICE AND PROCEDURAL FAIRNESS

2. The member was not present at the hearing. Prior to proceeding, the Committee determined that the Society had met or exceeded all the statutory service requirements. Filed as Exhibit 1 was the affidavit of Rebecca Brown, Senior Secretary of the Discipline Department, in which is detailed the steps taken to effect service on the Member. It appears that the Member has disappeared without a trace. The Member was properly served with notice of the hearing originally scheduled for September 8, 1997, and was also properly served with the notice of a new date of October 6, 1997. The hearing was rescheduled for November 4, 1997. No further notice was given due to the Member's disappearance.
3. The Society undertook to continue to try to locate the Member. The Society is to report on the efforts to Convocation.

4. The Committee heard testimony from several credible witnesses. During testimony, all other witnesses were excluded.

REASONS FOR RECOMMENDATION

5. In May 1995, Stephen Du et al ("Du") retained the Member for a real estate purchase closing June 30, 1995. The purchase price was \$347,300.00. Net of the deposit, a tax adjustment, a mortgage advance from Canada Trustco Mortgage Company and other monies supplied by Canada Trust on behalf of Du, Du owed \$117,000.00 toward the balance due on closing excluding fees and disbursements.
6. In June 1995, the Member and his associate, Kevin McGee, became tenants, not associates, of Stephen Altwerger who is an experienced member of the Society in good standing.
7. In late June, the Member asked Du for an uncertified cheque for \$117,000.00 payable to the vendor and an uncertified cheque for \$3,343.69 for the land transfer tax payable to the Province. On closing, the Vendor refused to accept the uncertified cheque. The closing was rescheduled for Monday, July 4th to allow time to certify the \$117,000.00 cheque. While registering the deed on July 4th, the Member learned that the tax was \$3,384.41 or \$40.72 more than the amount of Du's cheque, and that the Registry Office would not accept an uncertified cheque from a non-lawyer. The Member wrote a cheque for \$3,434.41 to the Minister of Finance on his own Bank of Nova Scotia general account. We assume that he used the extra \$50 to register the deed. He failed to register the mortgage.
8. On July 5th, the Member asked Du for a certified replacement cheque for \$50.00 more than the original tax amount request. Du stopped payment of his uncertified tax cheque. On June 6th, Du delivered to the Member a certified replacement cheque payable to the Member in trust for the original amount of \$3,343.69 because he was not satisfied with the explanation as to why the tax was \$50.00 more than first stated. The Member may have been trying to recover the \$50.00 used to register the deed, or he may have been trying to collect another \$50.00 to register the mortgage, or he may have been confused. In any event, the Member deposited the replacement cheque into his Bank of Nova Scotia general account on July 14th believing, if we give him the benefit of the doubt, that he was merely reimbursing his general account for most of the monies he had disbursed on behalf of his client. In the meantime, however, the Member's cheque to the Minister was returned NSF. The member did not use Du's replacement cheque to reimburse the Minister for the NSF cheque. Instead, from July 14th to 28th, he used it to defray overhead. In so doing, he misappropriated \$3,343.69 from Du.
9. Altwerger became involved in late August or September 1995 when McGee, believing that another real estate file had been mishandled (we have no information of misconduct) by the Member, asked Altwerger to review the Du purchase file. Altwerger discovered that the Member had not done all the required searches and had not registered the mortgage. Acting quickly and well in the interests of the public and the profession, Altwerger offered and oversaw the services of his secretary to do the work on the file and register the mortgage. Fortunately, the title was clear and the mortgagee received its security. A reporting letter to the client was prepared for the Member's signature, but it appears that it was never signed.
10. While reviewing the accounting in the Du transaction, Altwerger's secretary discovered the dishonoured tax cheque written on the Member's general account and the lack of a correcting payment to the Minister. Altwerger advised the Member to contact the Society, which he did. Altwerger also wrote to the Society. Altwerger has not seen the Member since he left Altwerger's premises in the Autumn of 1995.
11. In October 1995, the Minister of Finance wrote to Du requiring payment of the tax, penalties and interest. Du contacted the Member who told him not to worry as it was a simple misunderstanding involving his trust account. In so doing, he misled his client. Du paid the total claimed by the Minister, contacted the Society, and ultimately received reimbursement from the Lawyers' Fund for Client Compensation.

12. George Macri, deputy director of the Audit and Investigation Department, testified that the Member met with him and Eileen McIntyre (then an employee of the Society) in October 1995, and that the Member admitted that:

- a) he was overwhelmed by the practice of law;
- b) his marriage was breaking down;
- c) he had been under his doctor's care on a weekly basis since February 1995 for Attention Deficit Disorder, and on medication from April 1995 to August 1995;
- d) he wanted a leave of absence from the practice of law for medical reasons;
- e) in the Du purchase, he had not done the proper searches, had not reported to his client, had not paid the land transfer tax, and had not properly advised his client of this; and
- f) Du's first land transfer tax cheque had been returned NSF.

13. Lorraine Campbell, an examiner with the Society, testified that she met with the Member in November 1995. He advised her that he wanted to quit the practice of law. He admitted that his records were not current, and agreed to co-signing controls at the TD Bank where he had moved his accounts. He was co-operative but could not provide full explanations. Campbell attempted to reconstruct his records, but many records were missing. At least \$600.00 remains unreconciled. She attempted to contact the Member several times by letter and telephone but was unsuccessful.

14. All of the particulars of the Complaint were made out by the Society. The only question is the penalty. In all but exceptional cases, the penalty for misappropriation is disbarment. This case may be exceptional. It may be that the Member did not commit the misappropriation with the dishonesty or willful blindness usually present in such cases. It may be that he thought that Du's replacement cheque was reimbursement for money that he had expended on Du's behalf, which it would have been if his own cheque had not bounced. He may have confused notification that his cheque had bounced with notification that Du's first tax cheque had bounced. It could not be proven whether the Member was aware or unaware at the time he was writing the overhead cheques that his own cheque to the Minister of Finance had bounced. It is this lacuna, arising largely as a result of the Member's absence from the hearing, that prompted us to recommend that he be given an opportunity to provide an explanation to Convocation, not in mitigation of the finding of misconduct, but in mitigation of the penalty.

15. It appears that the Member was inexperienced in the management of a law practice having been called in 1994. He had almost no experience in real estate law. His handling of the Du purchase was grossly incompetent. Altwerger testified that the Member was embarrassed, chagrined, and "uptight" about doing real estate, and co-operative and relieved when Altwerger assumed handling his few real estate files. At least until Altwerger discovered the accounting irregularity, it is possible that the Member was not dishonest or blind, but incompetent and inattentive. After discovery of the accounting irregularity, he may have become psychologically or financially paralysed. He did report himself.

16. If there is dishonesty or willful blindness, it must lie in the Member becoming aware that his general cheque had been dishonoured such that the Minister of Finance remained to be paid, and then failing to do so promptly. This is so whether the Member learned that his cheque had bounced prior to or while writing the overhead cheques or only after it was discovered by Altwerger.

17. The Society candidly stated that had the Member responded appropriately to the Complaint, the Society may have sought a suspension; however, the Society sought disbarment on the basis that the Member has vanished, he has not made restitution, there is no way of knowing whether he respects the authority of the Society, and the interest of the public must be protected. On the evidence before us he was suffering from marital and medical problems at the relevant times. He advised the investigator that he was giving up the practice of law. He has been administratively suspended since December 1995. Despite strenuous efforts to reach him, there has been no contact with him since that time.

18. Members have a responsibility to know the state of their firm and client accounts. At some point, the Member became aware that he, not Du, owed the Minister the taxes, yet failed to rectify the mishandling of Du's funds, but continued to take improper personal advantage of them. We believe a lack of dishonesty or willful blindness is possible but not probable. Absent an explanation satisfactory to Convocation delivered in person by the Member, we have no hesitation in recommending that he be disbarred.

19. The Member has no discipline history.

20. The Member was called to the Bar on February 8, 1994.

ALL OF WHICH is respectfully submitted

DATED this 6th day of February, 1998

Bradley H. Wright, Chair

There were no submissions.

It was moved by Mr. Crowe, seconded by Mr. DelZotto 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 commencing at the expiration of his administrative suspension provided the solicitor provided an explanation for his actions satisfactory to Convocation and that upon resuming practice, he enroll in the Practice Review program. If the solicitor failed to appear or give a satisfactory explanation, the solicitor was to be disbarred.

Both counsel made joint submissions that the solicitor be permitted to resign.

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

Concern was expressed that the solicitor may not have understood his options for resignation.

Counsel, the solicitor, the reporter and the public were recalled and the Treasurer inquired about the solicitor's understanding about his options for resigning.

The solicitor advised that he understood the options.

The matter was stood down.

Re: Abdurahman Hosh JIBRIL - Etobicoke

The Acting Secretary placed the matter before Convocation.

Mr. Wilson withdrew for this matter.

Mr. Batty 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 12th May, 1998, together with an Affidavit of Service sworn 29th May, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 22nd May, 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

Philip M. Epstein, Q.C.

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

Audrey Cado
for the Society

ABDURAHMAN HOSH JIBRIL
of the City
of Etobicoke
a barrister and solicitor

Not Represented
for the solicitor

Heard: April 8, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On July 14, 1997 Complaint D250/97 was issued against Abdurahman Hosh Jibril alleging that he was guilty of professional misconduct.

The matter was heard in public on April 8, 1998 before Philip M. Epstein, Q.C. sitting as a single bencher. The Solicitor did not attend the hearing, nor was he represented. Audrey Cado appeared on behalf of the Law Society.

DECISION

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

Complaint D250/97

2. a) He failed to co-operate with a Law Society Examiner by failing to produce the books and records of his practice despite numerous attempts by the Law Society since October 23, 1996; and
- b) He has failed to file with the Law Society since he was called to the Bar on April 28, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 of Regulation 708 made pursuant to the *Law Society Act*.

FINDING OF THE COMMITTEE

It appears from the evidence that Mr. Jibril has not filed his books and records as requested by the Society, nor has he made his annual filings since he has been called to the Bar.

In the circumstances there is a finding of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended for a period of sixty days and from month to month thereafter until his filings are up to date to the satisfaction of the Society, and until his books and records are brought up to date and produced to the Society to their satisfaction.

REASONS FOR RECOMMENDATION

In the matter of Abdurahman Hosh Jibril, the Solicitor is charged with professional misconduct in that he failed to co-operate with a Law Society Examiner by failing to produce the books and records of his practice despite numerous attempts by the Law Society since October 23, 1996; and secondly, that he has failed to file with the Law Society since he was called to the Bar on April 28, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant in accordance with Section 16 of Regulation 708 of the *Law Society Act*.

The document book which is Exhibit 2, shows repeated attempts by the Society staff to get in touch with Mr. Jibril and to assist him in coming into compliance with the request of the Society to produce his up to date books and records and to make his filings. It is noteworthy that Mr. Jibril does not appear to have filed the necessary forms since his call to the Bar in 1995. That is not an auspicious beginning for Mr. Jibril.

On the 14th of January, 1998, Mr. Jibril executed an undertaking whereby he agreed to provide a full and complete response to Ms. Phillips' request to provide receipted copies of co-signing documentation, so that his trust account could undergo co-signing controls. He also undertook to provide up to date books and records by February 27th and agreed not to accept any further funds into trust until completion of these proceedings before me.

In the document book, Exhibit 2, it indicates that Ms. Phillips had a conversation with the Solicitor in the process of setting up co-signing controls. The Solicitor indicated that some other staff member had advised that notwithstanding the co-signing controls, that certain monies that he was about to receive could be placed in his general account and then passed on to his client. I am alarmed at the suggestion. It appears that notwithstanding the co-signing controls on the Solicitor's trust account, it is possible that the Solicitor may well be using his general account for transactions. In any event, I am alarmed at the fact that Mr. Jibril, since he has begun his practice, has not made the requisite filings. I am also alarmed at the fact that notwithstanding repeated requests by the Law Society staff to bring in his up to date books and records, he has failed to do so. Mr. Jibril did not appear at the hearing. I asked the Society's representative to telephone him and she acknowledged that she had done so and again received a response by way of an answering machine. The document books indicates that generally speaking, when Mr. Jibril's office is contacted, the response is by voice mail. It is frequently full and it does not appear that anyone could reasonably contact the member by telephone.

I am advised that Mr. Jibril is under administrative suspension, but I note that it appears that his telephone is still active. All in all, I am very concerned about the Solicitor's lack of response to the Society and I am also concerned that, since the Solicitor began his practice, the Law Society has not received his filings.

25th June, 1998

There may be an adequate or potential explanation that would mitigate penalty in these circumstances, but Mr. Jibril has not appeared to offer any. It may be that once he receives these Reasons and appreciates that the matter is going to Convocation, he will attend there and explain fully his situation so that the penalty proposed might be mitigated.

I have no difficulty in finding that the Solicitor is guilty of professional misconduct based on the complaint and the evidence of the two Law Society staff witnesses. In the unusual circumstances of this case and in particular, in view of the fact that there has been no filing since Mr. Jibril began practice, I think the only reasonable penalty is to suspend Mr. Jibril for a period of sixty days and from month to month thereafter until his filings are up to date to the satisfaction of the Society and until his books and records are brought up to date and produced to the satisfaction of the Society.

I appreciate that suspension for failure to file may, in some circumstances, be a harsh penalty. On the other hand, the Society has a duty to protect the public and Mr. Jibril appears to be a very free spirit, operating without any sense of his obligation to the Society and his obligation to make timely filings and production.

Abdurahman Hosh Jibril was called to the Bar on April 28, 1995.

ALL OF WHICH is respectfully submitted

DATED this 12th day of May, 1998

Philip M. Epstein, Q.C.

It was moved by Mr. Crowe, seconded by Mr. Ruby that the Report be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 60 days and from month to month thereafter until his filings are up to date to the satisfaction of the Society, and until his books and records are brought up to date and produced to the Society to their satisfaction.

Mr. Batty made brief submissions in support of the recommended penalty.

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

Carried

Resumption of the CARLYLE MATTER

Upon resuming, Ms. Bell advised that the solicitor wanted to resign administratively.

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

It was moved by Ms. Ross, seconded by Mr. Topp that the solicitor be suspended for a period of 6 months effective immediately and further, if the solicitor resumed the practice of law that he enrol in the Practice Review program.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months effective immediately, such suspension to run concurrently with any administrative suspension and further, if the solicitor resumed the practice of law that he enrol in the Practice Review program.

Re: Donald Kenneth IATZKO - Windsor

The Acting Secretary placed the matter before Convocation.

Mr. Wilson withdrew for this matter.

Ms. Cowie appeared for the Society and Ms. Bell appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 20th May, 1998, together with an Affidavit of Service sworn 29th May, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 22nd May, 1998 (marked Exhibit I). 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 P. Armstrong, Q.C., Chair
W. Niels Ortved
Tamara Stomp

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

Rhonda Cohen
for the Society

DONALD KENNETH IATZKO
of the City
of Windsor
a barrister and solicitor

Not Represented
for the solicitor

Heard: August 6 and September 15, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 25, 1997 Complaint D156/97 was issued against Donald Kenneth Iatzko alleging that he was guilty of professional misconduct.

The matter was heard in public on August 6 and September 15, 1997 before this Committee composed of Robert P. Armstrong, Q.C., Chair, W. Niels Ortved and Tamara Stomp. The Solicitor attended the hearing and represented himself. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D156/97

2. a) He breached an Order of Convocation suspending his rights and privileges as a member of the Law Society for failing to pay his Errors and Omissions levy, by practising law during the period May 26, 1995 to June 28, 1995 inclusive.
- b) He practised law during the period June 28, 1995 to April 9, 1996 inclusive, while his status with the Law Society was "retired or not working".
- c) He breached an Order of Convocation suspending his rights and privileges as a member of the Law Society for failing to pay his Annual Fee, by practising law during the period November 1, 1996 to November 28, 1996, inclusive.

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 D156/97 and is prepared to proceed with a hearing of this matter on August 6, 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 D156/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 28, 1989. He practises as a sole practitioner.

- Particular 2a) He breached an Order of Convocation suspending his rights and privileges as a member of the Law Society for failing to pay his Errors and Omissions levy, by practising law during the period May 26, 1995 to June 28, 1995, inclusive.

5. On or about December 20, 1994, the Solicitor received a Notice and memorandum in which he was advised that payment of his Errors and Omissions levy was due for the period January 1, 1995 to June 30, 1995. The Notice stated that pursuant to s. 36 of the Law Society Act failure to pay the levy within four months after the due date may result in suspension. A copy of the First Notice and memorandum are contained at Tab 1 of the Document Book. The Solicitor did not respond or remit payment.

6. On or about April 10, 1995, the Solicitor received a Second and Final Notice and memorandum in which he was advised that payment of his Errors and Omissions levy was due for the period January 1, 1995 to June 30, 1995. The Notice stated that payment in full must be received by May 5, 1995, to avoid suspension. A copy of the Second and Final Notice and memorandum are contained at Tab 2 of the Document Book. The Solicitor did not respond or remit payment.

7. By registered mail dated May 29, 1995 (Tab 3, Document Book), the Law Society advised the Solicitor that his rights and privileges as a member had been suspended effective May 26, 1995 as a result of his failure to pay his Errors and Omissions insurance levy. The Law Society's registered letter was signed for and delivered on June 2, 1995.

8. During the period May 1996 to February 1997, William Simpson, an Examiner with the Law Society's Audit and Investigation Department, conducted an audit of the Solicitor's practice. During a review of the Solicitor's records and files, Mr. Simpson discovered that the Solicitor had practised law while under suspension.

9. The Solicitor practised law during his suspension, May 26, 1995 to June 28, 1995, as evidenced by the following:

- a. Solicitor's account to Ontario Legal Aid dated May 30, 1995 re: client, Garrity, in which the Solicitor attended in court for sentencing on May 30, 1995 (Tab 4, Document Book);
- b. Solicitor's letter to Pat Cumings, Windsor Jail, dated May 30, 1995, re: client, Garrity (Tab 5, Document Book);
- c. Solicitor's letter to Brentwood Recovery Home dated June 7, 1995, requesting that a counsellor attend at the jail to determine if the Solicitor's client, Garrity, is suitable for Brentwood (Tab 6, Document Book);
- d. Solicitor's account to Ontario Legal Aid dated June 15, 1995, re: client, Meunier, in which the Solicitor met with client and attended at the court to withdraw the charges against his client (Tab 7, Document Book);
- e. Legal Aid Certificate re: client, Meunier, in which the Solicitor acknowledged on June 18, 1995, that he had been retained by the client (Tab 8, Document Book);
- f. Solicitor's account to Ontario Legal Aid dated June 16, 1995 re: client, Newton, in which the Solicitor met with the client and attended at court for trial on June 15, 1995 (Tab 9, Document Book);
- g. Legal Aid Certificate re: client, Newton, in which the Solicitor acknowledged on June 18, 1995 that he had been retained by the client (Tab 10, Document Book);
- h. Legal Aid Certificate re: client, Paun, in which the Solicitor acknowledged on June 16, 1995 that he had been retained by the client (Tab 11, Document Book);
- i. Solicitor's letter to Ontario Legal Aid, Area Director, dated June 22, 1995 re: client, Haidar, requesting that the Legal Aid Certificate be amended (Tab 12, Document Book);
- j. Solicitor's account to Ontario Legal Aid dated June 29, 1995 re: client, Haidar, in which the Solicitor attended at the court for trial on June 22, 1995 (Tab 13, Document Book);

Particular 2b) He practised law during the period June 28, 1995 to April 9, 1996 inclusive, while his status with the Law Society was "retired or not working".

10. The Solicitor had advised the Finance Department of the Law Society that during the period June 28, 1995 to March 1996, he was not practising and his status should be changed to "retired or not working". The Solicitor, however, continued to practice law during the period June 28, 1995 to April 9, 1996 as evidenced by the following:

- a. Solicitor's letter to client, Ek, dated July 17, 1995, in which the Solicitor confirmed the outcome of the client's case that day (Tab 15, Document Book);
- b. Solicitor's account to Ontario Legal Aid dated July 18, 1995, re: client, Ek, in which the Solicitor attended at court for a trial (Tab 16, Document Book);
- c. Solicitor's letter to client, Chayer, dated July 8, 1995, in which the Solicitor requested that his client contact him to deal with his latest charges (Tab 17, Document Book);
- d. Solicitor's note dated August 10, 1995 re: client, Chayer, indicating his attendance in court (Tab 18, Document Book);
- e. Solicitor's account to Ontario Legal Aid dated October 28, 1995 re: client, Chayer, in which the Solicitor attended provincial court for trial (Tab 19, Document Book);

Particular 2c) He breached an Order of Convocation suspending his rights and privileges as a member of the Law Society for failing to pay his Annual Fee, by practising law during the period November 1, 1996 to November 28, 1996, inclusive.

11. The Solicitor received a Notice in which he was advised that payment of his Annual Fee for the period July 1, 1996 to December 31, 1996, was due on July 1, 1996. The Notice stated that pursuant to s. 36 of the *Law Society Act* failure to pay the annual fees within four months after the due date may result in suspension (Tab 20, Document Book).

12. On or about September 23, 1996, the Solicitor received a Final Notice in which he was advised that payment of his Annual Fee for the period July 1, 1996 to December 31, 1996, was due on July 1, 1996. The Notice stated that pursuant to s. 36 of the *Law Society Act* failure to pay the annual fee within four months after the due date may result in suspension (Tab 21, Document Book).

13. By registered mail dated November 4, 1996 (Tab 22, Document Book), the Solicitor was advised that his rights and privileges as a member of the Society had been suspended effective November 1, 1996, as a result of his failure to pay his annual fees. The Law Society's registered letter was signed for and delivered on November 12, 1996. The Solicitor was reinstated on November 28, 1996.

14. The Solicitor continued to practice law during his suspension November 1, 1996 to November 28, 1996, as evidenced by the following:

- a. Solicitor's memorandum to Bill Simpson dated December 12, 1996 in which the Solicitor advised that he had attended at court re: clients, Jolicoeur, Trif, Antal and Jinkerson (Tab 23, Document Book);
- b. Law Society's handwritten note of a telephone message left by the Solicitor on November 19, 1996, in which he advised that he was in court until the end of the day (Tab 24, Document Book).

V. PRIOR DISCIPLINE

15. On or about August 22, 1995, Complaint D210/95 was sworn against the Solicitor alleging the following professional misconduct:

- a) he failed to serve his client, Salem Harb, in a conscientious, diligent and efficient manner, in that he failed to proceed with his client's application for permanent residence in a timely manner;
- b) he failed to serve his client, Elie Karam, in a conscientious, diligent and efficient manner, in that he failed to make written submissions as required by the Convention Refugee Determination Division Tribunal;
- c) he failed to serve his client, Joe Katona, in connection with an impaired driving charge, in a conscientious, diligent and efficient manner, in that he:
 - i) failed to attend for trial on November 16, 1994; and
 - ii) failed to follow his client's instructions to initiate an appeal of his client's conviction.

On November 21, 1995, the Solicitor undertook to cease the practice of law effective immediately until such time as the above discipline proceeding had been finally disposed of. Complaint D210/95 was heard by a Discipline Committee on March 5, 1996. A finding of professional misconduct was made in respect of each of the particulars. The Discipline Committee reprimanded the Solicitor in Committee and further ordered the following conditions:

- a) that he continue treatment for alcohol addiction through the Brentwood Recovery Home, or other appropriate treatment for as long as necessary;
- b) that, prior to returning to practice, Mr. Iatzko provide to the Law Society evidence from a medical practitioner licensed to practice in the Province of Ontario that he is fit to practice law and that he has no mental illness which renders him incapable of practising law, including addiction to alcohol and drugs; and
- c) that, upon his return to practice, Mr. Iatzko do so under the supervision of a fellow solicitor, Mr. Donald Tait, and continue to do so until such time as medical evidence indicates that such supervision is no longer necessary.

The Secretary of the Law Society authorized the Solicitor to return to the practice on or about April 4, 1996.

DATED at Toronto, this 5th day of August, 1997.”

RECOMMENDATION AS TO PENALTY

The Committee recommends that Donald Kenneth Iatzko be suspended for a period of five months. The Committee further recommends that prior to returning to practice the Solicitor be required to bring all of his filings up to date, and to provide a medical report satisfactory to the Secretary of the Law Society that he is fit to practise law.

REASONS FOR RECOMMENDATION

The Committee is satisfied that the reason for the Solicitor's professional problems all relate to his physical and mental health and his personal situation. The Solicitor is an alcoholic. In a letter dated September 12, 1997, from his physician, Randall R. Hurst, M.D., it is stated:

The effects of depression which Mr. Iatzko currently exhibits include feelings of apathy, loss of initiative, loss of interest in people, occupational activities and social activities which previously afforded this man gratification. The state of the clinical depression from which Mr. Iatzko currently suffers has all but completely immobilized him. Other symptoms that he currently exhibits are those of considerable anxiety, agitation, expression of many self critical and self depreciating views of himself.

At present, Mr. Iatzko's participation in group and individual therapy as well as the use of prescribed anti-depressants are affording him the opportunity to gain insight and to understand and evaluate the current life situations he finds himself in.

A practical resolution of his outstanding divorce proceeding, bankruptcy and Law Society difficulties will definitely facilitate improved self esteem with respect to Mr. Iatzko's ability to manage his depression.

I have every expectation that since the appropriate choices are in place with respect to treatment, Mr. Iatzko will once again become an effective advocate in his chosen profession.

The Counsel for the Law Society suggested a penalty of thirteen months . Our review of the record led us to conclude that the Solicitor had practised while under suspension for a period of approximately four months. In accordance with the reasoning of the Committee in the MacGregor case, January 29, 1993, we recommend that the Solicitor be suspended for the four months which he practised while under suspension, plus an additional month as both a specific and general deterrent, for a total of five months. We have also added the conditions that prior to returning to practice the Solicitor be required to bring all his filings up to date and provide a medical report satisfactory to the Secretary of the Law Society that he is fit to practise law.

Donald Kenneth Iatzko was called to the Bar on March 28, 1989.

ALL OF WHICH is respectfully submitted

DATED this 20th day of May, 1998

W. Niels Ortved, for the Committee

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 5 months and that prior to returning to practice the solicitor be required to bring all of his filings up to date and further to provide a medical report satisfactory to the Secretary that he was fit to practise law.

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

Ms. Bell made submissions in support of the recommended penalty but that the suspension not be effective immediately.

Counsel, the reporter and the public withdrew.

There was a discussion concerning the solicitor's treatment of his alcohol problem and whether Mr. Donald Tait would supervise the solicitor.

Counsel, the reporter and the public were recalled and the Treasurer asked counsel to contact the solicitor and Mr. Tait to make inquiries for Convocation.

The matter was stood down.

The Treasurer was ineligible to sit on the following discipline matter and withdrew from Convocation.

Mr. Ruby took the Chair as Acting Treasurer.

Re: Micaela Obreanu BORUP - Unionville

The Acting Secretary placed the matter before Convocation.

Mr. Marrocco withdrew for this matter.

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

The Report of the Discipline Committee dated May 12th, 1998 together with the Affidavit of Service was filed as Exhibit 1.

A letter from the solicitor dated June 23th, 1998 was filed as Exhibit 2.

Ms. Seymour asked that the following corrections be made to the Report:

- (1) pages 64 and 65 (re: Recommendation and Reasons for Recommendation as to Penalty) should be in public and not in camera;
- (2) page 64, 2nd paragraph under heading Reasons for Recommendation - should be "sixty-eight" instances of failing to report not "eight".

There were no submissions.

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

Counsel, the reporter and the public withdrew.

It was moved by Mr. Topp, seconded by Mr. DelZotto that the matter be adjourned.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision to adjourn the matter and asked the Society's counsel to contact the solicitor about considering an administrative resignation.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:00 P.M.

CONVOCATION RECONVENED AT 2:00 P.M.

PRESENT:

The Treasurer, Carey, Carpenter-Gunn, Carter, Chahbar, Cole, Crowe, Gottlieb, Manes, Marrocco, Puccini, Ross, Ruby, Swaye and Topp.

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IN PUBLIC
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Re: Walter Kingsley WIJESINHA - North York

The Acting Secretary placed the matter before Convocation.

Ms. Cowie appeared for the Society and Mr. David Hobson appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1998, together with an Affidavit of Service sworn 11th March, 1998 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 4th March, 1998 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

A letter from Dr. N. Velshi dated May 29th, 1998 was filed as Exhibit 2. The Acknowledgement, Declaration and Consent signed by Mr. Hobson, counsel for the solicitor on 25th June, 1998 was filed as Exhibit 3.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert P. Armstrong, Q.C., Chair
W. Niels Ortved

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

Elizabeth A. Cowie
for the Society

WALTER KINGSLEY WIJESINHA
of the City
of North York
a barrister and solicitor

Lawrence T. Feldman
for the solicitor

Heard: August 6, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCAATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 3, 1997 Complaint D255a/96 was issued against Walter Kingsley Wijesinha alleging that he was guilty of professional misconduct.

The matter was heard in public on August 6, 1997 before this Committee composed of Robert P. Armstrong, Q.C., Chair, Tamara Stomp and W. Niels Orved. The Solicitor did not attend although he was represented at the hearing by his counsel, Lawrence T. Feldman. Elizabeth A. Cowie appeared on behalf of the Law Society.

DECISION

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

2. a) On December 17, 1991 he was found guilty by a jury in a proceeding before the Ontario Court (General Division) of four counts of wilfully attempting to obstruct, pervert or defeat the course of justice by knowingly submitting to the Law Society of Upper Canada with intent that they should be acted upon by the Law Society as if they were genuine:
 - i. a Solemn Declaration given under oath by Kenneth Langille on November 24, 1989;
 - ii. a Solemn Declaration given under oath by Merrill Lee Roache on November 24, 1989;
 - iii. a Solemn Declaration given under oath by Norman James McMath on November 24, 1989;
 - iv. a Solemn Declaration given under oath by Anthony Thompson on December 11, 1989;

knowing the Declarations to be false, contrary to section 139(2) of the *Criminal Code of Canada*.

THE FACTS

The evidence in support of the Complaint was received in the form of an Agreed Statement of Facts supported by a Document Book, both of which were filed as Exhibits. In view of the seriousness of the matter, the evidence will be reviewed in some detail.

The Solicitor was called to the Bar in 1966. Prior to that time, he practiced law for 14 years in Ceylon. He practiced as an assistant Crown Attorney in Metropolitan Toronto between 1966 and January, 1988 when he established a private practice as a sole practitioner. He then restricted his practice to criminal defence work and specialized in the defence of impaired driving and related charges.

On December 17, 1991, the Solicitor was found guilty after 12 days of trial before Mr. Justice Trainor of the Ontario Court (General Division) sitting with a jury of four counts of wilfully attempting to obstruct, pervert or defeat the course of justice by knowingly submitting to the Law Society of Upper Canada with intent that they should be acted upon by the Law Society as if they were genuine:

- i. a Solemn Declaration given under oath by Kenneth Langille on November 24, 1989;
- ii. a Solemn Declaration given under oath by Merrill Lee Roache on November 24, 1989;
- iii. a Solemn Declaration given under oath by Norman James McMath on November 24, 1989;
- iv. a Solemn Declaration given under oath by Anthony Thompson on December 11, 1989;

knowing the Declarations to be false, contrary to section 139(2) of the *Criminal Code of Canada*.

Copies of the Declarations in question are attached as Appendices 1 to 4 respectively.

On January 8, 1992 a conviction was entered on Count 1. Mr. Justice Trainor granted a conditional stay in respect of Counts 2, 3 and 4 on the basis that all matters arose out of the same transaction. Also on January 8, 1992 the Solicitor was sentenced to 15 months' incarceration. The Solicitor appealed his conviction to the Court of Appeal for Ontario and sought leave to appeal his sentence. On February 18, 1994 the Court of Appeal ordered that the appeal against conviction be dismissed. The Court further ordered that the application for leave to appeal against the sentence be granted and that the appeal also be dismissed. The Solicitor subsequently appealed to the Supreme Court of Canada which appeal was heard on May 31, 1995 before a panel of a full Court. The Supreme Court similarly dismissed the appeal.

Based on the Solicitor's admission and the facts as agreed, the Committee found the solicitor guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee is divided in its recommendation as to penalty. The recommendation of the majority of the Committee as explained in this Report and Decision is that the Solicitor be disbarred.

REASONS FOR RECOMMENDATION

Regarding penalty, the following facts are also germane. The Solicitor is presently 67 years of age. He ceased to practice on May 1, 1991. He has no prior discipline history. He has now served his sentence imposed by Mr. Justice Trainor. While he did not appear on the occasion of the hearing, a letter was filed on his behalf, a copy of which is attached as Appendix 5. Finally, the Solicitor noted that while he respects the findings of the various Courts, he respectfully disagrees with them.

On the occasion of this hearing, counsel for the Law Society and the Solicitor made a joint submission that the Solicitor should be granted permission to resign. Having regard to the nature of the misconduct in question, the Committee made it clear that there was concern about such a disposition. This resulted in further submissions which included reference to the applicable authorities.

The parameters governing the issue of penalty are found in Section 34 of the *Law Society Act*. Specifically, in the case of a member found guilty of professional misconduct, a range of dispositions are available to Convocation up to and including disbarment.

Regarding the principles to be applied, these have been variously stated in the authorities. Obviously, any disposition must reflect the obligation that the profession be governed in the public interest. With this in mind, general deterrence is an important consideration to reinforce the expectation that misconduct will be treated seriously, and to deter others from similar actions. Specific deterrence must also be considered to protect against the possibility of repetition as far as the member is concerned. At the same time, the interests of the member must also be considered and rehabilitation, where possible, encouraged.

It is instructive to focus on these foregoing principles having regard to the facts in question. First, with regard to the principle of general deterrence, it must be borne in mind that the specific misconduct here goes to the heart of the Society's regulatory regime. Furthermore, the conduct was initiated by a member whose daily practice was premised on the integrity of the very process he sought to subvert, namely, the sanctity of the oath and the accuracy of sworn evidence. The Solicitor in this case has violated his duty to the Court and his duty to the profession as well as his duty to himself. It would be difficult to conceive of facts where the principle of general deterrence is of less application. In short, there should be very little latitude where the issue of false testimony is concerned.

Regarding specific deterrence, this is not a significant factor to be considered. It is common ground that future misconduct on the part of the Solicitor is not a concern.

With regard to the rehabilitation of the member, this consideration is also less significant. The member has not practiced since May, 1991 and does not intend to practice in the future. Indeed, as he acknowledges in his letter attached as Appendix 5, it would be virtually impossible for him to appear in any Court in the Province at any time in the future.

The real issue, therefore, is whether there are mitigating factors found in the evidence such that the maximum penalty should not be imposed.

Having regard to the authorities, one of the factors which has served as mitigation in other cases has been the Solicitor's motivation for the activity in question. For instance, if the misconduct were the result of dire personal circumstances such as illness, serious economic straits or the collapse of a member's personal life, the penalty might be moderated. Here, we had no evidence of such circumstances.

Also central to a number of the authorities is the issue of remorse. Again, in the evidence before us there was no suggestion of contriteness. To the contrary, the member emphasized that he disagreed with the findings made in the Courts.

At its highest, to the extent that there is a mitigating factor, we are asked to find this in the member's personal circumstances. That is, we are asked to depart from the maximum penalty on the basis of compassion. While one can be sympathetic to the member's situation, it does not necessarily, without more, constitute a sufficient mitigating factor to reduce a penalty otherwise applicable.

That there was a joint submission calling for the Committee to grant permission to resign is a significant factor to be considered. However, the recommendation as to penalty must reflect the independent view of the Committee based on both the submissions *and* the record. It is of significance in our view that the Solicitor chose not to appear. There were no witnesses called nor testimonials filed beyond the Solicitor's own letter. Having regard to the circumstances and the other evidence, compassion alone does not serve to diminish the penalty which in our view is applicable. On the basis of the record before us, the appropriate penalty is disbarment.

Walter Kingsley Wijesinha was called to the Bar on March 25, 1966.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February , 1998

Robert P. Armstrong, Q.C., Chair

W. Niels Ortved

DISSENT

RECOMMENDATION AS TO PENALTY

The Minority of the Committee recommends that Walter Kingsley Wijesinha be granted permission to resign.

REASONS FOR RECOMMENDATION

I write to recommend to Convocation that permission to resign be the penalty imposed upon the Member. I am disposed to this even though I have read the well-reasoned recommendation of the majority in this matter. Further, I am disposed to pay great deference to the joint submission of the two experienced counsel appearing on this matter.

I adhere to the view that joint submissions should be endorsed unless outside the range. Although the Committee was provided with cases involving false/improperly sworn affidavits/ statutory declarations, (e.g. Linton, decision of Convocation September 26, 1996 and Janjua, decision of Convocation of March 25, 1993) where suspensions were imposed, I believe that there is no serious dispute that the range of penalty here is permission to resign versus disbarment.

Further, there can be no dispute that the misconduct here is very serious and strikes at the very heart of the administration of justice. While under investigation by the Law Society the Member caused the Law Society to receive false affidavits intended to divert suspicion from himself. With obvious forethought and planning the Member set upon a path to personally benefit himself. His offences are of the gravest sort, more aggravated by his 22 years as a respected Crown Attorney who daily worked to uphold the law and respect for the judicial system.

However, there is no evidence put before the Committee to detail the cause and effect of these false affidavits. Simply put to us was the conviction. Without more I am constrained to make further findings of aggravation or mitigation regarding the facts.

However, I also look to the personal facts of the individual member and still am of the view that permission to resign is the appropriate penalty. Those personal facts are set out in the letter the Member submitted dated July 31, 1997 and which is attached as Appendix 5 to the majority reasons herein. That letter describes a man so distraught over the way he let down himself, his family, his friends, neighbours, and Sri Lankan community both in Canada and his native country, that suicide was an option. When dissuaded from that course of conduct, he has chosen to merely await the "inevitable" instead.

Clearly, this is a man who has looked deeply in the mirror. The Member need not be physically present before me to be able to see the broken man he now is. He makes no excuses and I respect that as too often the assignment of blame is the preoccupation of these hearings. The Member's letter may be taken as bluntly spoken but I see it in a different light.

I note that the Member voluntarily quit practising in 1991 and has sought to formally resign since then but has been prohibited from doing so while discipline matters remain outstanding. The Committee was told that the appeal from the General Division conviction was in regards to technical matters only. The sentence of 15 months was not "light". There was no dispute (albeit there was disagreement with the General Division finding) in the finding of professional misconduct before us. There is no prior discipline history but rather an exemplary career. I find the old adage applies: "The bigger they are, the harder they fall". No one knows that better than the Member.

I have carefully reviewed the cases submitted to us in support of the joint recommendation and realize that not one is close to being "on all fours" with the case at hand. But the cases preferring permission to resign are instructive for the making of that recommendation alone. Each case was equally worthy of disbarment.

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IN PUBLIC

I therefore recommend that the Member be granted permission to resign failing which, he shall be disbarred.

ALL OF WHICH is respectfully submitted

DATED this 20th day of February, 1998

Tamara Stomp

Ms. Cowie asked that the Report be corrected at page 3, first paragraph by changing the sentence to read: ".....the Solicitor was found guilty after "8" days of trial..." not 12 days.

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

Carried

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

Both counsel made submissions in support of the joint submissions made at the hearing for the minority recommended penalty of permission to resign.

Ms. Cowie made submissions that there had been an error in principle in recommending disbarment based on the fact that the solicitor had not attended the hearing.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Manes, seconded by Ms. Ross that the solicitor be disbarred.

Lost

It was moved by Mr. Ruby, seconded by Mr. Marrocco that the solicitor be permitted to resign.

Carried

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

Resumption of the IATZKO matter

Mr. Cowie advised Convocation that she was unable to reach the solicitor but spoke to Mr. Tait who was unaware of the discipline proceedings.

The matter was adjourned to Friday, June 26th, at 11:30 a.m. in order that Mr. Tait could speak to the solicitor.

Convocation was seised of this matter.

CONVOCATION ROSE AT 3:00 P.M.

Confirmed in Convocation this *25* day of *September*, 1998

Harvey T. Strasberg

Treasurer