

MINUTES OF SPECIAL CONVOCATION

Thursday, 26th, October, 1989
9:30 a.m.

PRESENT:

The Treasurer (Mr. Lee K. Ferrier) and Messrs. Bastedo, Carter, Cullity, Epstein, and Ferguson, Messrs. Hickey, Ms. Kiteley, Lamek, Lamont, Levy, Manes, Rock, Shaffer, Somerville, Spence, and Topp.

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"IN PUBLIC"

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Re: WILLIAM GEOFFREY MILNE, Toronto,

Mr. Paul Lamek, Chair, placed the matter before Convocation.

The reporter was sworn.

Mr. Jones of the Lockwood, Bellmore and Moore firm appeared on behalf of the solicitor. Mr. Shaun Devlin appeared for the Society.

The matter was adjourned on consent to January as the solicitor's counsel, Mr. B. Bellmore, is involved in a lengthy trial which precludes him from being available for November Convocation.

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Re: ROBERT ALLAN HORWOOD, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor appeared on his own behalf. Mr. H. Reg Watson appeared for the Society.

As a preliminary matter Mr. Horwood indicated that he did not insist on the same quorum which was present at Convocation when the Report of the Discipline Committee was adopted in June.

There were no submissions as to the Report.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Lamont that the penalty be a reprimand in Convocation on the solicitor's undertaking to cooperate fully with the Professional Standards Committee in a review of his practice.

Carried

The solicitor, counsel, public and the reporter returned.

Mr. Horwood was informed of the requirement that he give an undertaking to cooperate fully with the Professional Standards Committee in a review of his practice. Mr. Horwood indicated that he accepted the condition and gave the undertaking.

Counsel, public and the reporter withdrew. The Treasurer administered a reprimand to Mr. Horwood, the solicitor having waived his right of appeal.

The solicitor retired.

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Re: DAVID ELLIOTT WATERHOUSE, Niagara Falls

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor attended with his counsel, Mr. E. Greenspan. Mr. Reg Watson appeared for the Society.

Convocation had before it the the Report of the Discipline Committee, dated 16th January, 1989, together with an Affidavit of Service sworn 14th April, 1989, by Louis Kotholos that he had effected service on the solicitor by registered mail on 11th April, 1989 (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

Rino C. Bragagnolo, Q.C., Chair
Helen King MacLeod
June Callwood

In the matter of
The Law Society Act

H. Reginald Watson
for the Society

and in the matter of
DAVID ELLIOTT WATERHOUSE
of the City
of Niagara Falls
a barrister and solicitor

John J. Broderick, Q.C.
for the solicitor

Heard: February 8, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 6, 1989, Complaint D79/88 was issued against David Elliott Waterhouse, alleging that he was guilty of professional misconduct.

The matter was heard on February 8, 1989 by this Committee, composed of Rino C. Bragagnolo, Q.C. as Chair, Helen King MacLeod and June Callwood. Mr. Waterhouse attended the hearing and was represented by John J. Broderick, Q.C. H. Reginald Watson appeared as counsel for the Society.

DECISION

The Complaint

The following particular of professional misconduct was admitted and was found established:

(Para. 2: Complaint D79/88)

- (a) He demonstrated that he is ungovernable by the Law Society and not suited to the practice of law through his unethical conduct in relation to:
- (1) real estate transactions;
 - (2) litigation transactions; and
 - (3) the Law Society during its investigations.

Evidence

The entirety of the evidence with respect to the allegation of professional misconduct was contained in the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. SERVICE

1. The Solicitor accepts service of Complaint D79/88 and is prepared to proceed with a hearing of this Complaint on February 8th, 1989.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D79/88 with his counsel, John J. Broderick, Q.C., and admits the particular contained in the Complaint.

IV. BACKGROUND

4. The Solicitor is a sole practitioner who practises in Niagara Falls. He was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on April 8th, 1976.

V. FACTS

Audit

5. The Society's auditor attended at the Solicitor's office on June 10th, June 15th, June 16th, June 24th, June 27th, June 28th, June 30th, July 5th, July 7th, July 15th, July 21st, July 29th, September 6th and September 19th, 1988. The Society's audit disclosed a number of substantive areas of concern respecting the Solicitor's misconduct and also revealed that the Solicitor was not properly maintaining his books and records pursuant to the regulation. Some of the substantive concerns will be detailed later in this Agreed Statement of Facts.

6. The Society found a number of inadequacies as a result of the Solicitor not properly maintaining his books and records. One of these inadequacies was a trust shortage of more than \$10,000.00. Despite all of the attendances by the Society, it was not until September 6th, 1988, that the Society was able to determine the extent of the true trust shortage due to the magnitude of the problems with the Solicitor's books and records. Some of the trust shortage resulted from the Solicitor billing files and drawing fees from trust matters which had not been completed. All of the shortage has now been eliminated by the Solicitor, however, he borrowed from a client, Peter Sukkau Real Estate, to obtain the necessary funds. This will be discussed later in this statement.

7. After several visits by the Society's auditor, co-signing controls were implemented on the Solicitor's trust account on June 30th, 1988. The restrictions of co-signing were explained to the Solicitor and a copy of the direction to the co-signers was left with him. The Solicitor undertook to deposit all money coming into his possession and control forthwith to the trust account in his name at the Canadian Imperial Bank of Commerce in Niagara Falls. In addition to the co-signing controls, the Solicitor signed an undertaking to the Law Society which stated among other things that the Solicitor would accept no new legal work and would deposit into the aforementioned trust account and the Solicitor's existing general account all monies received in connection with his law practice. In the same undertaking, the Solicitor also agreed to wind down his practice and not take on any new matters after July 4th, 1988.

8. After the Solicitor executed his undertaking, the Society asked him to prepare a list of his active files. The Solicitor prepared a list, however, he was selective in the files which he disclosed to the Law Society and he continued to act on new matters as will be seen later in the statement.

Borrowing from a Client

9. At the time the trust shortage referred to in paragraph 6 was determined, it was also apparent that there was some \$6,000.00 in the trust account that the Solicitor was entitled to transfer to his general account. The state of the trust account was a manifestation of the Solicitor's general inability to handle his own financial matters in a proper fashion. In order to alleviate the shortage he borrowed \$15,000.00 from his client, Peter Sukkau Real Estate. The Solicitor had performed legal services on behalf of Peter Sukkau Real Estate in the past. The Solicitor borrowed \$15,000.00 and Sukkau Real Estate received a fourth mortgage on the Solicitor's office property. Although the Solicitor requested Sukkau Real Estate to obtain independent legal advice Mr. Sukkau, on behalf of the real estate firm, requested the Solicitor to undertake the work. The real estate firm now has and had at that time a listing with respect to the sale of the Solicitor's office property. The Solicitor was dilatory in providing the Society with a copy of the mortgage, however, that has been done and Mr. Sukkau has been provided with reporting letter. The Society does not have a copy of the letter. A number of the Solicitor's creditors have launched civil actions against him and several of the Solicitor's creditors have contacted the Society with respect to claims. At the time the \$15,000.00 was borrowed \$10,000.00 was deposited into the trust account, \$6,000.00 was transferred from the trust to the general account and the balance of the borrowings were used to pay general accounts. Although certain of the creditors advised the Society that the Solicitor had indicated that his general and trust accounts were frozen this was not an accurate statement, however, the inability to transfer the Solicitor's funds from the trust account to the general account adversely affected his ability to meet general expenses. The Solicitor is still indebted to Peter Sukkau Real Estate Limited and they will be paid out of the sale of the office building.

Breach of Undertaking

10. The Solicitor breached the terms of his undertaking to the Society dated July 4th, 1988, and violated the conditions of his co-signing instructions by acting in four (4) real estate matters, one a purchase and sale. On August 29th, 1988, an Agreement of Purchase and Sale was executed by the Murrays who then retained the Solicitor to act for them on a purchase from Arsenault. The Solicitor represented the Murrays and the transaction closed on September 12th, 1988. Prior to closing, the Solicitor opened a new trust account at the Royal Bank in Niagara Falls into which he deposited trust funds for the purchase and then issued a cheque from that account in the amount of \$48,378.77.

11. The Society received information respecting this transaction and on September 19th, 1988, the Society's auditor and the staff trustee met with the Solicitor in his office. The Solicitor was asked if he recognized the file named "Murray purchase from Arsenault". The Solicitor's reply was that he could not recall the file. Only when the Society informed the Solicitor that it was aware of the transaction which had closed seven days earlier, did the Solicitor admit that he did remember the transaction and that he had closed the purchase. The Solicitor admitted that it was a new matter and he had opened a new account at the Royal Bank in breach of his undertaking. He had in fact deposited the funds in a firm account with the Royal Bank and had obtained a certified cheque payable to the Solicitor for the vendor in the amount of \$48,378.77. It was subsequent to the certification of the cheque that the bank manager requested the Solicitor to identify the account as a trust account and as a result of that request the Solicitor did open a trust account which reflected the transactions which had been negotiated through the general account. The handling of the funds was in violation of his undertaking.

12. During the course of this meeting, the Solicitor admitted that he had not intended to inform the Society of this new matter. The Solicitor stated that the client had been referred to him and he took advantage of the fact to make a "quick \$400.00" as he needed the money.

13. As a result of the Murray transaction, the Society's auditor specifically asked the Solicitor if he had any other new matters outstanding. The Solicitor assured the Society that there were no other new matters. The Solicitor was instructed that the Royal Bank trust account could not be used as it violated the terms of his co-signing undertakings. On September 21st, 1988, the Society wrote to the manager of the Royal Bank confirming that the account would have to be closed. A copy of that letter was sent to the Solicitor who was to confirm the instructions to close the second trust account.

14. On September 22nd, 1988, despite the instructions from the Society, the Solicitor deposited approximately \$60,000.00 to his new trust account at the Royal Bank. On the same day, the Solicitor drew a cheque for approximately \$59,000.00 payable to Premier Trust respecting a transaction for Angela San Minelli. On September 23rd, the Solicitor processed another real estate transaction. He deposited approximately \$29,000.00 to the new trust account and wrote cheques for all of that amount. None of the cheques for the two transactions were co-signed as required by his undertaking with the Law Society.

15. Subsequent to September 23rd, 1988, the manager questioned the Solicitor about the letter from the Society. The Solicitor advised him that he would call the Society in order to change his trust from the Canadian Imperial Bank of Commerce to the Royal Bank. He was advised, however, to leave his trust account with the CIBC and close the Royal Bank trust account.

16. On September 27th, 1988, the Society spoke with the manager of the Royal Bank to specifically discuss the transactions which occurred on September 22nd and 23rd, 1988. During this discussion, the manager agreed to take immediate steps respecting the new trust account. After speaking with the bank manager, the Society contacted the Solicitor respecting the transactions on September 22nd and September 23rd, 1988. The Solicitor admitted that these two transactions were new matters and violated his undertaking to the Society.

17. The Society reviewed the Solicitor's file on the Murray purchase from Arsenault. This led the Society to the Murray sale which the Solicitor had closed on the same day, September 12th,

1988 and which had funded the Murray purchase. The Solicitor did not inform the Society of either of the Murray files. A review of the Solicitor's file on the Murray purchase indicated that the search of title dated back to only February of 1976.

18. On September 19th, 1988, the Solicitor admitted to the Society's auditor that he had been retained by the Murrays in late August and should have included the Murray transactions on the list of outstanding files.

3625 Dorchester Road

19. Mr. Hubert Ledwez owned the property at 3265 Dorchester Road. The first mortgage was registered to Mr. Ross Finch and the second mortgage was registered to Mr. Leon Gould. The property at 3265 Dorchester Road was composed of Part 1 and Part 2. The mortgage from Mr. Ledwez to Mr. Gould was on Part 1. The Solicitor represented Mr. Gould and Mr. Ledwez.

20. The Solicitor had acted for Mr. Gould on the mortgage transaction which closed in March of 1986. Mr. Gould's instructions at that time were that he was to have a first mortgage, however, the Solicitor did not take adequate steps to protect Mr. Gould and his mortgage was not registered until October of 1986 at which time it was second in priority. Subsequent to the late registration, the Solicitor falsely reported to Mr. Gould that he had a first mortgage. The Solicitor maintains that Ross Finch understood and admits that he was to postpone in favour of the Gould mortgage. It was an oversight on the part of the Solicitor in not assuring and obtaining execution of the necessary postponement agreement.

21. Mr. Ludwez defaulted on both mortgage payments and in 1987 Mr. Gould instructed the Solicitor to take legal action on his behalf against Mr. Ledwez respecting the default. At the time Mr. Gould gave the Solicitor these instructions, he was still under the impression that his mortgage was first in priority. The Solicitor took no action respecting Mr. Gould's instructions on the defaulted mortgage.

22. The Solicitor advanced funds to one Norman Visentin to assist in placing the building in a saleable condition. The building was not marketable at that time, the interior of the building had been almost completely demolished. All of the funds advanced by the Solicitor have been repaid by Visentin except approximately \$1,500.00.

23. Subsequently, Mr. Norman Visentin wished to purchase Part 1. The Solicitor also represented Mr. Visentin and arranged for Settlers Ontario Investment Corporation to make a mortgage loan to Mr. Visentin in the amount of \$56,250.00 to be secured by a first mortgage on Part 1. The transaction was scheduled to close on November 9th, 1987. On that date, Settlers advanced \$55,180.65 to the Solicitor. The Solicitor advanced approximately \$43,000.00 to Mr. Gould, \$5,000.00 to Mr. Visentin and approximately \$7,000.00 to himself. When the Solicitor paid out the mortgage proceeds, he ignored the priority of Mr. Finch's first mortgage, who received nothing. The Solicitor represented every party in the transaction except the first mortgagee, Mr. Finch. At the time the Solicitor improperly disbursed the funds, he was fully aware of the priority of the mortgages and the fact that he was preferring his interests and those of his client's over those of Mr. Finch.

24. Also, on November 9th, 1987, the Solicitor was asked by his client, Mr. Visentin, to provide him with registration particulars. The Solicitor provided him with a copy of an unregistered deed upon which the Solicitor had written the registration date of November 9th, 1987 and fictitious registration numbers as the Solicitor had not registered the

documents. The Solicitor did not register the deed and the Settlers' mortgage until January 13th, 1988. At that time, the Solicitor registered the documents, however, he registered them on Part 2 of the property instead of Part 1. Subsequent to the registration, the Solicitor issued a misleading reporting letter to Settlers stating that it had a first mortgage on Part 1. In reality, its mortgage is registered on Part 2 and is second in priority.

25. Throughout this matter, the Solicitor's conduct was compromised by his severe conflicts of interest in representing most of the parties including situations where he was instructed to take action against clients or former clients. Throughout the matter, the Solicitor did not take the appropriate steps to protect the interest of any of his clients in a timely fashion and when some action was taken, it was conducted improperly. Subsequently, the Solicitor issued misleading reporting letters in an attempt to cover his misconduct.

4624 Erie Avenue - Cacha's Restaurant

26. The Solicitor represented Mr. Gould on the sale and financing of Cacha's Restaurant to Mr. Sanchez in April of 1985. Mr. Sanchez did not meet the mortgage obligations and Mr. Gould became a mortgagee in possession in January of 1986 through the security of his third mortgage. He ran the restaurant as a going concern until August of 1986. In April of 1986, an offer was made and accepted from a Mr. De Rosa who made a deposit of \$5,000.00. The sale to Mr. De Rosa was aborted and Mr. Gould instructed the Solicitor to take legal action. Throughout the various mortgage defaults, the Solicitor represented Mr. Gould.

27. The Solicitor led Mr. Gould to believe that he had taken the appropriate steps to start legal proceedings, however, the Solicitor took no steps to protect Mr. Gould's interest. Mr. Gould is now represented by another solicitor who is attempting to remedy the situation.

6750 Mountain Road

28. The Solicitor represented Mr. Gould who owned a second mortgage on this property in the principal amount of \$35,000.00. The first mortgage was in the amount of \$175,000.00 to a financial institution. The owner of the property defaulted on both mortgages. Mr. Gould instructed the Solicitor to institute foreclosure proceedings. Meanwhile, Mr. Gould kept the first mortgage in good standing. The Solicitor did not follow Mr. Gould's instructions and took no action to initiate the foreclosure.

29. The Solicitor led Mr. Gould to believe that he had commenced the foreclosure action and thereafter falsely informed him as to his progress. On October 15th, 1987, the Solicitor reported to Mr. Gould in writing that the foreclosure had been completed when he knew that that statement was not correct. He had drafted the claim in the matter and he previously told Gould that matter was partially completed when in fact formal proceedings had not been commenced.

De Muy Accident

30. The Solicitor represented Ms. De Muy in an action respecting a motor vehicle accident. The case was settled in February of 1988, and the Solicitor received \$50,000.00 on behalf of Mr. De Muy.

31. The Solicitor paid himself \$7,000.00. However, the only fee billing he prepared (which was not received by Ms. De Muy) was for \$5,500.00. There was no reporting letter to the client nor was

there a trust statement which disclosed the additional \$1,500.00 that the Solicitor had received. In addition, the Solicitor disbursed \$3,000.00 to his ex-wife, Ms. Richardson, on February 23rd, 1988. Again there was no written disclosure of the \$3,000.00 disbursed in this fashion. Ms. De Muy was a personal friend of the Solicitor's former wife. Ms. De Muy in fact lived with the Solicitor and his wife for approximately 2 years. During that time Ms. De Muy damaged the Solicitor's car and the Solicitor had loaned and advanced funds to her to the extent of some \$1,500.00. Ms. De Muy was also indebted to the Solicitor's former wife, Patricia Richardson, in the amount of \$3,000.00.

32. The Solicitor failed to:

- (1) account
- (2) report; and
- (3) provide a fee billing to his client.

33. In connection with Ms. De Muy's accident, the Solicitor received medical reports from Dr. Diakow in August and September of 1985. Dr. Diakow billed the Solicitor for \$450.00. Dr. Diakow has made numerous attempts to collect this amount from the Solicitor since September of 1985, however, he has been unsuccessful.

Burnside Sale

34. The Solicitor represented Mr. Burnside in a sale transaction which closed on April 22nd, 1988. The purchaser was represented by Mr. Boyce.

35. On closing, the Solicitor undertook to obtain and register a discharge of the outstanding first mortgage to Premier Trust. The Solicitor also received a certified cheque from Mr. Boyce payable to Premier Trust in the amount of \$40,531.91 which was drawn on Mr. Boyce's trust account and delivered to the Solicitor in exchange for the undertaking.

36. The Solicitor mailed the cheque to Premier Trust on the closing date. The cheque, however, was not received and has not been located. The Solicitor failed to follow up with Premier Trust in connection with the required discharge. Mr. Boyce stopped payment on the original cheque and issued a fresh cheque to Premier Trust including an additional \$627.85 for interest charges.

37. The Solicitor admitted to the Society that he was liable to Mr. Boyce for an additional \$627.85 in interest charges due to his failing to fulfill the terms of the undertaking.

The Very Purchase

38. The Solicitor represented Ms. Very on the purchase of a residential property which closed on December 1st, 1987. Although the transaction closed on time, the Solicitor did not register the deed until June 30th, 1988.

Mark Smith Purchase

39. The Solicitor represented Mr. Smith on the purchase of a residential property which closed on March 31st, 1987. On May 19th, 1988, Mr. Smith complained to the Law Society about the Solicitor's delay in reporting and receiving documentation. The Solicitor reported to the mortgagee on May 8th, 1988, however, the report to Mr. Smith was delayed for an inordinate period of time. The Solicitor reported to Mr. Smith after the Society initiated its investigation.

Errors and Omissions

40. The Solicitor has nine outstanding Errors and Omissions files. The Society attempted to communicate with the Solicitor respecting each of these files, however, the Solicitor failed to reply to any correspondence from the Society respecting these claims. Only when the audit investigation had progressed did the Solicitor cooperate and provide the required documentation.

VI. PENALTY

41. The Solicitor's problems originated from a lack of attention to his practice due to the volume of work. Thereafter he demonstrated that he is not suited to the practice of law due to his unethical conduct including:

- (i) attempting to mislead clients;
- (ii) attempting to mislead the Law Society during its investigation;
- (iii) improperly preferring his interests to those of an unrepresented person;
- (iv) borrowing from a client;
- (v) breach of his undertaking to the Law Society by failing to wind down his practice of law;
- (vi) breach of his undertaking to the Law Society by failing to deposit all trust monies to his trust account subject to co-signing controls;
- (vii) failing to cooperate with the Society during its investigation;
- (viii) failing to maintain sufficient funds in trust to satisfy his trust liabilities;
- (ix) failing to maintain proper books and records;
- (x) failing to properly serve his clients;
- (xi) failing to honour financial obligations of his practice.

42. The solicitor has in the past suffered from problems relating to alcohol, however, these have been mainly overcome. There is no issue with respect to the Solicitor's psychiatric state other than a desire to placate and satisfy the demands of his clients in an improper fashion. The Solicitor recognizes that in the event he is at some future time permitted to practise that it should be in concert with others and under the control of a senior solicitor.

43. The Solicitor requests that he be permitted to resign his membership in the Society. The Solicitor understands that the Society is requesting that he be disbarred. He does, however, ask the Discipline committee to consider resignation as an alternative having regard to the fact that no funds were misappropriated or diverted from clients' accounts for the Solicitor's own personal advantage or use. The Solicitor acknowledges that he requires a period of time away from the practice of law.

44. The Society submits that the Solicitor be disbarred.

DATED at Niagara Falls this 16th day of January, 1989."

RECOMMENDATION AS TO PENALTY

We recommend that David Elliott Waterhouse be disbarred.

REASONS FOR RECOMMENDATION

The Society's auditor attended at the Solicitor's office on fourteen separate occasions from June 10 to September 19, 1988. The Society's audit disclosed a number of areas of concern respecting the Solicitor's practice and also revealed that the Solicitor was not properly maintaining his books and records pursuant to the Society's regulations. During the course of the audit a number of inadequacies resulting from the Solicitor's failure to properly maintain his books were uncovered. One such inadequacy was a trust shortage of more than \$10,000.00. Because the Solicitor's books and records were in such a poor state, the Society's auditors were not able to determine the extent of the true trust shortage until the thirteenth attendance on September 6, 1988. Some of the trust shortages resulted from the Solicitor billing files and drawing fees from trust on matters which had not been completed. At the time the trust shortage was uncovered, the Society's auditor found that there was approximately \$6,000.00 in the Solicitor's trust account for which the Solicitor had completed work and which he was entitled to transfer to his general account upon rendering his legal account to the client.

In order to cover the trust shortage the Solicitor borrowed the sum of \$15,000.00 from his client, Peter Sukkau Real Estate. The Solicitor had performed legal services on behalf of Peter Sukkau Real Estate in the past. Sukkau Real Estate received a fourth mortgage on the Solicitor's office property. In fairness to the Solicitor he did request that Sukkau Real Estate obtain independent legal advice, but Mr. Sukkau on behalf of his real estate firm declined and requested that the Solicitor undertake the preparation and registration of the mortgage documents. The loan to Sukkau Real Estate is still outstanding but is expected to be repaid out of proceeds of the sale of the Solicitor's office building.

It is to be noted that in 1986, only a few months prior to the Society's audit, the Solicitor was reprimanded in Committee for borrowing from a client and filing a false Form 2 and for failing to honour an undertaking given to a fellow solicitor.

On June 30, 1988, co-signing controls on the Solicitor's trust account were agreed to by the Solicitor. The restrictions of co-signing were explained to the Solicitor and a copy of the Direction to the co-signors was provided to him. The Solicitor undertook to deposit all monies coming into his possession and control forthwith to the trust account in his name at the Canadian Imperial Bank of Commerce, Niagara Falls, Ontario.

In addition to agreeing to the co-signing controls, the Solicitor signed an undertaking to the Law Society which stated among other things that the Solicitor would accept no new client files and agreed to wind down his practice commencing July 4, 1988.

The Solicitor breached the terms of his undertaking to the Society dated July 4, 1988 by acting in four new real estate matters:

- (a) On August 29, 1988 the Solicitor was retained to act on behalf of a Mr. and Mrs. Murray on the purchase of a real state property from a Mr. Arsenault. The Solicitor represented the Purchasers and the transaction closed on September 12, 1988. Prior to closing the Solicitor, in breach of his undertaking, opened a new trust account at the Royal Bank of Canada at Niagara Falls into which he deposited trust funds for the purchase and then issued a cheque from that account in the amount of \$48,378.77 to close. The Solicitor has admitted in the Agreed Statement of Facts that he represented the Murrays in the purchase and that in opening the trust account with the Royal Bank he was in breach of his undertaking to the Society (Para. 10 Agreed Statement of Facts). His only explanation for acting on the matter is that the Murrays had referred to him and he took advantage of the fact to make "a quick \$400.00", as he needed the money (para. 12, Agreed Statement of facts).

(b) Following the Murray transaction, the Society advised the Solicitor that the Royal Bank trust account could not be used as it violated the terms of his co-signing undertaking. On September 21, 1988 the Society wrote to the manager of the Royal Bank branch advising that the trust account would have to be closed. A copy of the letter was sent to the Solicitor requesting that he have proof of his instructions to the Royal Bank to close the second trust account.

(c) On September 22, 1988, despite the instructions given to him by the Society, the Solicitor deposited approximately \$60,000.00 to his new trust account at the Royal Bank.

(d) On the same day the Solicitor drew a cheque for approximately \$59,000.00 payable to Premier Trust on behalf of his client, Angela San Minelli. On September 23, 1988 the Solicitor was involved in a further real estate transaction and deposited approximately \$29,000.00 to the new trust account and wrote cheques for all of that amount; none of the cheques were co-signed as required by his undertaking to the Law Society. The Solicitor admits these two transactions were new legal matters on which he was retained subsequent to July 4, 1988 and that he was in breach of his undertaking to the Society.

The Agreed Statement of Facts sets out numerous attempts to mislead clients, summarized as follows:

(a) representing to his client Mr. Gould that he had a first mortgage when, in fact, he had a second mortgage due to the oversight on the part of the Solicitor in not obtaining execution of a necessary Postponement Agreement for the prior mortgage registered on title (para. 19 & 20, Agreed Statement of Facts).

(b) providing his client Mr. Visentin with a copy of an unregistered deed upon which the Solicitor had written the registration date of November 9, 1987 and fictitious registration numbers when, in fact, the deed was not registered until January 13, 1988 (para. 23 & 24, Agreed Statement of Facts).

(c) the Solicitor had arranged for a mortgage loan with Settlers Ontario Investment Corporation on behalf of Mr. Visentin to finance the purchase of the property at 3265 Dorchester Road. The Solicitor acted for both Mr. Visentin and Settlers in connection with this transaction. Because of the Solicitor's error the mortgage to Settlers was registered against Part 2 rather than Part 1. Subsequent to registration the Solicitor sent a misleading reporting letter to Settlers stating that it had a first mortgage on Part 1 when, in reality, its mortgage was registered on Part 2 and was second in priority to a first mortgage to Mr. Finch (para. 24, Agreed Statement of Facts).

The Agreed Statement of Facts also discloses many instances in which the Solicitor failed to properly serve his clients. Reference is made to the following:

(a) He failed to carry out the instructions of his client Mr. Gould in taking legal action against Mr. Ledwez when the latter defaulted in his mortgage payments (para. 21, Agreed Statement of Facts).

(b) He failed to carry out the instructions of his client Mr. Gould to commence legal action against Mr. Sanchez when the latter defaulted in his mortgage payments and Mr. Gould became a mortgagee in possession in January of 1986 on the security of his third mortgage, and thereafter failing to commence legal action as instructed by his client Mr. Gould against Mr. DeRosa pursuant to the Offer to Purchase of the said Sanchez property (para. 26 & 27, Agreed Statement of Facts).

(c) He failed to institute foreclosure proceedings on behalf of his client, Mr. Gould, in accordance with his instructions on a second mortgage held by Mr. Gould against the property at 6750 Mountain Road (para. 28, Agreed Statement of Facts).

(d) The Solicitor undertook to obtain and register a Discharge of a first mortgage to Premier Trust while representing Mr. Burnside in a sale transaction which closed on April 22, 1988. He received a certified cheque from his client Mr. Boyce payable to Premier Trust in the amount of \$40,531.91 which was drawn on Mr. Boyce's trust account and delivered to the Solicitor. The said cheque which the Solicitor mailed to Premier Trust was never received and has not been located. Mr. Boyce stopped payment on the original cheque and issued a fresh cheque to Premier Trust including an additional \$627.85 for interest charges. The Solicitor has admitted to the Society that he was liable to Mr. Boyce for an additional \$627.85 for interest charges. The Solicitor has admitted to the Society that he was liable to Mr. Boyce for an additional \$627.85 in interest charges due to his failure to fulfill the terms of his undertaking.

(e) The Solicitor failed to register a deed for his client Ms. Very until June 30, 1988 although the purchase transaction had closed on December 1, 1987 (para. 38, Agreed Statement of Facts).

(f) He failed to report and forward documents relating to the purchase of a residential property to his client, Mr. Smith, until May 8, 1988 on the transaction which had closed on March 31, 1987 (para. 39, Agreed Statement of Facts).

(g) The Solicitor failed to reply to any correspondence from the Society respecting nine outstanding claims made against the Errors and Omissions insurers. The Solicitor provided the required information and documentation only after the Society's audit was well in progress.

The sole issue before this Committee was whether, in the circumstances, Convocation should exercise its discretion to permit Mr. Waterhouse to resign rather than be disbarred.

Notwithstanding the character evidence and submissions on behalf of Mr. Waterhouse, we are unable to agree with the submissions that Mr. Waterhouse should be permitted to resign. We are unanimous in reaching the conclusion that the Solicitor's past conduct of deceit, both to the Society and to his clients, his breach of the undertakings given to the Society, the many breaches of his obligations to his clients and the fact that he has been ungovernable by the Society renders him unsuitable to continue in the practice of law.

David Elliott Waterhouse was called to the Bar and admitted as solicitor of the Supreme Court of Ontario on the 8th day of April, 1976.

ALL OF WHICH is respectfully submitted

DATED this 29th day of March, 1989

"R. Bragagnolo"
Chair

There were no submissions as to the Report.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Lamont, that the Report of the Discipline Committee dated the 29th March, 1989 be adopted.

Carried

It was moved by Mr. Lamek, seconded by Mr. Lamont, that the Recommendation as to Penalty contained in the Discipline Report, that the solicitor be disbarred, be accepted.

Carried

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of the decision.

The solicitor, counsel and the reporter retired.

.....

Re: KALMEN NATON GOLDSTEIN, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor attending with his counsel, Mr. A. Miller. Mr. Shaun Devlin appeared for the Society.

Convocation had before it the Report of the Discipline Committee, dated 5th June, 1989, together with an Affidavit of Service sworn 8th June, 1989 by Louis Kotholos that he had effected service on the solicitor by registered mail on 7th June, 1989 (marked Exhibit 1) and the Report of the Discipline Committee, dated 21st September, 1989, together with an Affidavit of Service sworn 26th September, 1989 by Dawna Robertson that she had effected service on the solicitor by registered mail on 22nd September, 1989 (marked Exhibit 2) and Acknowledgement, Declaration and Consent executed 26th October, 1989 by the solicitor with respect to both Reports (marked Exhibit 3). Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them was waived.

The Reports of the Discipline Committee are as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes (Chair)
Paul S.A. Lamek, Q.C.
J. James Wardlaw, Q.C.

In the matter of
The Law Society Act

Shaun Devlin
for the Society

and in the matter of
KALMEN NATON GOLDSTEIN
of the City
of Toronto
a barrister and solicitor

John Ward
for the solicitor
Heard: March 29, 1988
June 9, 1988
January 5, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 16, 1987, Complaint D138/87 was issued against Kalmen Naton Goldstein, alleging that he was guilty of professional misconduct.

This matter was heard in public on March 29, 1988, June 9, 1988 and January 5, 1989 before this Committee composed of Ronald D. Manes, as Chair, Paul S.A. Lamek, Q.C., and J. James Wardlaw, Q.C.

Mr. Goldstein attended the hearing and was represented by his counsel John Ward. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The Complaint

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

Paragraph 2: (Complaint D138/87)

"(a) During the period from January, 1985 to August 15th, 1986, he exhibited a pattern of transferring client retainers from his trust account to his general account prior to providing the required services and, in particular, engaged in such activity with regard to the following clients:

- (i) Anthanasios Apatzidis
- (ii) Marilyn Banks
- (iii) Nella Emodi-Lisi
- (iv) Gus Giokas
- (v) Bernie Kowalchuk
- (vi) Tony Krilis
- (vii) Roger Pinter
- (viii) Fernando Tavares
- (ix) Robert Herfst

(b) During the period April, 1985 to November, 1985, he failed to operate a trust account for his practice despite the fact that he received trust funds during that period.

(c) During the period November, 1985 to August, 1986, he:

(1) failed to maintain a book of original entry to record the receipt of trust funds as required by Section 15 (1)(a) of Regulation 573 made under the Law Society Act;

(2) failed to maintain a trust ledger for clients as required by Section 15(1)(a) of Regulation 573 made under the Law Society Act;

(3) failed to reconcile his trust bank account and make monthly comparisons to a listing of client trust obligations as required by Section 15(1)(h) of Regulation 573 made under the Law Society Act;

(d) Despite attendances by a representative of the Society's Audit Department in August and September, 1986, he maintained books and records on or about October 24th, 1986, which exhibited the following deficiencies, each of which constitutes a breach of Regulation 573 made under the Law Society Act;

(1) his trust disbursements book did not make reference to the client on whose behalf cheques were issued;

- (2) his trust receipts book had not been posted since August 27, 1986;
- (3) trust transactions had not been posted to client trust ledger accounts since July 31st, 1986;
- (4) a trust comparison had not been made since July 31st, 1986; and,
- (5) an overdrawn trust ledger account of \$500.00 had remained uncorrected since September 29, 1986.

Evidence

Your Committee received in evidence at various stages of the proceeding inter alia an Agreed Statement of Facts dated March 29th, 1988, a Supplementary Agreed Statement of Facts dated December 12, 1988 and a Supplementary Agreed Statement of Facts dated June 9th, 1988 which are annexed to this Decision as Appendices "A", "B", "C" respectively. The Committee also heard evidence and submissions on three days during which your Committee heard viva voce evidence from the Solicitor, his accountant and Scott Kerr, an in-house lawyer with the Discipline Department. The proceedings unfolded over an extended period of time primarily at the request of the Solicitor to enable him to bring his books and records up-to-date in compliance with the Rules and Regulations.

(1) The Solicitor

The Solicitor was called to the bar in 1968. He has been a sole practitioner since 1976 and practises in the areas of Workers' Compensation, Immigration and minor criminal and civil litigation matters.

In April, 1984 the Solicitor declared personal bankruptcy and his trust account was operated by another solicitor until the Solicitor's discharge from bankruptcy in April of 1985. The Solicitor did not operate a trust account in his name until November of 1985 and did not process any transaction through any trust account during that period.

The Solicitor was reprimanded in Committee on February 17th, 1971. A copy of the Complaint which was established against him is attached as Appendix "D". In that instance, the Solicitor was guilty of professional misconduct when he failed to reply to letters from the Law Society regarding a complaint in connection with his professional conduct.

The Solicitor was reprimanded in Convocation on January 30th, 1986. A copy of the Report and the Decision of the Discipline Committee which was accepted by Convocation is attached as Appendix "E". Essentially, the Solicitor admitted professional misconduct in failing to serve several clients in a conscientious, diligent and efficient manner and failing to provide them with the quality of service at least equal to that which one would generally expect of a lawyer and, in particular, failing to keep them reasonably informed as to the progress of their files, failing to respond in any meaningful way to their reasonable requests for information and unreasonably delaying their proceedings and completing their proceedings on their behalf. The Solicitor also failed to give any meaningful response to communications from the Law Society with respect to his actions and breached an undertaking to the Law Society to proceed with litigation on behalf of some of these clients in a diligent and expeditious manner and also failed to comply with his undertaking to respond in an expeditious manner to communications from the Law Society. Further, on two occasions in 1984, the Solicitor misled clients regarding the status of their proceedings. Lastly, the Solicitor failed to deliver an account to the Ontario Legal Aid Plan although the Solicitor made written assurances throughout that period that he would do so, with the result

that his agent was deprived of payment during that period. Two members of the Committee recommended that the Solicitor be reprimanded in Convocation while a third member of the Committee recommended that the Solicitor be suspended for a period of a month.

(2) The Particulars

A. Particular 2(a)

The Solicitor engaged in a pattern of depositing clients' retainers into his general account. In all cases, these clients' retainers were deposited before the Solicitor provided services to each client equal in value to the amount of such retainers. A chart detailing the Solicitor's actions in this regard is attached as Appendix "F". Approximately ten clients were involved in more than twenty impugned transactions.

In addition, the Solicitor used a "standard form of general retainer" subsequent to these proceedings being commenced against him with respect to three additional clients and deposited their retainers directly to his general account, applying the funds to the Solicitor's personal purposes when he had not provided services equal to the value of the majority of the retainer. It appears that the Solicitor provided further services equal to the value of the balance of the retainers. In addition, a chart detailing the results of an investigation of the Solicitor's handling of the retainers on eight additional files during the period of March 24th, 1987 to June, 1988 is also attached to this Decision and marked as Appendix "G". In these cases, the Solicitor deposited money to his general account but billed the client in most instances much later.

During the course of an audit on May 25th, 1988 the Society's representative inquired into the Solicitor's present practice with regard to the deposit of client retainers. The Solicitor advised the Law Society's representative that he continued to deposit all client retainers directly into his general account as soon as those retainers were received. The Solicitor further advised that he had clients sign his "standard form of general retainer" purporting to authorize such deposits. The Solicitor admitted that the retainer agreement does not properly allow such a practice. A copy of the impugned retainer agreement is attached as Appendix "H".

Also on her attendance on May 25th, 1988, the Law Society's representative reviewed eight transfers from trust to general on account of fees for the period January to May of 1988. The list of those transfers is attached to this Decision as Appendix "I". The Solicitor prepared fee billings contemporaneous with those transfers in four cases. However, the remaining four fee billings were not prepared prior to transfer in accordance with the Regulations. The Law Society's representative has not yet been able to determine whether the fees in any of those eight matters were earned prior to the date of transfer.

The Solicitor is guilty of Particular 2(a) of the Complaint in that from January, 1985 to August 15th, 1986 he exhibited a pattern of transferring client retainers from his trust to his general account prior to providing the required services. Although the Solicitor's subsequent conduct was not particularized in the Complaint, the Solicitor has admitted improperly transferring client's funds to his general account generally before the work was completed and in all subsequent cases before the accounts were rendered. Although this evidence was adduced as similar fact evidence to demonstrate the Solicitor's modus operandi of improperly transferring client retainers from trust to general, or improperly depositing retainers directly into his general account, no amendment to the Complaint was sought to further particularize or make a separate count of these unlawful transfers or deposits. Had this evidence been attempted to be adduced during the liability portion of the proceeding, we may have hesitated in respect of same given the high standard of justice which these proceedings require.

However, this evidence was tendered during the penalty portion of these proceedings and is relevant to both the character of the Solicitor and to further demonstrate the Solicitor's improper course of conduct from January, 1985 to June of 1988 both before and during the instant proceedings.

B. Particulars 2(b), (c), (d)

The first hearing date was March 29th, 1988 and on that date the Solicitor undertook to the Committee as follows:

1. To file 1985, 1986 and 1987 Forms 2/3 on or before May 16th, 1988;
2. To file with the Law Society a copy of his monthly trust reconciliation for a period of one year;
3. To retain, for a period of one year, the services of a chartered accountancy firm to provide bookkeeping services;
4. To contact the Practice Advisory Service to obtain its advice and to cooperate with the Practice Advisory Service in implementing advice provided by the Service.

On May 25th, 1988 a representative of the Law Society's Audit Department attended at the Solicitor's office. At that time, the status of the books and records of the trust account was as follows:

1. Client trust ledgers had not been entered since December, 1987;
2. Trust receipts journal had not been entered since December, 1987;
3. Trust reconciliations had not been prepared since December, 1987;
4. Client trust listings were up to date;
5. Client trust disbursements book was up-to-date.

The Solicitor stated at that time that the books and records with respect to his general account were not up-to-date. Further, the Solicitor did not at all maintain a cash receipts book, which book is one of the requirements for general accounts. As of June 7th, 1987 the client's trust ledgers and trust receipts journal had not been prepared to the end of May, 1988. At that time the Solicitor's bookkeeper stated that he could bring them up-to-date in a period of six to eight weeks.

The Solicitor completed Forms 2/3 for 1985, 1986 and 1987 on June 27th, 1988 and provided them to the Society. The Solicitor has been making monthly filings since June of 1988. We accepted the evidence of the Solicitor that his failure to file Forms 2/3 on or before May 16th, 1988 pursuant to his undertaking and to make a monthly filing of his trust account reconciliations until June of 1988 is in a great measure due to his accountant who, in his evidence, accepted the responsibility for the delay. The Solicitor continues to retain a chartered accountancy firm to provide bookkeeping services. In addition, a representative of the Law Society has reported that the Solicitor can maintain his books and records and there was no assistance that the Practice Advisory Service could provide to him.

On June 9th, 1988 the Committee ordered that the Solicitor do the following:

1. Deposit all client monies including all client retainers to Mr. Goldstein's trust account;

2. Not transfer monies from trust to general accounts except where the work has been performed prior to the transfer and an account rendered prior to the transfer;

3. Take all steps necessary to produce to the Society a completed general bank account receipts journal together with available bank statements and deposit slips for the period November, 1987 to June, 1988;

4. Take all steps necessary to produce to the Society by August 15th, 1988, all books and records for Mr. Goldstein's general bank account as required by Regulation 573 under the Law Society Act, maintained properly and currently.

The Solicitor appeared before the Committee on January 5th, 1989 and we were advised that the books and records were not yet in compliance.

The books and records of the Solicitor's practice were examined by the Law Society on three occasions prior to March 1st, 1984. The report prepared by the Law Society's Audit Department detailed deficiencies in the Solicitor's books and records. A copy of the Report was mailed to the Solicitor making him aware of his failure to meet this standard for books and records set out in the Regulation. No disciplinary action was commenced against the Solicitor as a result of that report.

RECOMMENDATION AS TO PENALTY

We recommend that the Solicitor be reprimanded in Convocation with respect to Particular 2 (a) and that with respect to Particulars 2 (b), (c) and (d) the Solicitor be suspended from the practice of law for two months and indefinitely thereafter until he brings his books and records into compliance. We also recommend that the Solicitor be fined \$3,000.00 to cover the Society's cost of investigation; the fine should be paid within twelve months of the expiration date of the suspension.

REASONS FOR RECOMMENDATION

The Solicitor's disregard for the Rules and Regulations of the Law Society approaches ungovernability. No doubt his behaviour was, at least in part, driven by what appears to be a fairly marginal law practice, economically speaking. We say this by way of observation only in that such observation does not excuse the Solicitor's conduct. The Solicitor has been in trouble with the Law Society since 1971, when he was reprimanded in Committee, merely three years after being called to the bar. Convocation reprimanded the Solicitor on January 30th, 1986 for professional misconduct (previously described) arising in 1985. During the course of the proceedings before your Committee, the Solicitor continued to engage in improper "retainer" practices described previously. The Committee extended extraordinary indulgences to the Solicitor to bring his books and records up-to-date, mainly because it was in the interests of the clients that such indulgence be extended.

Had it not been for the fact that the Solicitor appeared to make genuine efforts to bring his books and records up-to-date and the fact that there was no persuasive evidence before us that the Solicitor had failed to perform the services for which he prematurely took clients' monies, the Solicitor would be perilously close to attracting a recommendation for disbarment by your Committee. It remains to be seen whether the Solicitor's future conduct will form the subject matter of a further complaint by the Law Society which will attract such a recommendation from a subsequent committee. Suffice it to say that at this point in the Solicitor's twenty years at the bar, the cumulative evidence of ungovernability and professional misconduct does not justify the imposition of the ultimate penalty of disbarment.

Kalmen Naton Goldstein was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 22nd day of March, 1968.

ALL OF WHICH is respectfully submitted

DATED this 5th day of June, 1989

"R. Manes"
Ronald D. Manes
Chair

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

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

Shaun Devlin
for the Society

KALMEN NATON GOLDSTEIN
of the City
of Toronto
a barrister and solicitor

A. Miller
for the solicitor

Heard: September 5, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 21, 1989, Complaint D17/89 was issued against Kalmen Naton Goldstein, alleging that he was guilty of professional misconduct.

The matter was heard in public on September 5, 1989, before a committee composed of C. Bruce Noble, Q.C., as Chair, Mary P. Weaver, Q.C. and Ronald D. Manes.

Mr. Goldstein attended the hearing and was represented by his counsel, Mr. A. Miller. Mr. Shaun Devlin appeared as counsel for the Law Society.

DECISION

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

(Para 2: Complaint D17/89)

(a) In or about January, 1989, he abandoned his practice without making adequate arrangements to protect the interests of his clients.

(b) He failed to reply to correspondence from the Law Society regarding complaints made by the following:

- (i) Helen Goldbeck
- (ii) Executive International Movers Limited
- (iii) David Bentham
- (iv) Tripti Bhattacharjee
- (v) Bernd Kopp
- (vi) Valerie Moulton
- (vii) Jim Lewis
- (viii) James Bognar
- (ix) Cynthia Hill (Buchar)
- (x) Artemis and Michael Chortiatis
- (xi) Ronald Taylor
- (xii) James Krusto
- (xiii) Douglas Hobbs
- (xiv) Antonio Bonofiglio
- (xv) Balwant Singh
- (xvi) Peter Carlisi

(c) He misled his client Helen Goldbeck regarding the status of a matter in which he had been retained to act on her behalf.

Evidence

The Committee received and considered a joint Agreed Statement of Facts containing the following:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D17/89 and agrees to proceed with a hearing of this matter before the Discipline Committee on September 5, 1989.

II. IN PUBLIC/IN CAMERA

2. The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. FACTS FROM PARTICULAR 2(a)

3. The Solicitor was suspended from practice on November 25, 1988 for failure to pay his Errors and Omissions Levy.

4. On December 21, 1988 the Solicitor provided a cheque to the Society in payment of the outstanding Errors and Omissions Levy. The cheque was not acknowledged by the Society until January 11, 1989, at which time the rights and privileges of the Solicitor as a member of the Society were reinstated.

5. The Solicitor was before another panel of the Discipline Committee on January 5, 1989 at which time he was practising.

6. Shortly thereafter, the Solicitor was required to leave his office premises because the building was being renovated. He removed the files from that office and took them to the office of another solicitor and to his home at 65 Scadding Avenue, Suite #409, Toronto.

7. From that time until February 23, 1989, the Solicitor took no steps on behalf of clients. He did not have a secretary in his home. He was not available by phone for either clients or solicitors and the Solicitor did no legal work. He did not respond to requests for information from the Society or from clients.

8. On February 23, 1989, the Solicitor was suspended by Convocation for failure to pay his annual fees. The suspension continued until April 4, 1989. During that period, he did no legal work for clients.

9. During the entire period, from about January 5, 1989 to April 4, 1989, the Solicitor took no steps to advise clients that he would not take action on their files. He did not transfer files to any other solicitors. He made no arrangements with other solicitors to notify them that he would not be taking action on files that he has ongoing at the time.

10. The Solicitor has failed to pay certain amounts ordered against him by way of assessment of certain of his fee billings. On January 26, 1989, his former client, Balwant Singh obtained an order from the assessment officer requiring the Solicitor to repay the sum of \$5,339.00. The Solicitor has made no payment to date. A copy of the order appears at Tab 18.

11. On April 4, 1989, the Solicitor's former client, Rose-Marie Lundy-Berard obtained an order from the assessment officer requiring the Solicitor to repay to her the sum of \$3,805.00. Another former client, Penny Friars, obtained an order from the assessment officer on the same date for the repayment of the sum of \$2,175.00. The Solicitor has made no repayment of any of those sums. Copies of these orders appear at Tab 18.

12. On May 26, 1989, the Solicitor former client, Mrs. Moutis, obtained an order from the assessment officer requiring the Solicitor to repay her the sum of \$5,740.00. A copy of the order appears at Tab 18.

13. The Solicitor has not made any payments towards the sums owing to Mr. Singh, Ms. Lundy-Berard, Miss Friars and Mrs. Moutis.

IV. FACTS RELEVANT TO PARTICULARS 2(a) and 2(b)

14. The Society received complaints against the Solicitor by fifteen clients and solicitors. Copies of the original complaint letters are included in the Document Brief at Tabs 2 - 16.

15. The Society sent the following correspondence to the Solicitor regarding those complaints:

i) Individual letters regarding the complaints of:

Ruza Petrushevski
H. Douglas Hobbs
Helen Golbeck
Kumardeo Sharma
Gertrude B. Ostapa
Cynthia Hill (Buchar
Antonio Bonofiglio
Antonia Moutis
Keith W. Macklin
Antonios Elia
Graham Storms

ii) Letters from the Society dated January 30 and February 9, 1989 regarding the following clients:

Michael & Artemis Chortiatis
Christine Bentham
Andrew King
Shirley Krusto
Bernd Kopp
Executive International Movers Limited
Jim Lewis
Valerie Moulton
James Bogнар

(Copies of these letters are included in the Document Brief at Tab 17).

16. To date, the Solicitor has not replied to any of these complaints. The Solicitor admits that the Society could call as witnesses the fifteen complainants whose names appear in particular 2(b) of Complaint D17/89 to give evidence in support of the written complaints they have made.

The Solicitor admits that the substance of those complaints is correct where those complaints refer to his failure to serve their interests and reply to their communications during the period January to April, 1989. The Solicitor in so doing does not require the viva voce evidence of the complaints on these issues.

V. FACTS FROM PARTICULAR 2(c)

17. Mrs. Golbeck initially retained the Solicitor on April 14, 1984, regarding a wrongful dismissal matter. The Solicitor commenced an action on her behalf in September, 1984.

18. The solicitors for the defendant served a notice for examination for discovery for the plaintiff to be held on Tuesday May 27, 1986. Due to a prior commitment, the Solicitor requested that the examination be rescheduled to June 12, 1986. The examination for June 12 was also cancelled at the request of the Solicitor. A notice of examination for discovery for August 7, 1986 was served by counsel for the defendant. The Solicitor, however, failed to attend at the examination on August 7 at the required time and the examination was aborted.

19. On September 8, 1986, a status hearing was held. Mr. Justice Holland presiding at the hearing ordered that the action was to be listed for trial by February 1, 1987, failing which the action would be dismissed.

20. On September 11, 1986, Mrs. Golbeck was examined for discovery. At approximately 12:30 p.m. on that day, the parties broke from the examination. The examination was never completed. The Solicitor subsequently asked for a psychiatric report from a Dr. Kelly on behalf of Mrs. Golbeck and the Solicitor accepted payment of \$1,500 from Mrs. Golbeck on payment of his fees as the matter continued.

21. The Solicitor took no steps to list the action for trial and the action was dismissed administratively. No written notice of the dismissal was given to the Solicitor.

22. On March 31, 1987, Mrs. Golbeck attended at the offices of the Solicitor. They discussed a proposal to settle the matter which the Solicitor confirmed in writing. Mrs. Golbeck instructed the Solicitor to continue with the action if the defendant would not accept the proposed terms of settlement. The Solicitor took no steps to communicate the offer to the defendant.

23. On October 14, 1987, Mrs. Golbeck was served with two Statements of Claim in connection with a related claim made by the Defendant in the wrongful dismissal action. The Defendant, as well as being Mrs. Golbeck's former employer, was a credit union which had loaned money to Mrs. Golbeck by way of mortgages. Mrs. Golbeck had ceased to make payment on the mortgages on the advice of the Solicitor as part of the Solicitor's recommended settlement strategy. The Statements of Claim were issued on the basis of the arrears in the mortgage payments. Mrs. Golbeck immediately informed Mr. Goldstein subsequent to October 14, 1987, regarding the Statements of Claim.

24. On April 6, 1988, Mrs. Golbeck was served with a notice of sale under the mortgage which demanded payment by May 24, 1988. Mrs. Golbeck immediately attended at the Solicitor's office on April 8, 1988.

25. On May 11 and May 13, 1988, Mrs. Golbeck called the Solicitor to enquire as to the status of the matter.

26. On both of those occasions, the Solicitor made statements to Mrs. Golbeck which had the effect of misleading her as to the status of the action.

27. On May 16, 1988, Mrs. Golbeck attended at the Solicitor's office to discuss the progress of the matter.

28. On May 20, 1988, Mrs. Golbeck attended at the Solicitor's office without an appointment. Upon his return to the office, the Solicitor advised Mrs. Golbeck that another lawyer would be telephoning her in the following week with respect to the matter. The Solicitor made no statements about any injunction application on that date.

29. Mrs. Golbeck attended at the office of the other solicitor and was ultimately apprised of the real situation. Mrs. Golbeck then retained counsel and made a complaint to the Law Society. As well, she had made a claim to the Society's Errors and Omissions Insurance Department.

Solicitor's Actions Since the Issuance of the Complaint

30. This matter was initially returnable on April 5, 1989. The Discipline Committee adjourned the matter on that date in consideration of an undertaking given by the Solicitor through his counsel to transfer files, prepare accounts and answer complaints as directed by the Law Society. The matter was adjourned to May 10, 1989.

31. On April 10, 1989, the Society wrote to the Solicitor setting out the actions it expected the Solicitor to take within a period of two weeks of the date of that letter. A copy of the letter is included in the document brief as Tab 1.

32. The Solicitor did not reply to that letter.

33. When the matter was set to resume on May 10, 1989, the Solicitor attended before the Committee. The matter was adjourned on the consent of the Society subject to the Solicitor's promise to transfer all of his files to the staff trustee shortly after the date of the hearing. That transfer was accomplished. The Solicitor also reiterated his undertaking to prepare accounts and provide responses to complaints.

34. Thereafter, David McKillop, a solicitor in the office of the staff trustee, attempted to follow up with the Solicitor regarding the fulfillments of the undertakings. A copy of his memorandum to file, which the Solicitor accepts as the evidence of Mr. McKillop, is included in the document brief as Tab 19.

35. Mr. McKillop dealt further with the Solicitor and, on July 14, 1989, Mr. McKillop wrote to the Solicitor with a list of outstanding matters requiring the Solicitor's attention. To date, the Solicitor has not replied to that letter or provided any evidence that he has attended to any of those outstanding matters.

DATED AT Toronto this 5th day of September, 1989."

The Solicitor was called to the bar in 1968. He had been a sole practitioner since 1976 and has practised in the areas of Worker's Compensation, Immigration and minor criminal and civil litigation matters.

In April, 1984 the Solicitor declared personal bankruptcy and his trust account was operated by another solicitor until the Solicitor's discharge from bankruptcy in April of 1985. The Solicitor did not operate a trust account in his name until November of 1985 and did not process any transaction through any trust account during that period.

The Solicitor was reprimanded in Committee on February 17th, 1971. A copy of the Complaint which was established against him is attached as Appendix "D". In that instance, the Solicitor was guilty of professional misconduct when he failed to reply to letters from the Law Society regarding a complaint in connection with his professional conduct.

The Solicitor was reprimanded in Convocation on January 30th, 1986. A copy of the Report and the Decision of the Discipline Committee which was accepted by Convocation is attached as Appendix "A". Essentially, the Solicitor admitted professional misconduct in failing to serve several clients in a conscientious, diligent and efficient manner and failing to provide them with the quality of service equal to that which one would generally expect of a lawyer and, in particular, failing to keep them reasonably informed as to the progress of their files, failing to respond in any meaningful way to their reasonable requests for information and unreasonably delaying their proceedings and completing their proceedings on their behalf. The Solicitor also failed to give any meaningful response to communications from the Law Society with respect to his actions and breached an undertaking to the Law Society to proceed with litigation on behalf of some of these clients in a diligent and expeditious manner and also failed to comply with his undertaking to respond in an expeditious manner to communications to the Law Society. Further, on two occasions in 1984, the Solicitor misled clients regarding the status of their proceedings. Lastly, the Solicitor failed to deliver an account to the Ontario Legal Aid Plan although the Solicitor made written assurances throughout that period that he would do so, with the result that his agent was deprived of payment during that period. Two members of the Committee recommended that the Solicitor be reprimanded in Convocation while a third member of the Committee recommended that the Solicitor be suspended for a period of time.

RECOMMENDATION AS TO PENALTY

The Committee heard representations from the Solicitor for the Law Society and Counsel for the Solicitor. Ultimately, a joint recommendation was made both by the Law society and counsel for the Solicitor which was adopted by the Committee.

We recommend that;

1. a Committee be formed under Section 35 of the Law Society Act to review the ability of the solicitor to practise within the context of Section 35;
2. the Solicitor shall submit himself to the Committee for review and shall submit himself medically as the Committee may require; and

3. the Solicitor be suspended for a period of two months or until the Section 35 Committee makes a report to Convocation and Convocation deals with the report, whichever is the later.

REASONS FOR RECOMMENDATION

Although the Solicitor's disregard for the Rules and Regulations of the Law Society approaches ungovernability, the Committee had before it and considered the report of Andrew I. Malcolm, M.D., D.A.B.P.N., F.R.C.P.C.

The report of Dr. Malcolm provided in part as follows:

"Mr. Goldstein had been called to the Bar in March 1968. It is important to note, however, that in 1964 he suffered a serious head injury and was put on Dilantin for a period of approximately one year. Interestingly he was seizure-free from 1964 to 1973 at which point he had a grand mal convulsion and was put back on Dilantin. This drug had a markedly sedative effect on him but it did not protect him against seizures. In the following months he had three more attacks and then he was put on a combination of phenobarbital and Mysoline and except for an attack in 1979 he has had no convulsions until the present time. In Mr. Goldstein's case it would seem that good control has been achieved without undue side effects. I would like to emphasize, however, that Mr. Goldstein is strongly disinclined to offer his epilepsy as an explanation for his recent difficulties with The Law Society. Even so I noted that he had not seen Dr. Russell Koffman, his neurologist, for at least three years and that he had also not had an updated EEG for the same length of time. I strongly advised him to make a further appointment with Dr. Koffman as soon as possible.

Mr. Goldstein was divorced from his first wife in 1985. The marked dysharmony in that relationship contributed strongly to his depressed mood in the two years following 1983. After 17 years of successful practice he decompensated into depression and this state of mind led, in turn, to the commission of a series of errors involving clients. In 1984 he declared bankruptcy. In 1985 he divorced his wife. In 1987 he married his second wife and now, two years later he is once again having much marital strife and, once again, he is facing a disciplinary hearing at The Law Society.

Mr. Goldstein is now in a condition of emotional stasis. He is suffering from a serious variety of Dysthymia (300.40 in the D.S.M. III - R) and he definitely needs support and counselling. It is of interest to me that although he has been almost continuously depressed since 1983 he has never attempted to contact any kind of mental health worker. Perhaps the explanation for this regrettable failure has to do with the fact that his brother, with whom he has always had a strained relationship, is a psychiatrist. It should be noted, however, that this brother has actually loaned Mr. Goldstein a considerable sum of money to help him through his present difficulties. This loan has now become, of course, a further factor in the maintenance of Mr. Goldstein's perception of chronic stress. In fact the cumulative effect of his marital, financial and professional problems has taken him very close to despair. He put it to me that "it seems like I'm going on a one way street to oblivion.

Of course he thinks about suicide; but it is my opinion that his very strong moral sense will probably prevent him from any such course of action. His feeling is that suicide is a cruel act because it has such a devastating effect on the people left behind. And furthermore his father, who was a rabbi, could never have condoned such an act."

With this medical report before it and considering the conduct of the Solicitor in the context of that report, the Committee were unanimous in its view that the Solicitor may have been suffering at the time of the commission of the alleged acts of misconduct from a mental illness, which may have had an impact on his professional condition, namely a serious variety of Dysthymia. As a result of a full consideration of the report of Dr. Malcolm, the Committee was of a view that this was an appropriate case for recommendation to Convocation that the Solicitor be reviewed pursuant to the provisions of Section 35 of the Law Society Act and that the Solicitor be suspended until the Law Society is satisfied that he is mentally fit to continue in the practice of law in the Province of Ontario.

Kalmen Naton Goldstein was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 22nd day of March, 1968.

ALL OF WHICH is respectfully submitted

DATED this 21st day of September, 1989

"C. Bruce Noble"
C. Bruce Noble, Q.C.
Chair

There were no submissions on the Reports.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Lamont that the Reports be adopted.

Carried

The solicitor, counsel, public and the reporter returned.

Both counsel made submissions in regard to penalty. It was agreed between counsel that the appropriate penalty would be a suspension until a Section 35 committee report is submitted on the solicitor than 2 and the books and records are submitted to the Law Society and in any event for a period not less than two months.

The solicitor, counsel, public and the reporter withdrew.

The Motion as to penalty put forth in the joint submission was moved by Mr. Lamek, seconded by Mr. Rock.

Carried

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of the decision.

The solicitor, counsel and the reporter retired.

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Re: WILLIAM LOREN KENNEDY, Hamilton

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor appeared on his own behalf and Mr. Reg Watson appeared for the Society.

Convocation had before it the Report of the Discipline Committee, dated 5th June, 1989, together with an Affidavit of Service sworn 8th June, 1989 by Louis Kotholos that he had effected service on the solicitor by registered mail on 7th June, 1989 (marked Exhibit 1) and the Acknowledgement, Declaration and Consent executed by the solicitor on 26th October, 1989 (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

Gordon H.T. Farquharson, Q.C. (Chair)
Earl J. Levy, Q.C.
Roger D. Yachetti, Q.C.

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

H. Reginald Watson
for the Society

WILLIAM LOREN KENNEDY
of the City
of Hamilton
a barrister and solicitor

(not represented)
for the solicitor
Heard: October 12,
November 25, 1988

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 25, 1988, Complaint 7/88 was issued against William Loren Kennedy alleging that he was guilty of professional misconduct.

The matter was heard in public on October 12 and November 25, 1988 by a committee composed of Gordon H.T. Farquharson, Q.C. as Chair, Earl J. Levy, Q.C. and Roger D. Yachetti, Q.C. The Solicitor attended, but was not represented by counsel. H. Reginald Watson appeared as counsel for the Law Society.

DECISION

The Complaint

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

(Para. 2; Complaint D7/88)

"(b) He failed to file with the Society within six (6) months of the termination of his fiscal year ending July 31st, 1986, a statutory declaration in the form prescribed by the Rules and a report duly completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening section 16(2) of the Regulation pursuant to the Law Society Act."

Evidence

The entirety of the evidence before the Committee on the issue of misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D7/88 and is prepared to proceed with a hearing of this matter before the Discipline Committee on October 12th, 1988.

II. IN PUBLIC/IN CAMERA

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

III. WITHDRAWN PARTICULAR AND ADMISSIONS

3. The Society hereby withdraws particular 2(a) of Complaint D7/88. The Solicitor has reviewed Complaint D7/88 and admits particular 2(b) contained therein and admits that it constitutes professional misconduct.

IV. FACTS

Particular 2(b) - Forms 2/3

4. The Solicitor has failed to file his annual Form 2/3 report to the Law Society for his fiscal year ending July 31st, 1986, which should have been filed on or before January 31st, 1987. The last report received by the Society was for the Solicitor's fiscal year ending July 31st, 1985.

5. The Solicitor has also failed to file his Form 2/3 for the year ending July 31st, 1987.

DATED at Toronto this 12th day of October, 1988."

The Committee accepted the Agreed Statement of Facts and made a finding of professional misconduct as particularized in Paragraph 2(b) of Complaint D7/88.

RECOMMENDATION AS TO PENALTY

The Committee recommends that William Loren Kennedy be suspended for a period of one month, to continue thereafter until his Forms 2/3 for the fiscal years ending July 31, 1986 and July 31, 1987 are filed. However, should the requisite Forms be filed by the time Convocation considers this matter, the Committee recommends that the Solicitor be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

This Solicitor has been reprimanded in Committee on two occasions for similar offences. In the present circumstances, another reprimand in committee would not be appropriate.

William Loren Kennedy was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 17th day of September, 1953.

ALL OF WHICH is respectfully submitted

DATED this 5th day of June, 1988

"Gordon H.T. Farquharson"
Chair

There were no representations as to the Report.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Ms. Kiteley that the Report be adopted.

Carried

It was moved by Mr. Lamek, seconded by Ms. Kiteley that the Recommendation as to Penalty in the Report that the solicitor be reprimanded in Convocation be adopted. This was amended on the consent of the mover and seconder to provide that in addition to the reprimand in Convocation the solicitor be required to give an undertaking to cooperate with the Staff Trustees in respect to his practice. The amended Recommendation as to Penalty was adopted.

The solicitor, counsel, public and the reporter were recalled.

The solicitor and counsel were informed of the Motion in regard to the undertaking. The solicitor indicated he would give such an undertaking.

The solicitor waived his right to appeal.

Counsel, public and the reporter withdrew.

The solicitor was reprimanded by the Treasurer.

The solicitor retired.

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Re: MICHAEL ANGELO SPENSIERI, North York

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor attended with his counsel, Mr. J. Markin. Mr. Shaun Devlin appeared for the Society.

Convocation had before it the the Report of the Discipline Committee, dated 5th June, 1989, together with an Affidavit of Service sworn 8th June, 1989, by Louis Kotholos that he had effected service on the solicitor by registered mail on 7th June, 1989 (marked Exhibit 1), Acknowledgement, Declaration and Consent executed by the solicitor on 26th October, 1989 (marked Exhibit 2) and Supplementary Agreed Statement of Facts and Amended Complaint (Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Harvey T. Strosberg, Q.C. (Chair)
Kenneth E. Howie, Q.C.
Netty Graham

In the matter of
The Law Society Act

Shaun Devlin
for the Society

and in the matter of
MICHAEL ANGELO SPENSIERI
of the City
of North York
a barrister and solicitor

Claude Thompson
for the solicitor

Heard: February 28, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 7, 1987, Complaint D90/87 was issued against Michael Angelo Spensieri alleging that he was guilty of professional misconduct.

The matter was heard in camera on February 28, 1989 before a committee composed of Harvey T. Strosberg, Q.C. as Chair, Kenneth E. Howie, Q.C. and Netty Graham. Mr. Spensieri appeared and was represented by Claude Thompson. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The Complaint

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

(Para. 2; Complaint D90/87)

"(a) During the period of January 1st, 1983, to November 1st, 1985, after having accepted funds for investment purposes from approximately 35 clients in the aggregate amount of \$2,000,000, more or less, he:

(i) failed to deposit such monies in a trust account as required by subsection 14(3) of Regulation 573 made pursuant to the Law Society Act,

(ii) co-mingled his own monies with those client trust funds,

(iii) failed to maintain books and records regarding such sums as required by Section 15 of Regulation 573 made pursuant to the Law Society Act,

(iv) failed to provide accountings to those clients who had forwarded those funds, and

(v) failed to provide an accounting to the Law Society regarding those funds despite specific requests from the Law Society.

Evidence

The entirety of the evidence before the Committee on the issue of misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. BACKGROUND

1. The Solicitor was called to the Bar in 1974. He withdrew from practice on a voluntary undertaking dated December 12, 1988, given in the course of these proceedings.

II. FACTS

2. The Society commenced an investigation into the Solicitor's practice in 1986. The Solicitor provided certain information to the original Society auditor, Stephen Firth, which information was reviewed in the course of preparing an interim report from the Audit Department.

3. At that time, it was apparent that the Solicitor had maintained current books and records for his client mixed trust account.

4. During the course of that examination, however, it was apparent that the Solicitor had received funds from clients for investment purposes. The Society commenced a further investigation to review all of the transactions made by the Solicitor in this regard.

5. It has been determined to date the Solicitor processed client investment funds through seven corporate vehicles, those being:

- 1) Spencetrust
- 2) Carolina Holdings
- 3) Carolina Investments
- 4) Goldtrust
- 5) Omni Consul
- 6) Alert Investments
- 7) 5933393 Ontario Limited

The Society made specific demands for the information it required to complete its review of the financial activity. In that regard, the Society's current auditor, Margot Ferguson, made several attempts to review material. As well, written requests for information were sent to the Solicitor dated March 25 and May 14, 1987 and April 12, 1988. While the Solicitor replied in part by letter dated July 25, 1988, he has not taken steps to prepare the books and records requested by the Society.

6. The preliminary investigation to date has revealed that the bank accounts for the seven corporate entities through which the client funds were processed were not maintained as trust accounts. It appears that the Solicitor deposited some of his own monies in those accounts resulting in a co-mingling of his own monies with those of client trust funds. The Solicitor did not maintain books and records for the accounts and did not provide written accountings to the clients who invested funds with him.

7. The Solicitor admits that the foregoing facts establish professional misconduct on his part with regard to Particular 2(a) of Complaint D90/87.

III. PENALTY

8. The Society and the Solicitor jointly submit that the Solicitor be suspended until such time as he produces to the Society an accounting containing the following information and accompanied by the following documentation:

1) Source Documents - the accounting must be accompanied by copies of all deposit slips, bank statements and cancelled cheques that are available from all financial institutions where accounts were kept for the seven corporate entities. It is agreed that some of the corporate entities had more than one bank account. The Solicitor also agrees to use his best efforts to provide source documents from any other bank accounts through which it may be revealed client funds were transferred after passing through accounts for these corporate entities.

2) Receipts and disbursement journals - for each of the seven corporate entities, the Solicitor will use his best efforts to provide information for the preparation of chronological receipts journal and a chronological disbursements journal showing all funds received and disbursed from the accounts.

3. Individual ledgers for all client-investors - the Solicitor will use his best efforts to provide information for the preparation of ledgers for each client-investor showing the receipt of the funds, the purposes to which the funds were put and eventual repayment or re-investment of the funds.

4) Reconciliation - the Solicitor will use his best efforts to provide information for the preparation of comparisons of the balances on hand in the bank at the end of each month as compared with the amounts received from and owing to the clients as indicated from the client investor ledgers.

DATED at Toronto this 28th day of February, 1989."

On all the evidence and the admissions contained in the Agreed Statement of Facts, the Committee found the Solicitor guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be suspended until such time as he produces to the Society an accounting containing the following information and accompanied by the following documentation:

1) Source Documents

The accounting must be accompanied by copies of all deposit slips, bank statements and cancelled cheques that are available from all financial institutions where accounts were kept for the seven corporate entities. The Solicitor must also use his best efforts to provide source documents from any other bank accounts through which it may be revealed client funds were transferred after passing through accounts for these corporate entities.

2) Receipts and Disbursements Journals

For each of the seven corporate entities, the Solicitor must use his best efforts to provide information for the preparation of a chronological receipts journal and a chronological disbursements journal showing all funds received and disbursed from the accounts.

3) Individual Ledgers For All Client-Investors

The Solicitor must use his best efforts to provide information for the preparation of ledgers for each client-investor showing the receipt of the funds, the purposes to which the funds were put and eventual repayment or re-investment of the funds.

4) Reconciliation

The Solicitor must use his best efforts to provide information for the preparation of comparisons of the balances on hand in the bank at the end of each month as compared with the amounts received from and owing to the clients as indicated from the client-investor ledgers.

REASONS FOR RECOMMENDATION

Under all the circumstances, the joint submission on the matter of penalty was considered to be reasonable the Committee.

The penalty has been recommended by the Society because Mr. Spensieri is mentally ill. His condition is such that he is able to understand the nature of the proceedings and the fact that he is being suspended indefinitely until he is able to account; but, his state of mind is such that he cannot distinguish fact from fancy and is unable to make full answer to the particulars of the Complaint.

The Committee believes that the interests of the public and the interests of the Society will be best served by simply suspending the solicitor indefinitely until an accounting is given.

It is agreed between counsel that in the event that the accounting discloses any misappropriation or any other misconduct, the acceptance of this joint submission and disposition as to penalty will not bar any further proceedings arising out of such a disclosure.

Michael Angelo Spensieri was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 22nd day of March, 1974.

ALL OF WHICH is respectfully submitted

DATED this 5th day of June, 1989

"Harvey T. Strosberg"
Harvey T. Strosberg, Q.C.
Chair

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF
the Law Society Act;

AND IN THE MATTER OF Michael Angelo Spensieri, of the City of North York, a Barrister and Solicitor.

SUPPLEMENTARY AGREED STATEMENT OF FACTS
TO BE TENDERED TO CONVOCATION

I. AGREEMENT TO PROCEED

1. The Solicitor wishes to proceed with his discipline hearing before Convocation.
2. The Solicitor proposes to discontinue Civil Action No. 38367 and the related Notice of Motion for an interim injunction. These proceedings were originally brought against the Law Society in an effort to enjoin Convocation from proceeding with Discipline.
3. The Solicitor wishes to withdraw his Notice of Objection dated June 12, 1989.

II. ADOPTION OF REPORT

4. The Solicitor has no objection to the adoption of the Report of the Discipline Committee dated June 5, 1989.

III. ACCEPTANCE OF SUPPLEMENTARY AGREED STATEMENT

5. The Society and the Solicitor ask Convocation to accept this Supplementary Agreed Statement of Facts in which Convocation is asked to expand the time period covered by Complaint D90/87 and to accept a new joint submission that the Solicitor be permitted to resign his membership in the Society.

IV. AMENDMENT OF COMPLAINT

6. The Society and the Solicitor agree to an amendment of Complaint D90/87 before Convocation to expand the scope of the complaint, the amended complaint to read as follows:

a) During the period of January 1st, 1983, to December 12, 1988, after having accepted funds for investment purposes from clients in an aggregate amount of more than \$2,000,000 more or less, he:

(i) failed to deposit such monies in a trust account as required by subsection 14(3) of Regulation 573 made pursuant to the Law Society Act.

(ii) co-mingled his own monies with those client trust funds,

(iii) failed to maintain books and records regarding such sums as required by Section 15 of Regulation 573 made pursuant to the Law Society Act,

(iv) failed to provide accountings to those clients who had forwarded those funds, and

(v) failed to provide an accounting to the Law Society regarding those funds despite specific requests from the Law Society.

V. JOINT SUBMISSION FOR PERMISSION TO RESIGN

7. The Solicitor agrees that he is guilty of professional misconduct on Complaint D90/87, as amended, on the basis of the Report of the Discipline Committee of June 5, 1989 and the further evidence in this Supplementary Agreed Statement of Facts.

8. The Society and the Solicitor jointly submit that the Solicitor be permitted to resign by Convocation.

9. This resolution has been jointly proposed by the Solicitor and the Society. It has been accepted by the Society on the basis that it will allow the Solicitor to leave the profession in a timely manner in order to ensure the protection of the public. The Solicitor acknowledges that, should Convocation impose a penalty less than permission to resign, the Society is free to issue such further formal complaints as are authorized by the Chair or Vice-Chair of the Discipline Committee.

VI. FACTS

Audit regarding the 1983 - 1985 Period

10. An audit of the Solicitor's activities has been ongoing since early 1986. The audit initially focused on the Solicitor's activities during the years 1983 - 1985. Two formal complaints, D66/86 and D90/87 remain outstanding from that period. Complaint D90/87 is the subject of the Discipline Committee's Report which is before Convocation. Complaint D66/86 is adjourned sine die at present and the Society will withdraw that complaint contemporaneously with the Solicitor's resignation.

Audit regarding the 1986 - 1988 Period

11. The Solicitor continued to receive funds from clients of his law practice for the purpose of investment. The Society's audit into the Solicitor's activities in that regard continued for the period January 1, 1986 to December 12, 1988. The Solicitor's activities with regard to his law firm mixed trust account were the subject of a 28 page letter of enquiry to the Solicitor in 1988. The Solicitor has not fully responded to that letter to date.

12. The Society's audit of the Solicitor's activities during the 1986-1988 period is continuing. While the scope of the Solicitor's activities has not been fully determined, it is apparent that the Solicitor engaged in the same activity during the 1986 to 1988 period as he did in the 1983 to 1985 period, that being:

- 1) failing to deposit the monies received for investment purposes from clients into a trust account,
- 2) co-mingling his own monies with client trust funds,
- 3) failing to maintain books and records regarding client investments,
- 4) failing to provide accountings to clients and
- 5) failing to provide an accounting to the Law Society regarding those funds.

13. The Solicitor has thus not provided an accounting to the Society for his actions during the 1983 - 1988 period. The Solicitor's ability to provide that accounting at present is impaired by his medical condition.

Solicitor's Medical Condition

14. The Solicitor suffers from a bipolar mood disorder which is also known as "manic-depressive" illness. This condition was diagnosed in 1985 at a time when he was hospitalized for a period of two months in the latter part of that year.

Note: See amendment agreed to on page for paragraph 14 adding the sentence "While his mental illness did not prevent him from appreciating the nature and quality of his acts or from knowing they were wrong, the illness influenced the solicitor's behaviour in this matter significantly."

15. The Solicitor had a recurrence of symptoms in December, 1988. He was hospitalized from December 19th to February 1, 1989. The symptoms of the illness continued and the Solicitor has been unable to practise law during that period.

16. Copies of reports dated June 18, 1989 and March 15, 1987 from the Solicitor's treating physician, Patrick Luciani and a copy of the report of Dr. Andrew Malcolm dated November 26, 1988 are attached.

DATED at Toronto this 26th day of October, 1989.

"Michael Spensieri"	"Shaun Devlin"
Michael Angelo Spensieri	Shaun Devlin
	Counsel for the Society

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Carter that the Report of the Discipline Committee be adopted.

The solicitor, counsel, public and the reporter returned.

Both counsel made submissions in regard to the Report. It was a joint submission by both counsel that Complaint D90/89 be expanded as outlined in paragraph 6 of page 2 of the Supplementary Agreed Statement of Facts and Amended Complaint filed as Exhibit 3.

Mr. Devlin and Mr. Markin then made submissions as to whether or not the hearing should continue in camera as there would be sensitive psychiatric evidence put before the Bench. The Society's counsel neither opposed nor consented to the matter going in camera.

There were questions of counsel by members of the Bench.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Spence, seconded by Mr. Rock that as a preliminary matter submissions regarding whether or not the hearing should be in camera should be made in camera.

Carried

The solicitor, counsel and the reporter returned.

The solicitor and counsel were informed of the decision that submissions on the issue of having the entire proceedings in camera would be held in camera.

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"IN CAMERA"

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IN CAMERA Content Has Been Removed

IN CAMERA Content Has Been Removed

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"IN PUBLIC"

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The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of Convocation's decision.

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CONVOCATION ADJOURNED AT 11:40 A.M.

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CONVOCATION RECONVENED AT 11:45 A.M.

.....

PRESENT:

The Treasurer (Mr. Lee K. Ferrier) and Messrs. Carey, Carter, Cullity, Epstein, and Ferguson, Messrs. Hickey, Ms. Kiteley, Lamek, Lamont, Levy, Manes, Rock, Shaffer, Somerville, Spence, and Topp.

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"IN PUBLIC"

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Submissions were made by counsel in regard to the Agreed Statement of Facts and the Amended Complaint. During the course of the submissions Mr. Markin indicated that if Convocation was not willing to accept the joint submission that the solicitor be permitted to resign from the Law Society then his client would withdraw from the Agreed Statement of Facts.

Mr. Manes rose on a point of order and asked that Convocation request the solicitor and counsel to withdraw.

The solicitor, counsel, public and the reporter withdrew.

Mr. Manes indicated that he had some concern that if the solicitor did not accept the Agreed Statement of Facts there was not enough evidence for Convocation to continue. After some discussion it was Convocation's view that the Agreed Statement of Facts had to be accepted by the solicitor otherwise Convocation could not proceed. It was also Convocation's decision that if the Agreed Statement of Facts was accepted Convocation was not bound by the joint submission on the issue of penalty.

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of Convocation's decision.

Mr. Markin then indicated he required time to consult with his client to take instructions as to how he was to proceed. The matter was then stood down.

The solicitor, counsel and the reporter retired.

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Re: GEORGE STRUK, Brampton

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor appeared with his counsel, Mr. Orest Rudzic. Mr. Shaun Devlin appeared for the Society.

Convocation had before it the the Report of the Discipline Committee, dated the 25th July, 1989, together with an Affidavit of Service sworn 19th September, 1989, by Louis Kotholos that he had effected service on the solicitor by registered mail on 12th September, 1989 (marked Exhibit 1) and Acknowledgement, Declaration and Consent executed by the solicitor on 26th October, 1989 (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

In the matter of
The Law Society Act

Shaun Devlin
for the Society

and in the matter of
GEORGE STRUK
of the City
of Brampton
a barrister and solicitor

Orest H.T. Rudzic
for the solicitor

Heard: April 5, April 18 and
June 5, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 16, 1988, Complaint D113/88 was issued against George Struk, alleging that he was guilty of professional misconduct.

The matter was heard in public on April 5, April 18 and June 5, 1989 before this Committee, composed of Ian W. Outerbridge, Q.C. as Chairman, Jeffrey S. Lyons, Q.C. and Philip M. Epstein, Q.C. Mr. Struk attended the hearing and was represented by his counsel Orest H.T. Rudzic. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The Complaint

The following particular of professional misconduct was admitted by the Solicitor and found, based on the evidence, to have been established:

(Paragraph 2, Complaint D113/88)

"(a) He failed to file with the Society within six (6) months of the termination of his fiscal year ending August 31st, 1985, August 31st, 1986, and August 31st, 1987, a statutory declaration in the form prescribed by the Rules and a report duly completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening section 16(2) of the Regulation made pursuant to the Law Society Act."

Evidence

The Committee received in evidence the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D113/88.

II. IN PUBLIC/IN CAMERA

2. The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. BACKGROUND

3. The Solicitor is a sole practitioner who practises in Brampton. He has a general practice with emphasis on real estate and corporate commercial. He was called to the Ontario Bar in 1974.

IV. FACTS

4. The Solicitor's year end is August 31 of each year. The Solicitor last filed for the period ending August 31, 1984. To date, he has paid late filing fees totalling \$1,800.

5. The Solicitor's practice was audited by an examiner from the Law Society's Audit Department in November of 1984 and again in October, 1986. Those audits were resolved by correspondence with the Solicitor.

6. The Solicitor's practice was again audited in September of 1988. On that occasion, inadequacies were discovered in the books and records of the Solicitor. The Society wrote to the Solicitor requesting information from him regarding the correction of those inadequacies and, on November 29, 1988, the Solicitor replied.

7. Attached to this Agreed Statement is a document comparing the inadequacies disclosed in the books and records on the attendances in November 1984, October 1986 and September 1988.

8. Formal Complaint D113/88 in this matter was served upon the Solicitor shortly thereafter. At the time, the Solicitor's books and records were not maintained on a current basis.

10. On January 18, 1989, the Solicitor attended at the Society to discuss the matter. The Solicitor asked for an adjournment from the original return date of January 31, 1989 to the end of March. The Society opposed that adjournment. The Committee, on January 31, adjourned [sic] the matter one week.

11. At the return date on February 8, 1989, the matter was again adjourned one week to allow for a deadline for the filing of the outstanding Form 2/3's in a time period satisfactory to the Society.

12. Prior to the next return date on February 14, 1989, the Society advised the Solicitor that co-signing controls would be appropriate given the state of the books and records. The Solicitor asked to avoid that result. The Society advised that co-signing controls would not be requested if the Solicitor undertook to provide the Forms 2/3 by March 15, 1989. The Society warned that the Solicitor should not give an undertaking in this regard if it could not be met. The Solicitor, on the advice of counsel, gave the undertaking to file by that date.

13. On March 15, 1989, the Solicitor had not filed his Forms 2/3. He appeared at that time and requested an adjournment which was granted over the opposition of the Society.

14. To date, the Solicitor has not provided any of the forms which are the subject of Complaint D113/88.

Past Discipline

15. The Solicitor was reprimanded in Committee on October 16, 1984. A copy of the formal complaint is provided to the Committee.

16. A copy of the Agreed Statement of Fact upon which the finding of misconduct was based is provided to the Committee.

17. The Discipline Committee reprimanded the Solicitor in Committee in part in consideration of an undertaking given by the Solicitor regarding his books and records. A copy of that undertaking is provided to the Committee.

DATED at Toronto this 5th day of April, 1989."

The Committee accepted the Agreed Statement of Facts and made a finding of professional misconduct as particularized in paragraph 2(a) of Complaint D113/88.

RECOMMENDATION AS TO PENALTY

The Committee recommends that George Struk be reprimanded in Convocation and that:

1. the Solicitor be fined \$2,500 payable within thirty days of the confirmation of this report by Convocation, in default of which payment the Solicitor should be suspended from day to day until the fine of \$2,500 be paid and further,

2. that the Solicitor undertake to file on the 25th of each month for a one year period his trust comparisons which will include his trust bank statements, his trust listings and trust bank reconciliations. In default of such undertaking, the Solicitor is to be suspended for a period of 18 months.

REASONS FOR RECOMMENDATION

The Committee had the benefit of an Agreed Statement of Facts filed as Exhibit No. 4, and its finding of professional misconduct was made on April 5, 1989 premised on those facts. The matter of penalty was adjourned on that date to give the Solicitor time to file his forms.

The matter came on again before the Committee on April 18, 1989 at which time it considered a letter from the Solicitor's accountant, Ronald Moles, which indicated that the Forms 2/3 for the years 1985, 1986, 1987 and 1988 were complete but not filed. As the documents were not yet available in their final form, the Society required an opportunity to review them and the matter was adjourned again to a date to be set upon the Solicitor's undertaking to file the reports before the end of that week.

Thereafter the Committee was advised that the said forms were filed with the Society on the 20th of April, 1989. On the 25th of April the Society corresponded with the Solicitor requesting the trust comparison for the month end of March, 1989. The filing of these documents was due the 15th of April, 1989.

A further follow-up by the Society was required on the 24th of May, 1989, and the documents were finally filed on May 29, 1989.

The Committee had for consideration as well the record of proceedings in 1984 at which time the Solicitor had been reprimanded in Committee on October 16, 1984 after a finding with respect to circumstances of a very similar character. At that time the Solicitor had been obliged by the Discipline Committee to undertake to file his trust comparisons on the 25th of each month for one year.

It was clear from observations made by members of the discipline panel that the Solicitor did not have his priorities correct. The keeping of his books and records and indeed his responses to the Law Society were virtually of the lowest priority to the Solicitor and all of his other affairs took precedence. The Committee did not believe that a mere reprimand was going to be sufficient to bring this matter forcefully to the Solicitor's consciousness and cause him to reorganize his priorities. The members of the panel were of the clear impression that the Solicitor viewed the intervention of the Society and the Discipline Committee as a licencing process which he had to endure in order to maintain his practice.

George Struk was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 22nd day of March, 1974.

ALL OF WHICH is respectfully submitted

DATED this 25th day of July, 1989

"Ian W. Outerbridge"
Ian W. Outerbridge, Q.C.
Chair

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Spence that the Report of the Discipline Committee be adopted.

Carried

It was moved by Mr. Lamek, seconded by Mr. Spence and carried that the Recommendation as to Penalty contained in the Report that is that the solicitor be reprimanded in Convocation be fined \$2,500 and be required to give certain undertakings be adopted.

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of Convocation's decision.

The solicitor waived his right of appeal.

Counsel, public and the reporter withdrew.

The solicitor was reprimanded by the Treasurer.

The solicitor retired.

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Re: EBERHARD PETER VON KETELHODT, Toronto

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor appeared with his counsel, Mr. Miles O'Reilly. Mr. Shaun Devlin appeared for the Society.

Convocation had before it the the Report of the Discipline Committee, dated the 31st May, 1989, together with an Affidavit of Service sworn 8th June, 1989, by Louis Kotholos that he had effected service on the solicitor by registered mail on 7th June, 1989 (marked Exhibit 1) and Acknowledgement, Declaration and Consent executed by the solicitor 26th October, 1989 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Michael G. Hickey, Q.C., Chair
Samuel Lerner, Q.C.
Ronald D. Manes

In the matter of
The Law Society Act

Shaun Devlin
for the Society

and in the matter of
EBERHARD PETER VON KETELHODT
of the City
of Toronto
a barrister and solicitor

Miles O'Reilly
for the solicitor

Heard: April 12, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

Mr. Devlin appeared for the Society and Mr. Miles O'Reilly appeared for the solicitor who was also present.

The Report of the Discipline Committee was presented by Mr. Lamek and the Report together with an Affidavit of Service was filed as Exhibit 1. The Acknowledgement, Declaration and Consent executed by the solicitor was filed as Exhibit 2.

REPORT

On January 18, 1989, Complaint D6/89 was issued against Eberhard Peter Von Ketelhodt alleging that he was guilty of professional misconduct.

The matter was heard in public on April 12, 1989 before a committee composed of Michael G. Hickey, Q.C., as Chair, Samuel Lerner, Q.C. and Ronald D. Manes. Mr. Von Ketelhodt appeared and was represented by his counsel Miles O'Reilly. Shaun Devlin appeared as counsel for the Law Society.

DECISION

The Complaint

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

(Para. 2; Complaint D6/89)

"(a) He misappropriated the sum of \$197,000, more or less, from his client, the estate of Clara Clayton."

Evidence

The entirety of the evidence before the Committee on the issue of misconduct was in the form of the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D6/89 and agrees to proceed with a hearing of this matter before the Discipline Committee on April 12, 1989.

II. IN PUBLIC/IN CAMERA

2. The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. BACKGROUND

3. The Solicitor was called to the Ontario Bar on March 25, 1966. He is presently suspended and has been since February 23, 1989 for non-payment of his annual fees to the Society.

IV. FACTS

The Estate of Clara Mabel Clayton

4. Clara Mabel Clayton died on November 13, 1986. At the time of her death, her estate had a value of \$222,489.84, exclusive of her personal belongings and furnishings. The estate consisted entirely of cash and bonds with the exception of a mortgage receivable for the amount of \$60,988.21, the term of which mortgage became due in or about March, 1987.

5. The Solicitor was named executor and trustee of the estate by the terms of the will. He also acted as Solicitor for the estate. Letters probate were obtained on December 30, 1986. By the terms of the will, the estate was to be distributed by

delivering all personal belongings, furniture and furnishings and \$1,000 to a friend of the deceased, to paying debts, funeral and testamentary expenses and to providing the balance to the Hospital for Sick Children in Toronto.

6. Between November 13, 1986 and April 30, 1987, the Solicitor properly deposited receipts from the estate capital of \$6,173.08 into the estate trust bank account and disbursed \$19,259.50 for estate purposes including his fee of \$5,545.50.

7. On January 9, 1987, the Solicitor wrote to the Hospital for Sick Children in a letter the text of which was as follows:

Enclosed herewith please find Notarial copy of the Probate of the Last Will and Testament of Clara Mabel Clayton who died November 13, 1986. I shall shortly be in a position to release to you funds for the purposes spelled out in the said deceased's Last Will and Testament. A large part of the estate is tied up in a mortgage which the deceased took back on the sale of her former home and which is to mature on February 1987. The balance then outstanding under the said mortgage provided all payment are made as and when due, will be \$57,993.33.

The deceased's funeral was prepaid, so that the only bills to be paid will be for the probate fee, the disbursement for advertising, the bill from Mrs. Murphy, the lady who attended on the deceased for the last eight years and my bill as Executor acting in the estate.

The other assets of the account consist of two bank accounts at the Canadian Imperial Bank of Commerce, Jane and Annette Streets, Toronto and \$10,000.00 worth of Canada Government Savings Bonds maturing in November, 1987.

8. On March 4, 1987, the Solicitor received the proceeds of the mortgage receivable in the total amount of \$57,372.21 and transferred that sum to the estate trust bank account.

9. On August 28, 1987, the Solicitor transferred \$5,000 from the estate of Clara Clayton to the benefit of a client, Eva Kirchof. The Solicitor had previously acted for Ms. Kirchof and her common-law husband, Joseph Riedl on other matters. The money was used by Ms. Kirchof towards her purchase of a business known as Wally's Family Restaurant. The Solicitor did not obtain any security in connection with the advance. The Solicitor had no authority under the will to make such an advance.

10. On September 4, 1987, the Solicitor transferred a further \$40,000 from the Clayton Estate to the benefit of Eva Kirchof, again which was applied by Ms. Kirchof towards the purchase of Wally's Family Restaurant.

11. On September 24, 1987, the Solicitor transferred a further \$132,000 from the Clayton Estate to the benefit of Eva Kirchof who used the funds towards her purchase of Wally's Family Restaurant and towards her purchase of a one quarter interest in the property located at 5088 Dundas Street West in Etobicoke at which the restaurant was located.

12. The Solicitor had no authority for any of the above advances. He was aware at the time that he had no such authority.

13. On September 29, 1987, the Solicitor registered a fourth mortgage on the Kirchof home at 30 Alberry Crescent in Ajax, Ontario in the amount of \$170,000. At the time, there were three prior existing mortgages totalling \$195,000. In addition, the Solicitor was aware that Ms. Kirchof was a poor credit risk on the basis of information then in his possession which is outlined in this Agreed Statement.

14. On November 3, 1987, the Solicitor transferred a further \$3,220 from the Clayton Estate to the benefit of Ms. Kirchof who used these funds as part of the financing of the purchase of her one quarter interest in 5088 Dundas Street West.

15. The Solicitor did not report the transactions to the Hospital for Sick Children nor did he in any way advise a representative of the hospital of his actions. The Solicitor received payments totalling \$5,660 by way of payments on the mortgage debt. The Solicitor deposited these funds into his mixed trust account but the monies were used to the benefit of Ms. Kirchof at a later date.

16. The Solicitor deposited \$62,500 in January of 1988 from funds he had borrowed from his wife and from his bank. Those funds were deposited into the trust bank account for the Clayton Estate. The Solicitor then issued a cheque dated January 22, 1988 to the Hospital for Sick Children in the amount of \$62,500. In his covering letter, the solicitor made no statement on the issue of whether there were further funds forthcoming.

17. The matter was first brought to the attention of the Law Society on or about September 13, 1988 when an investigator from the Ministry of Consumer and Commercial Relations contacted the Society. The involvement of the Ministry had started when Ms. Kirchof had made a complaint about an alleged misrepresentation regarding the liquor license at the time of the purchase of the restaurant. The investigator from the Ministry had, on his own enquiry, pursued the matter of the mortgages and conducted an enquiry into whose funds had been used to finance the restaurant.

18. The Society then contacted the Solicitor on September 13, 1988 at which time the Solicitor made an oral statement to the Society's investigator.

19. On September 15, 1988, the Solicitor attended at the offices of the Law Society and met with representatives of the Society at their request. The Solicitor provided information regarding the advances from the Clayton Estate to Eva Kirchof. Representatives of the Society then conducted a specific enquiry of the Solicitor as to whether he had made any unauthorized advances from that estate or any other. The Solicitor replied that he had not. These statements were false as disclosed by information appearing further in this Agreed Statement of Facts. In the circumstances of the interview, the Solicitor did not turn his mind to the other advances and there was no intent to conceal the information from the Society.

20. Ms. Kirchof has become insolvent and she will not be able to repay any amount of the advances from the Clayton Estate. On October 14, 1988, the property at 30 Alberly Crescent was sold under the power of sale for default on the first and second mortgages. There was no recovery on the fourth mortgage.

21. The Solicitor is arranging funds for restitution to the Hospital for Sick Children. Part of the arrangements are linked to the arrangements in paragraph 36. It is anticipated that full restitution will be provided to the Hospital prior to May Convocation.

Other Advances From Clayton Estate

Dulski

22. On June 23, 1987, the Solicitor advanced the sum of \$17,500 from his mixed trust account, charged against the trust ledger account for the Estate of Clara Clayton and payable to Michael Forester in trust. These funds were advanced as a bridging loan from the Estate to Barbara Dulski who was a client of the

Solicitor's who could not obtain the bridge financing necessary for her to close a purchase transaction. The loan was secured by a promissory note given on June 23, 1987 for \$17,500 at 15% interest. The Solicitor then transferred \$17,500 from the estate bank account to his mixed trust account to correct the overdraft.

23. Barbara Dulski repaid the promissory note by certified cheque in the amount of \$17,773.29 on July 30, 1987 and the Solicitor credited the repayment to the estate. The Solicitor did not have the authority to lend the funds from the estate. He did not disclose this incident to the Law Society during discussions on September 15, 1988.

Bogatek

24. On November 5, 1987, the Solicitor transferred \$2,500 from the estate bank trust account of Clara Clayton to his mixed trust account and credited the transfer to his client Slawomir Bogatek. Mr. Bogatek needed the funds as bridge financing for the purchase of property in Toronto in which the Solicitor acted for him. Although the funds necessary to close were obtained by way of a mortgage the same day, the Solicitor did not credit the \$2,500 sum held in his trust account to the Estate of Clara Clayton until April 30, 1988. The Solicitor did not disclose this incident to the Law Society during discussions on September 15, 1988.

Geraldine Bergmeier

25. On November 21, 1985, the Solicitor transferred \$28,000 from his mixed trust account credited against the funds of Geraldine Bergmeier, his wife's cousin. The funds were advanced to Eva Kirchof to enable her to bring her first mortgage on her then-residence at 479 Jane Street in Toronto into good standing. Ms. Kirchof had been served with a Notice of Sale under mortgage by the first mortgagee. The advance was secured by a third mortgage on the property in the amount of \$28,000. The Solicitor did not obtain an appraisal on the subject property.

26. Ms. Kirchof used the monies to bring the first mortgage into good standing.

27. The Solicitor had a power of attorney for Geraldine Bergmeier. He made the advance without her knowledge. He did not report to her or in any way advise her of his actions.

28. At the time of the advance, total financing on the property was as follows:

1st mortgage	Municipal Savings and Loan	\$60,000
2nd Mortgage	Julio Podsiadlo	20,000
3rd Mortgage	Solicitor in trust	<u>28,000</u>
		\$108,000

29. On February 4, 1986, the first mortgagee served a second notice of sale under the mortgage for further arrears. The Solicitor acted for Ms. Kirchoff in arranging for an assignment and an increase in the amount of the first mortgage to \$70,000. The transaction was completed allowing Ms. Kirchof to pay off the further arrears.

30. On April 2, 1986, the Solicitor signed a Declaration of Trust whereby he declared that he held the \$28,000 third mortgage in trust for Geraldine Bergmeier. That declaration clearly stated that the advance was a loan from Bergmeier to Kirchof and was not directly or indirectly guaranteed by the Solicitor. The declaration also stated that the Solicitor had known Eva Kirchof for two years and "have found him to be a good and reliable mortgagor."

31. In May, 1986, Ms. Kirchof refinanced the property by obtaining a new first mortgage for \$104,000 and a third mortgage for \$7,500. Those funds were used to pay off the existing first mortgage of \$60,000 and the existing second mortgage of \$20,000, plus arrears on those mortgages. It was necessary for the Solicitor to postpone his \$28,000 mortgage in trust to allow the new first mortgage to be registered and the Solicitor executed that postponement. As a result, he consented to an arrangement whereby the debt in priority to the Bergmeier security was increased from \$80,000 to \$104,100. The Solicitor then made periodic advances from the monies he held in trust for Geraldine Bergmeier to and on behalf of Eva Kirchof to help Eva Kirchof meet personal and business expenses. As of February 5, 1987, the total of those advances over and above the \$28,000 initial advance was approximately \$22,000.

32. The Solicitor then discharged the existing second mortgage of \$28,000 and obtained instead a third mortgage for \$52,000 after allowing the \$7,500 third mortgage to become a second. This occurred on or about February 17, 1987. As a result, the value of the Bergmeier security was further diminished.

33. On August 11, 1987, the property at 479 Jane Street was sold for \$159,000.00. All of the proceeds of the sale went towards payment of the first and second mortgages for costs and arrears. There was no money available to satisfy any portion of the third mortgage held by the Solicitor in trust for Ms. Bergmeier. The solicitor consented to the discharge of the mortgage to allow the sale to close. The Solicitor received instead a mortgage for \$52,000.00 on a new property at 30 Alberly Crescent, owned by Ms. Kirchof and Mr. Riedl. The property at Alberly Crescent was purchased on March 17, 1987 for \$160,500.00. At the time that the Solicitor registered the third mortgage, he believed the value of the property to be between \$210,000.00 and \$230,000.00.

34. It was on this property that the solicitor also registered the fourth mortgage to the estate of Clara Clayton in the amount of \$170,000.00. That mortgage was registered on September 29, 1987, the same day as the third mortgage. The total amount of encumbrances on the property were:

First mortgage	\$ 117,500
Second mortgage	\$ 25,500
Third mortgage to the solicitor in trust for Geraldine Bergmeier	\$ 52,000
Fourth mortgage to the solicitor in trust for the Estate of Clara Clayton	<u>\$ 170,000</u>
	\$ 365,000

35. On October 14, 1988, the property was sold under Power of Sale due to default of the first and second mortgages as previously indicated in paragraph 20 of this Agreed Statement. The total funds available for the re-payment of the third mortgage was \$8,088.79. There were no funds available to satisfy the fourth mortgage.

36. The Solicitor is concluding arrangements for compensation for Geraldine Bergmeier for her loss. An arrangement has been reached on which Mrs. Bergmeier received independent legal advice. The documentation has not been completed to date but it is anticipated that arrangements will be in place before May Convocation.

DATED at Toronto this 12th day of April, 1989."

The Committee accepted the Agreed Statement of Facts and made a finding of professional misconduct as particularized in paragraph 2(a) of the Complaint.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Eberhard Peter Von Ketelhodt be given permission to resign his membership on the condition that he make full restitution to the Hospital For Sick Children and to Geraldine Bergmeier.

REASONS FOR RECOMMENDATION

This was a tragic case of a sixty-nine-year-old lawyer - a gullible one - of modest means who allowed himself to be used by one client to misappropriate approximately two hundred thousand dollars from the estate of another client.

The Solicitor has no previous discipline record. Although the matter was fully investigated by the Law Society, there was no evidence of motive.

The Committee believes that there is genuine remorse on the Solicitor's part; he has agreed to make restitution for the losses resulting from his misconduct. The amount involved is a considerable one for a man of his means.

In these extraordinary circumstances, therefore, the Committee accepted the joint submission of counsel and recommends that the Solicitor be allowed the limited dignity of resigning. It is conditional, however, on his making full restitution. Counsel for the Solicitor is to ensure that all the necessary releases are obtained, and the Law Society must be satisfied with respect to the extent and quality of those releases.

Eberhard Peter Von Ketelhodt was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 25th day of March, 1966.

ALL OF WHICH is respectfully submitted

DATED this 31st day of May, 1989

"M. G. Hickey"
Michael G. Hickey, Q.C.
Chair

There were no submissions as to the Report of the Discipline Committee.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Spence that the Report be adopted.

Carried

The solicitor, counsel, public and the reporter returned.

26 October 1989

Mr. O'Reilly indicated that he had obtained the necessary releases from those involved in the losses and had filed them with the Law Society.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Spence that the Recommendation as to Penalty contained in the Report that is that the solicitor be permitted to resign be adopted.

Carried

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of Convocation's decision.

The solicitor, counsel and the reporter retired.

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Re: NICOLAS CARLOS CANIZARES, Toronto

Mr. Epstein withdrew and took no part in the discussions or decision.

The reporter was sworn.

No one appeared for the solicitor nor was the solicitor present. Mr. R. Conway appeared for the Society.

It was made known to Convocation that the solicitor was presently in jail pending the hearing of certain criminal charges.

Mr. Conway made submissions as to whether or not the matter should proceed in public or in camera. It was the Society's position that the matter proceed in camera as a result of the possibility that the discipline proceedings could have some effect on the criminal matters currently pending against the solicitor.

Counsel, public and the reporter withdrew.

It was the decision of Convocation to continue the matter in camera.

Counsel and the reporter returned.

Counsel was informed of Convocation's decision to continue the matter in camera.

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"IN PUBLIC"

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Mr. Mark then requested an adjournment to the next Convocation and that he waived any quorum requirement regarding those Benchers present at the adoption of the Report.

It was moved by Mr. Rock, seconded by Mr. Manes that the matter be adjourned to the November Convocation.

Carried

The solicitor, counsel and the reporter retired.

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CONVOCATION ADJOURNED AT 1:10 P.M.

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CONVOCATION RECONVENED AT 2:25 P.M.

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PRESENT:

The Treasurer (Mr. Lee K. Ferrier) and Messrs. Bastedo, Bragagnolo, Carey, Carter, Cullity, Ferguson, and Hickey, Ms. Kiteley, Messrs. Lamek, Lamont, Manes, Shaffer, Somerville, Spence, and Topp.

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Continuation of Spensieri matter

The Treasurer indicated to Mr. Markin that not all members of the Bench that had been present in Convocation in the morning had returned although they were expected. Mr. Markin then asked that the matter be stood down to await the arrival of those Benchers. The matter was then stood down.

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"IN PUBLIC"

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Re: LESLIE HOWARD MITCHNICK, Hamilton

Mr. Lamek placed the matter before Convocation.

The reporter was sworn.

The solicitor appeared with his counsel, Mr. Gerald Swaye. Mr. Shaun Devlin appeared for the Society.

Convocation had before it the the Report of the Discipline Committee, dated the 17th August, 1989, together with an Affidavit of Service sworn 19th September, 1989, by Louis Kotholos that he had effected service on the solicitor by registered mail on 11th September, 1989 (marked Exhibit 1) and Acknowledgement, Declaration and Consent executed by the solicitor on 26th October, 1989 (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

Helen King MacLeod (Chair)
Rino C. Bragagnolo, Q.C.
June Callwood

In the matter of
The Law Society Act

Shaun Devlin
for the Society

and in the matter of
LESLIE HOWARD MITCHNICK
of the City
of Hamilton
a barrister and solicitor

Gerald A. Swaye, Q.C.
for the solicitor

Heard: February 8 & 9, 1989

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA
IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On October 21, 1988, Complaint D84/88 was issued against Leslie Howard Mitchnick, alleging that he was guilty of professional misconduct.

The matter was heard in public on February 8 and 9, 1989 before a committee composed of Helen King MacLeod as Chair, Rino C. Bragagnolo, Q.C. and June Callwood.

Mr. Mitchnick attended the hearing and was represented by Gerald Swaye. Shaun Devlin appeared on behalf of the Law Society.

DECISION

The Complaint

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

(Paragraph 2: Complaint D84/88)

(a) During the period August, 1987 to June, 1988, he misappropriated the sum of \$22,770.00, more or less, from his client, Keith Garnhum.

(b) He engaged in a practice of depositing or transferring client funds to the general bank account of his law firm prior to completing the required services and rendering fee billings. This resulted in ongoing apparent personal liabilities to his clients which liabilities totalled \$24,911.72 as of June 30th, 1988.

Evidence

The Committee received in evidence the following Agreed Statement of Facts:

"AGREED STATEMENT OF FACTS"

1. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D84/88 and agrees to proceed with a hearing of this matter before the Discipline Committee on February 8, 1989.

II. IN PUBLIC/IN CAMERA

2. The Solicitor and Counsel for the Law Society agree that this hearing should be held in public pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Society and the Solicitor consent to an amendment of particular 2(b) of Complaint D84/88 by the addition of the words "or transferring" after the existing word "depositing". The Solicitor has carefully read Complaint D84/88 and admits the allegations in particulars 2(a) and 2(b) as amended and agrees that those acts on his part constitute professional misconduct.

IV. BACKGROUND

4. The Solicitor was called to the Bar in 1978. He practised with his father, David Mitchnick, Q.C. in a two-man law firm from that time until December, 1988. David Mitchnick sold the practice at that time and retired. The Solicitor ceased practising on December 31, 1988 pursuant to a voluntary undertaking given to the Society.

V. FACTS

Particular 2(a) Garnhum Misappropriation

5. The Solicitor acted for Keith Garnhum in a matrimonial matter. Mrs. Garnhum was represented by Bernd Zabel. On July 31, 1987, the Solicitor received into his trust account the sum of \$27,249.47 on behalf of Mr. Garnhum. These monies were the proceeds from the sale of former matrimonial home. By arrangement with Mr. Zabel, the Solicitor undertook not to release the funds to Mr. or Mrs. Garnhum until the matrimonial case was concluded. The undertaking required the Solicitor to put the monies in an interest bearing account.

6. The Solicitor did not put the monies in an interest bearing account and instead put them in the firm's trust account. The Solicitor then drew upon those funds on a regular basis to his personal benefit on the dates and in the amounts indicated below:

August 21, 1987	\$1,000.00
September 18, 1987	2,000.00
October 9, 1987	2,000.00
October 29, 1987	1,000.00
December 9, 1987	1,000.00
December 18, 1987	2,100.00
January 8, 1988	3,500.00
January 12, 1988	1,850.00
February 4, 1988	1,750.00
February 14, 1988	3,250.00
June 1, 1988	3,320.00
	<u>\$22,770.00</u>

No monies were owed to the Solicitor by way of fees at the time of the taking of these monies. The Solicitor had taken his fee for work done up to July 31, 1987 as of that date. In order to conceal his misconduct from the firm's bookkeepers at year end, Mr. Mitchnick created a false fee billing in the amount of \$9,077 on December 31, 1987. He placed this account in the firm's books and records to create an apparent justification for the taking of the monies. The fee billing was never sent to the client nor were the monies earned.

7. The matrimonial matter was successfully settled and the Solicitor was required to issue a trust cheque to his client on June 13. The Solicitor wrote a trust cheque for \$20,141.42 on the firm's trust account. Because of the Solicitor's prior taking of the monies, there were not funds on hand to the credit of Mr. Garnhum sufficient to meet that cheque. Mr. Mitchnick hoped that the cheque would be processed using the funds in the trust account held to the benefit of other clients and it subsequently was.

8. The firm's bookkeeper discovered the Solicitor's activities thereafter and advised the Solicitor to tell his father. The Solicitor took no such steps at the time.

9. On August 8, 1988, the Solicitor issued a further trust cheque payable to Mr. Garnhum's ex-wife as part of the settlement in the sum of \$7,839. Again, there were not funds on hand to the credit of Mr. Garnhum sufficient to meet this amount. However, the cheque cleared and the funds were transferred pursuant to the cheque. Part of these funds came from monies in the mixed trust account held to the benefit of other clients.

10. The Solicitor and the bookkeeper ultimately told the Solicitor's father. The Solicitor then arranged to borrow funds from his father and friends to repay the shortage and, on September 2, 1988, the Solicitor deposited the sum of \$23,731.55 to the trust account to cover the shortfall.

11. On September 2, the Solicitor also attended at the Law Society to voluntarily disclose information regarding the above activities. At the time, the Society was unaware of the situation. The Solicitor agrees, however, that, whether or not Mr. Mitchnick Sr. would have brought pressure to bear to have the Society informed, the matter would have been detected at year end by the firm's bookkeeper unless the Solicitor had taken further steps to avoid detection.

Particular 2(b) Liabilities to Clients

12. Between January 2, 1987 and June 30, 1988, the Solicitor caused the transfer of approximately \$25,000.00 from his trust account to his general account, for which no billings were contemporaneously rendered. These transfers fall into three categories:

(i) Fees which had been earned and disbursements which had been incurred at the time of the transfer;

(ii) Fees and disbursements which had not fully been earned at the time of the transfer but which were earned subsequent to the time of transfer;

(iii) Monies which were transferred which have never been earned or incurred.

Section 14(8)(c) of 573 made under the Law Society Act places an obligation on solicitors in such instances to provide fee billings contemporaneously with such transfers.

13. For the purposes of penalty, the Society acknowledges that category (i) is a relatively minor type of misconduct. The Solicitor acknowledges, for the purposes of penalty, that category (ii) is a more serious type of misconduct. The Society and solicitor acknowledge that all of the transfers, with the exception of Graham, Kay, Kinrade, Atkins and Stark, fall within categories (i) and (ii). The Society has not undertaken a complete determination of how many of the transfers fall into each category.

14. An example of a category (ii) situation occurred in the case of client McLean. In that case, the Solicitor transferred \$400.00 to general for fees on February 10 and transferred a further \$750.00 for fees on April 29. The Solicitor commenced work on the file on February 8 and did not complete it until December 23, 1988. The Solicitor sent his account on December 30, 1988 for his fees and disbursements in the total amount of \$1,160. A copy of the fee billing is provided to the Committee. As of December 30, all of the monies had been earned and the Solicitor was entitled to them. However, the Solicitor was only entitled to a portion at the time of the transfers of February 10 and April 29.

15. Graham, Kay, Kinrade, Atkins and Stark are all accounts which fall under category (iii) as outlined in paragraph 12. In each case, the Solicitor transferred more money from trust to general than he was ever entitled to transfer and the Solicitor was forced to refund monies to clients.

16. In the Graham matter, the Solicitor transferred \$2,500 from trust to general on June 8, 1988. At that point, he had done some work for the client and he continued to do further work after that date. The Solicitor completed his work for Ms. Graham on December 30, 1988 on which date he sent two fee billings to the client, each for \$500.00. His total bill to the client was then \$1,000 and there remained \$1,500 in the Solicitor's possession to which he was not and has never been entitled. The Solicitor repaid that money to the client when he withdrew from practice.

17. In the Kay matter, the Solicitor acted for Mrs. Kay regarding a matrimonial situation. The matrimonial home was sold and a balance of \$15,118.38 was received by the Solicitor. The client had also paid a \$500.00 retainer.

18. The Solicitor transferred \$1,575 to his general account for fees and disbursements. The monies had been earned to the Solicitor at the time of the transfer although the fee billing did not occur for approximately two months later.

19. The Solicitor also disbursed other funds to third parties on behalf of the client.

20. As part of the terms of his receipt of the funds from the real estate transaction, the Solicitor held back a sum of \$1,500. Those monies were to be held in trust. The Solicitor did not hold those funds in trust. Instead, he transferred them to his general account by way of payments of \$500 on December 9 and \$1000 on December 22. The Solicitor's account of January 8, 1988 showed the monies as being held back and did not disclose that they had been transferred to general.

21. On January 21, Mrs. Kay attended at his office and advised that her husband had left to go to Kuwait. The Solicitor refunded the holdback monies and he did so by paying those monies to the credit of Mrs. Kay at the Bank of Nova Scotia. The Solicitor had personal use of these monies during the period December 9 and December 22 to January 21.

22. In the Kinrade matter, the Solicitor acted for Mrs. Kinrade regarding a matrimonial situation. On February 29, 1988, the Solicitor received \$1,250 from the sale of the matrimonial home. He transferred that money on that date to his general bank account rather than his trust account. At about the same time, he took \$250 of that by way of an interim fee for which there was a fee billing. The Solicitor did further work during the period March 28 to June 15, 1988 and sent a billing for that work on November 3 for the additional amount of \$150 together with a disbursement charge of \$10.49. This left a balance of \$839.51 in the Solicitor's possession, which funds were trust funds belonging to the client. The Solicitor paid \$839.51 to Ross, McBride, the new solicitors for Mrs. Kinrade, on February 1, 1989.

23. In the Atkins matter, the Solicitor acted for the Estate of Harvey William Atkins and for three beneficiaries. The Solicitor transferred \$300 from estate funds to his general account for an interim fee on January 28, 1988. He transferred an additional \$1,500 from estate funds to his general account on March 21, 1988. That activity was marked "transfer" on his trust ledger and it was not noted as an interim fee. At the time of the transfer, work on the file was largely completed.

24. On August 18, 1988, the Solicitor sent a legal account to the three beneficiaries claiming a fee of \$950 and disbursements of \$50.20 for a total of \$1,000.20. At that point, the Solicitor had actually taken \$1,800 in total of money belonging to the client estate and had had the use of that money in his general account. The Solicitor paid \$799.80 to Ross, McBride, the new solicitors for the Atkins estate, on February 1, 1989.

25. As of February 1, 1989 all outstanding liabilities to clients have been corrected.

Solicitor's Personal Circumstances

26. The Committee will be provided with a brief prepared by the Solicitor containing medical reports outlining the Solicitor's personal circumstances and his experiences with cocaine. In addition to that material, the following evidence is provided to the Committee.

27. On September 2, 1988 when the Solicitor attended at the Society, he discussed his use of cocaine. He said that he had spent \$1,000.00 per week on the drug during his period of heavy use in 1985, 1986 and 1987. From January of 1988, his use tapered off. It declined to the point where the Solicitor used approximately \$200 - \$300 of the drug per week. That had tapered off even further during June and July because of financial pressures. He had quit taking the drug on his own on August 13.

28. The Solicitor said that at no time did the drug make him lose control while he was working. He did not use the drug during office hours, only on social occasions after work. His father did not notice anything unusual about his behaviour during his period of cocaine use. The Solicitor found that he did not resort to the drug during stress and found less temptation to do so in times of acute financial crisis. He said that he used the drug alone or used it in the company of a good friend.

29. The Solicitor has been fully co-operative with the Society throughout the course of the investigation.

30. There is no complaint made whatsoever to the Law Society by any client.

DATED at Toronto this 8th day of February, 1989."

The Committee accepted the Agreed Statement of Facts and made a finding of professional misconduct as particularized in Complaint D84/88.

RECOMMENDATION AS TO PENALTY

We recommend that Leslie Howard Mitchnick be suspended for a period of two years and that he be subject to the following conditions upon his reinstatement:

(a) To be subject to supervision as directed by the Law Society of Upper Canada for a period of five years after his reinstatement;

(b) Not to operate his own trust account for a period of five years after reinstatement;

(c) To attend as required for all medical treatment as directed by his attending physicians to continue during his period of suspension and for five years thereafter;

(d) To submit himself to random drug testing to continue during his period of suspension and for a five year period thereafter at the request of the Law Society of Upper Canada.

REASONS FOR RECOMMENDATION

The Solicitor, Leslie Howard Mitchnick, is 37 years of age and was called to the Bar in 1978 when he joined his father's practice in Hamilton, Ontario as a family law lawyer. The Committee felt that there were, in this case, exceptional and extenuating circumstances in favour of the Solicitor.

The Solicitor, in 1981, admitted that he began to use the drug cocaine. This was after the death of his grandfather which may have been a triggering event. At the height of his cocaine addiction in 1985, 1986 and 1987 the Solicitor was spending approximately \$1,000.00 per week on the drug. His use was reduced in 1988 to approximately \$200.00 to \$300.00 per week. During this period of time the Solicitor continued to practise in his father's firm. His father had contracted a serious illness which required the Solicitor to have an increased work load in his practice, causing substantial additional stress. The Solicitor quit taking the drug altogether on his own on August 13, 1988.

The Committee heard from Dr. Greenspoon who had known Mr. Mitchnick for several years and was his attending physician. He gave evidence that after the Solicitor's problem came to light the Solicitor was physically well and had not suffered any serious physical side effects of his cocaine addiction. He also gave evidence that cocaine was a highly addictive drug and created for the Solicitor a very easy and early dependence. Dr. Greenspoon's report dated February 1, 1989 is attached as Exhibit "A" to these Reasons.

The Solicitor is also attending a psychiatrist, Dr. S.W. Dermer. His prognosis of the Solicitor is that he was impressed with the Solicitor's willingness to seek out assistance as well as constructively deal with many of the day to day issues that are facing him. His report dated December 15, 1988 is attached as Exhibit "B" to these Reasons. Dr. Dermer's Supplementary Report dated January 3, 1989, attached as Exhibit "C", advised the Committee that, in his opinion, Mr. Mitchnick would be fit to practice law within a period of one year.

In addition, the Solicitor has successfully attended and completed a drug treatment therapy program at Bry Lin Hospital in Buffalo, New York, and his full course of treatment notes were made available to the Committee. Upon his discharge from that hospital there was follow-up treatment made available through the Rush Hall Chemical Dependency Treatment Program in St. Catharines.

The Committee heard from Mr. William J. Wilkins, who was called to the Bar in 1969 and who practises in the family law area in Hamilton. He described the Solicitor as having expertise in the family law field and that he was extremely capable and competent in his area of practice. Mr. Wilkins was more than willing to provide a supervisory role to Mr. Mitchnick should it be required.

The Committee heard from Mr. Michael Hinchey who was called to the Bar in 1979. He described the Solicitor as providing fine representation for the people of Hamilton and that he actively and capably defended his clients and provided quality representation.

Several other witnesses gave evidence and were highly supportive of the Solicitor. The Committee was impressed by the overwhelming nature of the support and the dedication of the Solicitor's professional colleagues and friends to assist him in a permanent recovery.

The solicitor himself gave evidence in a very candid and forthright manner. He has been fully cooperative with the Society. The Solicitor admitted his previous cocaine addiction and was genuinely remorseful for the problems he had caused. He acknowledges in his evidence that he did misappropriate the funds as set out in the complaint. Full repayment of the amount in question has been made. When the Solicitor realized he could no longer carry on, he sought the assistance of his friends and medical advisors and asked them to help him with his rehabilitation. During this time his friends have provided both financial and emotional support.

The Solicitor, in the view of the Committee, has recognized his problem and taken active steps to achieve his full recovery. The Solicitor is still going through his rehabilitation program and additional time is required before it could be said that he is fully recovered.

The Solicitor told the Committee that he was extremely sorry for what had happened and wished that he could change what he had done. He was thankful for the help from his friends and colleagues, and wished to do whatever he could to make amends. The Solicitor described the shock of this matter when it was learned by his father, friends and other members of the profession. The Solicitor has suffered substantially as a result of these proceedings.

The Committee also took into account letters as set out in Exhibit "D" to these Reasons attesting to Mr. Mitchnick's good character. These letters came from other lawyers, clients, court officials and the Deputy Area Director of the Ontario Legal Aid Plan in Hamilton.

On behalf of the Society, Mr. Devlin told us that, in his view, the repeated takings over a long period of time makes the situation much worse. He submitted these takings of trust funds were compounded by the fact that false fee billings were created to remove any obvious shortfall in the accounts to prevent the Solicitor from being discovered by the firm's bookkeeper. Permission to resign or disbarment was argued as a reasonable penalty.

The Committee is mindful of the serious nature of the complaint involving the Solicitor. Against these facts must be weighed the particular circumstances of the Solicitor's illness and addiction, and the character of the Solicitor. The Solicitor has practised since 1978 without incident. He has a reputation in his community for competence, honesty and integrity. The Committee is satisfied that his colleagues have the highest regard for the Solicitor in his professional and personal capacity. He has the strong support of his friends and his treatment programs to assist him in a full recovery.

The Committee has been persuaded that all of the mitigating circumstances in this case warrant suspension of the Solicitor as opposed to permission to resign or disbarment.

Leslie Howard Mitchnick was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 14th day of April, 1978.

ALL OF WHICH is respectfully submitted

DATED this 17th day of August, 1989

"Helen King MacLeod"
Helen King MacLeod
Chair

There were no submissions as to the Report.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Lamont that the Report of the Discipline Committee be adopted.

Carried

It was moved by Mr. Lamek, seconded by Mr. Lamont that the Recommendation as to Penalty contained in the Report of the Discipline Committee be adopted that is that the solicitor be suspended for 2 years with conditions.

The solicitor, counsel, public and the reporter returned.

There were submissions by both counsel. Counsel for the Law Society urged Convocation to adopt the view that the solicitor either be disbarred or be permitted to resign in light of the misappropriations.

Mr. Swaye then made submissions urging Convocation to accept the Recommendation as to Penalty of the Discipline Committee and in addition to submissions he called three witnesses, Mr. Bill Wilkins, a solicitor, Mr. Martin Levy, a chartered accountant and Dr. Alan Greenspoon, a medical doctor. The three witnesses were sworn. In addition the solicitor himself gave evidence.

Mr. Devlin made some argument in reply and then the solicitor, counsel, public and the reporter withdrew while Convocation deliberated.

The Recommendation as to Penalty contained in the Report as moved by Messrs. Lamek and Lamont was adopted.

The solicitor, counsel, public and the reporter returned.

The solicitor and counsel were informed of the decision.

The solicitor, counsel and the reporter retired.

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The Spensieri continuation

The Spensieri matter then continued with the following being present:

The Treasurer (Mr. Lee K. Ferrier) and Messrs. Bastedo, Bragagnolo, Carey, Carter, Cullity, Epstein, Ferguson, and Hickey, Ms. Kiteley, Messrs. Lamek, Lamont, Manes, Shaffer, Somerville, Spence, and Topp.

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"IN PUBLIC"

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The reporter was sworn.

Mr. Markin indicated that he was content to proceed with those above present.

On the joint submission of both counsel paragraph 14 of the Supplementary Agreed Statement of Facts and Amended Complaint which was filed as Exhibit 3 was amended by adding the sentence "While his mental illness did not prevent him from appreciating the nature and quality of his acts or from knowing they were wrong, the illness influenced the solicitor's behaviour in this matter significantly."

The Report and Supplementary Agreed Statement of Facts as amended was adopted.

The solicitor, counsel, public and the reporter withdrew.

It was moved by Mr. Lamek, seconded by Mr. Spence that the joint submission as to penalty that the solicitor be permitted to resign be adopted.

The solicitor, counsel, public and the reporter returned.

Submissions were made by both counsel in support of the recommendation.

The solicitor, counsel, public and the reporter withdrew while Convocation deliberated.

It was moved by Mr. Topp, seconded by Mr. Hickey that the solicitor be disbarred.

It was moved by Mr. Somerville that the matter be adjourned. The motion failed for want of a seconder.

It was moved by Mr. Ferguson, seconded by Mr. Carter that the original recommendation of the Committee that the solicitor be indefinitely suspended be adopted.

In light of the Motion for disbarment the solicitor and counsel and the reporter were recalled and informed that a Motion to disbar the solicitor had been made.

There were further submissions by counsel.

The solicitor, counsel, public and the reporter withdrew while Convocation deliberated.

Mr. Topp, with the consent of his seconder, withdrew his Motion as did Mr. Ferguson. The Motion made by Mr. Lamek and seconded by Mr. Spence that the solicitor be permitted to resign was carried.

The solicitor, counsel, public and the reporter were recalled and informed of the decision.

The solicitor, counsel and the reporter retired.

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CONVOCATION ROSE AT 5:20 P.M.

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Confirmed in Convocation this day of , 1990

Treasurer