

28th January, 1993

MINUTES OF SPECIAL CONVOCATION

Thursday, 28th January, 1993  
9:00 a.m.

PRESENT:

The Treasurer (Allan M. Rock), Bastedo, Bragagnolo, Brennan, Campbell, Carter, Copeland, Curtis, Elliott, Feinstein, Finkelstein, Graham, Hill, Howie, Lamont, Manes, Mohideen, Murray, D. O'Connor, Palmer, Ruby, Sealy, Somerville and Thom.

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PUBLIC

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ADMISSIONS COMMITTEE

JOHN RICHARD CIRILLO, North York

Application for Readmission

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Ms. Graham and Mr. Ruby withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. Gordon Atlin appeared for the applicant who was present.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Admissions Committee recommending readmission be adopted.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF the Law Society Act;

AND IN THE MATTER OF John Richard Cirillo,  
of the City of North York

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

ADMISSIONS COMMITTEE:

Clayton C. Ruby                      Chair  
Netty Graham                        Bencher  
Daniel J. Murphy, Q.C.            Bencher

COUNSEL:

Gavin MacKenzie                    Counsel for the Society  
Gordon Atlin, Q.C.                 Counsel for Mr. Cirillo

DATE: October 9, 1992

28th January, 1993

NATURE OF APPLICATION

John Richard Cirillo ("Mr. Cirillo") seeks readmission to the Law Society of Upper Canada ("the Society") pursuant to section 46 of the Law Society Act.

RESIGNATION

By Order of Convocation dated 28th of May, 1987 Mr. Cirillo was permitted to resign his membership in the Law Society.

In a report dated 14th April, 1987, the Discipline Committee found Mr. Cirillo guilty of professional misconduct. The following particular of professional misconduct was admitted and found established.

With the knowledge that \$100,000.00 in gold bullion in his possession had probably been obtained from the proceeds of crime which had flowed through his trust account to purchase the gold, he retained possession of the gold for personal gain and thereafter misled police officers and Law Society investigators as to the true facts and his involvement.

The Report of the Discipline Committee is appended at Attachment 1.

In its recommendation to Convocation, the Committee stated (at page 13):

"Mr. Cirillo was well regarded and his misconduct has been generally regarded by clients and colleagues as entirely out of character."

And later on the same page in the report, the Committee states:

"In conclusion, having regard to Mr. Cirillo's youth and the impressive evidence as to his character and record of community service, we are satisfied that Convocation should in its discretion, permit Mr. Cirillo to resign his membership in the Society."

John R. Cirillo was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 9th day of April, 1981.

MEETING OF ADMISSIONS COMMITTEE

A quorum of the Admissions Committee, composed of Mr. Clayton Ruby (Chair), Mrs. Netty Graham and Mr. Daniel Murphy, met on October 9, 1992 to hear evidence on the application for readmission. The hearing lasted half a day.

Law Society counsel took a neutral position, neither supporting nor opposing the application. A book of documents was filed, containing the following:

Report and Decision of the Discipline Committee dated April 14, 1987;  
Order of Convocation dated May 28, 1987;  
Relevant excerpts from a taped conversation among John Cirillo, Gabriel Petricca, and a Mr. Tore;  
Handwritten Statement of John Cirillo dated January 24, 1987;  
Medical Report of Dr. Michael Madonik dated March 27, 1987;  
Reasons for sentence of The Honourable H.R. Locke, D.C.J., dated January 21, 1988;  
Statutory Declaration sworn by John Cirillo on February 24, 1992;  
Readmission procedures approved by Convocation March 21, 1985 and November 24, 1989.

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Counsel for Mr. Cirillo filed a book of correspondence containing fifty-three letters in support of Mr. Cirillo's application. The Committee heard character evidence from three witnesses, Mr. Anthony Joseph Fusco, Mr. Celeste Iacobelli and Mr. Richard Coleman. Mr. Cirillo also gave evidence.

#### REASONS FOR DECISION

We begin our consideration of this matter with the central fact that Mr. Cirillo committed a serious crime. The crime involved an act of deliberate dishonesty, and the significance of that crime cannot be minimized. Moreover, his conduct after the commission of the offence with respect to others who were involved in it reflected discreditably on him as a lawyer, and his use of that status. But as pointed out very fairly by Mr. MacKenzie, he responded to the authorities, both the police and the Law Society, very quickly, and with genuine remorse; and that, too, is a factor that must be taken into consideration.

Perhaps the single most important factor of the many that we have considered is that the Committee which heard this matter on behalf of the Law Society originally, and Convocation thereafter, on full and careful consideration, permitted him to resign. The conduct in other circumstances might well have resulted in disbarment; but there was no doubt that the Committee and Convocation took into account his faultless history at the Bar and in the community, to that point. That judgement by Convocation and by the Committee that heard him originally should be given some weight.

When he sentenced Mr. Cirillo, Judge Locke said:

"The essential issue is to discover why, within a short period of not more than hours, more likely minutes, on one day of his life, he suddenly abandoned a totally honest and dedicated way of living to participate in this shabby criminal enterprise."

As Mr. MacKenzie's cross-examination and Mr. Atlin's examination-in-chief both brought out, Judge Locke was wrong. This was not a mere momentary lapse; it was a criminal and deliberate act, and a criminal and dishonest state of mind which continued for some months.

But it is to the solicitor's credit that rather than seek to take advantage of that passage in Judge Locke's judgement, he was the first to admit before us, in a free and open way, that the act was far from momentary, and that what motivated it was greed. He expressed with conviction the belief that the way of life which allowed him to yield to those circumstances and to that motive, had ended. We listened to him, and we were impressed by his representations as to what his character is today; and that is the central issue with which we must deal.

We are, in the result, satisfied that he is of good character today. We look to his subsequent activities, particularly with charities in the Italian-Canadian community, one of which is of sufficient importance to him that he devotes an average of two days a week to it. This is exceptional, but it appears to be part of a life-long pattern of community service.

He has today strong and sensitive support from a family and a community which understands fully the wrongfulness of what he did. The professional support has been most impressive, and we think it important.

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The evidence of Mr. Richard J. Coleman, a partner in the firm of Osler, Hoskin & Harcourt, was typical of what is before us on paper, and what we heard. He pointed out that Mr. Cirillo's practice at the time of this offence, of this crime, was consuming him; that he had no time to eat or exercise, and that he was very depressed. He was not erratic, but was someone who was in trouble. Since then Mr. Coleman has seen a total change in Mr. Cirillo's attitude to life. There is an understanding that what we are all here for is not just "to make a buck", and to work, but other and more important things.

Most central to our concerns, when asked what he relied upon for his belief that Mr. Cirillo would not act dishonestly again, he said, "There is no chance that he would act dishonestly again. If I was asked to bet my life on that, I would". To quote his letter, Mr. Cirillo is a better person, and will be a better lawyer.

Mr. Celeste Iacobelli, a partner in the firm of Gambin Associates, also testified before us, and his view is similar. As a life-long friend, he made it clear that though in many ways this had been a terrible five years for Mr. Cirillo, in many ways it had been a very helpful time as well. He writes, "I feel confident that there will be no further wrong-doings; that Mr. Cirillo will return as a capable, respected member of the Law Society, and a benefit to those members of the public that will seek his advice and assistance."

Mr. Anthony Fusco corroborated the evidence we have heard about Mr. Cirillo's charitable involvement in the community, and the change that has taken place. He gave cogent evidence of a man who, today, possesses full good character.

The law on this matter is set out most helpfully for us in the decision of Convocation in the matter of Gordon Goldman, dated 5th of May, 1987, and we have relied on it.

As a rule, those who are disbarred are meant to be permanently disbarred. One might query, and indeed we doubt, whether that is equally true of those who are permitted to resign; but for the purposes of today's proceedings, we are prepared to assume that that is so, and that the same high onus and the same law applies to one case as to the other.

Focusing in particular upon the fact that he was allowed to resign, and on the other factors recounted, the applicant has made out a case of very special circumstances. Has he entirely purged his guilt? In our view, he has. Has he fulfilled the requirements for readmission? We feel he has. Have we approached this with a view that the Society should be slow to permit restoration to the rolls? Yes. Does the evidence show that there is no probability that Mr. Cirillo will offend in the future? We think it does.

The period of time that has passed is not very lengthy, but under the circumstances we consider it to be sufficient to make the judgements that are called for on a readmission application. We particularly are pleased to see the response by members of the profession of very high standing, who have come forward on his behalf. We are satisfied that he has shown, by a long course of conduct, that he is now a person to be trusted, and in every way is fit to be a member of the Law Society. We take into consideration our duty to the public, and the very heavy onus that rests on an applicant in a case of this sort.

He has good character today.

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RECOMMENDATION

We therefore recommend to Convocation that his application be accepted, subject to this: we think he ought not to be called to the Bar until the Professional Standards Committee of the Law Society of Upper Canada has considered the case, and decided what further education or conditions might be required in terms of assurance that this lawyer will provide adequate service to the public; and we require that he comply with whatever their recommendation in that regard might be.

ALL OF WHICH IS respectfully submitted

DATED this 7th day of January, 1993.

"Clayton C. Ruby"  
Chair

There were brief submissions by both counsel in support of the Report.

There were questions from the Bench.

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

The Report was adopted.

Counsel, the applicant, the reporter and the public were recalled and informed of Convocation's decision.

Counsel and the applicant retired.

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DISCIPLINE COMMITTEE

MARIO GIANGIOPPO, North York

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

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

A request for an adjournment was made by the solicitor to enable him to retain counsel.

Counsel for the Society opposed the adjournment.

There were questions from the Bench.

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

It was moved by Mr. O'Connor, seconded by Mr. Howie that the request be denied.

Not Put

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It was moved by Mr. Bastedo, seconded by Mr. Finkelstein that the adjournment be granted on the terms that it be peremptory to the March Discipline Convocation and that the Undertaking not to practise remain in effect.

Carried

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

Counsel and the solicitor retired.

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GORDON STANLEY CLARKE, Toronto

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Ms. Curtis and Mr. Murray withdrew.

Mr. Gavin MacKenzie appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 25th November, 1992 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 8th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (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

Brendan O'Brien, Q.C., Chair  
Carole Curtis  
Ross W. Murray

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

Christina Budweth  
for the Society

GORDON STANLEY CLARKE  
of the City  
of Toronto  
a barrister and solicitor

Janet Brooks  
for the solicitor

Heard: February 4, 1992  
November 25, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On October 23, 1991, Complaint D173/91 was issued against Gordon Stanley Clarke alleging that he was guilty of professional misconduct.

The hearing was heard in public on February 4, 1992 and November 25, 1992 before this Committee composed of Brendan O'Brien, Q.C., Chair, Ross W. Murray and Carole Curtis. Mr. Clarke attended the hearing and was represented by Janet Brooks. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

" He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1990 and January 31, 1991 a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 (2) of the regulation made pursuant to the Law Society Act. "

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D173/91 and is prepared to proceed with a hearing of this matter on February 4, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D173/91 and admits the particular contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on March 20, 1975. He practices as a sole practitioner in the City of Toronto.

5. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal years ending January 31, 1990 and January 31, 1991, as required by S.16(2) of Regulation 573 under The Law Society Act.

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6. As the Solicitor did not file his Form 2 or Form 3, each year he was subject to a late filing levy of \$10.00 per day. When this levy amounted to \$1,500.00 for the year 1990, he was subject to suspension pursuant to Section 36 of The Law Society Act.

7. The Solicitor paid the late filing fee for the year 1990 and continued in the practise of law. He did not, however, file the required forms.

8. For the year ending January 31, 1991, the Solicitor owed \$1,230.00 in late filing fees as of February 4, 1992.

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

DATED at Toronto this 4th day of February, 1992."

"GORDON STANLEY CLARKE"  
GORDON STANLEY CLARKE

"CHRISTINA BUDWETH"  
CHRISTINA BUDWETH  
DISCIPLINE COUNSEL

Mr. Clarke gave additional evidence which may be summarized as follows:

He was called to the Bar in 1975. He practised with others until 1983. Since then, he has practised alone but shares office space in Toronto with others and there is some sharing of telephone services but no sharing of bookkeeping services.

Mr. Clark's practice relates mostly to industrial and intellectual property, patents, trademarks, copyrights and industrial designs and in addition, he does some computer law. A lot of his work is litigious and adversarial and he spends a lot of his time in various courts. Much of his work is done from his home and some of his clients are in the United States to which he sometimes travels. He is married and between the first hearing and the second hearing they now have a child.

Up to 1989, Mr. Clarke had a bookkeeper who through incompetence and perhaps deliberate misfeasance got his books and records into a terrible mess from which he has been slowly recovering.

Prior to this trouble he had no problems with the Law Society and filed his reports regularly between 1983 and 1988.

His first troubles with the Law Society began in 1989 when his filings fell into arrears resulting in a discipline hearing on October 2, 1990 on a Complaint similar in nature to this Complaint. A Committee then composed of Patricia Peters, Chair, Ron Manes and June Callwood after hearing evidence agreed to change the complaint to an invitation to attend. (The evidence relating to this earlier hearing was introduced by Mr. Clarke). In his evidence on that occasion, Mr. Clarke explained about his incompetent bookkeeper and also that until he was informed by Mr. Ken Jones of the Law Society he was unaware of the fact that annual returns had to be filed whether or not the books were in balance. He also said he had spent hundreds of hours trying to correct the mistakes made by the former bookkeeper. In concluding the matter on that occasion, "The Committee made it clear that it regarded the procedure of simply issuing a Complaint without further inquiry of the solicitor as somewhat heavy handed. The Committee also suggested that it would be appropriate if there were automatic liaison between the Discipline Department and the Practice Advisory in such cases, so that the solicitor can be fully advised as to his or her responsibilities in the circumstances."

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Notwithstanding the advice given by that Committee, the situation with respect to the solicitor's books did not improve and filings continued in default with the result that on August 9, 1981, Mr. Clarke received notice of another default and was informed that a \$10.00 per day penalty for late filing would accrue after October 4, 1991 and that he might be brought before the Discipline Committee but nothing was done to remedy the default and the penalty began to accumulate.

On October 28, 1991, this Complaint was served on December 3, 1991, there was an attendance to set a date for hearing in February of 1992, but still nothing was done to correct the default, nor had anything been done up to and including the date of the hearing on February 4, 1992.

Meanwhile, a monetary penalty for late filing of \$1,230.00 had accumulated and in respect of the earlier default, the solicitor had paid a penalty of \$1,500.00. The solicitor agreed that this was a needless waste of money that could have been better spent in obtaining help to prepare the necessary filings.

To make the situation all the more difficult to understand the evidence revealed that the Society did a routine audit of the solicitor's books in 1991 when no problems were found. Although the Society had the solicitor's books and records for some time in connection with this audit, Mr. Clarke stated that this did not excuse his delay in making his filings.

The solicitor said more than once that he had spent a great deal of time himself in putting his records right and that he could not afford an accountant or a bookkeeper. The evidence revealed that some of his financial difficulty arose from unpaid accounts which by the end of 1991, had risen to about \$100,000.00. He said that the realization of this fact nearly crushed him.

Further evidence disclosed that there was probably a relationship between his bookkeeping problems and the large amount of unpaid accounts. Mr. Clarke stated that he made a determined effort to avoid using his trust account because of the trouble that it had caused him and in consequence, he was not asking for retainers in advance with the result that he billed after the work was done with consequent loss. For long periods of time the total amount in the trust account did not exceed about \$1,500.00 and because of this he did not receive bank statements for months at a time.

On the day of the hearing, (February 4, 1992) Mr. Clarke said he was ready to file his returns except for the fact that he could not get a bank statement and that the bank would not guarantee a date when the statement would be ready. It appeared that Mr. Clarke had now employed an accountant, Mr. Paul Murray, who had done some work for him in the past, who didn't seem to be having any more luck with the bank than Mr. Clarke had. A recess was then called to enable Mr. Clarke to get in touch with the bank but the result was no more satisfactory. It then became apparent that the filings could not be made until early in the following week and until the filings were brought up to date, the matter could not be disposed of, but argument was then heard as to whether or not the Complaint had been established, and during this argument there was discussion as to Mr. Clarke's need for some form of supervision and his need for bookkeeping assistance. Mr. Clarke said he had tried to get bookkeeping assistance from the other lawyers who shared space but without success. In this connection, he said "I am in condition now where I could probably employ a part time bookkeeper." He also said that the lawyers with whom he shared space would probably not refuse a reasonable request for some form of supervision.

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The Committee after considering the evidence, found the charge to be established but postponed a decision as to penalty to see what could be done with respect to bringing the filings up to date and arranging for some form of supervision and bookkeeping assistance. The matter was then adjourned with a request to the solicitor to make a written submission with respect to his plans to prevent the same thing happening again.

On February 10th, Mr. Clarke reported in writing to the Society that despite the fact that the bank had not produced a statement until that day, "for reasons unknown to either myself or my accountant" he had finally made the necessary filings and had now employed Coopers & Lybrand to maintain his books and records through January 31, 1993 and to provide their guidance and assistance. He then gave detailed particulars of all the steps that would be taken to ensure no further problems. It subsequently appeared that on February 17, 1992 the solicitor met with Sue McCaffrey and Marie Morley of the Professional Standards Department of the Society when they spent about 3 hours discussing the problems. A five page report was subsequently prepared by the Professional Standards Department dated May 25th, a copy of which was furnished to the Committee. This report noted the solicitor's practice was highly computerized at a level of sophistication significantly greater than is usually encountered in a lawyer's office and it was also noted that the Law Society had not received any complaints about delay or missed limitation periods or similar problems that would suggest difficulties with file management but the solicitor had expressed interest in assistance with the organization of his active files.

Practice problems were then summarized:

- (i) books and records and comprehension of the Law Society account requirements;
- (ii) inadequate cash retainers;
- (iii) no bookkeeper.

The other matters mentioned were not relevant to this Complaint. At the end of the report there were a series of suggestions that do relate to this Complaint.

2. Rather than act as his own bookkeeper (an expensive proposition in more ways than one), or retain Coopers and Lybrand to perform bookkeeping functions (also expensive), the solicitor should retain the services of a bookkeeper familiar with his accounting software (which is widely used by the profession, and thus well known to legal bookkeepers). The solicitor could seek referrals from colleagues or from Coopers and Lybrand for such an individual. Alternately, if appropriate, the Systems Consultant of the Professional Standards Department/Practice Advisory Service could assist in suggesting to the solicitor methods for locating a bookkeeper.

3. The solicitor should continue, and increase, his efforts to obtain and replenish cash retainers.

4. The trust account should be relocated to a branch of the bank close to the solicitor's office, rather than relying on sporadic attendance at the present branch at Yonge and Bloor. The solicitor can continue to maintain his other banking interests at that branch, but the trust account should be readily accessible for deposit purposes.

The report stated that a review of Mr. Clarke's profile (E & O record, complaints history) confirm that he is not a likely candidate for the Professional Standards Program.

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Because there had been some discussion of the possibility of a suspension or supervision, the solicitor decided that he would retain counsel to address the penalty issue and this was done. After some delays (not the fault of the Committee) on November 25th the Committee met again when the solicitor appeared with his counsel, Ms. Janet Brooks. Further evidence was called, the first witness being Mr. Robert Amsterdam of the law firm of Amsterdam & Peroff with whom the solicitor shares office space. Mr. Amsterdam stated he had been a student in the office of Mr. Ross Smiley and was called to the Bar in 1980. He does trans-border work and commercial litigation and had just returned from England the previous day. He stated that immediately following the February hearing before the Discipline Committee, Mr. Clarke, who he had always respected and admired, came to see him in a highly emotional state to seek his assistance. He then gave evidence in camera about certain very personal family problems experienced by Mr. Clarke which had preceded and coincided with the February hearing and had come to a climax at that time and the combined effect of this had shattered his morale. These problems had substantially been resolved by August of 1992. At their initial meeting, Mr. Amsterdam had agreed to assist Mr. Clarke in every way possible and he gave much detail as to matters in which he was able to advise and assist. Mr. Amsterdam spoke very highly of Mr. Clarke's talent and ability in the field of law in which he practices and told of the great improvement in his morale since last February.

Mr. Amsterdam produced a letter from Mr. Clarke's accountant, Mr. Paul Murray. The text of this letter addressed to Mr. Amsterdam was as follows:

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November 23, 1992

Dear Mr. Amsterdam,

RE: GORDON S. CLARKE

Today we met with Mr. Clarke to examine his accounting records for the period from February 1, 1992 to October 31, 1992.

We have found his accounting records to be complete, up-to-date and among the best we have seen for a sole proprietor. We would not have any problems preparing Law Society forms 2,3,4, and 5 from the current records presented to us.

Should you require any more information, please do not hesitate to contact this office at your convenience."

Further evidence revealed that Mr. Murray, who had formerly done work for Mr. Clarke, at and before the February hearing, had not had anything to do with the books until retained again on or about November 23, 1992 to look at the books and furnish the letter for the purposes of the hearing. It further appeared that Mr. Clarke had not continued with the services of Coopers & Lybrand and Mr. Amsterdam was not currently in touch with the bookkeeping arrangements, although he knew that Mr. Clarke had one employee named Miss Heather Chisholm.

It was evident from Mr. Amsterdam's evidence that he had a real interest in Mr. Clarke's practice and that he was prepared to do what he reasonably could to give him assistance if he needed it. Mr. Amsterdam also agreed that if he saw problems arising again he would notify the Society. Mr. Amsterdam was under no obligation to do this. He had no contractual relationship with Mr. Clarke, nor was he under any obligation to continue his interest in Mr. Clarke's well-being.

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Mr. Clarke then gave further evidence. He explained that he had come to the conclusion that Coopers & Lybrand was too big and too expensive a firm for his small practice and in the result, he had gone back to his former accountant, Paul Murray, but he had only done so that week. He said that Mr. Murray was very pleased with what he saw. Mr. Clarke further stated that notwithstanding the advice from Miss Sue McCaffrey of the Professional Standards Department his trust account was still at the bank branch at Bloor and Yonge which had given him such a hard time the previous February. He acknowledged that he had not employed a bookkeeper, either full or part time, but instead had personally trained his secretary, Miss Heather Chisholm, who was now proficient in this area, as evidenced by the letter from Paul Murray. Mr. Clarke said he was willing to maintain his links with Mr. Amsterdam and agreed with the Committee that he would absolve Mr. Amsterdam from any duty of confidentiality in reporting to the Society if that should become necessary and also agreed that he would be prepared to undertake to file with the Society statements showing monthly reconciliations of his trust account. During this evidence, Mr. Clarke revealed that he had only recently learned that the Law Society was not interested in his general account but only in his trust account.

Mr. Clarke corroborated the evidence given by Mr. Amsterdam that on the occasion of his first appearance before the Committee and prior thereto had been very much upset by personal problems which were since resolved.

Mr. Clarke concluded by saying that he was now ready to make the necessary filings with the Society when they became due.

#### RECOMMENDATION AS TO PENALTY

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The Committee agreed to accept the undertakings that the Solicitor had agreed to give, namely:

1. That he would file monthly trust account reconciliations for a period of 18 months from December 31, 1992;
2. That he would provide written permission to Mr. Amsterdam to notify the Society of any problem that he might see in connection with the Solicitor's practice and that he (Mr. Amsterdam) would be freed from any duty of confidentiality in this respect.

In addition to accepting these undertakings, the Committee recommends that the Solicitor be reprimanded in Convocation and in addition, the majority of the Committee recommends that the Solicitor be ordered to pay the sum of \$1,000.00 for costs. As to this last recommendation, the Chairman dissented.

#### REASONS FOR RECOMMENDATIONS AS TO PENALTY

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After the first hearing in February, the Committee was much troubled by the probability that a solicitor who was having such difficulty in handling the relatively minor problems of preparing and filing reports with the Society would have much greater difficulty in coping with the more complex problems that would be encountered in running a solo law practice, and further that there was a real potential for more serious problems unless arrangements could be made for some form of supervision or assistance.

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After the second hearing, these concerns were much alleviated by reason of the seeking of assistance from the Professional Standards Department, the seeking of assistance from Mr. Amsterdam, and the training of the secretary to act as bookkeeper. The principal concern that still remained was to ensure that there should not be a reversion to the former state of paralysis and inertia. The purpose of the undertakings was to forestall such possibility. This left for determination a decision as to whether a reprimand should be given in Committee or in Convocation.

After careful consideration, the option for a reprimand in Committee was rejected as insufficient. A reprimand in Committee in a case such as this does not differ very much from an invitation to attend and it was obvious that the previous disposition of the matter in this way by the previous Committee, though well intentioned, had not brought about any change in the dangerous path that was being followed.

The proposed penalty was decided upon as the one that would be most likely to put the problem behind the solicitor once and for all. Eighteen months of filings must surely put the bookkeeping system on a firm basis.

In addition, the majority of the Committee accepted the submission of counsel for the Society that an order for the payment of \$1,000.00 for costs should be imposed. No evidence was given as to any expenses incurred in respect of these proceedings, nor in respect of any other costs. Counsel for the Society justified the imposition of such an order by saying that it had become the practice in even more simple cases to award costs of \$500.00.

#### DISSENT RESPECTING COSTS

The majority would impose an order that would require the member to pay costs fixed at \$1,000.00.

I have dissented from this part of the decision because in my opinion, the Society does not have the power to make such an order.

In a statute governing adversarial proceedings, it would require very specific language to give to the successful party the extraordinary power of imposing an order for costs upon the losing party unlimited as to amount, and not subject to any taxation or assessment, yet the majority has made such an arbitrary order.

The Law Society Act deals with payment of the Society's expenses in Section 40 and in Section 41 with payment of the costs to a member where the disciplinary proceedings were unwarranted, but no other provision respecting the payment of costs appears in the Act.

The order that has been made in this case does not purport to be an order for the payment of expenses nor could it be since no evidence was given as to expenses and the only expense that could come within Section 40 was the expense of preparing a very short transcript of evidence (33 pages) which probably cost less than \$100.00.

The word "expense" used in Section 40 could not be interpreted to mean the general costs incurred in running the Law Society. Section 40 specifically provides that the expenses to which it applies are those "incurred by the Society in the investigation or hearing of any complaint in respect of which he has been found guilty."

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By a long line of authority, the word "expense" has been interpreted to mean a specific amount disbursed or for which liability has been incurred in relation to a particular matter.

In Re Wallis ex parte Lickarish (1980) 25 Q.B.D. 176 at Page 180 - 181. Fry, L.J. stated that a mortgagee in enforcing his security could not charge for work done by himself as expenses incurred, but if he paid out money to someone else for doing the same work, that that could be charged as an expense. He continued, "For instance, if a mortgagee was a surveyor, he could not charge for surveyor's work done by himself, though he could charge for the same work if he had employed another surveyor to do it".

This case was followed by Mr. Justice Cory in 1980, in Canada Trust v. Bulora, (1980) 34 C.B.R. (NS) 145 at 147 - 149. This case involved a claim for expenses incurred in enforcing a debenture.

See also the following:

Hickey v. Stalker, 1924, 1 D.L.R. 440 AT 447;

R. v. Hull, 22 L.J.Q.B. 324;

Young v. Naval Military Co-Op Society, (1905) 1 K.B. 687;

It has been suggested that the power to impose an order for costs could be found in the final words of Section 34. This section reads as follows:

"34. If a member is found guilty of professional misconduct or of conduct unbecoming a barrister and solicitor after due investigation by a committee of benchers, Convocation may by order cancel his membership in the Society by disbarring him as a barrister and striking his name off the roll of solicitors or may by order suspend his rights and privileges as a member for a period to be named or may by order reprimand him or may by order make such other disposition as it considers proper in the circumstances. R.S.O. 1970, C. 238, S. 34.

It might first be noted that if the words "or may by order make such other disposition as it considers proper in the circumstances" are broad enough to give power to make an order for the payment of unspecified costs then the powers given in Section 40 to order the payment of expenses would not have been necessary and that section would be redundant. For this reason alone, it is submitted that no such interpretation could be given to Section 34.

Quite apart from what is said above, there is another and different reason why those words in Section 34 could not justify an order for costs in addition to an order for a reprimand. It will be noted that Section 34 deals with four alternative dispositions of a discipline proceeding, the first being disbarment, the second being suspension and the third being reprimand, and then a fourth alternative is provided by the last words, but it will be noted that the fourth disposition may be ordered as an alternative to the first three and not in addition to the first three, or any one of them. For these words to empower the Society to impose an order for costs, Section 34 would have to read after the words, "reprimand him" "and in addition thereto may by order make such other disposition as it considers proper in the circumstances" but that is not what the statute provides. The fourth disposition is clearly an alternative to any of the first three.

28th January, 1993

There is a third reason why the final words of Section 34 could not justify an order for payment of costs and that is the rule known as the *eiusdem generis* rule which is a rule of interpretation that would apply to Section 34. This rule may be summarized as follows: "Where general words follow an enumeration of things by words of specific meaning, such general words are not to be construed in their widest extent but are to be held as applying only to things of the same general kind or class as those specifically mentioned". See Black's Law Dictionary, Fourth Edition, Page 608, Jowitt's Dictionary of English Law, Page 698 and The Dictionary of Canadian Law, (1991) Page 321. Stroud's Judicial Dictionary, 5th Edition, Vol. 2, P. 914.

In Jowitt's Dictionary a classic example to illustrate this rule is given. A Sunday observance law enacted that no tradesman, artificer, workman, labourer "or other person whatsoever" shall follow his ordinary calling on Sunday. Here the word "person" was held to be confined to those of callings of the same kind as those specified by the preceding words so as to not include a farmer. See *Sandiman v. Breach*, (1827) 7 B.N.C. 96.

If we apply this rule of interpretation to Section 34, the "other disposition" mentioned as a fourth alternative would have to be a disposition of the same general kind or class as those specifically mentioned. For example, in a proper case, instead of imposing disbarment, the Society could permit the member to resign. This would clearly be within the power given in the fourth alternative, similarly some sort of probationary order would be proper.

In this connection, it will be noted that the first three categories mentioned in Section 34 are all different kinds of penalties. Traditionally costs have never been considered as a form of penalty, rather costs are to provide indemnity. See *Dub v. Penlon*, (1992) O.R. 3D, 190 at 191.

To sum up, my reasons for concluding that the final words of Section 34 could not give the Society power to impose an order for costs, are as follows:

- (a) since costs and expenses are specifically dealt with elsewhere in the Act, it could never have been intended that they could come within the general powers given in Section 34 without even being mentioned;
- (b) the fourth power of disposition given in Section 34 is an alternative power and not a power given in addition to the first three;
- (c) by a proper application of the *eiusdem generis* rule the general words would have to be interpreted so as to permit an order of the same kind or class as is described in the first three alternatives; i.e. some form of alternative penalty and not an order for indemnity.

The power given under Section 40 to make an order for the payment of expenses is broad enough to include the cost of transcripts of evidence, witness fees, the cost of employing an expert witness, or any such similar expense paid or incurred by the Society, but applying the meanings given to the word "expense" in the cases mentioned above, it could not be interpreted to mean general costs incurred by the Society in running the Discipline Department. It would seem to me that in a case where an order for the payment of expenses is being made there would have to be evidence put before the Committee to show what these expenses were because if the total was prohibitively high, the Committee has power to order only part of the expenses in a proper case and this limited use of the Rule has been made in years gone by.

28th January, 1993

For the foregoing reasons, I must respectfully dissent from the decision of the majority on this point.

"Brendan O'Brien"

Gordon Stanley Clarke was called to the Bar, admitted as a solicitor of the Supreme Court of Ontario on the 20th day of March, in 1975.

DATED this 25th day of November, 1992.

ALL OF WHICH is respectfully submitted,

"Brendan O'Brien"  
Chair

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions.

The Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the majority Recommendation as to Penalty contained in the Report that is, that the solicitor agree to certain Undertakings and in addition be reprimanded in Convocation and pay the Society's costs, be adopted.

Submissions were made by counsel on the issue of costs as raised by the dissent. Mr. MacKenzie referred to a Memorandum of Argument distributed to the Benchers. Also the issue was raised as to whether the reprimand should be in Committee or Convocation.

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

The Motion to adopt the majority Recommendation as to Penalty was lost.

It was moved by Ms. Palmer, seconded by Mr. Hill that the solicitor be reprimanded in Committee with undertakings and payment of expenses.

Carried

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

The solicitor was asked whether he would accept being reprimanded by Convocation sitting as a Committee.

Counsel then addressed the issue of whether the reprimand in Committee should also be in public following the Ramsey case and recommendations in the Yachetti Report.

The matter was stood down.

Convocation adjourned for a 10 minute recess.

Convocation resumed.

28th January, 1993

RESUMPTION OF THE GORDON STANLEY CLARKE MATTER

The solicitor elected to have the matter referred back to the Committee for a reprimand.

Counsel and the solicitor retired.

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YAROSLAV MIKITCHOOK, Toronto

Mr. Somerville placed the matter before Convocation.

The reporter was sworn.

Mr. O'Connor, Ms. Graham and Ms. Curtis withdrew.

Mr. Neil Perrier appeared for the Society and Mr. Earl Glasner appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 9th September, 1992 together with an Affidavit of Service sworn 10th October, 1992 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th September 1992 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (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

Dennis R. O'Connor, Q.C., Chair  
Carole Curtis  
Netty Graham

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

Neil Perrier  
for the Society

YAROSLAV MIKITCHOOK  
of the City  
of Toronto  
a barrister and solicitor

Earl Glasner  
for the solicitor

Heard: May 19, 1992  
June 24, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On November 18, 1991, Complaint D184/91 was issued against Yaroslav Mikitchook, alleging that he was guilty of professional misconduct.

The matter was heard in public on May 19, 1992, June 24, 1992 and August 5, 1992, before this Committee composed of Dennis R. O'Connor, Q.C., Chair, Carole Curtis and Mrs. Netty Graham. Mr. Mikitchook attended the hearing and was represented by Earl Glasner. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D184/91

2. a) He failed to provide a reply to the Society, despite letters dated June 7, 1991 and July 31, 1991, and telephone requests on July 16, 1991 and July 29, 1991;
- b) He breached his Undertaking to the Society by his failure to promptly and fully answer all correspondence and telephone calls from the Society;
- c) He failed to serve his client, Mr. Hamed, in a conscientious, diligent and efficient manner by his failure to proceed with a motion ordering the defendants to deliver a Statement of Defence;
- d) He misled his client, Mr. Hamed, by advising that a motion would be heard on various dates after February of 1991, when in effect, no motion had been set down to take place after February 1, 1991.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D184/91 and is prepared to proceed with a hearing of this matter on May 19, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D184/91 with his counsel, Earl Glasner, and admits the particulars contained therein. The Solicitor admits that all four particulars constitute professional misconduct.

IV. FACTS

Particulars 2(c) and (d)

4. The Solicitor is 45 years of age and was called to the Bar on March 20, 1975. He is a sole practitioner in Toronto.
5. The complainant entered into litigation in which he was claiming, inter alia, \$250,000 for breach of contract and loss of income with respect to a dispute concerning his shares in partnerships in the "Skyline Club", which arose in 1984. Mr. Harry Kopyto was retained by the complainant and Supreme Court action #1117/85 was commenced.
6. In August, 1986, the complainant met with the Solicitor to discuss taking over carriage of the matter from Mr. Kopyto. The Solicitor was eventually retained to act on this matter. There was some dispute as to who was to deliver the file to the Solicitor. The complainant, Mr. Abel Hamed, sent a letter to Mr. Kopyto dated October 2, 1986 (Document Book, Tab 1).
7. On October 17, 1986, the complainant's Supreme Court action #1117/85 was dismissed with costs by The Honourable Mr. Justice R.E. Holland at a status hearing. The Solicitor did not obtain the file from Mr. Kopyto until after the status hearing.
8. On the Solicitor's advice, the complainant did not move to set aside the dismissal of the action and, instead, issued a Statement of Claim in District Court action #293613/87 with respect to this matter.
9. Tab 2 contains a copy of the letter from the complainant to the Solicitor dated February 23, 1987 requesting that the new Statement of Claim be issued without delay.
10. Statement of Claim (#293613/87) was issued in the District Court on May 13, 1987 (Tab 3). The defendants set down a motion dated June 7, 1987 to strike the complainant's claim on the basis that it was an abuse of process (Tab 4).
11. In August, 1987, the complainant paid the costs of the dismissed Supreme Court action #1117/85 (Tab 5).
12. In January, 1988, there were cross-examinations on Affidavits with respect to the defendants' motion to dismiss the District Court action. The Solicitor had also set down a motion demanding that the defendants forthwith deliver their Statement of Defence.
13. Contained in Tabs 6 - 10 are five hand delivered letters from the complainant to the Solicitor requesting that the Solicitor immediately move to secure a response to the Statement of Claim in the District Court action.
14. By letter dated March 22, 1989 (Tab 11), the Solicitor informed the complainant that his motion for a Statement of Defence was to be heard on April 12, 1989.
15. In a subsequent telephone conversation on April 27th, the Solicitor informed the complainant that the court date was being adjourned to May 4, 1989. On May 4, 1989 the Solicitor contacted the complainant to inform him that his motion was being adjourned to May 10, 1989.
16. Contained at Tab 12 is a copy of the Solicitor's Notice of Motion for delivery of a Statement of Defence dated May 4, 1989.

28th January, 1993

17. On May 10, 1989, the plaintiff's motion was adjourned until May 17, 1989 at the request of the defendants' counsel.

18. On May 17, 1989 the defendants' motion to dismiss the District Court action on the basis that it was an abuse of process was dismissed.

19. Between May, 1989 and October, 1989, the complainant had several telephone conversations with the Solicitor to enquire when the plaintiff's motion for the delivery of a Statement of Defence in the District Court action would be heard.

20. A hearing date for the said motion was rescheduled for November 2, 1989, but the Solicitor contacted the complainant to inform him that that date had to be adjourned as the Solicitor was scheduled to be in court on another matter.

21. On November 3, 1989, the Solicitor informed the complainant that the motion would be heard on November 17, 1989.

22. On November 17, 1989 the complainant attended at the District Court but the motion had not been set down for that date.

23. On November 28, 1989 the motion was set down on the District Court list to be heard on that date. The complainant attended but both the Solicitor and the defendants' counsel were not in attendance. The Solicitor subsequently arrived and requested that the matter be adjourned for three days to allow the defendants' counsel to respond to some issues.

24. The Solicitor informed the complainant that the motion was made returnable for December 8, 1989. On December 8, 1989 the complainant attended at the District Court and was informed by the Solicitor that the motion was to be adjourned to December 18, 1989 at the defendant's counsel's request.

25. By letter dated March 26, 1990 (Tab 14), the Solicitor advised the Society, inter alia, that the motion material had been prepared and ready for argument for some time, and that it was only through a variety of incidents that the matter had not been heard. The Solicitor indicated that there was only one occasion in which he had control over the adjournment of the motion. The Solicitor admitted to having overlooked the setting down of the motion for one of the hearings and advised the complainant of that on the morning that the motion was to be heard.

26. In May, 1990 the Solicitor verbally undertook to deal with the client's concerns with respect to the above matter more efficiently in the future. He also provided a written Undertaking to promptly reply to letters and telephone calls from the Society (Tab 17).

27. Tabs 18 - 25 provide a chronology of the events which transpired in the duration of 1990.

28. In January, 1991, the complainant further advised the Law Society that the Solicitor had not yet attended to the motion. The complainant, however, requested that the Law Society hold its investigation in abeyance until May, 1991 (See Tab 26).

29. As of May 23, 1991, the complainant further advised the Society that the Solicitor had still yet to argue the motion.

28th January, 1993

30. The Solicitor had informed the complainant that court dates were scheduled for the motion for January 18, March 28, April 24, May 3 and May 23, 1991. On each occasion, the Solicitor contacted the complainant just prior to the motion date to advise him that he would not be able to attend and that the motion was to be adjourned. Contained in Tabs 27 - 32 are copies of various correspondence regarding numerous attendances by the complainant at the District Court to observe the hearing of the motion in 1991.

31. On May 23, 1991, when the Solicitor did not attend at court for the hearing of the motion, the complainant obtained a copy of the court file in District Court action #293613/87. Contrary to the Solicitor's representations to the client that the plaintiff's motion had been set down on the District Court list on numerous occasions, the court file revealed that the matter had been adjourned sine die since February 1, 1991. The file contained no further notations or endorsements on the motion record that the motion had been set down on the dates listed in paragraph 28.

32. Authorization for Complaint D184/91 was granted on October 10, 1991. The formal Complaint was issued on November 18, 1991 and served shortly thereafter.

33. The original appearance to set a date in this matter was on December 17, 1991 at which time a date for the hearing of this matter was scheduled for March 11, 1992.

34. On March 11, 1992 the hearing was adjourned for one week to March 17, 1992.

35. Prior to March 17, 1992, a request was made to adjourn the discipline hearing in order to allow the Solicitor the opportunity to argue the motion which the Law Society was informed was set down for March 19, 1992.

36. On April 8, 1992, the motion had yet to be argued.

37. On April 8, 1992, the matter was adjourned to this date because the length of other hearings prohibited the hearing of this matter.

38. The motion has yet to be argued.

Particulars 2(a) and (b)

39. As a result of the complainant's letter to the Society dated April 28, and May 23, 1991, the Society wrote to the Solicitor enclosing copies of the complainant's letters and demanding a response within two weeks of the date of that letter. No reply was received.

40. On July 16, 1991, a Society staff member contacted the Solicitor. The Solicitor informed the staff member that he had dictated a response to the letters and that he thought that it had been delivered. He advised that he would check his file and reply to the Law Society. When no reply was received, the staff member placed another telephone call to the Solicitor on July 29, 1991 and left a message asking the Solicitor to respond. The Solicitor did not return the call.

41. On July 31, 1991, the Society sent the Solicitor a registered letter advising that if no reply was received within seven days, the matter would be referred to the Discipline Committee. No reply was received. No request for a time extension, or explanation for the failure to reply has been offered to the Society.

28th January, 1993

Prior Discipline Record

42. The Solicitor has no previous discipline record.

DATED at Toronto this 19th day of May, 1992."

RECOMMENDATION AS TO PENALTY

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The recommendation of the Committee is that the penalty be as follows:

1. There be a reprimand in Convocation.
2. The reprimand is conditional upon the Solicitor entering into a written Undertaking before Friday, August 7th, 1992, whereby he agrees to retain and pay for counsel to act for Mr. Hamed on the motion through to completion with the understanding that the counsel would not use the fact of the new retainer as a basis for adjourning the hearing on September 14th, 1992. Further, the Solicitor would undertake to keep his client informed on the progress of the motion.
3. The Solicitor pay the Law Society's costs in the amount of \$3,000.00

Counsel for the Law Society and the Solicitor jointly recommended points 2 and 3 above. The only matter of disagreement was whether there should be a reprimand in Convocation or a reprimand in Committee.

REASONS FOR RECOMMENDATION

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The Committee is of the view that breaching an undertaking given to the Law Society as set out in particular 2(b) is a serious matter and in all but unusual cases should result in at least a reprimand in Convocation. Similarly, intentionally misleading a client as set out in particular 2(d) should in all but unusual cases result in a reprimand in Convocation as a minimum. The presence of both in this case weighs strongly against a reprimand in Committee.

A reprimand in Convocation is towards the lower end of the range of appropriate penalties for this type of misconduct.

Yaroslav Mikitchook was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 20th day of March, 1975.

ALL OF WHICH is respectfully submitted

DATED this 7th day of September, 1992

"D. O'Connor"  
Dennis R. O'Connor, Q.C.  
Chair

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

28th January, 1993

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. Brennan that the Recommendation as to Penalty contained in the Report that is, that the solicitor be reprimanded in Convocation with conditions, be adopted.

There were submissions by counsel. Mr. Perrier indicated that the undertaking had been complied with, the costs had been paid and he supported the reprimand in Convocation.

Mr. Glasner supported a reprimand in Committee.

There were questions from the Bench.

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

The motion to reprimand the solicitor in Convocation was adopted.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

There were no submissions on whether the reprimand should be in public or in camera.

The solicitor was reprimanded in public.

Counsel and the solicitor retired.

.....

RICHARD PAUL RANIERI, Toronto

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Mr. Bastedo withdrew.

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

Convocation had before it the Report of the Discipline Committee dated 13th January, 1993 together with an Affidavit of Service sworn 20th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 15th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

28th January, 1993

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Thomas G. Bastedo, Chair  
Philip M. Epstein  
Paul S.A. Lamek, Q.C.

In the matter of  
The Law Society of Upper Canada  
and in the matter of

Not Represented  
for the Society

RICHARD PAUL RANIERI  
of the City  
of Toronto  
a barrister and solicitor

Christina Budweth  
for the solicitor

Heard: February 18, 1992  
May 22, 1992  
June 25, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On November 6, 1991, Complaint D178/91 was issued against Richard Paul Ranieri alleging that he was guilty of professional misconduct.

The matter was heard in public on February 18, 1992, May 22, 1992 and June 25, 1992, before this Committee composed of Thomas G. Bastedo, Chair, Philip M. Epstein and Paul S.A. Lamek, Q.C. The Solicitor attended the hearing and represented himself. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D178/91

2. a) he continued to practice law despite the fact that his rights and privileges to do so were suspended pursuant to section 36 of the Law Society Act and in breach of his undertaking not to practice given to the Society on December 12, 1990;
- b) he failed to file Forms 2/3 for fiscal periods ending January 31, 1989 and January 31, 1990 as required by subsection 16(2) of Regulation 573 of the Law Society Act;
- c) he breached Rule 2 of the Rules of Professional Conduct in failing to diligently and conscientiously serve a client, Ambrosine McClean; and

28th January, 1993

- d) he breached the provisions of Rules 2 and 6 in failing to promptly account to his client Ambrosine McClean for monies received from the settlement of an action.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D178/91 and is prepared to proceed with a hearing of this matter on February 18, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D178/91 and admits the particulars contained therein. The Solicitor admits that the particulars detailed in the complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar on April 7, 1983. He is a sole practitioner and does not currently practise law.

5. The Solicitor's right to practice was suspended on May 26, 1989 for failure to pay his Errors and Omissions levy. The suspension was lifted June 6, 1989. The Solicitor was suspended again on November 11, 1989 for failure to pay the same levy. On that occasion he was reinstated on January 18, 1990.

6. The Solicitor was suspended for non-payment of his annual fees on February 23, 1990. He has not been reinstated.

Particular 2(b) - Failure to File Forms 2/3 for Fiscal Period Ended January 31, 1989 and January 31, 1990

7. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2/3 within six months of the fiscal year ending January 31, 1989 and January 31, 1990, as required by Section 16(2) of Regulation 573 under the Law Society Act.

8. As the Solicitor did not file his Form 2/3, each year he was subject to a late filing levy of five dollars per day. When this levy amounted to \$600 for the year 1989, he was subject to suspension pursuant to Section 36 of the Law Society Act.

28th January, 1993

9. The Society corresponded with the Solicitor by letter dated September 20, 1989. In that letter the Society confirmed that the Solicitor had been sent a Notice of Default in Annual Filing on August 15, 1989. The Solicitor was further advised that his failure to file had begun to attract a late filing fee of five dollars per day and that failure to remit the amount of the fine would result in suspension of his right to practice law. A copy of the Society's September 20, 1989, complete with registered mail receipt card evidencing receipt is attached as Exhibit 1 to this agreed statement of facts.

10. On February 9, 1990 the Society Staff Trustee wrote to the Solicitor again advising him that his right to practice would be suspended effective Friday, February 23, 1990. The letter advised as to steps the Solicitor could take in order to avoid suspension. A copy of the Society's February 9, 1990 letter is attached as Exhibit 2 to this agreed statement of facts.

11. The Solicitor was suspended on February 23, 1990.

12. The Solicitor has not yet made his filings for the years ended January 31, 1989 and January 31, 1990.

#### Practice While Suspended and In Breach of Undertaking Not To Practice

13. As outlined above the Solicitor's right to practice was suspended by Convocation on February 23, 1990.

14. On December 12, 1990, the Solicitor gave an undertaking to the Society not to practice. In that undertaking the Solicitor acknowledged the order of Convocation suspending his right to practice. A copy of the Solicitor's December 12, 1990 undertaking is attached as Exhibit 3 to this agreed statement of facts.

15. Also on December 12, 1990, the Solicitor consented to the imposition of co-signing controls on his practice.

16. On December 13, 1990, the Law Society corresponded with the Solicitor and advised that "we will find new lawyers for all your files". During a telephone conversation between the Law Society and the Solicitor on the same day, the Solicitor advised that Joe Solomon and Mel Raskin would be taking over all of his files and that he would be meeting with the clients to ensure an orderly transition of the files.

17. During a meeting between Patricia Rogerson, the Society Staff Trustee, and the Solicitor on March 7, 1991, Ms. Rogerson specifically advised the Solicitor that solicitors under suspension of their right to practice were not permitted to appear in lower courts nor were they permitted to act as agents in matters in which non-solicitors might be permitted to act. Ms. Rogerson provided the Solicitor with a complete explanation on the restriction of his right to practice resulting from the suspension.

18. On April 3, 1991, Ms. Rogerson had a telephone conversation with Mel Raskin. During that conversation Mr. Raskin admitted that files were being opened in his name over which he did not have actual control.

19. On April 5, 1991, Ms. Rogerson met with the Solicitor to review five files which had been opened under Mr. Raskin's name but in respect of which, the Solicitor had done the actual file work. A copy of Ms. Rogerson's correspondence to the Solicitor following this meeting is attached as Exhibit 4 to this agreed statement of facts. The Solicitor admits the truth of the facts stated therein.

28th January, 1993

20. The Solicitor was retained to act for Ambrosine McClean to recover damages for personal injury sustained in a motor vehicle accident in 1988.

21. The Solicitor corresponded with the firm of Mercer and Myers Insurance Adjusters Ltd. on April 5, 1990, in reply to that firm's correspondence of February 15 and April 4, 1990. The Solicitor indicated terms upon which his client, Ambrosine McClean, was prepared to settle her action. A copy of the Solicitor's April 5, 1990 correspondence is attached as Exhibit 5 to this agreed statement of facts.

22. Cheques in furtherance of the settlement were prepared by Simcoe & Erie Group and bore cheque numbers 55801, dated February 8, 1990 in the amount of \$6,350 made payable to Ms. McClean and number 56195 dated April 25, 1990 in the amount of \$1,000 made payable to Richard P. Ranieri "In Trust". Cheque 55801 was endorsed by Ms. McClean. Both cheques were deposited into the Solicitor's trust account on April 3, 1990 and May 16, 1990, respectively.

23. On May 30, 1990, the Solicitor prepared correspondence to the Ontario Legal Aid Plan detailing services performed on behalf of Ms. Robin Grace in respect of Legal Aid Certificate 46-585928. A copy of the Solicitor's report to Legal Aid and ancillary documents are attached as Exhibit 6, collectively, to this agreed statement of facts.

24. On or about April 18, 1991, the Solicitor issued a notice of action in the District Court of Ontario on behalf of Rajcoomar and Drupattie Panchu as District Court Action 2040/91U. A copy of that pleading is attached as Exhibit 7 to this agreed statement of facts.

Particulars 2(c) and (d) Re: Ambrosine McClean

25. The Solicitor was retained by Ambrosine McClean to represent her in respect of a motor vehicle accident which occurred on May 15, 1988. The retainer was on a Legal Aid Certificate, Number 46-716887, issued September 29, 1988.

26. As stated above, the Solicitor corresponded with the firm of Mercer and Myers Insurance Adjusters Ltd. on April 5, 1990 to confirm terms of settlement, in reply to Mercer and Myers correspondence of February 15 and April 4, 1990.

27. By letter of April 5, 1990, the Solicitor confirmed the terms of the final settlement to his client. A copy of the Solicitor's April 5 correspondence to his client is attached as Exhibit 8 to this agreed statement of facts.

28. As disclosed above, cheques in furtherance of the final settlement of the matter were received and deposited into the Solicitor's trust account on April 3 and May 16, 1990, respectively.

29. In order to disburse the appropriate amount of settlement funds to his client, the Solicitor was required to render to and receive approval for his account from Legal Aid.

30. Ms. McClean made numerous requests of the Solicitor for the settlement funds. At this time Ms. McClean was 76 years of age, in failing health and of very limited means. The Solicitor advised Ms. McClean he required authorization from Legal Aid to release the funds.

31. In July, 1990 Ms. McClean complained to Legal Aid about the Solicitor's conduct.

28th January, 1993

32. In July, 1990 Ralph Back, Deputy Legal Accounts Officer, Legal Aid, wrote to the Solicitor regarding Ms. McClean's complaint and requested a copy of the account forthwith. The Solicitor would give evidence that he personally delivered the account to the Legal Aid Office. Employees of that office would testify it was not received.

33. On September 14, 1990, Russell E. Jones, investigator with the Ontario Legal Aid Plan wrote to the Solicitor respecting his failure to remit an account to Legal Aid and distribute the balance of the settlement funds to his client. A copy of Mr. Jones' September 14, 1990 letter is attached as Exhibit 9 to this agreed statement of facts.

34. The Solicitor spoke with staff in Mr. Jones' office on September 18, 1990 and advised that he would provide a copy of the account by the end of the week. The account was not delivered.

35. The Solicitor's office was, at times material to the complaint, in the same building as the Legal Aid Office.

36. Having heard nothing from the Solicitor, Mr. Jones corresponded with the Law Society by letter dated October 4, 1990, a copy of which is attached as Exhibit 10 to this agreed statement of facts.

37. The Solicitor maintains he submitted his account to Legal Aid on May 15, 1990. Legal Aid did not receive the account until January 4, 1991.

38. When the Law Society was called in to investigate the whereabouts of the settlement funds, they found that the Solicitor had incomplete and unsatisfactory records for the period January 31, 1988 to December, 1990. At the time, it was impossible to determine to what the various trust monies belonged. Accordingly, no funds could be disbursed from his trust accounts. The Solicitor, with the Society's assistance reconstructed his trust account. The Society was eventually able to determine that the Solicitor had not misappropriated Ms. McClean's settlement funds or any other client funds. The Society delivered a cheque in the amount of \$6,275 to Ms. McClean on April 19, 1991 .

DATED at Toronto this 17th day of February, 1992."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Richard Paul Ranieri be suspended for a period of six months.

#### REASONS FOR RECOMMENDATION

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The Solicitor was aware that his right to practice was suspended by Convocation on February 23, 1990. In addition, on December 12, 1990, the Solicitor gave an undertaking to the Law Society not to practise. In spite of the suspension and the Solicitor's own undertaking, in 1991, files were being opened in the Solicitor's name. The details of this breach are set out in the Agreed Statement of Facts.

The Solicitor failed to file the Forms 2/3 for the fiscal periods ending January 31, 1989, January 31, 1990, and is in arrears with respect to his fees.

28th January, 1993

The Committee considers that the Solicitor's breach of Convocation's suspension of his ability to practice law, and the breach of the Solicitor's own undertaking is a serious offence for which he should be suspended for a period of six months. However, the Committee is also of the view that in the event that it is possible to do so, the Solicitor ought to be rehabilitated and allowed to re-enter the practice without an undue economic burden.

Accordingly, after the six months suspension is completed (such suspension to take effect from the 25th day of June, 1992), the Solicitor will be permitted to re-enter the profession if he pays to the Society fifty percent of the arrears owing at the date of the end of the suspension, if the filings and records brought up to date are in order, and if he undertakes to pay the balance of the amounts owing in equal monthly instalments over a two year period. If there is a default in the monthly payments, then all of the amounts at that time then owing will become due and payable, and if not paid, the Solicitor will be suspended again until the arrears are paid.

Richard Paul Ranieri was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 7th day of April, 1983.

ALL OF WHICH is respectfully submitted

DATED this 13th day of January, 1993

"T. Bastedo"  
Thomas G. Bastedo, Chair

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended for a period of six months commencing June 25th, 1992 with conditions, be adopted.

There were submissions by both counsel. The position of counsel for the Society was that the solicitor be suspended from the date of Convocation, January 29th, 1993.

The solicitor supported the Committee's recommendation because of the delay by the Committee in delivering their decision or in the alternative make the suspension retroactive to the end of September the result being a two month suspension from the date of Convocation of January 29th. In addition the solicitor asked to be allowed to be employed as a paralegal under Rule 20.

The Society's counsel opposed the Rule 20 application.

There were questions from the Bench.

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

It was moved by Mr. Somerville that consideration of the Rule 20 application be deferred until after lunch.

Withdrawn

28th January, 1993

It was moved by Mr. Howie, seconded by Ms. Graham that the suspension be effective from the date of the Discipline Convocation on September 24th, 1992 and continue to March 24th, 1993.

Carried

It was moved by Mr. Howie, seconded by Ms. Graham that the solicitor's entitlement to return to practice depend upon the completion of the term of his suspension and payment of necessary fees and levies according to normal administrative procedures.

Carried

It was moved by Mr. Howie, seconded by Ms. Graham that the Rule 20 application be left to Discipline Policy.

Carried

It was moved by Mr. Manes, seconded by Ms. Palmer that the 6 month suspension commence at the end of the administrative suspension.

Withdrawn

It was moved by Mr. Copeland, seconded by Mr. Carter that the 6 month suspension be retroactive to June 25th, 1992 and that the solicitor be allowed employment as a paralegal and be required to pay the fees owing in full.

Mr. Copeland withdrew his Motion.

The Committee's Recommendation was not put.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

CONVOCATION ADJOURNED FOR LUNCHEON AT 12:30 P.M.

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CONVOCATION RECONVENED AT 1:45 P.M.

PRESENT:

Acting Treasurer (Kenneth Howie), Bastedo, Bragagnolo, Brennan, Carter, Copeland, Curtis, Elliott, Feinstein, Graham, Hill, McKinnon, Manes, Mohideen, Murray, Palmer, Sealy, Somerville, Thom, Wardlaw and Weaver.

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PUBLIC

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The Treasurer withdrew from Convocation as one of the ineligible Benchers in the following Discipline matters. Mr. Howie, Chair of the Finance and Administration Committee took the Chair as Acting Treasurer.

.....

MEYER FELDMAN, Thornhill

Mr. Somerville placed the matter before Convocation.

The reporter was sworn.

The Treasurer and Messrs. Copeland and Carter withdrew.

Mr. Stephen Foster appeared for the Law Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 18th December, 1992 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul Copeland, Chair  
Robert J. Carter, Q.C.  
Joan L. Lax

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

Stephen Foster  
for the Society

MEYER FELDMAN  
of the Town  
of Thornhill  
a barrister and solicitor

Michel Bouchard  
for the Society

Heard: October 27, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

REPORT

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On April 16, 1992, Complaint D69/92 was issued, on April 23, 1992 Complaint D74/92 was issued and replaced with Complaint D74a/92 issued on October 23, 1992, and on May 11, 1992, Complaint D78/92 was issued against Meyer Feldman alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27, 1992 before this Committee composed of Paul Copeland, Chair, Robert J. Carter, Q.C., and Joan L. Lax. Mr. Feldman attended the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

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

Complaint D69/92

2. (a) He failed to file with the Society within six months of the termination of his fiscal years ending January 31, 1988 and January 31, 1989, a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act;
- (b) He failed to file with the Society within six months of the termination of his fiscal years ending January 31, 1990 and January 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

Complaint D74a/92

2. (a) He swore an affidavit on January 24, 1990 without due regard as to the truth of its contents, in that he swore he had reported a judgment against him to the Law Society's Errors and Omissions Adjuster, when he had not;
- (b) He has taken no steps to honour a judgment against him since the date of its issue on April 22, 1983.

Complaint D78/92

2. (a) He failed to reply to the Law Society regarding a complaint by John Resendes, despite letters dated January 21, 1992 and February 26, 1992 and telephone requests on February 12, 1992 and February 19, 1992.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D69/92, D74a/92 and D78/92 and is prepared to proceed, without counsel, with a hearing of these matters on October 27, 1992.

28th January, 1993

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D69/92, D74a/92 and D78/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 12, 1962. He is currently and has since March 6, 1992 been suspended from the practice of law as a result of non-payment of his annual fee.

Complaint D69/92 - Particular 2a) - Failure to File for 1988 and 1989

5. By letter dated February 14, 1991, the Society advised the Solicitor that his report filed for the fiscal years ended January 31, 1988 and January 31, 1989, was not completed by a person licensed to practice as a public accountant in the province of Ontario. The Solicitor was requested to immediately retain a licensed public accountant to inspect and complete an enclosed Form 3. No reply was received.

6. By letter dated March 14, 1991, the Society forwarded to the Solicitor a copy of its February 14th letter. The Solicitor was requested to give this matter his early attention. No reply was received.

7. By letter dated April 15, 1991, the Society requested that the Solicitor reply to its previous correspondence as soon as possible so that this matter could be resolved without involving the Discipline Committee. No reply was received.

8. By letter dated May 14, 1991, the Society forwarded to the Solicitor copies of its February 14, 1991, March 14, 1991 and April 15, 1991 letters. The Solicitor was advised that should a reply not be received within fifteen days, the matter would be referred to the Discipline Committee.

9. By facsimile transmission to the Society, received May 30, 1991, the Solicitor requested an extension of another twenty-one days so that he could retain a chartered accountant to complete the work. The Society granted the Solicitor the requested extension.

10. On June 20, 1991 the Solicitor picked up from the Society's Audit Department his original filings for the fiscal years ended January 31, 1988 and 1989.

11. By letter dated July 15, 1991, the Society advised the Solicitor to give priority to the re-filing of his reports for the fiscal years ended January 31, 1988 and January 31, 1989. No reply was received.

12. By letter dated August 14, 1991, the Society forwarded to the Solicitor a copy of its July 15th letter. The Solicitor was requested to give this matter his early attention. No reply was received.

28th January, 1993

13. By letter dated September 17, 1991, the Society requested the Solicitor reply to its previous correspondence as soon as possible. The Solicitor was requested to give this matter priority so that it could be resolved without involving the Discipline Committee. No reply was received.

14. By letter dated October 16, 1991, the Society forwarded to the Solicitor a copy of its July 15, 1991, August 14, 1991 and September 17, 1991 letters. The Solicitor was advised that should his reply not be received within fifteen days, the matter would be referred to the Discipline Committee. No reply was received.

15. By registered letter, dated November 14, 1991, the Society forwarded to the Solicitor copies of its previous correspondence. The Solicitor was advised that should this matter not be resolved within two weeks of the date of this letter, the matter would be referred to the Discipline Committee.

16. A Law Society staff employee spoke with the Solicitor by telephone on December 11, 1991 and January 10, 1991. On both days, the Solicitor advised that he had been in contact with Mr. Mortfield, the person who had originally completed his report and that Mr. Mortfield was in the process of obtaining his license and being registered by the Public Accountant's Counsel of Ontario.

17. By letter dated February 17, 1992 the Society requested the Solicitor provide an update on the status of Mr. Mortfield's licence registration with the Public Accountant's Counsel of Ontario. No reply was received.

18. A Law Society staff employee spoke to the Solicitor by telephone on March 10, 1992. The Solicitor advised that Mr. Mortfield had been certified and that he would provide the Society with a copy of Mr. Mortfield's certification. The Solicitor did not provide a copy of Mr. Mortfield's certification nor has the Solicitor refiled his filings for the fiscal years ended January 31, 1988 and January 31, 1989.

COMPLAINT D69/92 - PARTICULAR 2b) - Failure to File for 1990 and 1991

19. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal years ending January 31, 1990 and January 31, 1991, as required by S.16(2) of Regulation 573 under The Law Society Act.

Fiscal Year Ended January 31, 1990

20. A Notice of Default in Annual Filing, dated August 10, 1990 was forwarded to the Solicitor by the Law Society. The Solicitor did not respond to this correspondence.

21. A Notice of Default in Annual Filing, dated August 15, 1990 was forwarded to the Solicitor by the Law Society. The Solicitor did not respond to this correspondence.

22. By registered letter dated September 20, 1990, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The letter also advised that when this levy amounted to \$1,500.00 he was subject to suspension pursuant to Section 36 of The Law Society Act. The letter also advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file.

28th January, 1993

23. The Solicitor did not respond to the Law Society's letter dated September 20, 1990 and the late filing fee began to accrue on October 8, 1990.

24. To date, the Solicitor has not filed for the fiscal year ended January 31, 1990.

Fiscal Year Ended January 31, 1991

25. A Notice of Default in Annual Filing, dated August 9, 1991 was forwarded to the Solicitor by the Law Society. The Solicitor did not respond to this correspondence.

26. By registered letter dated September 9, 1991 the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The letter also advised that when this levy amounted to \$1,500.00 he was subject to suspension pursuant to Section 36 of The Law Society Act. The letter also advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file.

27. The Solicitor did not respond to the Law Society's September 9, 1991 letter and the late-filing fee began to accrue on October 4, 1991.

28. By registered letter dated January 17, 1992, the Law Society advised the Solicitor that his name would go before Convocation on February 28, 1992 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. by February 27, 1992. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file.

29. By letter dated February 14, 1992 the Law Society advised the Solicitor that his annual filing and late filing levy had not been received. The Solicitor was reminded that his name would go before Convocation on February 28, 1992 should payment not be received by February 27, 1992.

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

31. To date, the Solicitor has not filed for the fiscal year ended January 31, 1991.

COMPLAINT D74a/92 - PARTICULAR 2 a) - Swore an affidavit without due regard to the truth of its contents

32. In July, 1977 the Solicitor acted for Mr. Ettore Milani in respect of a loan by Mr. Milani in the amount of \$50,000 secured by a second mortgage.

33. The mortgagor defaulted on the loan and made an assignment in bankruptcy. The property securing the loan was sold under power of sale but no monies were recovered on the second mortgage.

28th January, 1993

34. In April, 1981 Mr. Milani brought an action in negligence against the Solicitor. The Solicitor notified Errors and Omissions of the claim but was advised by the adjusters for the insurer that coverage was being denied, in part, on the basis that he had acted as a mortgage broker and not as a solicitor.

35. On April 22, 1983 Mr. Milani obtained a judgement against the Solicitor for \$50,000 plus interest for a total amount of \$77,273.96. The reasons for judgement by Her Honour Judge Haley stated, in part:

...As a solicitor, I find he failed in his duty to his client, Milani, in once having negotiated the terms of the loan for Mr. Milani, failing to enforce compliance with those terms as far as the term deposit was concerned.

He chose to alter those terms without any notice or discussion with Mr. Milani. I find he breached a duty he clearly owed to his client to carry out the transaction according to its terms.

36. The aforementioned Judgment was referred to the Society's Insurer by M. Chodes, counsel for Mr. Milani. As a result, Mr. Victor Smith, Director of Insurance for the Society, contacted the Solicitor. On November 24, 1983 a meeting took place amongst Mr. Smith, the Solicitor and Mr. H. D. Campbell, Counsel for the Society.

37. At that meeting, the Solicitor was invited to seek errors and omissions coverage. However, the Solicitor advised that he felt the judgement in question was bad law and that he was hesitant to seek coverage. He asked that the matter be left open until he had a chance to consult counsel. It was agreed by those in attendance that the meeting of November 24 would not be construed as a report for insurance purposes.

38. On April 10, 1986 the Solicitor wrote to Errors and Omissions seeking to have the insurer indemnify him with respect to the Milani judgement.

39. On or about November 10, 1988 a claim was commenced by Mr. Milani and the Solicitor against the Society and American Home Insurance Company. The claim sought coverage in respect of the Milani judgement.

40. The Society brought a motion to dismiss the claim. On January 24, 1990 the Solicitor swore an affidavit which was filed in opposition to the said motion. The affidavit stated, in part:

13. Upon receipt of the decision I immediately notified the adjusters of the law society of Upper Canada, pointing to the reasons of her Honour Judge Haley which cited my professional negligence.

A copy of the January 24, 1990 Affidavit is attached as Exhibit "A" to this Agreed Statement of Facts.

41. The Court ordered on January 25, 1990 that the action against the Law Society and American Home Assurance Company be dismissed.

28th January, 1993

42. A Society staff employee and the Solicitor met on May 15, 1991. The Solicitor advised the Society that the affidavit sworn on January 24, 1990 was drafted by Milani's solicitor in order that he could make a claim against the Society's Errors and Omissions policy. The Solicitor agreed with the Society that while much of the information in the affidavit could have been obtained by Milani's solicitor from the file, the information in paragraph 13 could only have come directly from the Solicitor.

43. During the same meeting the Solicitor admitted that in the circumstances his swearing of the affidavit was careless at best. The Solicitor denied any intent to defraud or swear a false affidavit.

COMPLAINT D74/92 - PARTICULAR 2 b) - Has taken no steps to honour the judgement against him

44. The Society relies on the facts set out in paragraphs 32 to 43 in respect of particular 2 b).

45. To date, the Solicitor has not satisfied the judgment obtained against him by Mr. Ettore Milani.

COMPLAINT D78/92 - Failure to reply

46. Mr. John Resendes, an employee of United Portuguese Wholesale Distributors, hereinafter referred to as "United", advised the Society by letter dated October 9, 1990, of its concern that the Solicitor had over-charged it for work completed, had not provided it with a satisfactory explanation of the services rendered, and had arranged to withdraw his fees directly from United's bank account prior to rendering an account.

47. By letter dated October 26, 1990, the Society provided the Solicitor with a copy of the letter of complaint. The Solicitor was requested to provide his comments to the same within two weeks.

48. By undated letter, received on November 5, 1990, the Solicitor advised the Society that he had previously provided United with a complete breakdown of all work done and that he had discussed the matter with Mr. Resendes on many occasions. The Solicitor further stated that he had suggested Mr. Resendes have another solicitor review the accounts in order to discuss them with the Solicitor or that Mr. Resendes proceed to have the account taxed.

49. By letter dated November 7, 1990, the Society requested the Solicitor provide copies of any notes and/or correspondence relating to the breakdown of work provided to United, as well as his comments with respect to United's concern that he withdrew money directly from its bank account prior to invoicing it for the services rendered. The Solicitor was requested to respond within two weeks of the date of this letter. No reply was received.

50. A Law Society staff employee spoke with the Solicitor by telephone on January 2, 1991. The Solicitor stated that he would respond on or before January 8, 1991.

51. By letter dated January 7, 1991, the Solicitor provided the Society with various documentation respecting the complaint and indicated that he would be prepared to meet with the Society to review his complete file. He stated that he had notified Mr. Resendes that the fees in question would be deducted from the proceeds of the transaction and that he had obtained a direction to that effect.

28th January, 1993

52. By letter dated January 14, 1991, the Society requested the following from the Solicitor:

- any evidence of notes made during conversations with Mr. Resendes or reporting letters which would explain to Mr. Resendes what work had been done on the file.
- clarification of what had transpired between the Solicitor and Mr. Resendes regarding authority to deduct his fees from "United's" account.
- a copy of the direction signed by Mr. Resendes.

The Solicitor was requested to reply within two weeks of the date of this letter.

53. By letter dated January 22, 1991, the Solicitor advised the Society that he was sure that the documents he had forwarded to the Society contained notations of his conversations with Mr. Resendes. He further advised that as he had spoken to Mr. Resendes on a daily basis, notations were not made of all conversations. The Solicitor further stated that he was sure he had forwarded a copy of the direction previously to the Society, however, he stated that he was enclosing the same. (The direction was not enclosed with this letter and the direction included with the earlier documentation does not deal with the Solicitor's fees.) With respect to receipt of funds, the Solicitor states that he received the monies, deducted his fees and paid the balance over to his client. The Solicitor further stated that he had forwarded to the Society a copy of his memo to account to United.

54. By letter dated February 25, 1991, the Society confirmed its telephone conversation with the Solicitor in which he advised that he would forward to the Society a copy of his trust ledger card regarding Mr. Resendes. The Solicitor was requested to provide the same within two weeks of the date of this letter.

55. By facsimile transmission received on March 19, 1991, the Solicitor forwarded to the Society a copy of "United's" ledger card.

56. By letter dated August 1, 1991, the Society advised the Solicitor that the client ledger cards provided did not display the dates upon which the transfer of his fee was made from his trust account to his general account in connection with the services rendered to United. The Solicitor was requested to provide that portion of the trust ledger card and the general ledger card which displayed the dates that the transfer was made. The Solicitor was requested to provide this information within two weeks of the date of this letter. No reply was received.

57. A Law Society staff employee spoke to the Solicitor by telephone on August 20, 1991. The Solicitor advised that he hoped to reply within fourteen days.

58. By letter dated September 6, 1991, the Solicitor advised the Society that he would attempt to determine when the funds were transferred as the date does not appear on the ledger card. The Solicitor stated that he would contact the Society again in a few weeks.

59. A Law Society staff employee spoke with the Solicitor by telephone on January 3, 1992. The Solicitor advised that he did not know the date on which the funds were transferred from trust to general, however, he would attempt to ascertain the same and contact the Society by telephone on January 6, 1992. The Solicitor did not contact the Society.

28th January, 1993

60. A Law Society staff employee left a telephone message for the Solicitor at this office on January 17, 1992 requesting he return the call. The call was not returned.

61. By letter dated January 21, 1992, the Society requested the Solicitor recheck his records, particularly his journal entries and advise the Society of his findings within two weeks of the date of this letter. No reply was received.

62. A Law Society staff employee spoke with the Solicitor by telephone February 12, 1992. The Solicitor advised that he would response on or before February 14, 1992. No reply was received.

63. A Law Society staff employee spoke with the Solicitor by telephone on February 19, 1992. The Solicitor advised that the Society would be in receipt of his response by the next day. No reply was received.

64. By registered letter, dated February 26, 1992, the Society reminded the Solicitor of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

65. On April 9, 1992 authorization to proceed with a formal complaint in this matter was sought and obtained.

66. On April 21, 1992 the Society's February 26, 1992 letter was returned by the post office marked "unclaimed". The Society then ascertained that the Solicitor had verbally reported a change of address to the Society on January 31, 1992 and that the Society's February 26, 1992 letter had been sent to the old address.

67. The authorization of the complaint was held in abeyance and a further registered letter, dated April 23, 1992, was sent by the Society to the Solicitor at his new address. The Society's letter reminded the Solicitor of his obligation to reply. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. The registered letter was signed for and delivered on May 2, 1992. No reply has been received.

#### V. DISCIPLINE HISTORY

68. The Solicitor received a reprimand in committee and was ordered to pay costs of \$1,000.00 on February 7, 1991 regarding his failure to file for the fiscal years ended January 31, 1988 and January 31, 1989.

69. The Solicitor was suspended by Order of Convocation for eighteen months effective May 15, 1990, regarding his having borrowed from clients and conduct unbecoming a lawyer.

#### VI. PENALTY

70. The Law Society and the Solicitor respectfully make the following joint submission as to penalty:

- i) The Solicitor give an undertaking to reply to the Law Society, by November 27, 1992 in respect of the complaint of John Resendes.

28th January, 1993

- ii) The Solicitor's rights and privileges as a member be suspended indefinitely until such time as he has completed all his filings to the satisfaction of the Law Society, and paid in full all fees and other monies owing to the Law Society.
- iii) Upon reinstatement of the Solicitor's rights and privileges after completion of his filings and payment of fees and other monies owing, the Solicitor's rights and privileges shall be suspended for a further period of three months.
- iv) Upon reinstatement of the Solicitor's rights and privileges following this three month suspension, the Solicitor be authorized to practice subject to the following conditions:
  - a) that he give an undertaking that, without the express approval of Convocation, he will not practise on his own but only as an employee of another member of the Law Society in good standing who will assume responsibility for the books, records and accounts relating to the Solicitor's practice.
  - b) that he give an undertaking to use his best efforts to repay, within a reasonable time after resuming practice, the monies owing to Ettore Milani pursuant to the April 23, 1983 judgement against the Solicitor.

DATED at Toronto this 26th day of October, 1992."

RECOMMENDATION AS TO PENALTY

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The Committee recommends the following penalty:

1. That the Solicitor give an Undertaking to reply to the Law Society by November 27, 1992 in respect of the complaint of John Resendes.
2. That the Solicitor's rights and privileges as a member be suspended indefinitely until such time as he has completed all his filings to the satisfaction of the Law Society, and paid in full all fees and other monies owing to the Law Society.
3. That upon reinstatement of the Solicitor's rights and privileges after completion of his filings and payment of fees and other monies owing, the Solicitor's rights and privileges shall be suspended for a further period of three months.
4. That upon reinstatement of the Solicitor's rights and privileges following this three month suspension, the Solicitor be authorized to practice subject to the following conditions:
  - a) that he give an Undertaking that, without the express approval of Convocation, he will not practice on his own but only as an employee of another member of the Law Society in good standing who will assume responsibility for the books, records and accounts relating to the Solicitor's practice.
  - b) that he give an Undertaking to use his best efforts to repay, within a reasonable time after resuming practice, the monies owing to Ettore Milani pursuant to the April 23, 1983 judgment against the Solicitor.

REASONS FOR RECOMMENDATION

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We were advised by counsel for the Society that the Solicitor has not practiced since May of 1990 and that he has no immediate plans to return to practice. The Solicitor does not have the funds to pay all the fees and other monies owing to the Law Society.

These three separate discipline complaints involving five separate acts of professional misconduct were dealt with at the hearing before us. These complaints and the Solicitor's prior discipline history, in our view, do not warrant disbarment. The penalty that we recommend was placed before us as a joint submission and in our view, falls within the appropriate range of penalty for this fact situation.

Meyer Feldman was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 12th day of April, 1962.

ALL OF WHICH is respectfully submitted

DATED this 18th day of December, 1992

"P. Copeland"  
Paul Copeland, Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. Murray that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended indefinitely until his filings were completed and all fees and other monies owing to the Society were paid and certain conditions were met, be adopted.

Counsel for the Society asked that the Penalty portion of the Report be amended by deleting paragraph 1 on page 15 which read: "That the Solicitor give an Undertaking to reply to the Law Society by November 27, 1992 in respect of the complaint of John Resendes."

Both counsel for the Society and the solicitor supported the Recommendation.

There were questions from the Bench.

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

It was moved by Mr. Thom, seconded by Mr. Manes, that 4.(b) on page 15 of the Recommendation re: payment of Judgment, be deleted.

Lost

The Recommendation as to Penalty as amended was adopted.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

Counsel and the solicitor retired.

.....

28th January, 1993

ANDREW BISHOP TULK, Toronto

Mr. Somerville placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock, Finkelstein and O'Connor withdrew.

Mr. Tom Lockwood and Mr. Eric Fournie appeared for the Society and Mr. Donald Brown appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 25th January, 1993 together with an Affidavit of Service sworn 27th January, 1993 by Louis Katholos that he had did personally serve the solicitor (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (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

James M. Spence, Q.C., Chair  
Dennis R. O'Connor, Q.C.  
Denise Bellamy

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

Thomas J. Lockwood, Q.C.  
E. Eric Fournie  
for the Society

ANDREW BISHOP TULK  
of the City  
of Toronto  
a barrister and solicitor

Donald J.M. Brown, Q.C.  
for the solicitor

Heard: January 21, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On October 17th, 1991, Complaint D166/91 was issued against Andrew Bishop Tulk alleging that he was guilty of professional misconduct.

The matter was heard in public on January 21, 1993, before this Committee composed of James M. Spence, Q.C., Chair, Dennis R. O'Connor, Q.C. and Denise Bellamy. The Solicitor was in attendance and was represented by Donald J.M. Brown, Q.C. Thomas J. Lockwood, Q.C. and R. Eric Fournie appeared on behalf of the Law Society.

DECISION

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The complaint against Mr. Tulk ("Tulk" or the "Solicitor"), sworn by the Secretary, alleges as follows:

Complaint D166/91

2. a) Tulk allowed himself to become the tool or dupe of Bruce Orsini ("Orsini") in connection with a fraudulent transaction.
- b) Tulk, as a partner in the firm of Blaney, McMurtry, Stapells ("Blaney"), acted as solicitor to Orsini and provided the necessary legal guidance and assistance to facilitate the sale by Orsini of 98,100 shares of Permanent Acceptance Corporation Limited ("PAC") to the public at a price of \$12.50 per share.
- c) The assistance provided by Tulk to Orsini was a necessary element in the success of the sale of the PAC shares.
- d) The sale of PAC shares was a fraudulent scheme wherein public purchasers paid \$12.50 each for shares that had little value and were induced to make these purchases on the basis of misrepresentations made by Orsini or agents employed by him.
- e) Tulk knew that the PAC shares were being sold to the public at \$12.50 per share and knew, or was wilfully blind to the fact, that a properly informed purchaser would not have invested in PAC shares at that price.
- f) Tulk knew, or was wilfully blind to the fact, that Milton Cork ("Cork"), a promoter of PAC was not independent of Orsini and thus the sale by Orsini of PAC shares to the public was improper.
- g) Tulk allowed himself to be placed in a conflict of interest with Cork, in a situation where Cork required independent legal advice.

Evidence

An Agreed Statement of Fact was received by the Committee. The submissions of counsel to the Society with respect to the conduct of Mr. Tulk are set forth in paragraphs 24 through 26 of the Agreed Statement. Paragraph 27 states that the Solicitor agrees with the facts set out in the Agreed Statement and accepts that the conduct described therein constitutes professional misconduct. The text of the Agreed Statement is as follows:

"AGREED STATEMENT OF FACT

Introduction

1. The solicitor, Andrew Bishop Tulk ("Tulk"), was called to the bar in 1970. At all relevant times Tulk was a partner in the firm of Blaney, McMurtry, Stapells ("Blaney") as a member of the corporate department.

28th January, 1993

2. Tulk's principal area of practice has been junior or entry level securities work, generally involving obtaining financing for a business by raising amounts less than \$3,000,000. This typically involved raising start-up capital for clients who have no previous experience with public financing or with the Securities Act. Due to Tulk's experience in this area of specialty, he was, for a time, a member of the Advisory Committee of the Ontario Securities Commission ("OSC").

3. Under the scheme of the Securities Act a company cannot sell its shares to the public without preparing and obtaining approval for a prospectus, unless there exists, in the Securities Act or Regulations, an exemption from the prospectus requirement. A prospectus is a formal document which describes the securities, the risks involved and other relevant information for the benefit of the investing public. A prospectus must be approved by staff of the OSC and the shares qualified by that prospectus cannot be distributed until a receipt has been issued. The process of preparing and obtaining approval for a prospectus is usually lengthy and expensive.

4. Tulk's practice, as was not uncommon, was to a large extent involved in structuring transactions so as to fall within prospectus exemptions. Specifically, Tulk's practice consisted of junior mining, junior industrial and real estate syndications.

5. One common transaction which utilizes exemptions in the Securities Act is a "reverse take-over". A "take-over" is a transaction whereby one company, or its shareholders, acquires control of another company, known as the "target company." A reverse take-over usually involves the following elements:

- a) The target company is a "shell", which is an inactive corporation with few, if any, assets and no business. The shell becomes a target only if it is a "reporting issuer" as defined by the Securities Act. Reporting issuer is the term applied to a corporation which has fulfilled the requirements of the Securities Act for the public trading of its securities. Unless a corporation is a reporting issuer the public cannot trade in its securities.
- b) The acquiring company is a private company which has either an existing business or simply a business plan.
- c) The acquiring company may amalgamate with the target company, or sell its business to the target company. Alternatively, the controlling shareholders of the acquiring company may exchange their shares for shares of the shell. In any event a large block of shares from the target company is issued to the new owners, effectively changing control of the public company and creating a public vehicle for the business which had been in the private company.

28th January, 1993

6. The reverse take-over procedure became popular because it allowed the promoters of a business to place the business into a public vehicle without the costs and delays inherent in going public by way of a prospectus. Thus old reporting issuers became valuable, not for their assets, but for their status as reporting issuers under the Securities Act. A company which has been a reporting issuer for a length of time may take advantage of certain exemptions under the Securities Act which are unavailable to newly formed public companies. This created an additional advantage in undertaking a reverse take-over in that the new owners of the public vehicle had available a wider variety of exemptions which may be utilized to raise financing. The procedure permitted shares to be issued for services and many "hold" periods under the Securities Act were eliminated or abbreviated. A reverse take-over is usually coupled with a financing transaction whereby the new owners raise funds from the public to finance the business which is now in the public company.

William Bruce Orsini

7. In late 1985, Tulk commenced acting for William Bruce Orsini ("Orsini"). Orsini was in the business of locating and acquiring control of reporting issuer shells to be used as targets for reverse take-overs. By 1988 Orsini's objectives became acquiring control of reporting issuers which had assets he felt were undervalued. In 1988 total billings to Orsini and related companies constituted 25% of the billings generated by Tulk, making Orsini his largest client in that year.

Permanent Acceptance Corporation Limited

8. Permanent Acceptance Corporation Limited ("PAC") was a reporting issuer as that term is defined in the Securities Act. Its shares were capable of being traded on the over-the-counter market. In 1988 PAC was inactive and had neither assets nor income. Its issued capital consisted of 115,006 common shares and 10,000 preference shares. In early 1988 PAC was controlled by Mervyn Boyce ("Boyce") through the ownership of 73,805 common shares and 3,840 preference shares, representing a 64% voting interest in PAC.

9. Tulk acted as solicitor to Boyce in 1987 and in early 1988. Tulk provided legal services with respect to two separate transactions which occurred between June 1987 and January 1988 in which Boyce attempted to sell his PAC shares as part of a reverse take-over of PAC. Both transactions ultimately failed. Legal fees in the aggregate of \$99,982.55 were billed by Blaney as follows:

- a) \$80,340.14 was billed to Boyce in respect of the first transaction.
- b) \$19,642.41 was billed to an unrelated third party in respect of the second transaction on the basis of Tulk's understanding that that third party had agreed to pay such fees in the event the transaction failed.

In October 1988, both these accounts remained outstanding. Tulk recognized that Boyce had no assets and no ability to pay the debt and Tulk did not look to Boyce to pay the debt. The unrelated third party in the second transaction disputed its liability to pay any of Blaney's fees for the transaction which had failed.

Reverse Take-Over of PAC by Orsini

10. In October 1988 Orsini requested that Tulk design a transaction whereby Orsini could acquire Boyce's shares in PAC but still be able to sell those shares to the public immediately. In normal circumstances a party who acquires control of a company through a reverse take-over would be subject to the control block restrictions established by the Securities Act. A party which controls a public company, and any other person acting in combination with such party, is unable to sell his or her shares unless certain conditions established by the Securities Act are met. Orsini requested that Tulk design a plan which would allow him to obtain control of PAC, but also eliminate Securities Act restrictions and allow the direct sale of his shares to the public. Tulk advised Orsini, however, that he was not prepared to do any more legal work in relation to PAC unless provision was made for payment of the outstanding accounts.

11. The plan, as designed by Tulk, had seven steps:

- i) Orsini and his nominees would constitute the board of directors of PAC through a technique known as board rotate.
- ii) PAC would assume liability for the outstanding accounts owed by debts of Boyce and the third party to Blaney (\$99,982.55).
- iii) Audited financial statements would be prepared and appropriate forms delivered to the OSC in order to obtain revocation of a cease trade order which was then in force and prevented the sale of any PAC shares.
- iv) Orsini would identify an independent promoter (i.e., a promoter who was not "acting in combination" with Orsini or Boyce within the meaning of the Securities Act) who would assume the newly acquired liabilities of PAC owing to Blaney together with a debt of \$15,000 owed to PAC's accountants. The new promoter would accept responsibility for this debt in exchange for shares to be issued from treasury. The exchange of debt for shares at a rate of \$1 per share would be sufficient to ensure that the new promoter held the largest single block of issued shares in PAC and thus potential control of PAC. The intended effect of this step would be to create a new control block which would attract the Securities Act restrictions. Once the new block was in place the Boyce shares could be sold to the public.
- v) Orsini, through a holding company, would purchase the shares of PAC owned by Boyce.
- vi) Orsini's company would sell those shares to the public.
- vii) Orsini's company would retain at least \$500,000 from the sale of those shares and then amalgamate with PAC. On the amalgamation, the liquid capital pool would consist of that sum and Orsini's company would acquire multiple voting shares which would allow Orsini to gain voting control of PAC.

12. The essence of this plan was a shifting control block. Although Orsini would have de facto control through the board of directors, which would remain in place throughout the subsequent steps, he would own no shares. When the independent promoter took control of PAC, through the assumption of debt, control based on share ownership shifted from Boyce to this new individual. With share control now in "independent" hands, Orsini would be free to sell Boyce's shares to the public. In the end, but as part of the plan from the beginning, Orsini would acquire voting control of the amalgamated PAC without investing any funds himself. For the plan to be successful the independent promoter had to be agreeable to surrendering control to Orsini at a future date.

28th January, 1993

Step i): Change of Directors

13. On November 22, 1988, the existing directors of PAC voted to appoint a nominee of Orsini to a position on the board of directors which was then vacant. Following this appointment each old director resigned in turn. Following each resignation a new director was appointed by the remaining members of the board. The effect of this series of sequential resignations and appointments was to establish a completely new board of directors. By the end of the meeting on November 22, 1988, the board of PAC consisted of Orsini together with his nominees. This new board was controlled by Orsini.

Step ii): Assumption of Debt

14. An integral step in the design was the assumption by PAC of the debt owing to Blaney by Boyce and the third party for outstanding legal fees. This assumption, together with the subsequent promissory note from Cork, provided two attractions for Tulk:

- a) it allowed Blaney to enhance prospects for payment for an outstanding receivable; and
- b) it allowed the issue to the new promoter of sufficient number of shares to form a new control block.

Both of these factors were important considerations in the design of the transaction so far as Tulk was concerned. Tulk obtained the approval from the managing partner of Blaney and from Orsini on behalf of PAC. The primary beneficiary of the assignment was Blaney. Tulk achieved an arrangement which improved the prospects that the firm would receive payment for an old receivable.

Step iii): Revocation of Cease Trade Order

15. For most of its existence the shares of PAC had been subject to a cease trade order issued by the OSC. The cease trade order had been imposed because PAC had failed to comply with the requirement that it regularly file financial statements. Thus in November 1988 audited financial statements were prepared and an application (prepared under Tulk's direction) was made to the OSC to revoke the cease trade order. By Order of the OSC on November 30, 1988, the shares of PAC were allowed to trade again.

Step iv): Recruitment of Promoter

16. Orsini recruited Milton Cork ("Cork") to act as an independent promoter of PAC. Cork agreed to accept the debt of PAC in exchange for shares. Cork executed two promissory notes in the aggregate amount of \$114,982.55, one note payable to Blaney and the other to PAC's accountant. The promissory notes, and all of the agreements which made reference to Cork as a promoter of PAC, were prepared under Tulk's supervision. Tulk recognized a conflict of interest, inasmuch as Cork assumed a debt of \$99,982.55 owed to Blaney. Tulk advised Cork that he was not acting for him, but did not suggest Cork seek independent legal advice. Tulk recognized that Cork had limited means and could not pay the debt until Cork had the opportunity to sell his PAC shares. As Cork was issued sufficient shares to control PAC he could not readily sell his shares until Orsini took control of PAC. Due to the complexity of securities regulations Cork required independent legal advice with respect to his ability to sell his PAC shares in the market.

28th January, 1993

17. Tulk also understood that the transaction he designed would not comply with securities regulations unless Cork was independent (i.e. not acting in combination with Orsini). If Cork were acting in combination with Orsini the shares owned by Orsini would be subject to control block restrictions and could not be readily sold to the public. Tulk told Orsini that he could have no deals with Cork, but Tulk took no steps to investigate Cork's independence. Tulk, however, knew that Cork had prior business dealings with Orsini and accepted that Cork did not have the means to pay his debt if he were unable to sell the PAC shares.

18. Tulk did not neglect to enquire as to Cork's independence. Rather, he elected to make no enquiries. When a junior lawyer working with Tulk on this transaction made specific enquiries on the issue of whether there could be two control blocks, Tulk refused to answer the question.

Step v): Purchase of Shares from Boyce

19. On December 6, 1988, Boyce executed a share purchase agreement whereby he agreed to sell his PAC shares to Orsini's company at \$1 per share. This document was prepared under Tulk's direction. The share purchase was ultimately completed when Orsini paid Boyce from the proceeds of the sale of the PAC shares to the public. Although Tulk advised Boyce to obtain independent legal counsel, Tulk was also aware that Orsini was pressuring Boyce to sell his shares immediately or the offer would be withdrawn.

Step vi): Sale of PAC Shares to the Public by Orsini

20. Immediately upon purchasing the shares from Boyce at \$1 per share, Orsini's company began to sell these shares to the public at \$12.50 per share. Over 500 individual investors purchased 98,100 shares for total proceeds of \$1,226,250. The purchasers were induced to make those purchases on the basis of misrepresentations made by Orsini or agents employed by him, of which Tulk had no knowledge. Tulk was aware that the PAC shares, which Orsini had just agreed to purchase for \$1 per share, were being sold to the public at \$12.50 per share. Tulk knew that if the amalgamation had been completed as proposed, the book value of those shares to the investing public would be approximately \$1.74 per share.

21. Tulk participated in the drafting of all press releases issued by PAC. Tulk knew on December 9, 1988, that a press release issued by PAC a few days earlier had become incorrect in a material way because of subsequent events and that PAC had an obligation to issue a new press release. Tulk advised Orsini that a new press release was required, but knew that Orsini continued to sell his PAC shares to the public without a press release being issued. A correct press release was issued on December 20, 1988.

22. At the planning stage of the transaction Tulk had advised Orsini that the sale of PAC shares to the public could be viewed as abusive by the OSC unless Orsini preserved all proceeds of the sale of shares (less expenses and purchase costs). The advice given by Tulk was that the net proceeds must be used for the purpose of funding prospective acquisitions by PAC, and could not be used for the personal benefit of Orsini. Notwithstanding this advice, in January 1989, Tulk accepted payment of \$150,000 from Orsini for outstanding legal fees (\$57,000 for accounts associated with this transaction) while making no enquiry of Orsini as to the source of those funds. Tulk was aware that Orsini had funds from another source of approximately \$84,000.

28th January, 1993

Step vii): Cease Trade Order

23. The final intended step in the transaction was the amalgamation of PAC with Orsini's company. The amalgamation was scheduled for February 15, 1989. It was interrupted by a cease trade order issued by the OSC on that same day.

Conduct of Tulk and Submission on Behalf of the Law Society of Upper Canada

24. Tulk purposely designed the transaction so as to eliminate all disclosure and approval requirements which attach to transactions of this nature. Tulk knew that the design would not achieve this end unless Cork were truly independent of Orsini. It is the submission of counsel to the Law Society of Upper Canada (the "Society") that Tulk was wilfully blind to the relationship between Cork and Orsini. Tulk provided no written warning to Orsini that the transaction may be subject to review by the Ontario Securities Commission. Further, Tulk failed to heed the warning which was inherent in the refusal of Orsini to issue an accurate press release on a timely basis.

25. In counsel's further submissions the design of the transaction, from its inception, relied upon Cork to vote in favour of the amalgamation and surrender control to Orsini. Tulk was aware that the design itself, together with Cork's obligation to pay Blaney, vitiated any meaningful independence on behalf of Cork.

26. It is the submission of counsel to the Society that, by designing the transaction and acting as counsel to Orsini, Tulk provided a form of assistance to Orsini in a transaction which was abusive to the public. The design of the transaction, inasmuch as it eliminated the usual regulatory checks and restraints, became easy prey to a fraud. The public was left with no protection to the abusive conduct of Orsini. In designing this transaction, and in ignoring incidents which should have raised suspicions, Tulk became the tool or dupe of Orsini.

Agreement of Tulk

27. Tulk agrees with the foregoing facts and further accepts that the conduct described herein constitutes professional misconduct.

28. Tulk and the Society respectfully submit that an appropriate penalty, in the circumstances, would be a suspension of Tulk's rights and

privileges as a member of the Society for a period of three months.

January 19, 1993."

Finding

On the basis of the Agreed Statement and the statement of the Solicitor as set forth in Paragraph 27 thereof, the Committee made a finding that the conduct of the Solicitor as described in the Agreed Statement constitutes professional misconduct.

RECOMMENDATION AS TO PENALTY

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The Committee recommended that the rights and privileges of the Solicitor as a member of the Society be suspended for a period of three months, such period to commence on and as of January 21, 1993, the day of the Committee hearing.

REASONS FOR RECOMMENDATION

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1. Paragraph 28 of the Agreed Statement states that the Solicitor and the Society agreed that a suspension for three months would be an appropriate penalty in the circumstances. Counsel for the Solicitor requested that the suspension commence on the date of the hearing; counsel for the Society made no submissions on this point.

2. At the hearing the Committee had the benefit of the able and helpful submissions of counsel and the text, provided to us beforehand, of the decision of the Ontario Securities Commission in the matter of the Securities Act and in the matter of Bruce Orsini and Andrew Tulk and in the matter of Lorne Banks and Paul Gordon dated October 16, 1991, which we were invited to treat as background to the submissions on penalty.

3. The gravity of the misconduct in any discipline case must always be a paramount factor in determining the appropriate penalty. Lawyers have a duty to their clients but they also have a duty which extends beyond clients to the proper working of the legal system. This is especially important in cases where, as a result of improper conduct on the part of a lawyer, the interests of the public may be adversely affected. The offering of securities to public investors is a situation in which the duty of the lawyer in respect of the proper working of the law can be of crucial significance. In the present case, the terms of the Agreed Statement enabled the Committee to make a finding of misconduct without necessitating a finding as to the specific matters alleged in the Complaint. Nevertheless, the Committee is satisfied from the evidence and submissions that the course of conduct of the Solicitor in this case constituted a serious departure from the standard which is properly to be expected of a responsible and diligent solicitor in matters of this kind. Moreover, it could reasonably have been anticipated that members of the investing public might well suffer financial loss as a result of the transactions referred to in the Complaint being carried out in the contemplated manner, without the provision of the full disclosure required in a prospectus; indeed, such financial loss seems to have been the result in this case. Professional misconduct of this type, even where it is devoid of any fraud or misappropriation, is a serious matter and it is not to be condoned or treated lightly. In determining the proper penalty, this principle must be taken into account.

4. The Committee considered that it should also take into account the following circumstances in this case, especially the matters mentioned in (b) and (c) below:

- (a) The Solicitor never stood to gain directly from the transaction and, while the transaction could have facilitated payment of the fees of the Solicitor's law firm, no issue has been raised about the propriety of these fees which, in any event, have either been refunded or remain unpaid.
- (b) The Solicitor cooperated fully with the Law Society in its investigation which commenced prior to the decision in the Ontario Securities Commission proceedings. Through his counsel, the Solicitor cooperated with the Law Society and its counsel in pre-hearing consultations with the Chair of Discipline which led to the making of the Agreed Statement. These consultations and the resulting Agreed Statement appear to have contributed valuably to the effectiveness of the discipline process of the Law Society in this case, by avoiding excessive costs and an extensive contest over a range of difficult issues in the course of which the central question of misconduct could have become clouded in a very detrimental way.

28th January, 1993

- (c) A suspension of three months' duration must be viewed in the context of the Solicitor's recent and current circumstances. The Solicitor has already effectively been out of practice for at least 13 months, apart from some incidental work from which he has incurred losses. This situation apparently results, not surprisingly, from the adverse decision given in the Ontario Securities Commission proceedings, and the widespread publicity given to that decision. The order which the Ontario Securities Commission ultimately made against the Solicitor was to suspend his trading rights under the Securities Act for a period of two years. This order does not in law prohibit the Solicitor from acting in matters involving the Commission but its practical effect must be very close to a prohibition. The Solicitor is no longer with his former law firm. The Solicitor's prospects for a return to practice in the future are no doubt significantly affected by all of these factors and also by the fact that his professional affairs have been in a difficult and uncertain condition ever since the Ontario Securities Commission issued its cease trading order in connection with the transaction in February of 1989, almost 4 years ago.

In the opinion of the Committee, these considerations support the recommended penalty of a three months' suspension. In view of the Solicitor's present circumstances, the Committee sees no objection to the recommended period of suspension commencing as requested on January 21, 1993, the date of the hearing.

Andrew Bishop Tulk was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 25th day of January, 1993

"J. Spence"  
James Spence, Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. Murray that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended for a period of 3 months such period to commence on January 21, 1993, be adopted.

There were submissions by both counsel in support of the Recommendation.

There were questions from the Bench.

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

It was moved by Ms. Palmer, seconded by Mr. Bragagnolo that the solicitor be suspended as of January 28th rather than January 21st, 1993.

It was moved by Ms. Graham, seconded by Ms. Elliott that the solicitor be suspended for 6 months.

The matter was adjourned briefly to give the Bench time to review the Report.

It was decided that the matter would be adjourned in terms of penalty only to a date to be set by the Secretary. Counsel were advised of the motions including that of a higher penalty. Counsel were requested to deal with the solicitor's conduct as set out in the Report.

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

Counsel and the solicitor retired.

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GERALD BRUCE FOX, Newmarket

Mr. Sommerville placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock, O'Connor, Manes and Thom and Ms. Graham withdrew.

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

Convocation had before it the Report of the Discipline Committee dated 6th January, 1993 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1992 (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

Ronald D. Manes, Chair  
Stuart Thom  
Netty Graham

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

Christina Budweth  
for the Society

GERALD BRUCE FOX  
of the Town  
of Newmarket  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: November 17, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 9, 1992, Complaint D98/92 and on October 19, 1992, Complaint D166/92 was issued against Gerald Bruce Fox alleging that he was guilty of professional misconduct.

The matter was heard in public on November 17, 1992, before this Committee composed of Ronald D. Manes, Chair, Stuart Thom and Mrs. Netty Graham. Mr. Fox attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D98/92

2. a) He failed to reply to the Law Society regarding a complaint by Charlotte Feil, despite letters dated February 3, 1992 and March 25, 1992 and telephone requests on February 21, 1992 and March 2, 1992.
- b) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of the regulation made pursuant to the Law Society Act.

Complaint D166/92

2. a) He failed to reply to the Law Society regarding a complaint by Tippet-Richardson Limited despite letters dated June 16, 1992, July 17, 1992 and September 11, 1992, and a telephone request on August 25, 1992 and telephone messages left on September 3, 1992 and September 8, 1992.
- b) He failed to honour a financial obligation to Tippet-Richardson Limited, in the amount of \$673.84, incurred in connection with his practice of law.

DECISION

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

"AGREED STATEMENT OF FACTS - D98/92

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D98/92 and is prepared to proceed with a hearing of this matter on November 11, 1992.

28th January, 1993

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed the Complaint D98/92 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He practices as a sole practitioner.

PARTICULAR 2a) - Failure to Reply

5. The Complainant, Charlotte Feil, retained the Solicitor through Legal Aid, in January of 1990 regarding a matrimonial dispute.

6. By letter dated December 22, 1991, Ms. Feil advised the Law Society of the Solicitor's delay and failure to communicate regarding the status of her matter.

7. By letter dated February 3, 1992, the Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide the Law Society with a reply within two weeks. No reply was received. A copy of the Law Society's February 3, 1992, with enclosure, is attached as Exhibit "A" to this Agreed Statement of Facts.

8. A Law Society staff employee spoke with the Solicitor by telephone on February 21, 1992. The Solicitor advised the Law Society that he hoped to be able to reply by February 28, 1992. No reply was received.

9. A Law Society staff employee left a telephone message for the Solicitor at his office, requesting he return the call. The Solicitor did not return the call.

10. Ms. Feil advised the Law Society, by telephone, on March 23, 1992, that the Solicitor had refused to release her file.

11. By registered mail, dated March 25, 1992, the Law Society forwarded to the Solicitor a copy of its February 3, 1993 letter with enclosure. The Solicitor was reminded of his obligation to reply to the Law Society. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee. A copy of the Law Society's March 25, 1992 letter is attached as Exhibit "B" to this Agreed Statement of Facts.

12. The Society has confirmed with the office of the new counsel for Mr. Feil, Heather Ritchie, that Ms. Feil's file was received from the Solicitor on or about the 1st week of May, 1992.

PARTICULAR 2b) - Failure to File

13. The Solicitor's fiscal year end is January 31. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 31, 1991, as required by S.16(2) of Regulation 573 under The Law Society Act.

28th January, 1993

14. A Notice of Default in Annual Filing, dated August 9, 1991 was forwarded to the Solicitor by the Law Society. A copy of the Notice is attached as Exhibit "C" to this Agreed Statement of Facts.

15. By registered mail dated September 19, 1991, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day applied on filings made after their due dates and on defaults in filings. The fee began to accrue on October 4, 1991. When this levy amounted to \$1,500.00 he was subject to suspension pursuant to Section 36 of The Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's September 19, 1991 letter is attached as Exhibit "D" to this Agreed Statement of Facts.

16. By registered mail dated January 17, 1992, the Law Society advised the Solicitor that his name would go before Convocation on February 28, 1992 for suspension of his rights and privileges should his late filing fee remain unpaid as of 5:00 p.m. on February 27, 1992. The late filing levy had remained unpaid for four months. The Solicitor was reminded that the paying of the late filing fee would not relieve him from his obligation to make annual filings and that he may be brought before the Discipline Committee for failure to file. A copy of the Society's January 17, 1992 letter is attached as Exhibit "E" to this Agreed Statement of Facts.

17. By letter dated February 14, 1992 the Law Society advised the Solicitor that his annual filing and late filing levy had not been received. The Solicitor was reminded that his name would go before Convocation on February 28, 1992 should payment not be received on February 27, 1992. A copy of the Society's February 14, 1992 letter is attached as Exhibit "F" to this Agreed Statement of Facts.

18. By registered mail dated March 2, 1992, the Law Society advised the Solicitor that his rights and privileges as a member of the Society had been suspended as of February 28, 1992 by an Order of Convocation made that same day. The Solicitor was advised that in order to reinstate his rights and privileges, a certified cheque in the amount of the late filing levy was required. A copy of the Law Society's March 2, 1992 letter is attached as Exhibit "G" to this Agreed Statement of Facts.

19. The Solicitor paid the late the late filing levy on March 6, 1992 and his rights and privileges were reinstated. The Solicitor did not, however, file the required forms.

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

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

#### V. DISCIPLINE HISTORY

22. On August 11, 1983 the Solicitor was found guilty of professional misconduct and was reprimanded in committee for: failing to reply to the Law Society; causing a false reporting letter to be sent to a client; failing to co-operate with a fellow solicitor; and causing prejudice to his former employer and clients.

23. On January 14, 1987 the Solicitor received a reprimand in committee regarding his misapplication of client monies; his failure to keep a client advised on an appeal; his failure to serve a client in a conscientious, diligent and efficient manner; his failure to reply to the Law Society; and his breach of a written undertaking to the Law Society.

24. On May 24, 1990 the Solicitor received a reprimand in Convocation and ordered to pay costs of \$750 regarding his failure to reply to the Law Society.

DATED at Toronto this 11th day of November, 1992."

"AGREED STATEMENT OF FACTS D166/92

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D166/92 and is prepared to proceed with a hearing of this matter on November 11, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D166/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitute professional misconduct as set out in Rule 13, Commentary 3 and 6 of the Rules of Professional Conduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 21, 1975. He practices as a sole practitioner.

5. Tippet-Richardson Limited contracted with the Solicitor to store his legal files for a monthly charge. By facsimile transmission, dated August 27, 1991, Tippet-Richardson advised the Solicitor that they had not received a response to their requests for payment of account STG-54128 in the amount of \$380.39. The Solicitor was advised that should payment arrangements not be made by September 4, 1991, the matter would be referred to the Law Society.

6. By letter dated March 24, 1992, Tippet-Richardson forwarded to the Solicitor a copy of its most recent statement dated February 25, 1992 in the amount of \$673.84. Tippet-Richardson advised the Solicitor that the last payment received on account was on August 31, 1990. Tippet-Richardson forwarded a copy of its March 24, 1992 letter to the Society by way of a complaint, a copy of which is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By letter dated April 10, 1992, the Society forwarded to the Solicitor a copy of the letter of complaint. The Solicitor was requested to provide his written comments to the same within two weeks. No reply was received.

28th January, 1993

8. A Law Society staff employee left telephone messages for the Solicitor at his office on May 19, 1992 and May 25, 1992 requesting he return the calls. The calls were not returned.

9. By registered letter, dated May 28, 1992, the Society forwarded to the Solicitor a copy of its April 10, 1992 letter. The Solicitor was reminded of his obligation to reply to the Society. The Solicitor was advised that should a reply not be received within seven days, the matter would be referred to the Discipline Committee.

10. By letter dated June 8, 1992, the Solicitor advised that he had intended to bring his account into good standing and have the files picked up from Trippet Richardson at the same time he had movers deliver the household furniture from his father's estate. As a result of the complaint made by Tippet-Richardson, the Solicitor stated he would contact Tippet-Richardson to ascertain the amount owing, and forwarded payment with a request that the files be made available for pick up within the next three weeks. A copy of the Solicitor's June 8 letter is attached as Exhibit "B" to this Agreed Statement of Facts.

11. By letter dated June 16, 1992, the Society requested the Solicitor confirm that he had arranged to pay the outstanding account and have the files pick up. No reply was received.

12. By letter dated July 17, 1992, the Society requested the Solicitor forward a cheque to Tippet-Richardson and provide the Society with proof of payment of the account. No reply was received.

13. A Law Society staff employee spoke with the Solicitor by telephone on August 25, 1992. The Solicitor advised that he would make payment of the account to Tippet-Richardson by the end of the week. The Solicitor did not make the payment to Tippet-Richardson.

14. A Law Society staff employee left telephone messages for the Solicitor at his office on September 3, 1992 and September 8, 1992, requesting he return the calls. The calls were not returned.

15. By registered letter, dated September 11, 1992, the Society reminded the Solicitor of his previous assurances to pay the account owing to Tippet-Richardson. The Solicitor was advised that should the Society not receive a response from him within seven days, the matter would be referred to the Discipline Committee. No reply was received.

16. The Solicitor has not paid the account owing to Tippet-Richardson. As of October 22, 1992, the account balance was \$1056.10.

17. The Solicitor has not requested an extension to reply nor has he provided the Society with an explanation for his failure to reply to the series of communications commencing June 16, 1992.

17. a) The amount outstanding as at October 27, 1992 was \$1,056.10.

#### V. DISCIPLINE HISTORY

18. On August 11, 1983 the Solicitor was found guilty of professional misconduct and was reprimanded in committee for: failing to reply to the Law Society; causing a false reporting letter to be sent to a client; failing to co-operate with a fellow solicitor; and causing prejudice to his former employer and clients.

28th January, 1993

19. On January 14, 1987 the Solicitor received a reprimand in committee regarding his misapplication of client monies; his failure to keep a client advised on an appeal; his failure to serve a client in a conscientious, diligent and efficient manner; his failure to reply to the Law Society; and his breach of a written undertaking to the Law Society.

20. On May 24, 1990 the Solicitor received a reprimand in convocation and ordered to pay costs of \$750.00 regarding his failure to reply to the Law Society.

DATED at Toronto this 11th day of November, 1992."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Gerald Bruce Fox be suspended for a period of three months commencing January 28, 1993 and indefinitely until the 1991 filings are made. There will be costs levied of \$1,500.00, payable nine months from the date of the beginning of the suspension.

#### REASONS FOR RECOMMENDATION

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The Solicitor is charged and has pleaded guilty to four counts of professional misconduct set out in two complaints, being D98/92 and D166/92. The professional misconduct consists generally of failing to reply to his Law Society; failure to file his Forms 2/3 for 1991 and failure to honour a financial obligation.

It is noteworthy that these failures to file and respond to a financial obligation continue as of the date of the hearing.

The Solicitor gave evidence in mitigation of sentence with respect to why such failures continued in the past, some of which continue. We are unanimously of the opinion that although the facts of the explanation are not disputed by Law Society counsel, we accept Law Society counsel's submission that they are not particularly relevant to, and certainly do not excuse, the past and continuing failures to file, respond to the Law Society and to honour financial commitments. As an example, the failure to file Forms 2/3 has been outstanding since July of 1991 preceding any of the explanations in mitigation given by the Solicitor.

In administering penalty, the Committee is mindful of the Solicitor's previous discipline history. On August 11, 1983, the Solicitor was found guilty of professional misconduct and was reprimanded in committee for failing to reply to the Law Society; causing a false reporting letter to be sent to a client; failing to co-operate with a fellow solicitor and causing prejudice to his former employer and clients.

On January 14th, 1987, the Solicitor received a reprimand in committee regarding his misapplication of client monies; his failure to keep a client advised on an appeal; his failure to serve a client in a conscientious diligent and efficient manner; his failure to file to the Law Society and his breach of a written undertaking to the Law Society.

28th January, 1993

On May 24th, 1990, the Solicitor received a reprimand in Convocation and was ordered to pay costs of \$750.00 regarding his failure to reply to the Law Society.

The Solicitor conceded in his own evidence that the complaints before this committee were part of a pattern of behaviour exhibited by him at least since his previous discipline record commenced in August of 1983. The Solicitor in his evidence further conceded that the suspension was not unreasonable. The Solicitor's sole concern appears to be that he has a practice to go back to after the suspension and presumably upon making the necessary filings so that suspension does not continue.

It is our very strong view that the Solicitor must determine whether he wishes to continue in the practice of law, and the onus is now on him to decide whether he will in fact continue. Had Law Society Counsel sought a greater penalty, we may have been inclined to grant a greater penalty because it is our view that although Mr. Fox does not feel that what he is doing in terms of ignoring his Law Society is intentional, the pattern of behaviour is exactly that and our fear is that in the future, that pattern may have a dramatic effect on a client or on the public generally.

Although Mr. Fox may feel that the length of the suspension or the costs are too onerous, it is (or should be in effect), the last break that Mr. Fox gets by his Law Society regarding this pattern of conduct.

Gerald Bruce Fox was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 21st day of March 1975.

ALL OF WHICH is respectfully submitted

DATED this 6th day of January, 1992

"R. Manes,  
Ronald Manes, Chair

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

There were no submissions and the Report was adopted.

It was moved by Mr. Somerville, seconded by Mr. Murray that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended for a period of 3 months commencing January 28th, 1993 and indefinitely until his filings and costs were paid, be adopted.

Both counsel made submissions in support of the Recommendation. The solicitor asked if he was suspended that the effective date be February 5th, 1993 to allow him to close out of year end.

The Motion as to penalty was amended accordingly.

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

The Motion as amended as to penalty was adopted.

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

Counsel and the solicitor retired.

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Convocation adjourned for a brief recess.

Convocation resumed at 3:30 p.m.

.....

ANTHONY WILLIAM KLYMKO, Toronto

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock, Copeland and Carter withdrew.

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

Convocation had before it the Report of the Discipline Committee dated 4th January, 1993 together with an Affidavit of Service sworn 15th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 8th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul Copeland, Chair  
Robert J. Carter  
Joan L. Lax

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

Neil Perrier  
for the Society

ANTHONY WILLIAM KLYMKO  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 27, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

---

On July 6, 1992 Complaint D119/92 was issued against Anthony William Klymko, alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27, 1992 before this Committee composed of Paul Copeland, Chair, Robert J. Carter and Joan L. Lax. Mr. Klymko attended the hearing and was not represented. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D119/92

2. (a) He failed to reply to the Law Society regarding discrepancies found in his books and records during an audit on February 18, 1992 despite letters dated March 5, 1992 and May 12, 1992 and telephone requests on March 31, 1992, April 7, 1992 and April 13, 1992.

DECISION

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D119/92 and is prepared to proceed with a hearing of this matter on October 27, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D119/92 and admits the particulars contained therein. The Solicitor also admits that the particulars in the complaint together with the facts as hereinafter set out constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 24, 1973. He practices as a sole practitioner.

28th January, 1993

5. As a result of a review of the Solicitor's practice on February 18, 1992, the Society sent a letter to the Solicitor, dated March 5, 1992. The Solicitor was requested to reply within two weeks from the date of this letter. No reply was received. A copy of the Society's March 5, 1992 letter is attached as Exhibit "A" to this Agreed Statement of Facts.

6. A Law Society staff employee spoke to the Solicitor by telephone on March 31, 1992. The Solicitor advised that he had not received the Society's March 5th letter. The Society forwarded to the Solicitor the March 5, 1992 letter by registered mail that day. The registered letter was signed and delivered on April 1, 1992. A copy of the Acknowledgement of Receipt of a Registered Item card is attached as Exhibit "B" to this Agreed Statement of Facts.

7. A Law Society staff employee left a telephone message for the Solicitor at his office on April 7, 1992, requesting that he return the call. The call was not returned.

8. A Law Society staff employee spoke to the Solicitor by telephone on April 13, 1992. The Solicitor advised that he had been unable to comply with the Society's request as he had been busy.

9. By registered letter, dated May 12, 1992, the Society advised the Solicitor of its concern that funds taken from the trust account without a fee billing are considered to be funds misappropriated. The Solicitor was requested to prepare and submit the fee bills and answers to the questions raised in the Society's March 5th letter. The Solicitor was advised that should a reply not be received by May 15, 1992 the matter would be referred to the Discipline Committee. No reply was received. A copy of the Society's May 12, 1991 letter and a copy of the signed Acknowledgement of Receipt of a Registered Item card is attached as Exhibit "C" to this Agreed Statement of Facts.

10. The Solicitor has not requested an extension to reply nor has he provided an explanation for his failure to reply.

V. DISCIPLINE HISTORY

11. The Solicitor received a reprimand in committee on December 7, 1982 regarding his failure to file his forms 2/3 and his failure to attend at an invitation to attend.

12. The Solicitor received a reprimand in committee on October 10, 1990 regarding his failure to serve clients diligently; failure to maintain books and records; and failure to reply to fellow solicitor. A copy of formal complaint is attached as Exhibit "C" to this Agreed Statement of Facts.

DATED at Toronto this 27th day of October, 1992."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Anthony William Klymko be reprimanded in Convocation and pay the Society's costs fixed at \$500.00.

28th January, 1993

REASONS FOR RECOMMENDATION

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Counsel for the Society submitted that the appropriate penalty in this case was a reprimand in Convocation plus the Society's cost fixed at \$500.00. The Solicitor agreed with counsel for the Society on the question of costs, but submitted that the appropriate penalty was a reprimand in Committee. In support of his submissions, counsel for the Society relied on the Solicitor's prior disciplinary history, and in particular, the Solicitor's failure to be deterred by two previous reprimands in Committee. As appears from paragraph 11 of the Agreed Statement of Facts, the Solicitor received a reprimand in Committee on December 7, 1982 regarding his failure to file his forms 2/3 and his failure to attend at an invitation to attend. As appears from paragraph 12 of the Agreed Statement of Facts, the Solicitor also received a reprimand in Committee on October 10, 1990 regarding his failure to serve clients diligently; his failure to maintain books and records; and his failure to reply to a fellow Solicitor. Counsel for the Society also pointed out that the Solicitor had not replied to the Society's March 5th letter until late in the afternoon on October 26, 1992, being the day prior to this hearing.

The Solicitor acknowledged that he had not been diligent in responding to the Society's letter, but submitted that the matter was not so weighty as to need to go to Convocation. Had this been the first omission by the Solicitor in this kind of matter, the Committee might well have agreed with this submission. However, in view of the Solicitor's previous misconducts, both of which were dealt with by reprimands in Committee, we are all of the view that a more serious penalty is required.

Although the Committee had before it a copy of the Solicitor's reply dated October 26, 1992, we were advised that there had not been an opportunity for the Society to determine the sufficiency of the reply prior to the hearing. We are unable to make a finding as to whether the Society's enquiry has been satisfactorily met. In imposing a penalty, we are therefore dealing only with the question of the Solicitor's failure to respond to the Society for the approximate seven-month period between April 1, 1992 and October 26, 1992.

Discipline should serve as both a specific and general deterrent. In the circumstances of this case, we are strongly influenced by the Solicitor's prior disciplinary history and the fact that the Solicitor had no adequate explanation for his failure to reply to the Society. In our view, these two factors disentitle the Solicitor to a reprimand in Committee. We therefore recommend that the Solicitor be reprimanded in Convocation and pay the Society's costs, fixed at \$500.00.

ALL OF WHICH is respectfully submitted

DATED this 4th day January, 1993

"J. Lax"  
Joan L. Lax

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Recommendation as to Penalty contained in the Report that is, that the solicitor be reprimanded in Convocation with costs, be adopted.

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

There were questions from the Bench.

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

The Motion to reprimand the solicitor was adopted.

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision.

The reprimand was administered in public.

Counsel and the solicitor retired.

.....

CHRISTOPHER MACDOUGALL REID, Toronto

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock, Copeland and Thom withdrew.

Mr. Stephen Foster appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 8th January, 1993 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul D. Copeland, Chair  
Stuart Thom  
Hope Sealy

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

Stephen Foster  
for the Society

CHRISTOPHER MACDOUGALL REID  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 13, 1992  
November 24, 1992

28th January, 1993

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 10, 1992, Complaint D108/92 was issued against Christopher MacDougall Reid, alleging that he was guilty of professional misconduct. An amended Complaint D108a/92 was filed with the Committee, on consent, at the hearing of this matter.

The matter was heard in public on the 13th day of October, 1992 and the 24th day of November, 1992, before this Committee composed of Paul D. Copeland, Chair, Stuart Thom and Hope Sealy. The solicitor attended the hearing and was not represented. Stephen Foster appeared on behalf of the Law Society.

DECISION

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The following particular of conduct unbecoming a barrister and solicitor was found to have been established:

Complaint D108a/92

- 2(a) On August 3, 1989 he defrauded Zellers Department Store located in the Station Mall, Sault Ste. Marie, Ontario of \$272.16 and thereby committed the criminal offence of fraud. He entered a guilty plea to the criminal charge of fraud that resulted in the Ontario Court of Justice (Criminal Division) at Sault Ste. Marie, Ontario before His Honour Judge W.W. Cohen on November 15, 1990. He was granted a conditional discharge in lieu of the recording of a criminal conviction.

Evidence

The evidence before the Committee consisted of the Agreed Statement of Facts, including Exhibit "A" (the Solicitor's letter of October 2, 1991) a transcript of the proceedings before His Honour Judge Cohen, of the Ontario Court of Justice (Criminal Division) in Sault Ste. Marie, Ontario, on the 15th day of November, 1990, and a second letter to the Law Society from the Solicitor dated November 24, 1992. That letter is attached to these reasons.

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of the amended Complaint D108a/92 and is prepared to proceed, without counsel, with a hearing of this matter on October 13, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed amended Complaint D108a/92 and admits the particular contained therein. The Solicitor also admits that the particular in the amended Complaint together with the facts as hereinafter set out constitute conduct unbecoming a barrister and solicitor.

IV. FACTS

4. The Solicitor was called to the Bar on April 15, 1987. He currently practises as a sole practitioner in the City of Toronto. He formerly practised in the City of Sault Ste. Marie.

5. On July 20, 1989, at approximately 14:05 hours, the Solicitor attended at the Zellers Department Store at the Cambrian Mall, Sault Ste. Marie, Ontario and purchased a gas Barbecue, stock #57540361, in the amount of \$272.16. He paid for the barbecue by personal cheque.

6. A security tag was placed on the barbecue and the Solicitor left the store with the barbecue.

7. On July 20, 1989, at approximately 14:30 hours, the Solicitor attended at another Zellers Department Store at the Station Mall, Sault Ste. Marie, Ontario.

8. The store security observed the Solicitor take an empty shopping cart and place a barbecue on the cart from the display area.

9. The Solicitor then placed a security tag on the barbecue and proceeded to the customer service desk at which time he requested a refund for the barbecue which was on the cart.

10. Due to the store's cheque cashing policy, being that no refund can be given out until a two week waiting period had passed to ensure that the cheque has cleared the bank, the Solicitor was advised that he would be able to pick up his refund on August 3, 1989.

11. The Solicitor was arrested on August 3, 1989 at the Zellers Department Store at the Station Mall, Sault Ste. Marie, Ontario when he attempted to obtain the refund for the barbecue.

12. The Solicitor entered a guilty plea of having committed the criminal offence of fraud, contrary to section 380(1) of the Criminal Code of Canada on November 15, 1990. The Solicitor was granted a conditional discharge effective forthwith without probation.

13. By letter dated October 2, 1991, the Solicitor advises the Society that his actions were deplorable and he had no excuse for them. The Solicitor also advises that during the spring and summer of 1990 he had developed a drinking problem as a result of depression caused partly by the fact that his common-law spouse of six years had left him in March, 1990.

28th January, 1993

14. In his letter, the Solicitor advises that he has never committed such an offence before or since July 20, 1990. He advises that his arrest and subsequent court appearance were extremely humiliating, especially since Sault Ste. Marie is a small town and since he is a Metis, active in the local Aboriginal community. He also advises that he is ashamed of his actions. A copy of the Solicitor's letter of October 2, 1991 is attached as Exhibit "A" to this Agreed Statement of Facts.

V. DISCIPLINE HISTORY

15. The Solicitor has no previous discipline record.

DATED at Toronto this 13th day of October, 1992."

Based on the Agreed Statement of Facts, and the submissions, we found that the allegation of conduct unbecoming a barrister and solicitor was established.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that the Solicitor be reprimanded in Convocation.

REASONS FOR RECOMMENDATION

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This matter came on for hearing before the Committee on the 13th day of October, 1992. Counsel for the Society suggested that an appropriate disposition in this matter would be a reprimand in Committee. He indicated that the incident in July and August of 1989 was the result of the Solicitor's depression and a drinking problem. Counsel indicated that there was no evidence in the possession of the Law Society to confirm the Solicitor's depression or drinking problem. Counsel indicated that there was no loss suffered by the victim of the fraud, that the Solicitor had no prior discipline history and that the Solicitor had come from a difficult background. We were advised that in the court proceedings, both Crown counsel and defence counsel, as well as the judge, made reference to the fact that, above and beyond the criminal law consequences of the Solicitor's behaviour, the Solicitor would have to face the Law Society concerning his offence. Counsel for the Society advised us that he had been unable to locate any precedents that would assist us in deciding the appropriate penalty in this matter.

The Solicitor indicated that he had no objection to a reprimand being imposed in Committee.

Over the lunch recess the Committee was of the view that a reprimand in Committee was not a sufficiently serious penalty in this matter. After lunch we expressed our views to the Solicitor and in effect invited him to seek an adjournment if he had approached the hearing of this matter on the basis that the Committee was likely to follow the recommendation as to penalty put forward by counsel for the Society. We indicated to the Solicitor a number of areas of concern that we had. The Solicitor requested an adjournment.

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The hearing of this matter resumed on the 24th day of November, 1992. The Solicitor was still unrepresented. We received the letter from the Solicitor to the Committee dated the 24th of November, 1992, a copy of which is attached to these reasons.

Counsel for the Society was able to provide us with the decisions in the case of *David Arthur Stephens* and in the case of *B.C.B.* The Committee had obtained three decisions from the Law Society of British Columbia concerning solicitors named Hoodekoff, Short and Roadburg.

In *Stephens*, the Solicitor was reprimanded in Convocation and ordered to pay the Law Society's costs in the amount of \$378.16. Mr. Stephens had smuggled a sports car into Canada, sworn a false affidavit concerning the value of the vehicle, defrauded the Government of Canada of \$1,200.00 in duties and taxes, and the Government of Ontario in the amount of \$600.00 in provincial sales taxes. Mr. Stephens was convicted of defrauding the Government of Canada of a value in excess of \$1,000.00. In that case the Committee found that there were a number of facts that had affected the Solicitor around the time the offence was committed. The Committee also found that the Solicitor had suffered greatly as a result of the publicity concerning his offence.

In *B.C.B.* the Solicitor was reprimanded in Committee. The Solicitor in that case arranged for persons to affix their signatures to the last page of their affidavits before any of the material in the affidavit was inserted. The material subsequently placed in the affidavits was not alleged by the Crown to be false in their factual content. The affidavits were "pro forma" affidavits (the words are those of Provincial Court Judge Salem) involving non-contentious factual matters necessary to establish a factual framework for a *Charter* motion. The Solicitor pleaded guilty in the Provincial Court to the offence of using or offering to use a writing purporting to be an affidavit that he knew was not sworn or declared by the affiant. The Solicitor received an absolute discharge on that offence.

In British Columbia, the discipline process is different than our process, in that the Committee hearing the matter makes a finding and imposes punishment. The Committee also decides whether the identity of the member should be published when publication is made of the Discipline Committee's proceedings. We view a discipline proceeding in British Columbia where the member's name is subsequently published to be equivalent to our reprimand in Convocation.

In *Hoodekoff*, the Solicitor was found guilty of conduct unbecoming a barrister and solicitor, by stealing a ratchet from Sears Department Store and then running away from store security personnel when approached by them.

On the issue of penalty, the following was said:

The Committee has taken into consideration the numerous letters as to the member's character from members of the Bar and of the Bench based on long associations with the member. The writers describe Mr. Hoodekoff as a hardworking, dedicated member of the profession and testified to his high ethical moral and professional standards and to his absolute honesty. All describe the incident giving rise to this situation as being totally out of character.

This unfortunate conduct arose very shortly following the tragic death of the member's father following a long bout with cancer. The member, who had nurtured his father during his final illness, was grief stricken and down cast.

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Dr. Maelor Vallance, chairman of the Psychiatric Services Commission, in his report tells us that Mr. Hoodekoff became progressively more withdrawn and depressed. It was in this mental and emotional state that this conduct occurred and was followed by a brief period of panic. This was recognized by the Provincial Court when in lieu of entering a conviction it granted Mr. Hoodekoff a conditional discharge.

We deem it inappropriate in the circumstances for us to impose a penalty when the court deliberately refrained from doing so, particularly in view of the evidence before us of the member's exemplary background and of the very helpful report of Dr. Maelor Vallance as to the psychological background of this offence and the extreme unlikelihood of any recurrence, which evidence and opinion we accept.

In our view the requirements of justice will be satisfied by a reprimand which we hereby impose, and by an order that the member pay the costs of these proceedings, on or before the 1st day of July, 1987.

The Committee made no recommendation one way or the other in regard to publication.

In *Short*, Mr. Short was arrested for shoplifting two items of a value of \$7.54 from a Safeway store. That charge was eventually dealt with through the Diversion Centre, and the proceedings against Mr. Short were stayed. As a result of the charge the Law Society became aware that after Mr. Short signed his application to article he had been convicted in Saskatchewan of possession of marijuana under the *Narcotic Control Act* and possession of mushrooms under the *Food and Drug Act*. He had been fined \$100.00 on each offence. There were a number of factors affecting Mr. Short at the time of the commission of the theft offence. In April of 1984 after Mr. Short had returned from a three and one-half month leave in Hong Kong, he found that the firm he was associated with had gone through a significant unsettling transition. His position in the firm had been effected by these changes. Mr. Short was scheduled to have a contested divorce hearing on June 5 and 6, 1984. He was to attend the third day of examinations for discovery on Saturday, May 26, 1984. On Friday, May 25, 1984, Mr. Short concluded a particularly strenuous preliminary inquiry involving a grizzly murder. After that he was invited to a party and it was while picking up items for the party that he found he did not have sufficient funds to pay for all the items that he had picked up at Safeway.

Mr. Short had consulted a psychiatrist in the previous year about his divorce problems. He sought professional advice from the psychiatrist concerning the shoplifting charge. The psychiatrist indicated in a report that at the end of May, 1984 Mr. Short was at a crisis point in his life and was experiencing stress which goes far beyond anything that one would normally encounter in daily life.

Letters were received from Crown counsel and regional Crown counsel indicating that Mr. Short was diligent, hardworking, conscientious and an ethical counsel. The senior partner in Mr. Short's firm advised that Mr. Short had a good reputation as a defence counsel and that Mr. Short had exhibited a high degree of interest and competence in the area of criminal law.

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The Committee levied a fine of \$1,000.00 with respect to Mr. Short's failure to advise the Law Society about his drug conviction in connection with his enrolment as an articulated student. With respect to the theft charge, the Committee issued a reprimand to the member and referred the member to Interlock for an assessment to determine whether or not to impose conditions on Mr. Short's practice. The Committee refused a request that publication of the hearing be made anonymously.

Subsequently, after receiving the Interlock report, the Committee decided that no conditions of practice should be imposed on Mr. Short.

In *Roadburg*, Mr. Roadburg was arrested for stealing two software items valued at \$109.90 from the Super Software Store in Richmond, B.C. Mr. Roadburg was referred to the Diversion Program which he successfully completed. Mr. Roadburg consulted Dr. Maelor Vallance shortly after his arrest and at the time of the discipline hearing he was undergoing psychiatric treatment by another doctor who had provided a report to the Committee.

The Committee ordered that Mr. Roadburg be reprimanded for his conduct. The Committee rules that Mr. Roadburg continue in therapy as recommended by his psychiatrist and that reports from the psychiatrist be provided to the Law Society. Mr. Roadburg was to pay the costs of the hearing, not exceeding \$950.00. The Committee declined to make an order that the identity of the member not be published when publication was made of the Committee's proceedings. The Committee went on to recommend to the Secretary of the Law Society that he direct that the publication of this case make it clear that the panel did not hold the opinion that Mr. Roadburg was a generally dishonest person; on the contrary, other than the single incident which caused him to be before the Committee, they were not aware of anything against the character or reputation of the member.

Against the background of those cases, the Committee has reached its decision to recommend that the Solicitor be reprimanded in Convocation. The following factors were considered by the Committee in reaching its decision. There is no significance to the order in which the factors are listed.

1. No psychiatric evidence was placed before the Committee. Even having regard to the Solicitor's Metis background, the Committee was uncertain whether the Solicitor's attendance at the Healing Circle, could be considered equivalent to having sought psychiatric treatment.
2. No character evidence was presented on behalf of the Solicitor.
3. The fraud offence in this case was more serious than a spur of the moment, impulse shoplifting offence. The offence required some degree of planning and sophistication.
4. There was no evidence before the Committee confirming the Solicitor's domestic problems, depression arising therefrom, or the Solicitor's drinking problems.
5. With regard to the criminal offence, the Solicitor did not exhibit remorse by an early guilty plea. While it is understandable that an accused person might seek to avoid the consequences of his actions, we note the following matters in regard to the criminal proceedings against the Solicitor:
  - (a) an Askov application was brought on his behalf seeking a stay of the proceedings based on unreasonable delay;

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- (b) the Solicitor pleaded not guilty at the outset of the trial, and evidence was called against him;
  - (c) on the second day of the trial the Solicitor entered a guilty plea.
6. The Solicitor has been publicly humiliated twice as a result of his arrest and prosecution.
  7. The Solicitor, as a result of his arrest has converted to become a member of the Jehovah's Witness' congregation. A letter from Cameron Pope, an elder in the Treverton Park congregation is attached to the Solicitor's letter of November 24, 1992.
  8. The Solicitor has no prior discipline history and three year and one-half years have now passed since the Solicitor's arrest. If a person had been convicted of this offence prior to his admission to the Bar, the Committee was of the view, that with appropriate character evidence, the conviction would not preclude an admissions committee from finding that such an applicant met the good character requirement for admission to the Bar.
  9. Notwithstanding a very difficult family background, the Solicitor had been admitted to the Bar in Ontario.
  10. Many members of the Solicitor's community and his clients were aware of the Solicitor's arrest and prosecution on the fraud charge and this has had a serious impact on the Solicitor and his practice.

While a more serious penalty could be recommended in this case the Committee was of the view that the conduct was extremely unlikely to be repeated by the Solicitor, and for that reason a reprimand in Convocation would be sufficient punishment in this case. The profession should be aware however, that dishonest conduct by members of the profession will be dealt with in a serious manner by the Society.

Christopher MacDougall Reid was called to the Bar and admitted as a Solicitor to the Supreme Court of Ontario on the 15th day of April, 1987.

ALL OF WHICH is respectfully submitted

DATED this 8th day of January, 1993

"P. Copeland"  
Paul D. Copeland  
Chair

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Recommendation as to Penalty contained in the Report that is, that the solicitor be reprimanded in Convocation, be adopted.

28th January, 1993

There were brief submissions by counsel for the Society in support of the Recommendation.

There were questions from the Bench.

The matter was stood down to allow counsel and the solicitor to consider problems with dates in the Report.

.....

GREGORY PETER LINTON VANULAR, Pickering

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock, Copeland and Carter withdrew.

Mr. Gavin MacKenzie appeared for the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 7th January, 1993 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 11th January, 1993 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by the solicitor on 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul Copeland, Chair  
Robert J. Carter, Q.C.  
Joan Lax

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

Christina Budweth  
for the Society

GREGORY PETER LINTON VANULAR  
of the Town  
of Pickering  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 27, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 2, 1992, Complaint D128/92 was issued against Gregory Peter Linton Vanular, alleging that he was guilty of professional misconduct.

The matter was heard in public on October 27, 1992, before this Committee composed of Paul Copeland, Chair, Robert J. Carter, Q.C., and Joan Lax. Mr. Vanular attended the hearing and was not represented. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D128/92

2. (a) He personally guaranteed a loan in which his client, Sam Beninato, was the borrower contrary to Rule 13, Commentary 6 of the Rules of Professional Conduct; and
- (b) In relation to the circumstances detailed in particular (a), he failed to honour his guarantee when called upon to do so thereby violating the provisions of Rule 13, Commentary 6 of the Rules of Professional Conduct.

Evidence:

The evidence in this matter consisted of the following Agreed Statement of Facts together with oral evidence from the Solicitor. This evidence is described in the Reasons for recommendation as to Penalty.

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D128/92 and is prepared to proceed with a hearing of this matter on October 27 and 28, 1992.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D128/92 and this agreed statement of facts and admits the particulars contained in the complaint. The Solicitor also admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the bar on April 9, 1981. He practises as a sole practitioner in Pickering.

28th January, 1993

5. Sam Beninato was a long standing client of the Solicitor. At one time, the Solicitor and Mr. Beninato were partners in a restaurant business. Mr. Beninato was also a licensed real estate agent. Mr. Beninato established a company, R.M.S. Home Marketing Services, the concept of which was to assist homeowners in selling their homes without a real estate agent. In 1991, Mr. Beninato requested that the Solicitor assist him in finding financing for the venture which required an infusion of capital.

6. The Solicitor referred Mr. Beninato to a mortgage broker. The broker arranged for a Sam Berkel to contact the Solicitor on behalf of the potential lender, Maxine Cooper. Mr. Berkel and the Solicitor arranged the details of a loan from Ms. Cooper to Mr. Beninato in the amount of \$15,500. One of the conditions of the advance was that the Solicitor was required to guarantee the loan, both personally and through his law firm. The funds would not have been advanced without the guarantees provided by the Solicitor and his firm.

7. In addition to the guarantees provided by the Solicitor, Mr. Beninato agreed to provide collateral for the loan in the form of a GIC in the amount of \$7,500 from the Bank of Nova Scotia. A term of the GIC is set to expire in 1993.

8. At all times during the transaction, Maxine Cooper was independently represented by a solicitor, Jack Greenberg.

9. Mr. Greenberg prepared the documentation in relation to the loan which included a promissory note, the guarantee and the pledge agreement for the GIC. Attached as Exhibits 1 and 2, respectively, are a copy of the guarantee of the Solicitor and his law firm to the lender Maxine Cooper and a copy of the pledge agreement pledging a Bank of Nova Scotia GIC number 104-99 as security for the loan.

10. The proceeds of the loan were paid directly to Mr. Beninato by way of a cheque drawn against Mr. Greenberg's trust account. Mr. Beninato never made any payments on the loan. Ms. Cooper attempted to collect directly from Mr. Beninato and then from the Solicitor.

11. After numerous demands, the Solicitor sent Mr. Berkel, on behalf of Ms. Cooper, a cheque to cover payments under the loan together with a handwritten note. A copy of the handwritten note is attached as Exhibit 3 to this agreed statement of facts. The cheque from the Solicitor, drawn against his firm's general account, was returned by the bank NSF.

12. Ultimately, a statement of claim was issued against the Solicitor and default judgement obtained.

13. The Solicitor has not yet made any payments toward satisfaction of the guarantee.

V. PRIOR DISCIPLINE

14. On May 24, 1988 the Solicitor was found guilty of professional misconduct for participating in financing for his personal residence that had been structured to disguise the fact that he was a borrower and to make it appear that the price paid for the property was higher than it actually was; that he borrowed money from clients without insuring that their interests were protected; and, that during the period 1984 to mid-1987 there were frequent unreasonable delays in the completion of his work on behalf of clients. By Order of Convocation dated June 23, 1988, the Solicitor's right to practice was suspended for six months effective July 11, 1988 and he was ordered to pay a fine of \$5,000. The Solicitor resumed practise on January 11, 1989. Convocation also ordered that at the completion of the suspension the Solicitor was to practice with an experienced solicitor for an indefinite period until relieved by Convocation. Copies of the complaints D135/87 and the Report and Decision of the Discipline Committee respecting the aforesaid are attached collectively as Exhibit 4 to this agreed statement of facts.

15. The Solicitor was found guilty of professional misconduct on February 26, 1991 for failing to reply to the Society. On that occasion the Solicitor was reprimanded in committee. A copy of complaint D213/90 is attached as Exhibit 5 to this agreed statement of facts.

16. On May 8, 1991, the Solicitor was found guilty of professional misconduct in respect of complaint D26a/89 for failing to meet a financial obligations arising out of his practice, including: a \$33,000 judgement in favour of a client; and, payment of an Errors & Omissions deductible. On that occasion the Solicitor was reprimanded in committee.

17. On April 14, 1992 the Solicitor was found guilty of professional misconduct for exhibiting a standard of practise below that expected of a barrister and solicitor. The complaint was supported by particulars alleging the Solicitor's unreasonable delay in replying to the Society, his delay in fulfilling undertakings and his failure to honour financial obligations arising out of his practise. The discipline committee recommended that the Solicitor be reprimanded in Convocation. The matter is pending the October 22 Convocation.

18. The Solicitor has been suspended on several occasions between November 1989 and June 1992 as follows:

<u>Suspended</u>	<u>Reinstated</u>	<u>Reason</u>
November 24, 1989	December 15, 1989	Non Payment of E&O levy
May 25, 1990	June 27, 1990	Non payment of E&O levy
November 23, 1990	December 27, 1990	Non payment of E&O levy
February 23, 1990	March 7, 1990	Non payment of annual fees
May 24, 1991	May 31, 1991	Non payment of E&O levy
November 29, 1991	December 12, 1991	Non payment of E&O levy
March 6, 1992	April 2, 1992	Non payment of annual fees
June 5, 1992	June 10, 1992	Non payment of E&O levy

DATED at Toronto this 23rd day of September, 1992."

RECOMMENDATION AS TO PENALTY

The majority of the Committee recommend that Gregory Peter Linton Vanular be disbarred.

28th January, 1993

REASONS FOR RECOMMENDATION

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Counsel for the Society submitted that the Solicitor be suspended for a definite period of nine months, pay the Society's costs in the amount of \$2,500, or be suspended for a longer period if the outstanding judgment is not paid before this matter reaches Convocation. Alternatively, Ms. Budweth submitted that the Solicitor be disbarred.

Mr. Vanular submitted that he be suspended for an indefinite period until the judgment is paid. Alternatively, he submitted that he be given permission to resign.

The Committee recommends that the Solicitor be disbarred.

Reasons for Recommendation:

The Solicitor was called to the bar in April 1981. In his eleven years as a member of the legal profession, he has appeared before Discipline Committees on five separate occasions. On each of these occasions, he has been found guilty of professional misconduct. In addition, he was, between November 1989 and June 1992, suspended eight times for non-payment of either annual fees or the Errors and Omissions Levy. It is against this disciplinary record that the Committee considered the penalty to be imposed in this case.

The facts in this matter are straightforward. The Solicitor's longstanding client and former business partner, Mr. Benimato, needed financing for a business venture and approached the Solicitor for assistance. The Solicitor referred Mr. Benimato to a mortgage broker. The broker arranged for Mr. Sam Berkel to contact the Solicitor on behalf of a potential lender, Ms. Cooper.

In June 1991, Mr. Berkel and the Solicitor arranged for Ms. Cooper to advance the sum of \$15,500 to Mr. Benimato on the condition that the Solicitor guarantee the loan, both personally and through his law firm. It is admitted that the funds would not have been advanced without these guarantees. The loan was secured by collateral in the form of a GIC in the amount of \$7,500 from the Bank of Nova Scotia, pledged to Ms. Cooper by Mr. Benimato. Ms. Cooper was independently represented by a Solicitor, (Mr. Greenberg) who prepared the documentation in relation to the loan. The proceeds were paid directly to Mr. Benimato by way of cheque drawn against Mr. Greenberg's trust account.

Mr. Benimato made no payment on the loan and Ms. Cooper attempted to collect the debt, initially from Mr. Benimato and then from the Solicitor. After numerous demands for payment, the Solicitor sent Mr. Berkel, on behalf of Ms. Cooper, a cheque drawn on his firm's general account to cover the payments under the loan. This was accompanied by a handwritten note dated September 30, 1991. The note reads:

September 30/91

Sam,

I really hate covering for this asshole. But I will live up to my word. Call me tomorrow to work a plan out to get this prick.

Regards,  
" Greg "

28th January, 1993

The cheque from the Solicitor which accompanied this note was returned by the bank N.S.F.

Ms. Cooper ultimately sued Mr. Benimato, his company, the Solicitor, and the law firm, Vanular & Barna. She obtained judgment on April 7, 1992 against the Solicitor and his firm in the amount of \$16,751.07 with interest at 20% per year and costs in the amount of \$275 with interest at 9% per year.

At the time of the hearing before the Committee, the Solicitor had made no payments to satisfy the judgment.

The Solicitor was not represented at the hearing and did not ask to give evidence. At the outset of his submissions, he characterized Ms. Budweth's submissions as breathing fire for 15 minutes. Shortly after commencing his submissions, the Solicitor began to state matters that we regarded as evidence. We requested him to testify under oath. Accordingly, an oath was administered and the Committee therefore had the benefit of hearing the Solicitor's explanation of the Benimato-Cooper transaction outlined above. It also had the benefit of assessing the Solicitor's demeanour and credibility.

The Committee was extremely discouraged and disappointed by the Solicitor's lack of sympathy, concern or understanding for the position of the lender, Ms. Cooper. During his evidence, the Solicitor sought only to explain his predicament by casting blame on his client, Mr. Benimato. The Solicitor alleged that he had given his guarantee only to assist a client who required financing. He pointed out that there was no personal benefit to him, which is true. According to the Solicitor, he gave the guarantee "out of the goodness of his heart". His appreciation of the event can best be described as extreme anger with Mr. Benimato. At no time did the Solicitor appear to appreciate the significance of giving a guarantee qua solicitor when he knew that a member of the public had relied on the integrity of his personal guarantee and that of his law firm. Nor, did he seem to understand that to dishonour the guarantee was wrong. We have heard no evidence of any attempt by the Solicitor to contact Ms. Cooper or to apologize for his inability to honour the guarantee. The Solicitor showed no remorse for his conduct and the Committee concluded he simply didn't care about dishonouring the guarantee.

At the outset of the hearing, the Solicitor requested an adjournment stating that he wanted to and intended to satisfy the Judgment. However, there was absolutely no evidence that the Solicitor had made any attempt at any time to contact Mr. Berkel or Ms. Cooper to do this. When asked why he had not honoured the cheque sent with his note of September 1991, he replied that he had more pressing obligations at the time. However, the Solicitor presented no evidence of inability to pay, either in September 1991, or at the time of the hearing. In fact, his evidence was to the contrary.

Since the events giving rise to this complaint, the Solicitor has been before a Discipline Committee in April 1992, before Convocation in June 1992, before a Discipline Committee (to set a date in this matter) in July 1992, and before Convocation in October 1992. The formal complaint in this matter was sworn on July 2, 1992. The Solicitor had ample time since September 1991 to make good his guarantee. The Committee was advised that the Solicitor had obtained an adjournment from September 1992 to October 1992 by signing the Agreed Statement of Facts and agreeing that the matter would proceed on October 27. The Solicitor's request for adjournment was denied.

Prior Disciplinary Record:

The Solicitor's first appearance before a Discipline Committee was in May 1988, when he was found guilty of professional misconduct for participating in financing for his personal residence that had been structured to disguise the fact that he was a borrower and to make it appear that the price paid for the property was higher than it actually was; that he borrowed money from clients without ensuring that their interests were protected; and, that during the period 1984 to mid-1987 there were frequent unreasonable delays in the completion of his work on behalf of clients. In that matter, there was a Joint Submission as to Penalty. The recommendation was a six-month suspension and a \$5,000 fine, which recommendation was accepted by Convocation in June 1988.

In the 1988 complaint, the Discipline Committee, composed of John D. Ground, Q.C., as Chairman, Philip M. Epstein, Q.C. and Donald H. L. Lamont, Q.C., stated in its reasons as follows:

...: The Solicitor appears to have been the victim of the real estate broker who structured the transaction and a victim of circumstances in regard to the transaction involving the purchase of his residence. The Committee is satisfied that his failure to ensure that clients from whom monies were borrowed were protected by independent legal representation was as a result of the Solicitor's misunderstanding of the rules and did not indicate any lack of integrity on the part of the Solicitor. The Committee is further satisfied that the Solicitor has taken proper steps to ensure that the deficiencies in the carrying on of his practice has been rectified and has employed a senior Solicitor in both of his firm's offices to be responsible for the carrying on of the real estate practice.

Counsel for the Society submitted that the Committee's recommendation in the 1988 complaint was influenced by their view that the Solicitor was then a young lawyer who had made a grave error at the beginning of his career. In that case, the Committee appears to have accepted that the Solicitor was "victimized" both by circumstances and an unsavoury real estate broker. Here, the Solicitor sought to explain the events giving rise to his misconduct in similar terms. He characterized himself as a "victim" of an unsavoury client and business partner who took advantage of his good nature. We entirely reject this. Although it is likely that the Solicitor hoped that Mr. Benimato would make payments on the loan, there is no evidence that the Solicitor took steps to satisfy himself that this would in fact occur. We are unable to determine why the Solicitor was willing to give his guarantee and that of his firm in this instance. Nevertheless, we do not view the Solicitor as a "victim", nor do we believe that the guarantee was given only, if at all, "out of the goodness of his heart".

The balance of the Solicitor's disciplinary record is described briefly below.

In February 1991, the Solicitor was found guilty of professional misconduct for failing to reply to the Society. There was a reprimand in Committee.

28th January, 1993

On May 8, 1991, the Solicitor was found guilty of professional misconduct for failing to meet a financial obligation arising out of his practice, including: a \$33,000 judgment in favour of a client; and, payment of an Errors and Omissions deductible. Counsel for the Society referred to this as an 'omnibus' complaint in that many of the complaints particularized here were known at the time of the earlier complaint. In the result, the Solicitor was reprimanded in Committee.

In April 1992, the Solicitor was found guilty of professional misconduct for exhibiting a standard of practice below that expected of a barrister and Solicitor. The complaint was supported by particulars alleging the Solicitor's unreasonable delay in replying to the Society, his delay in fulfilling undertakings, and his failure to honour financial obligations arising out of his practice. The Discipline Committee recommended that the Solicitor be reprimanded in Convocation and this recommendation was adopted by Convocation on October 22, 1992. It is worth noting that this reprimand occurred on the Thursday prior to the discipline hearing in this matter.

It was a term of the 1988 suspension order that after the restoration of the Solicitor's privileges, that he be required to practise with another experienced Solicitor. It was clear to us from both the submissions of counsel for the Society and the Solicitor that this was, to use the words of counsel for the Society, "an unmitigated disaster". According to Ms. Budweth, the Solicitor's business acumen exceeded the ability of the senior lawyer to adequately supervise the Solicitor's practice. Having heard and observed the Solicitor, we have no doubt that this is so. We find that the supervision order was frustrated and undermined by the Solicitor. Subsequently, a second Solicitor was engaged to attempt to succeed where the first had failed. This arrangement also proved entirely unsuccessful. The Solicitor's subsequent partnership with Mr. Barna, which lasted for approximately two years, was not approved by the Law Society. We conclude that reasonable efforts have been made to assist Mr. Vanular to meet the standards expected of him in this profession. These efforts have not been successful. We are firmly of the view that future similar efforts would be entirely unproductive, due to the Solicitor's lack of co-operation and unwillingness to improve his conduct.

The Solicitor submitted that if we rejected a suspension order, he be given permission to resign. This is not a case for this form of penalty. The Committee heard no evidence of any compelling circumstances, indeed of any circumstances at all, which could provide a context for Mr. Vanular's conduct. There is no evidence of addiction, illness, personal tragedy or psychiatric problems. Further, there is no character evidence. We simply have no evidence upon which to found a recommendation for permission to resign and we therefore reject this as an appropriate penalty.

We also reject the Solicitor's alternative submission that he be suspended until the Judgment is paid. The Solicitor has had ample time to discharge his guarantee. He presented us with no plan for payment. We were left with his simple assertion that he intended to pay. There is no evidence which would give us confidence that this would in fact happen. In any event, in view of the Solicitor's prior disciplinary record, we are of the view that a harsher penalty is warranted.

This brings us to considering whether the appropriate penalty here is a lengthy period of suspension or disbarment.

28th January, 1993

We believe that the Solicitor's conduct in this particular matter calls for a lengthy period of suspension. However, his conduct cannot be viewed in isolation. In assessing penalty, we are influenced by and have taken into account the Solicitor's conduct since 1988 and by his disciplinary record. From this, we conclude that the Solicitor appears to be ungovernable or verging on ungovernable. Both his prior history and his demeanour before our Committee disclosed a course of conduct which is entirely disdainful of the processes and rules of our profession and of the public which we serve.

It is true that this is not a misappropriation case in the conventional sense. It is true that Ms. Cooper may recover a portion of her loss from the GIC pledged to her by Mr. Benimato. It is true that the Solicitor received no personal benefit from this transaction. But, there does not appear to be any way to protect the public, short of disbarment, from the kind of conduct in which Mr. Vanular engages. His conduct is thoroughly dishonest and contemptuous of the public. Had there been character evidence presented to us, or had we received other evidence apart from what we have described in this Report, we might well have been persuaded that a lengthy period of suspension would be the appropriate penalty. However, in the absence of this evidence, having regard to the facts of this case, and in light of a prior disciplinary record of some significance, we believe that the appropriate penalty is disbarment.

Gregory Peter Linton Vanular was called to the bar and admitted as a Solicitor of the Supreme Court of Ontario on the 9th day of April, 1981.

ALL OF WHICH is respectfully submitted

DATED this 7th day of January, 1993

"P. Copeland"  
Chair

"J. Lax"  
Joan Lax

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were brief submissions by the solicitor.

The Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the majority Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

Counsel for the Society made submissions in support of the majority Recommendation.

The solicitor made submissions in support of the dissenting Recommendation that is, suspension until the loan was paid or in the alternative that he be permitted to resign.

There was no reply by Mr. MacKenzie.

There were questions from the Bench.

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

The Motion to disbar was lost.

It was moved by Mr. Somerville, seconded by Ms. Curtis that the solicitor be permitted to resign.

Lost

It was moved by Mr. Finkelstein, seconded by Mr. Bragagnolo that Convocation accept the dissenting Recommendation of a suspension of the longer of 9 months or a suspension until the Judgment was paid and the solicitor to pay the Society 's costs.

Carried

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

The solicitor requested that the suspension be effective February 13th, 1993 to allow him to complete pending criminal trials.

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

It was moved by Mr. Hill, seconded by Mr. Manes that the effective date remain as at the date of Convocation.

Not Put

It was moved by Mr. Bragagnolo, seconded by Mr. Finkelstein that the suspension commence on February 13th, 1993.

Carried

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

Counsel and the solicitor retired.

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RESUMPTION OF THE CHRISTOPHER MACDOUGALL REID MATTER

Counsel for the Society clarified discrepancies in the dates in the Report and advised that the solicitor's problems pre-dated his arrest.

There was no reply by the solicitor.

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

The motion to reprimand the solicitor was adopted.

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

The solicitor was reprimanded in public.

Counsel and the solicitor retired.

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PHILIP CAMERON UPSHALL, Brampton

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

Messrs. Rock and Bragagnolo, Ms. Curtis and Ms. Weaver withdrew.

Mr. Gavin MacKenzie appeared for the Society and Mr. David Porter appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 28th November, 1992 together with an Affidavit of Service sworn 18th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th December, 1992 (marked Exhibit 1) together with Acknowledgement, Declaration and Consent signed by counsel for the solicitor on 28th January, 1993 (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

Rino C. Bragagnolo, Q.C., Chair  
Mary P. Weaver, Q.C.  
Carole Curtis

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

Gavin MacKenzie  
for the Society

PHILIP CAMERON UPSHALL  
of the City  
of Brampton  
a barrister and solicitor

David M. Porter  
for the solicitor

Heard: September 1, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 25, 1992, Complaint D53/92 was issued against Philip Cameron Upshall, alleging that he was guilty of professional misconduct.

The matter was heard in public (with the exception of psychiatric reports put in as Exhibit 4 which were in camera) on September 1, 1992 before a Committee composed of Rino C. Bragagnolo, Q.C., Chair, Mary P. Weaver, Q.C. and Carole Curtis. Mr. Upshall attended the hearing and was represented by David M. Porter. Gavin MacKenzie appeared as counsel for the Law Society.

DECISION

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

Complaint D53/92

2. a) During the period 1989 to 1990, he misappropriated approximately \$737,072.74 from the trust account of Upshall, MacKenzie and Kelday and specifically misappropriated funds entrusted to him and the firm by the following clients: Rita Houston, Jack Dossett, Cal Gibson, Feather Industries (Canada) Limited and the Estate of Bruce Upshall.
- b) He misappropriated approximately \$1,072,400 from his mixed trust account during the period March 1, 1991 to August, 1991.
- c) He acted in a conflict of interest, contrary to the provisions of Rule 5 of the Rules of professional Conduct, by participating in a joint venture, Mississauga Road Partnership Number One, with Clients, James O'Donnell and Bob Attrell, and by failing to advise them of the nature of his conflict and obtaining their consent to his continuing to act in the matter and participate in the venture.
- d) In the transaction detailed in particular (c), he misrepresented the purchase price of the investment property to his clients, Bob Attrell and James O'Donnell. In addition, he improperly profited in the amount of approximately \$130,000 by misappropriating the investor funds which were paid in excess of the actual purchase price.
- e) In the transaction detailed in particulars (c) and (d) above, he improperly profited by approximately \$110,023.43 on the sale of his client Bob Attrell's interest in the property to his client Rolf Chen when in the course of the transfer between his two clients he misrepresented the purchase/sale price of the interest in the property to both clients.
- f) In respect of particulars (c) and (d) detailed above, he forged and uttered two agreements of purchase and sale in furtherance of the misrepresentations.
- g) He misappropriated \$100,000 received from his clients, Beverley Corlett and Douglas Thompson, for investment.
- i) Following the misappropriation detailed in particular (h), he forged a document, being an acknowledgement of a \$20,000 investment in Hudson's Bay Mining & Smelting Ltd., by his client, Rita Houston, when no such investment was made by him on behalf of Rita Houston.

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D53/92 and is prepared to proceed with a hearing of this matter on September 1, 1992.

II. ADMISSIONS

2. The Solicitor, having been advised by his counsel, David Porter, admits particulars (a) through (g) and (i) set forth in Complaint D53/92, admits the facts as set forth in this agreed statement of facts, and acknowledges that he is accordingly guilty of professional misconduct.

III. BACKGROUND FACTS

3. The Solicitor was called to the bar in 1969. From 1972 to December 15, 1990, he practised as a partner in the firm Upshall, MacKenzie and Kelday in Brampton. Thereafter he practised in Brampton as a sole practitioner. He withdrew from practice in late 1991 as a result of the Law Society investigation that culminated in this complaint, and he has since provided to the Law Society a written undertaking not to practise law pending the completion of these discipline proceedings.

IV. FACTS RELATING TO COMPLAINT D53/92  
(a) - Particular 2(a)

4. The Solicitor misappropriated \$737,072.74 from the trust account of Upshall, MacKenzie and Kelday during 1989 and 1990.

(i) Rita Houston - \$40,000.

In September 1989, Rita Houston gave the Solicitor three cheques totalling \$43,000 to invest. He returned \$3,000 to her and advised that \$40,000 had been placed in a capital certificate. He gave her a receipt which stated that the certificate was due September 30, 1991 at \$44,000. He did not invest her money, but rather misappropriated it by depositing it into his personal bank account for his exclusive use.

(ii) Jack Dossett - \$340,000

6. In January, 1990, Jack Dossett gave the Solicitor \$110,000 to invest. The Solicitor deposited the money into the trust account of the partnership. Trust cheques were then issued in the amount of \$100,000 to National Trust Company which was deposited into the Solicitor's personal account at National Trust and in the amount of \$10,000 to his company 767137 Ontario Limited.

7. The Solicitor repaid the \$110,000 misappropriation by transferring \$10,204.02 from a trust account of the Estate of Bruce Upshall, by depositing \$96,795.98 to the Dossett trust account from the proceeds of the sale of shares owned by the Estate of Bruce Upshall and by transferring \$3,000 from his personal bank account at National Trust. On March 30, 1990, he issued a trust cheque to Jack Dossett for \$110,000.

8. On April 4, 1990, the Solicitor received an additional \$125,000 from Mr. Dossett to invest. He deposited all of this money into his personal bank account at National Trust Company.

28th January, 1993

9. On October 30, 1990, the Solicitor received yet another \$105,000 from Jack Dossett. \$40,000 of this money was deposited in the partnership's general account. The remaining \$65,000 was deposited into his personal bank account at the Toronto-Dominion Bank. To cover up the misappropriation, the Solicitor sent false details of investments to Mr. Dossett by facsimile transmission.

(iii) Cal Gibson - \$260,000

10. On August 20, 1990, the Solicitor deposited \$210,000 in the partnership's trust account which were monies he received from Mr. Gibson with instructions to invest. He issued trust cheque for \$150,000 to UMK Financial Services Limited general account and issued two cheques in the amount of \$60,000 and \$50,000 to National Trust Company. These cheques were deposited in his personal account. UMK Financial Services was a mortgage brokerage company which at the time was owned by the partnership.

11. To induce Mr. Gibson to invest the Solicitor approached him with an offer to earn 16% interest on surplus funds Mr. Gibson had just received from the sale of his business. The Solicitor had acted for Mr. Gibson on the sale of the business.

(iv) Feather Industries (Canada) Limited - \$80,000

12. In 1990, the Solicitor acted for his corporate client, Feather Industries, on a mortgage refinancing on property owned by the client located at 115 Scarlett Road, Toronto. He received mortgage proceeds of \$700,000 from National Trust and deposited this into the trust account of the partnership. He issued a trust cheque in the amount of \$600,000 to the Canadian Imperial Bank of Commerce for payment of a previous mortgage. He also issued a trust cheque for \$80,000 to National Trust Company which was deposited into his personal bank account. He then transferred \$80,000 from his father's estate, the Estate of Bruce Upshall, which increased the trust balance in the Feather Industries client ledger to \$96,333.60 and issued a trust cheque in the amount of \$96,000 to Feather Industries.

(v) The Estate of Bruce Upshall - \$17,072.74

13. Bruce Upshall died on December 27, 1989. Letters probate were granted February 27, 1990. The Solicitor, his brother John, and his sister Marguerite were named as executors and trustees. Details of misappropriation from his father's estate by the Solicitor, are set out in the chart below:

(b) - Particular 2(b)

14. The Solicitor misappropriated \$1,072,400 from his mixed trust account between March and August, 1991, inclusive.

(i) \$392,400 Trust Shortage

15. The Solicitor caused a \$392,400 trust shortage by making five disbursements from his trust account without instructing his bookkeeper to enter the disbursements in his trust books and records.

(ii) Metrospot Television Ltd.

16. In January, 1991, the Solicitor asked his client Metrospot Television Ltd., to provide him with \$100,000 to be used as "show money", that is, to enable him to inform others that he held \$100,000 in trust as security in connection with financing that he was arranging. The Solicitor used the \$100,000 for his own purposes. He repaid the \$100,000 to Metrospot in May, 1991, by misappropriating a further \$100,000 from his mixed trust account. This \$100,000 forms part of the \$392,400 trust shortage referred to in paragraph 15.

(iii) Rita Houston - \$20,000

17. In May, 1991, Rita Houston gave the Solicitor \$20,000 in trust to invest. She provided no specific instructions other than she wanted him to find her a good investment. The Solicitor deposited her money into a trust bank account on May 14, 1991 and on the same day issued a trust cheque payable to himself which was deposited into his general account. The Solicitor then provided Ms. Houston with a false acknowledgment of Hudson's Bay Mining & Smelting Ltd., and told her that the \$20,000 had been invested in securities of that company.

(iv) Cal Gibson - \$150,000

18. In April, 1991, Cal Gibson gave the Solicitor \$150,000 in trust for the purposes of purchasing shares in Lectronic Caddy Inc. The Solicitor deposited the money into his trust account but issued a \$75,000 trust cheque to Feather Industries Ltd., a \$50,000 cheque to Philip Upshall General Account and a \$25,000 trust cheque to himself. The \$75,000 paid to Feather Industries was a repayment of \$75,000 misappropriated earlier, which is included in the \$392,400 misappropriation referred to in paragraph 15.

(v) Total Holdings Ltd. - \$300,000

19. In 1991, the Solicitor acted for his corporate client, Total Holdings Ltd., in drafting an agreement to purchase a Toyota automobile dealership. On July 29, 1991, the Solicitor received \$300,000 in trust on account of the purchase of this dealership. On that same day, he issued a trust cheque to Toronto-Dominion Bank in the amount of \$300,000 and deposited it into his personal bank account. The Solicitor then paid \$300,000 to his stockbroker, Richardson Greenshields.

(vi) Jack Dossett - \$130,000

20. The Solicitor received \$130,000 in trust from his client, Jack Dossett, in respect of a proposed offer to purchase a Honda automobile dealership in Oakville. The Solicitor deposited the \$130,000 into his mixed trust account on June 26, 1991. On June 28, 1991, he had issued a trust cheque for \$100,000 to Toronto-Dominion Bank. That \$100,000 was then deposited into his personal bank account at Toronto-Dominion Bank. On July 26, 1991 he issued a trust cheque for \$30,000 to the law firm of Bowyer Greenslade & Hall for the purpose of bringing the Mississauga Road Partnership Number One mortgage, referred to below, into good standing. The \$100,000 deposited into the Solicitor's personal bank account was paid to his stockbroker, Richardson Greenshields.

28th January, 1993

21. In 1988, the Solicitor offered to purchase approximately 50 acres of agricultural land on Mississauga Road in Brampton for \$1.6 million. The agreement of purchase and sale required \$100,000 in deposits and provided for a vendor take back mortgage of \$600,000. The balance of \$900,000 was due on closing. Norman Bain, in trust, appears as purchaser on the agreement; however, title to the property was engrossed in the name 767137 Ontario Limited, the Solicitor's company.

22. The Solicitor contacted his clients, James O'Donnell and Bob Attrell as well as his friend, Lou Duggan. The Solicitor informed them that the Mississauga Road lands were being purchased for \$2.1 million and showed them an agreement of purchase and sale to this effect. O'Donnell and Duggan each agreed to invest \$512,000, so that each received a one-third interest in the lands being purchased. Attrell agreed to invest \$256,000 for a one-sixth interest. The Solicitor retained the other one-sixth but contributed no funds toward the purchase price. The project was known as Mississauga Road Partnership Number One.

23. The client ledger regarding his transaction makes it clear that the surplus funds (over and above the true purchase price) were not used to close the deal or for the benefit of the investors. \$55,000 was paid to the Solicitor's personal account at National Trust and \$75,000 was paid to the Solicitor's personal account at the Toronto-Dominion Bank.

24. The Solicitor induced Duggan and O'Donnell into investing by telling them that the lands were "hot" and could be resold in the very near future for considerably more money. As an inducement, the Solicitor showed them an offer which he had received to sell the lands for \$2,604,732.

25. On the completion of the purchase, trust certificates were prepared setting out the investors' interests in the acquired lands which were held in trust by 767137. Reporting letters were sent stating the misrepresented purchase price to be \$2,103,822.

26. Attrell agreed to invest on the condition that if the lands were not sold within one year he could sell his interest to someone else. The Solicitor told him he had a group of clients from the Orient who would purchase Attrell's interest in the property for \$390,000. The Solicitor did eventually sell Attrell's interest to his client, Rolf Chen, for \$500,023.43, of which Attrell was paid only \$390,000. The difference of \$110,023.43 was misappropriated as follows:

1. \$10,868.61 to National Trust and deposited to Mr. Upshall's personal bank account;
2. \$6.90 to the general account of Upshall, MacKenzie and Kelday; and
3. \$99,147.92 to 767137 Ontario Limited, Upshall's corporation.

27. The Solicitor misrepresented the value of Attrell's share to Mr. Chen by advising him that the fair market value of the lands were \$67,000 an acre while he would be paying only \$60,000 an acre. The Solicitor advised Mr. Chen that he would be acquiring Lou Duggan's interest and accordingly misrepresented to him the identity of the partner whose interest Chen was acquiring.

28th January, 1993

28. In November, 1989, Beverley Corlett and her husband, Douglas Thompson each paid to the Solicitor \$50,000 for an interest in Mississauga Road land. The Solicitor never reported to them on this investment and they have received no documentation from him verifying the nature of their interest. These monies were misappropriated by him.

29. The Solicitor was in arrears on the vendor take back mortgage from the very first mortgage payment. On two subsequent occasions power of sale proceedings were commenced with judgment being obtained on the last occasion. The Solicitor misappropriated \$30,000 from his mixed trust account in July, 1991, to make a \$30,000 mortgage payment to bring the mortgage into good standing. Payments have not been made since July, 1991.

(d) - Particulars 2(h) and (i)

30. The facts relating to particulars 2(h) and (i) are set forth in paragraph 17 above. Because the \$20,000 misappropriated from Rita Houston is included in the \$1,072,400 misappropriated by the Solicitor from his mixed trust account, the Law Society respectfully requests leave to withdraw particular 2(h).

(e) Summary

31. Between 1989 and 1991, the Solicitor misappropriated \$737,072.74 from the mixed trust account of the firm of which he was a partner and \$1,092,400 from the mixed trust account of his sole practice. He also improperly profited in the amount of \$340,023.43 from sales of interest in a real estate venture in which he involved clients and friends in 1988 and 1989. This misconduct included the falsification of documents and other violations of the rules of professional conduct.

32. Of the \$1,829,472.74 which the Solicitor misappropriated, \$619,798 has been repaid, and \$1,209,674.74 remains unrepaid.

DATED at Toronto this 1st day of September, 1992."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Philip Cameral Upshall be disbarred.

REASONS FOR RECOMMENDATION

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Between 1989 and 1991, the Solicitor misappropriated \$737,072.74 from the mixed trust account of a firm of which he was a partner and \$1,092,400.00 from the mixed trust account of his sole practice. Of the funds misappropriated, \$1,209,674.74 remains unpaid. The Society's Audit Department has seized a stock portfolio in the Solicitor's name having a market value estimated between \$60,000.00 and \$100,000.00. The Solicitor has no other assets to repay the unpaid balance of the misappropriated monies. His only present source of income is a disability pension.

The Solicitor also improperly profited in the amount of \$340,023.43 from the sale of a real estate joint venture in which he involved clients and friends in 1988 and 1989.

28th January, 1993

This misconduct included the falsification of documents and other violations of the Rules of Professional Conduct.

It should be noted that the misappropriation included \$17,072.74 from the estate of the Solicitor's father, of which the Solicitor was a co-executor with his brother and sister (paragraph 13 of the Agreed Statement of Facts).

On September 24, 1991, Mr. Upshall took an overdose of pills and alcohol after the Law Society had commenced its investigation and a fraud charge had been laid by a former friend and business partner. He had written a suicide note to his wife. Following this incident, he was treated by a psychiatrist, Dr. Robin W. Brooks-Hill, while he was convalescing in York County Hospital. Dr. Brooks-Hill's medical report was before the Committee. He made the following comments:

IN CAMERA EVIDENCE

IN CAMERA Content Has Been Removed

END OF IN CAMERA EVIDENCE

There is no evidence that the Solicitor used drugs or alcohol. He had not required psychiatric treatment or medication to control his mood swings prior to his suicide attempt in September 1991. Although he enjoyed a somewhat grandiose lifestyle, he lived within his means. Income from his legal practice in 1990 was \$240,000.00.

No reasonable explanation has been advanced for the misappropriations or what happened to the misappropriations. Bad investments in the stock market might account for \$300,000.00. What happened to the rest?

Despite the character evidence and the submission of counsel on behalf of the Solicitor which shows an unblemished record of service, not only to his clients, but also to his community and country for over twenty years, the Committee is unable to agree with the submission that the Solicitor be permitted to resign and recommends that the Solicitor be disbarred for the following reasons:

- a) The Solicitor has not shown any remorse. He blames his partners greed, rather than his own misconduct for any loss resulting from the Mississauga land deal.
- b) The Law Society must send a strong message to the profession and to the public that it will not tolerate the misconduct of members who steal large sums of money from clients, particularly when there is no restitution. It must leave no doubt in the mind of any member who engages in such misconduct, that he or she will face disbarment.
- c) The Committee reaffirms the governing principal that where a Solicitor is found to have misappropriated trust funds, he or she should be disbarred, unless there are strong extenuating circumstances indicating otherwise. The Committee does not believe that the extenuating circumstances advanced on the Solicitor's behalf meet that test. We are of the view that while the episodes of varying low and high mood swings and low self-esteem may explain the misconduct, there is no evidence of serious impairment or control which would render the misconduct either justifiable or blameless.

Philip Cameron Upshall was called to the Bar and admitted as a Solicitor of the Supreme Court of Ontario on the 21st day of March, 1969.

ALL OF WHICH is respectfully submitted

DATED this 28th day of November, 1992

"R. Bragagnolo"  
Rino C. Bragagnolo, Q.C., Chair

28th January, 1993

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Report of the Discipline Committee be adopted.

There were no submissions and the Report was adopted.

It was moved by Mr. O'Connor, seconded by Mr. Somerville that the Recommendation as to Penalty contained in the Report that is, that the solicitor be disbarred, be adopted.

Mr. Porter presented a Brief of Documents and a Character Reference Brief in support of his argument to permit the solicitor to resign. Submissions were made with reference to the psychiatric evidence being received in camera.

There was a reply by Mr. MacKenzie in support of the disbarment.

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

It was moved by Mr. Feinstein, seconded by Ms. Palmer that the solicitor be permitted to resign.

Not Put

The motion to disbar was adopted.

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

A request was made by Mr. Porter that the publication of the disbarment not be made until June as Mr. Upshall fears it may have some effect on his treatment in jail.

The Acting Treasurer refused to entertain the request.

The Brief of Documents was entered as Exhibit 3 and the Character Reference Brief as Exhibit 4.

Counsel retired.

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Mr. Howie withdrew from Convocation and Mr. Somerville took the Chair as Acting Treasurer.

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RICHARD MICHAEL HUGH POWER, Toronto

Mr. O'Connor placed the matter before Convocation.

The reporter was sworn.

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

28th January, 1993

Convocation had before it the Report of the Discipline Committee dated 30th November, 1992, together with an Affidavit of Service sworn 15th January, 1993 by Louis Katholos that he had effected service on the solicitor by registered mail on 17th December, 1992 (marked Exhibit 1) together with the Acknowledgement, Declaration and Consent signed by the solicitor 28th January, 1993 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

THE LAW SOCIETY OF UPPER CANADA

THE DISCIPLINE COMMITTEE

REPORT AND DECISION

Rino C. Bragagnolo, Q.C., Chair  
Mary P. Weaver, Q.C.  
Carole Curtis

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

Neil Perrier  
for the Society

RICHARD MICHAEL HUGH POWER  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: September 1, 1992

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On June 1, 1992 Complaint D85/92 was issued against Richard Michael Hugh Power alleging that he was guilty of professional misconduct.

The matter was heard in public on September 1, 1992 before a Committee composed of Rino C. Bragagnolo, Q.C., Chair, Carole Curtis and Mary P. Weaver, Q.C. The Solicitor nor counsel for the Solicitor was in attendance. The matter was scheduled to proceed on August 25, 1992 at which time the Solicitor was not in attendance and the previous Committee ordered that the matter proceed preemptory on September 1, 1992. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D85/92

2. a) He failed to reply to the Law Society regarding deficiencies in the examination of his books and records despite letters dated October 24, 1991, November 26, 1991, January 24, 1992 and February 13, 1992.
- b) He failed to file with the Society within six months of the termination of his fiscal year ending July 31, 1991, a statutory declaration in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 (2) of the regulation made pursuant to the Law Society Act;
- c) Withdrawn at the request of the Law Society.

REASONS FOR FINDING OF PROFESSIONAL MISCONDUCT

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The Committee heard viva voce evidence of two Law Society employees, namely, Margot Devlin, Manager-Audit Examinations and Irene Andrighetti, Manager-Processing Section-Audit, and it found that Complaints 2(a) and 2(b) had been established because the Solicitor had not satisfied the Society's concerns set out in the letter of October 24, 1992, leading to Complaint 2(a) and further that he has not filed the Statutory Declaration and the forms prescribed by the Rules, and thereby, he has contravened Section 16(2) of the Regulation as more particularly described in Complaint 2(b).

RECOMMENDATION AS TO PENALTY

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The Committee recommends that the Solicitor be suspended indefinitely until he has filed Forms 2/3 for the year 1990-1991 and has satisfied the Society's concerns set out in the letter of October 24, 1992 and that upon the Solicitor having complied with these conditions, the Solicitor should be reprimanded in Convocation and ordered to pay the Society's costs fixed at \$1,000.00

REASONS FOR RECOMMENDATION

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The Solicitor's failure to reply to the Law Society regarding deficiencies in the examination of his books and records, despite correspondence requiring him to do so, dated October 24, 1991, November 26, 1991, January 24, 1992 and February 13, 1992, as well as his refusal to appear before the Discipline Committee to explain his misconduct, clearly indicate unwillingness on the part of the Solicitor to be governed by the Society.

28th January, 1993

Richard Michael Hugh Power was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 10th day of April, 1984.

ALL OF WHICH is respectfully submitted

DATED this 30th day of November, 1992

"R. Bragagnolo"  
Rino Bragagnolo, Chair

It was moved by O'Connor, seconded by Mr. Brennan that the Report of the Discipline Committee be adopted.

Counsel advised of a typographical error in the Report where the date of a letter from the Society to the solicitor should have been October 24th, 1991 and not 1992. Amendments were made to same on pages 2 and 3.

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

It was moved by Mr. O'Connor, seconded by Mr. Brennan that the Recommendation as to Penalty contained in the Report that is, that the solicitor be suspended indefinitely until he has filed his Forms 2/3 and pay the Society's costs, be adopted.

Mr. Perrier made submissions in support of the Recommendation.

The solicitor felt that he had complied with the conditions and had paid the late filing fee.

There were questions from the Bench.

It was moved by Mr. Wardlaw, seconded by Mr. O'Connor that the matter be adjourned to the March Discipline Convocation.

Carried

Counsel and the solicitor retired.

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CONVOCATION ROSE AT 6:00 P.M.

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Confirmed in Convocation this        day of                                , 1993.

Treasurer