

24th June, 1999

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 24th June, 1999
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Arnup, Bindman, Bobesich, Braithwaite, Carey, Chahbar, Clarkson, Coffey, Crowe, Curtis, Diamond, E. Ducharme, Epstein, Feinstein, Gottlieb, Hunter, MacKenzie, Pilkington, Porter, Potter, Puccini, Ross, Simpson, Swaye, Topp, White and Wilson.

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The reporter was sworn.

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IN PUBLIC

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Ms. Lesley Cameron, Senior Counsel-Discipline introduced Ms. Kathryn Chalmers who acted as Duty Counsel.

Re: James Marvin MENZIES - Barrie

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Ms. Kathryn Seymour appeared on behalf of the Law Society and Mr. Victor Vandergust appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 16th March, 1999, together with an Affidavit of Service sworn 26th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 23rd March, 1999 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th April, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes, Chair
Thomas E. Cole
Elvio L. DelZotto, Q.C.

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

Kathryn Seymour
For the Society

JAMES MARVIN MENZIES
of the City
of Barrie
a barrister and solicitor

Victor Vandergust
For the solicitor

Heard: January 26, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 10, 1998 Complaint D115/98 was issued against James Marvin Menzies alleging that he was guilty of conduct unbecoming a barrister and solicitor.

The matter was heard in public on January 26, 1999 before this Committee composed of Ronald D. Manes, Chair, Elvio L. DelZotto, Q.C. and Thomas E. Cole. The Solicitor attended the hearing and was represented by Victor Vandergust. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

The following particulars of conduct unbecoming a barrister and solicitor were found to have been established:

Complaint D115/98

2. a) On January 28, 1998, he appeared before His Honour Judge C.R. Harris in the Ontario Court Provincial Division in Barrie, Ontario and was found guilty on the charge that he unlawfully did, between the 31st day of December 1987 and the 1st day of May, 1989, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the Income Tax Act R.S.C. 1952, c. 148 as amended, by willfully evading or attempting to evade the payment of Federal taxes in the amount of \$20,730.29 imposed by the Income Tax Act upon the said J. Marvin Menzies, that is, by failing to file a T1 personal Income Tax Return for the taxation year 1988 as required by section 150 of the Income Tax Act;

- b) On January 28, 1998, he appeared before His Honour Judge C.R. Harris in the Ontario Court Provincial Division in Barrie, Ontario and was found guilty on the charge that he unlawfully did, between the 31st day of December 1988 and the 1st day of May, 1990, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the Income Tax Act R.S.C. 1952, c. 148 as amended, by willfully evading or attempting to evade the payment of Federal Taxes in the amount of \$16,049.05 imposed by the Income Tax Act upon the said J. Marvin Menzies, that is, by failing to file a T1 personal Income Tax Return for the taxation year 1989 as required by section 150 of the Income Tax Act;
- c) On January 28, 1998, he appeared before His Honour Judge C.R. Harris in the Ontario Court Provincial Division in Barrie, Ontario and was found guilty on the charge that he unlawfully did, between the 31st day of December 1989 and the 1st day of May, 1991, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the Income Tax Act R.S.C. 1952, c.148 as amended, by willfully evading or attempting to evade the payment of Federal taxes in the amount of \$33,448.52 imposed by the Income Tax Act upon the said J. Marvin Menzies, that is, by failing to file a T1 personal Income Tax Return for the taxation year 1990 as required by section 150 of the Income Tax Act;
- d) On January 28, 1998, he appeared before His Honour Judge C.R. Harris in the Ontario Court Provincial Division in Barrie, Ontario and was found guilty on the charge that he unlawfully did, between the 31st day of December 1990 and the 1st day of May, 1992, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the Income Tax Act R.S.C. 1952, c.148 as amended, by willfully evading or attempting to evade the payment of Federal taxes in the amount of \$19,391.73 imposed by the Income Tax Act upon the said J. Marvin Menzies, that is, by failing to file a T1 personal Income Tax Return for the taxation year 1991 as required by section 150 of the Income Tax Act.

Evidence

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

AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D115/98 and is prepared to proceed with a hearing of this matter on January 26 and 27, 1999.

II. IN PUBLIC / IN CAMERA

2. The parties agree that this matter should be heard in public pursuant to Section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1990 c.S.22.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D115/98 and this agreed statement of facts and admits the particulars contained herein. The Solicitor also admits the convictions and the penalty, together with the facts as stated below, and admits that same constitutes conduct unbecoming a barrister and solicitor.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970 and practises as a sole real estate practitioner in Barrie, Ontario.

5. Between December 31, 1987 and May 1, 1992, the Solicitor earned an income by practising law in the City of Barrie, Ontario. Although he earned an income, the Solicitor failed to file his T1 Forms and thereby delayed Revenue Canada from assessing his tax liability. When the matter of the Solicitor's failing to file came to the attention of Revenue Canada, their Identification and Compliance Section conducted an investigation. After the investigation, Revenue Canada demanded that the Solicitor file his tax returns for 1988, 1989, 1990, and 1991. The said returns were to be filed by December 30, 1993, to avoid criminal charges being laid. The returns were not filed until on or about January 06, 1994. However, the Solicitor neglected to pay assessed amounts of taxes when assessed. The amounts owed (\$89,619.59) were eventually paid on January 28, 1998, being the date of the Guilty Plea in the Ontario Court Provincial Division. (Document Book, Tab 2)

6. In a Certified Copy of Information dated February 26, 1997, (Document Book, Tab 1) Gail MacNeil, an Officer with the Department of National Revenue, swore that she believed on reasonable grounds that:

- a. The Solicitor did, between the 31st day of December, 1987 and the 1st day of May, 1989, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the *Income Tax Act*, R.S.C. 1952, Chapter 148, as amended, by wilfully evading or attempting to evade the payment of Federal taxes in the amount of \$20,730.29 imposed by the *Income Tax Act* upon the said Solicitor, that is by failing to file a T1 personal Income Tax Return for the taxation year 1988 as required by Section 150 of the said *Income Tax Act*,
- b. The Solicitor did, between the 31st day of December, 1988 and the 1st day of May, 1990, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the *Income Tax Act*, R.S.C. 1952, Chapter 148, as amended, by wilfully evading or attempting to evade the payment of Federal taxes in the amount of \$16,049.50 imposed by the *Income Tax Act* upon the said Solicitor, that is by failing to file a T1 personal Income Tax Return for the taxation year 1989 as required by Section 150 of the said *Income Tax Act*,
- c. The Solicitor did, between the 31st day of December, 1989 and the 1st day of May, 1991, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the *Income Tax Act*, R.S.C. 1952, Chapter 148, as amended, by wilfully evading or attempting to evade the payment of Federal taxes in the amount of \$33,448.52 imposed by the *Income Tax Act* upon the said Solicitor, that is by failing to file a T1 personal Income Tax Return for the taxation year 1990 as required by Section 150 of the said *Income Tax Act*,
- d. The Solicitor did, between the 31st day of December, 1990 and the 1st day of May, 1992, at or near the City of Barrie, in the County of Simcoe, or elsewhere in the Province of Ontario, commit an offence as defined by Paragraph 239(1)(d) of the *Income Tax Act*, R.S.C. 1952, Chapter 148, as amended, by wilfully evading or attempting to evade the payment of Federal taxes in the amount of \$19,391.73, imposed by the *Income Tax Act* upon the said Solicitor, that is by failing to file a T1 personal Income Tax Return for the taxation year 1991 as required by Section 150 of the said *Income Tax Act*.

7. On January 28, 1998, in the Ontario Court Provincial Division, the Solicitor appeared before the Honourable Judge C.R. Harris and entered guilty pleas to and was convicted of the four counts of "evading or attempting to evade" the payment of federal taxes in the total amount of \$89,619.59.(Document Book, Tab 2)

8. Also on January 28, 1998, the Solicitor made restitution to Revenue Canada for the outstanding taxes in the amount of \$89,619.59.(Document Book, Tab 2)

9. Following a pre-trial and joint submission by Crown and defence counsel, as disclosed in the transcript (Tab 2), the Honourable Judge Harris imposed the minimum fine. The Solicitor was required to pay fifty per cent of the amount evaded, being a penalty in the amount of \$44,809.80, within twenty-four months of the conviction, on terms. (Document Book, Tab 2)

10. The sentence was based upon the \$89,000 restitution, the pleas of guilty, the fact of no prior criminal record, the neglect involved in the situation and the fact that, even absent statutory obligation, some aspect of deterrence is important in matters of this nature.

11. The Solicitor admits the facts of his conviction and penalty as disclosed in the January 28, 1998, Provincial Court transcript (Tab 2).

12. The Solicitor throughout was aware of and has complied with other reporting and remittance requirements with:

- a) Revenue Canada such as:
 - (i) proper remittance of source deductions for employer and employees;
 - (ii) preparation of employee T-4 slips and filing of T-4 summaries; and
 - (iii) filing of Goods and Services Returns.
- b) The Law Society such as:
 - (i) annual trust audit and other compliance forms.

V. DISCIPLINE HISTORY

13. The Solicitor has no discipline history.

DATED at Toronto, this 26th day of January, 1999."

RECOMMENDATION AS TO PENALTY

The Committee recommends that James Marvin Menzies be reprimanded in Convocation and pay Law Society costs in the amount of \$1,200.

REASONS FOR RECOMMENDATION

The Committee is unanimously of the view that we should accept the joint submission.

Mr. Menzies was called to the Bar in 1970 and until the proceedings here, had no previous discipline record. He practises in Barrie, as primarily a real estate solicitor and has been in sole practice since approximately 1979.

The convictions which led to this complaint arose out of Mr. Menzies' failure to file income tax forms from 1989 through 1992, for a period of approximately four years, for approximately \$90,000, which led to four counts of income tax evasion and a conviction on those four counts by Judge Harris on January 28th, 1998. The Solicitor made full restitution to Revenue Canada in the amount of \$89,619.59.

After a lengthy pre-trial before Judge Harris, the Solicitor received the minimum penalty of a fine in the amount of \$44,809.80, which was equal to fifty percent of the amount evaded, payable within twenty-four months of the conviction, on terms.

It is agreed in the Agreed Statement of Facts that - and I should say - supported by reference in the Crown brief, that had Mr. Menzies filed his delinquent returns by December 30th, 1993, there would have been no criminal charges. He filed six days late, January 6th, 1994. Once Mr. Menzies filed, negotiations ensued about the amount of the arrears and so on, but the civil side of Revenue Canada washed their hands of the matter apparently, and he was not able to reach any resolution with the criminal side of Justice.

After a three year delay, charges were laid February 26th, 1997.

It is the joint submission of counsel that Mr. Menzies be reprimanded in Convocation and pay the Society's costs of \$1200.

In support of this joint submission, we were pointed to the following facts. There is no evidence of any falsehood or deceit by the Solicitor. He fully cooperated in the investigation and the complaint process. He has made full restitution. He has no prior discipline record and he is of good personal and professional character.

In the latter regard, we have been provided with character letters from both fellow practitioners and clients. These letters are impressive as they paint a picture of an outstanding solicitor demonstrating a capacity for very able representation, a solicitor who has been deeply involved in the Barrie Real Estate Lawyers' Association as both the Secretary and as one of its founding members. What is very clear from these references is that Mr. Menzies has not allowed his personal problems, and in particular his tax problems, to affect his law practice. He continues to serve his clients very well and is a valuable member of the Barrie bar.

The reference letters from his clients reflect not only his competence and integrity, but also the commitment of at least those clients from whom we received references to continue with Mr. Menzies as their solicitor, notwithstanding their knowledge of the criminal convictions and complaint before the Society. It is the fact that the Solicitor has continued to practise law in what appears to be the highest traditions of the profession without allowing these personal problems to impact on that practice, that the Committee finds to be most important in terms of accepting the joint submission.

The joint submission calls for what, in the opinion of the Committee, is the minimum penalty for this type of conduct unbecoming. We have been provided with a book of authorities which canvass what appear to be all of the significant cases in the past almost thirty years with regard to income tax evasion. The bottom line of these cases is that the penalties range from a reprimand in Convocation and legal costs, to disbarment, depending on the presence of deceit and the wilfulness with which the offence or offences took place.

It is our collective view that the cases which are most closely aligned to this situation are the cases of Quintin and Fass, both of which were disposed of by Convocation with a reprimand.

24th June, 1999

We also note from the character brief that we have been presented that Mr. Menzies has engaged a firm of financial advisors to ensure that he keeps all future liability, and in particular to Revenue Canada, current.

Mr. Menzies then has taken steps to ensure, and to assure us, that this kind of conduct will never happen again. Having said all that, we believe that the joint submission to the Committee is quite justified and sensible and accordingly, we recommend that to Convocation.

James Marvin Menzies was called to the Bar on March 19, 1970.

ALL OF WHICH is respectfully submitted

DATED this 16th day of March, 1999

Ronald D. Manes, Chair

There were no submissions on the finding of conduct unbecoming.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and pay the Society's costs in the amount of \$1,200.

Both counsel made submissions in support of the joint submissions made at the hearing that the solicitor be reprimanded in Convocation.

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

It was moved by Mr. Gottlieb, seconded by Mr. Swaye that the solicitor be reprimanded in Committee and pay the Society's costs.

Lost

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

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded in Convocation and pay the Society's costs in the amount of \$1,200.

The Treasurer administered the reprimand.

Mitchell Lynn HOUZER - Toronto

Ms. Curtis withdrew for this matter.

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

Ms. Worley advised that the solicitor requested an adjournment until September in order to complete his filings.

Copies of a letter dated June 22nd, 1999 from the solicitor were circulated to the Benchers.

Ms. Worley did not oppose the adjournment request.

It was moved by Mr. Topp, seconded by Mr. Swaye that the request for an adjournment to September be granted.

Carried

Re: Abdurahman Hosh JIBRIL - Toronto

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 16th March, 1999, together with an Affidavit of Service sworn 26th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 23rd March, 1999 to the 883 Bloor Street West address. (marked Exhibit 1) together with the Report and Affidavit of Service sworn 30th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 26th March, 1999 to the 404 Driftwood Avenue address. 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
Elvio L. DelZotto, Q.C.
Thomas E. Cole

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

Kathryn Seymour
For the Society

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

Not Represented
For the solicitor

Heard: January 26, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On September 30, 1998 Complaint D137/98 was issued against Abdurahman Hosh Jibril alleging that he was guilty of professional misconduct.

The matter was heard in public on January 26, 1999 before this Committee composed of Ronald D. Manes, Chair, Elvio L. DelZotto, Q.C. and Thomas E. Cole. The Solicitor did not attend the hearing nor was he represented. Kathryn Seymour appeared on behalf of the Law Society.

DECISION

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

Complaint D137/98

2. a) The Solicitor failed to fulfill his financial obligations to another solicitor in breach of Rule 13, Commentary 6, of the Rules of Professional Conduct; and
- b) The Solicitor failed to fulfill his financial obligations to Dr. Chaudhri in breach of Rule 13, Commentary 6, of the Rules of Professional Conduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Abdurahman Hosh Jibril be suspended for three months consecutive to any current suspensions and that on his return to practice he enrol in and complete the Practice Review Program. The Committee further recommends that the member pay Law Society costs in the amount of \$500 to be paid within three months of his return to practice.

REASONS FOR RECOMMENDATION

We are all of the view that the member Abdurahman Jibril has been served pursuant to the Act with notice of this hearing and further that the Society has gone above and beyond its technical obligations of service in attempting to bring home to the member personally the fact of the hearing.

The circumstances of service are set out in the Affidavit of Service of Ms. Soulliere and Dawn Dumont, as well as in Exhibit 3, which is correspondence to the member's sister in circumstances explained in the Dumont affidavit, which correspondence was sent by Ms. Seymour to Mr. Jibril, care of his sister. In addition to that, we have been provided with a Report and Decision of the Discipline Committee which heard a 1997 complaint against the member where he was convicted of failing to produce his books and records and failing to file with the Society. In the reasons for the recommendation, Mr. Epstein, sitting as a single bencher, outlined not only the member's professional misconduct in failing to cooperate with the Law Society by failing to produce his books and records, but also the repeated attempts by the Society's staff to get in touch with Mr. Jibril and assist him in compliance.

Mr. Epstein notes at page 3 the fact that there was no explanation at the hearing to mitigate penalty because Mr. Jibril did not appear at the hearing to offer any explanation. We are told as well in this decision by Mr. Epstein that: "Mr. Jibril appears to be a very free spirit, operating without any sense of his obligation to the Society and his obligation to make timely filings and production".

All in all, I cite that only to show that Mr. Jibril seems to have a pattern of having little, if any, interest in the discipline proceedings by the Law Society and it is not surprising that he did not appear at this hearing.

Mr. Abdurahman Hosh Jibril was called to the Bar on April 28, 1995. It seems to us that on all the evidence, he has virtually abandoned the practice of law. He has never filed his form 2's and 3's. He has never produced his books and records. He has been under administrative suspension since June 1st, 1998. On April 8th, 1998, Mr. Epstein, sitting as a single bench, found professional misconduct in Mr. Jibril's failure to cooperate with the Law Society examiner by not producing books and records despite numerous attempts by the Law Society since October 23rd, 1996, and failing to file with the Law Society since he was called to the Bar on April 28th, 1995, a certificate in the form described by the Rules. Mr. Epstein notes that the Society's staff made repeated attempts to get in touch with Mr. Jibril to assist him in compliance, but to no avail.

Mr. Epstein notes, in the way that only Mr. Epstein could, "That is not an auspicious beginning for Mr. Jibril". Mr. Epstein goes on to note that there may be an adequate or potential explanation that would mitigate penalty, but Mr. Jibril did not appear at the hearing to offer any such evidence.

Accordingly, Mr. Epstein recommended to Convocation that the member be suspended for a period of sixty days and month to month thereafter until his filings are up to date to the satisfaction of the Secretary and his books and records are brought up to date and produced to the satisfaction of the Secretary. That suspension commenced as of the date of the Order, that is, June 25th, 1998.

We have Mr. Jibril, once again, before the Society in his short tenure as a solicitor now charged and convicted of failing to fulfill his financial obligations to another solicitor and failing to fulfill his financial obligations to an expert that he retained on behalf of a client. We have the affidavit evidence of that solicitor who testifies that he was renting office space to Mr. Jibril; that Mr. Jibril moved out on short notice; that Mr. Jibril agreed that he was obligated to pay one month rent in lieu of that notice; and also, there were various phone bills and another debt, all of which amounted to approximately \$1356. After repeated requests and a complaint to the Law Society in April of 1996, Mr. Jibril forwarded a cheque to the solicitor and it was returned marked NSF. That amount remains outstanding today. All we know is that Mr. Jibril is out of the country somewhere with no expected date of return.

Similarly, we have the affidavit of the family physician who was retained by Mr. Jibril for the purpose of providing expert medical reports. The physician duly remitted the report together with a fee invoice of \$375 and a second invoice of \$75 for an addendum. Despite repeated efforts, these invoices were not honoured. The complaint was made in September of 1996. In addition to that, there were medical reports regarding another matter for \$300 and \$275 respectively with respect to another client. The total invoices amount to \$1,025 which remain unpaid as of today.

The record will already show the repeated efforts that the Society has made to serve the member and the fact that the member, both in the previous complaint and in this proceeding, appears disinterested and in the latter regard, in the face of this proceeding, left town.

There is nothing before us which remotely explains or mitigates the solicitor's abdication of his responsibilities to his fellow solicitor and a professional expert that he retained. Accordingly, we recommend a penalty of a three month suspension consecutive to the current suspensions. Upon his return to practice, the member will be required to attend Practice Review and thereafter until they are satisfied that the member appreciates his obligations under the Law Society Act and Regulations and can practise according to them.

We recommend costs in the amount of \$500 to be paid within three months of the member's return to practice. We are of the view that in the circumstances of this case that it is not necessarily in the public interest for the Committee to require the payment of the member's debts as a part of our recommendation. The sense of the Committee is that such an order would at least appear to be, if not actually be, using the Society as a collection agency; and accordingly we do not make that recommendation here.

ALL OF WHICH is respectfully submitted

DATED this 16th day of March, 1999

Ronald D. Manes, Chair

Ms. Seymour outlined the efforts made by the Society to locate the solicitor. She advised that the solicitor had been served at his last known address which complied with the requirements of the Act.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for 3 months consecutive to any current suspensions and that on his return to practice he enrol in and complete the Practice Review Program. The Committee further recommended that the solicitor pay costs in the amount of \$500 to be paid within 3 months of his return to practice.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Bindman, seconded by Mr. Crowe that the solicitor be disbarred.

Lost

It was moved by Ms. Potter, seconded by Ms. Curtis that the solicitor be suspended for 6 months with the terms set by the Discipline Committee.

Lost

It was moved by Mr. MacKenzie, seconded by Ms. Pilkington that the recommended penalty be adopted and in addition the solicitor must fulfil his financial obligations prior to returning to practice.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for 3 months consecutive to any current administrative suspension. Further that upon the solicitor's return to practice he must enrol in and complete the Practice Review Program and pay the Society's costs of \$500 payable within 3 months of his return to practice. In addition, prior to returning to practice the solicitor must fulfil his financial obligations.

Re: Mary Judith Baker LEACH - Toronto

The Secretary placed the matter before Convocation.

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

Mr. Jonathan Batty appeared for the Society. No one appeared for the solicitor nor was the solicitor present.

Convocation had before it the Report of the Discipline Committee dated 7th April, 1999, together with an Affidavit of Service sworn 3rd May, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 27th April, 1999 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert P. Armstrong, Q.C., Chair

Richmond C. E. Wilson, Q.C.

Abdul A. Chahbar

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

Jonathan Batty
For the Society

MARY JUDITH BAKER LEACH
of the City
of Toronto
a barrister and solicitor

Not Represented
For the solicitor

Heard: August 19, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On the 5th day of May, 1998, Complaint D63/98 was issued against Mary Judith Baker Leach and on the 31st day of July, 1998, Complaint D113/98 was issued against Mary Judith Baker Leach. Both Complaints alleged professional misconduct.

The matter was heard in public on the 19th day of August, 1998 before this Committee composed of Robert P. Armstrong, Q.C., Chair, A. Chahbar and Richmond C.E. Wilson, Q.C. The solicitor did not attend and was not represented by Counsel. J. Batty appeared on behalf of the Law Society.

DECISION

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

Complaint D63/98

2. a) The Solicitor practised law continuously from January 1, 1996 to July 23, 1997 in violation of Rule 50 made under subsection 62(1) of the Law Society Act.

Complaint D113/98

2. a) The Solicitor failed to honour her personal undertaking, dated July 15, 1994, to Antonio Saponara and Klemendini Vlismas, and to their solicitor, Felix Rocca;
- b) The Solicitor failed to reply in a timely and substantive manner to the communications of a solicitor, Felix Rocca, regarding the completion of her undertaking dated July 15, 1994; and
- c) The Solicitor failed to reply to the Law Society concerning the complaint of a solicitor, Felix Rocca despite requests on: February 2, 1998; February 10, 1998; April 7, 1998; and, June 4, 1998;

Evidence

The evidence consisted of *viva voce* evidence from Jennifer Campbell, Don Jenkins, and Lorraine Campbell of the Law Society in regard to Complaint D63/98. In addition, three document books containing a large number of documents related to the practice of Ms. Leach were filed.

In regard to Complaint D113/98 the Committee received evidence from Felix Rocca, a lawyer who practises in the City of Vaughan and Sylvia McAuley and Lorraine Campbell of the staff of the Law Society. A document book containing a number of documents related to this complaint was also filed.

Complaint D63/98

By letter dated December 5, 1995, Ms. Leach advised the Law Society that it was her intention to retire from the practice of law as of December 31, 1995. As a result, Ms. Leach was no longer required to pay the same level of fees to the Law Society as a lawyer in regular practice. She was billed and paid the fees of a lawyer in the retired category during the years 1996 and 1997. She was not required, because of her retired status, to pay the insurance levy.

In 1997 Lorraine Campbell, an Examiner with the Department of Audit and Investigation of the Law Society, carried out an audit of the books and records of Ms. Leach's practice. During the course of the audit, it became apparent that Ms. Leach had continued to carry on the practice of law after December 31, 1995, although it does not appear from the evidence before us to have been a particularly active practice. Counsel for the Law Society described it as a "lingering" practice.

There was filed before us a number of documents which indicated that Ms. Leach continued to provide legal services in regard to a number of matters. The following are some examples:

- (a) In July of 1996, Ms. Leach commissioned an affidavit of Ms. Barbara Morrison who described herself as "the secretary at the Law Office of M. Judith Leach." The affidavit was in regard to a divorce proceeding in the Ontario Court (General Division).

- (b) A Legal Aid account of Ms. Leach described services provided in the above divorce proceeding in 1996 and 1997.
- (c) Ms. Leach prepared and apparently registered a mortgage in January 1996 on behalf of a client.
- (d) In 1996, Ms. Leach prepared and registered the assignment of a mortgage on behalf of a client. On July 2, 1996, Ms. Leach sent a reporting letter to the client in regard to this transaction.
- (e) On October 4, 1996, Ms. Leach obtained an Order in the Ontario Court (General Division) re-initiating a petition for divorce to the list. A letter of April 16, 1997 to her client indicates that she was at that time still acting in regard to the divorce proceedings.
- (f) There are a number of other documents in regard to real estate transactions and/or divorce proceedings in which Ms. Leach is shown as the solicitor of record in 1996 and 1997.

THE FINDING

We are satisfied on the evidence presented before us that Ms. Leach continued to practise law during 1996 and 1997, contrary to Rule 50 made under subsection 62(1) of the Law Society Act. We therefore find that Ms. Leach is guilty of professional misconduct as charged in Complaint D63/98.

Complaint D113/98

This complaint arises out of a real estate transaction in which Ms. Leach acted for the vendors and Felix Rocca, a solicitor in the City of Vaughan, acted for the purchaser. On the closing of the transaction Ms. Leach gave an undertaking to provide a statutory declaration stating that the vendor, John Archie Gray, was not the same person as the execution debtors named in particular executions which were listed in the undertaking. Ms. Leach undertook to register the statutory declaration on title within two weeks of closing.

Mr. Rocca wrote several letters over a period of more than two years to Ms. Leach requesting her to fulfil the undertaking. It appears from the correspondence that Ms. Leach at some point lost her file. On May 23, 1995, Ms. Leach forwarded two documents to Mr. Rocca which purported to satisfy the undertaking for a statutory declaration. Ms. Leach stated that, "We will register these affidavits Friday next week." One of the documents was not signed. In any event, no document which satisfied the undertaking was registered on title.

It also appears that Ms. Leach simply ignored many of the letters written to her by Mr. Rocca.

Mr. Rocca filed a complaint with the Law Society by letter dated January 16, 1998. On April 7, 1998, the Law Society wrote to Ms. Leach enclosing a copy of the complaint of Mr. Rocca. The letter from the Law Society requested Ms. Leach to respond to the complaint pursuant to Rule 13, Commentary 3 of the Rules of Professional Conduct. Ms. Leach did not respond to the letter from the Law Society. A further letter dated June 4, 1998 from the Law Society in regard to the complaint was not answered.

THE FINDING

We are satisfied on the evidence presented before us that Ms. Leach is guilty of professional misconduct as charged in Complaint D113/98.

RECOMMENDATION AS TO PENALTY

The Committee recommends the following penalty for Mary Judith Baker Leach:

- (a) Ms. Leach is to pay the Law Society fees and LPIC premiums (if LPIC will provide coverage) for the period the solicitor practised law in an incorrect membership category, that is from January 1, 1996 to July 23, 1997;
- (b) Ms. Leach should be suspended from the practice of law for a period of nineteen months commencing from the time that Ms. Leach has paid all amounts owing to the Law Society and LPIC and from the time that her administrative suspension has been terminated.

REASONS FOR RECOMMENDATION

Ms. Leach was previously reprimanded in Committee for failing to reply to other solicitors in 1990. She has been under an administrative suspension for non-payment of fees since 1998.

The counsel for the Law Society submitted that we should make a finding that Ms. Leach is ungovernable and that we should recommend she be disbarred. While we think that this is a very serious matter and a message should be sent both to the solicitor and the profession that her conduct is totally unacceptable, we are not persuaded that this calls for disbarment. This is neither the worst case nor the worst offender and therefore, in our view, should not attract the ultimate penalty.

The penalty we have recommended is nevertheless severe and we believe will send the appropriate message to Ms. Leach and the profession.

The counsel for the Law Society submitted that this case is similar to a case of practising law while under suspension. We agree with that submission and the penalty we have recommended is in accord with that kind of case.

Mary Judith Baker Leach was called to the Bar in 1977.

ALL OF WHICH is respectfully submitted

DATED this 7th day of April, 1999

Robert P. Armstrong, Q.C., Chair

Mr. Batty requested that the following corrections be made to the Report:

- (1) at page 2 under the heading Evidence the name of "Don" Jenkins be changed to read "Stan" Jenkins; and
- (2) that the name "Sylvia McAuley" be changed to read "Sylvie McAulay".

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor pay the Society's fees and LPIC premiums for the period the solicitor practised law in an incorrect membership category and that she be suspended for a period of 19 months commencing from the time the solicitor has paid all amounts owing and from the time that her administrative suspension has been terminated.

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

It was moved by Mr. Hunter, seconded by Mr. Porter that the recommended penalty be adopted.

Carried

Re: Wayne Douglas BERTHIN - British Columbia

The Secretary placed the matter before Convocation.

Ms. Curtis withdrew for this matter.

Ms. Elizabeth Cowie appeared on behalf of the Society and Ms. Chalmers, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 29th April, 1999, together with an Affidavit of Service sworn 12th May, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 4th May, 1999 (marked Exhibit 1). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Tamara Stomp, Chair
Thomas Cole
Nora Angeles

In the matter of

Neil Perrier (Aug. 27, 1996)
Elizabeth Cowie
For the Society

The Law Society Act
and in the matter of

WAYNE DOUGLAS BERTHIN
of the Province
of British Columbia
a barrister and solicitor

Not Represented
For the solicitor

Heard: August 27, 1996, October 19, 1999
January 20, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

IN THE MATTER OF Wayne Douglas Berthin

The following Complaints were issued against Wayne Douglas Berthin alleging that he was guilty of professional misconduct and conduct unbecoming a barrister and solicitor. Complaint D128/96 was issued on April 16, 1996, and Complaints D380/97 and D54/98 were issued on April 17, 1998.

Complaint D128/96

Alleged professional misconduct:

2. a) He breached the Order of Convocation dated September 22, 1994 requiring him to pay costs in the amount of \$11,000, by failing to pay the said costs.

Alleged conduct unbecoming a barrister and solicitor:

3. a) He was convicted of the following offences:
 - i) Break and enter, contrary to section 348(1)(a) of the *Criminal Code*; and
 - ii) mischief by wilfully damaging property without legal justification or excuse and without the colour of right, contrary to section 430(3) of the *Criminal Code*.

Complaint D380/97

- a) He failed to meet a financial obligation to Atchison & Denman, which was incurred in relation to his legal practice, in the amount of \$332.27;

- b) he failed to provide a full and meaningful reply to the Law Society in a timely manner regarding a complaint by Thomas Dunne, despite letters dated February 8, 1995 and March 14, 1995;
- c) he failed to meet a financial obligation to Network Court Reporting Ltd., which was incurred in relation to his legal practice, in the amount of \$1,001.79;
- d) he failed to provide a full and meaningful reply to the Law Society in a timely manner regarding a complaint by Barbara Belsito, despite letters dated February 8, 1995 and March 14, 1995;
- e) he failed to meet a financial obligation to Rosenberger, Weir, Macdonald, which was incurred in relation to his legal practice, in the amount of \$1,224.08;
- f) he failed to provide a full and meaningful reply to the Law Society in a timely manner regarding a complaint by Paul Rosenberger, despite letters dated February 8, 1995 and March 14, 1995;
- g) he failed to meet a financial obligation to Dover Process Servers Limited, which was incurred in relation to his legal practice, in the amount of \$700.00;
- h) he failed to provide a full and meaningful reply to the Law Society in a timely manner regarding a complaint by John Dover, despite letters dated February 8, 1995 and March, 1995.

Complaint D54/98

- I. a) He failed to file with the Society, within the time prescribed by the Regulation, the forms required under section 16 of Regulation 708 pursuant to the Law Society Act for each fiscal period subsequent to his fiscal year ending January 31, 1994.

History of Proceedings

This matter initially proceeded on August 27, 1996 before a Committee composed of T. Stomp, Chair, T. Cole and N. Angeles on Complaint No. D128/96. The Member was present and represented himself. The Society was represented by Neil Perrier. The hearing proceeded as a contested matter. The allegations in Complaint No. D128/96 essentially comprised two matters, one being the Breach of an Order of Convocation by failure to pay \$11,000.00 in costs and two, convictions of offences of Break and Enter and Mischief to Property, both contrary to the Criminal Code.

Viva voce evidence was called by the Society and the Member commenced to give evidence himself. During cross-examination by Mr. Perrier, it was learned that an appeal had been filed as against the Criminal Code convictions. Mr. Perrier admitted that he was not aware that an appeal had been filed and the Member indicated that he had not advised of same earlier because, essentially, no one had asked him. The Member knew none of the details of the appeal. The matter was stood down over the recess to find out the details, but not much more was forthcoming. Therefore, Mr. Perrier asked for an adjournment in order to determine the status of the matter and same was granted.

A telephone conference call was convened with the Committee (absent Ms. Angeles who could not be reached at the time) on July 15, 1997 as the Member resided in British Columbia. More information regarding the appeal was known, but the appeal had not yet been heard. There was some information that the appeal may be heard in November of 1998, but the Member did not know this. In any event, neither the Society nor the Member requested an adjournment until after the appeal. On that basis, the matter could proceed.

However, Ms. Cowie advised that there were now two further complaints against the Member that, for obvious reasons, were requested to be dealt with by this Committee as well. Those complaints are No. D380/97 and No. D54/98. The Member had no objection to the proceedings for those complaints being before us, but requested an adjournment in order to be able to properly prepare for the defence of same because he had only recently received notice of them. Another adjournment was granted for that reason and therefore the matter did not proceed on the scheduled dates of July 16 and 17, 1997.

All three complaints were before the Committee on October 19, 1998 when the hearing next proceeded. The Committee first proceeded to hear the balance of the evidence regarding the first complaint being No. D128/96. The Committee reserved its' decision on that finding and thereafter heard the evidence on the two remaining complaints.

At the end of the day, findings of Professional Misconduct were made on Complaint No. D128/96 on Count 2(a). A finding of Conduct Unbecoming a Barrister and Member was found on Complaint No. D128/96 on Count 3(a). A finding of Professional Misconduct was found on Complaint No. D380/97 on Counts 2(a), (c), (e) and (g) and the balance of that Complaint dismissed. A finding of Professional Misconduct was made on Complaint No. D54/98 on Count 2(a) therein.

Submissions were heard with respect to penalty and the decision thereupon was reserved.

Before the decision of the Committee was rendered, a motion was brought at the instance of counsel for the Society requesting that fresh evidence be heard by the Committee before the final decision was rendered. That motion came to us by way of telephone conference call on January 20, 1999 and the Member did participate. Notwithstanding the objections of the Member, the Committee determined to admit the fresh evidence, which was that the appeal of the Member had been granted in part. The Member's conviction for the Break and Enter charge was quashed and returned for a new trial. However, the endorsement of Mr. Justice Hermiston was clear in recommending to the Crown Attorney that no new trial proceed. The conviction for the Mischief to Property was upheld. The appeal of sentence was dismissed.

In Camera Motion

The Member brought a motion requesting that the proceedings be held in camera because they dealt with personal financial circumstances which he submitted were private matters. However, the Member could not point to any evidence in particular nor characterize that evidence as confidential or privileged communications that needed to be protected. Nor could the Member point to an intimate personal matter, such as psychiatric assessments, etc., that were involved. Neither could the Member point to any parallel criminal or civil proceedings that could be adversely affected by the public disclosure. The motion was denied and the hearing proceeded in public. On October 19, 1998, when the proceedings recommenced and the second and third complaints were heard, the Member renewed his request for an in camera proceeding. He had no different submissions to make, nor different evidence to point to and for the same reasons as set out above, the motion was denied and the hearing proceeded in public.

Motion for Delay

The Member brought an oral motion that Complaint No. D380/97 should be dismissed on the grounds of an approximate three year delay from the time that the Member last communicated with the Law Society about the matters therein and the swearing of the Complaint on April 17, 1998. The Member argued that his defence to the Complaint may be prejudiced from the delay because he cannot recall certain facts and circumstances surrounding the events in question and he cannot find certain documents that may assist in his defence. The Member could provide no details and relied upon the possibility of prejudice only. The Committee found no inordinate delay in all the circumstances. The Committee was not satisfied of the prejudice alleged and the mere possibility without particulars or evidence of same is not enough. The motion for delay was dismissed.

Findings on Complaint No. D128/96

The Member admitted that he breached the Order of Convocation dated September 22, 1994 requiring him to pay costs in the amount of \$11,000.00, by failing to pay the said costs. The Member stated that he could not pay the costs because he was financially unable to do so. He stated that his financial circumstances had been going downhill since approximately 1992.

However, the Member admitted that at no time did he tell the Committee (who rendered their Decision on September 9, 1993) nor Convocation (who rendered its' decision on September 22, 1994) that he was unable to pay the \$11,000.00 in costs ordered. Findings of Professional Misconduct in that matter were made for a number of acts, including acting in a mortgage matter where the effective annual interest rate exceeded that prohibited by the Criminal Code, failing to disclose placement fees in relation to mortgage loans on behalf of a number of clients, acting in a conflict of interest contrary to Rule 5, acting contrary to Rule 7 paragraph 2 and Rule 23 paragraph 6. For all of these matters, Convocation suspended the Member for two months commencing November 1, 1994 and made the \$11,000.00 order for costs.

The Member made a number of arguments to us that his subsequent bankruptcy of April, 1998, proved his inability to pay and in fact acted as a shield by which this Committee could no longer proceed to deal with the matter of costs. The Member argued that by virtue of Section 69 of the *Bankruptcy Act* all proceedings for enforcement of the debt were stayed against him. The Committee does not accept any curtailment of its' jurisdiction to proceed to make a finding of Professional Misconduct based on the failure to pay the \$11,000.00 costs order of Convocation. This Committee is not enforcing the debt. Rather, by virtue of Regulation 708, we note that bankruptcy in and of itself may be sufficient to amount to Conduct Unbecoming. Further, the Committee notes that if the Society chose to file Convocation's Order pursuant to Section 19 of the *Statutory Powers and Procedures Act*, it would have the status of a Court Order and pursuant to Section 178 (1) of the *Bankruptcy Act*, would be included in the list of debts not discharged by bankruptcy as being of the nature of a fine, penalty or restitution order.

This Committee therefore finds that the particulars of paragraph 2(a) of Complaint No. D128/96 have been made out.

With respect to the particulars set out in paragraph 3(a) of Complaint No. D128/96, this Committee originally made a finding on both counts of Break and Enter and Mischief to Property. Considering the fresh evidence that has been received regarding the success of the appeal with respect to the Break and Enter count, this Committee therefore renders its' final decision that only Count 3(a)(ii) of Complaint No. D128/96 has been made out.

The essence of the Society's case in this matter is the fact of the conviction. Throughout the course of these proceedings, we have learned that the charge of Mischief to Property arose as a result of the actions taken by the Member when the landlord of his office premises seized and locked his office and contents thereof for failure to pay rent. The Member made his way into the premises notwithstanding and the Mischief occurred in his attempt to get out when he flung a chair through the plate glass window. No restitution has been paid to the landlord.

At trial, the Member received ten days sentence on both the Break and Enter with Intent and Mischief to Property charge, concurrent to each other. On appeal, the conviction for the Mischief was not disturbed, nor was the sentence.

Before us, the defence of the Member was that he was "not guilty". However, he did not provide to us any facts to indicate same. Rather, the Member simply indicated that he was not guilty of the offence and that the conviction was a mistake. He said at page 42 of the transcript of August 27, 1996 "I think only the Court of Appeal will be able to tell us finally, not this body here and that's my position". The Court of Appeal has now told us and therefore we make a finding of Conduct Unbecoming on the conviction of Mischief to Property.

Finding on Complaint No. D380/97

The facts in support of the allegations in the Complaint Nos. D380/97 and D54/98 were contained in Exhibits 13 and 14 respectively, being the Agreed Statement of Facts and Document Book in support thereof. Without reproducing that material here, suffice it to say that the allegations amount to complaints by four different entities that the Member did not honour financial obligations that arose to those individual entities as a result of his legal practice. They are as follows:

1. Atchison & Denman, Court Reporting Services Inc. were owed a total of \$1,329.48 for a transcript of a cross-examination, evidenced by invoice dated January 16, 1992. The Member eventually provided post-dated cheques, the final one of which was returned "N.S.F." and \$332.27 is still outstanding.
2. Network Court Reporting Limited is owed for two accounts in the sum of \$335.45 and \$666.34 respectively for services provided in or around November 11, 1993 and February 8, 1994. The total is still outstanding.
3. Rosenberger, Weir, Macdonald was owed a total of \$1,224.08 for services provided on November 11, 1994. After some time, the Member provided three post-dated cheques in the amount of \$408.03 each. Subsequently, the Member stopped payment on the cheques and the total amount is still outstanding.
4. Dover Process Servers Limited commenced a Small Claims Court action against the Member for failure to pay them \$700.00 owed. An Offer to Settle from the Member is dated September 20, 1994. The Member provided two post-dated cheques in the sum of \$100.00 each. The first was cashed successfully, but then the Member sent a letter enclosing further cheques. The Member explained that the new cheques were to replace the ones previous given but some were written for the sum of \$100.00 and some for the sum of zero. Although the Member states that the cheques paying zero were written through inadvertence, he has not made good on any of the amounts. Therefore, the balance outstanding is \$600.00.

In his evidence, the Member did not dispute the fact that the monies above-noted were owed. However, he did go to great lengths to indicate the history of the matters and how the debts arose and his efforts to make payments towards them. However, in the final analysis, the conclusion that he failed to pay was irresistible.

The Member invited us to decline to make a finding of Professional Misconduct for failing to pay his financial obligations because he was financially unable to do so. The Member told us that from 1992 on, he was operating in difficult financial circumstances. He advised that he closed his practice in October of 1994 which would have been just after he was suspended for two months by the Order of Convocation of September 22, 1994. The Member's practice was in Midland and he advised that he collected mail at that address for some time and subsequently at a Georgetown, Ontario post office box address, even though the Member had moved to British Columbia. The Member cannot really recall how or what mail he collected. He denied receiving some of the letters that were produced as Exhibits and admitted others. He remembered some of the efforts he had made to pay the accounts and other matters he could not recollect. The Member remembered providing some responses to the Law Society regarding these complaints and did not remember others. Exhibits at the hearing included four different letters, dated April 12, 1995 to the Law Society regarding each of the four different complainants set out above. In each of the letters, the Member advised the Law Society that "Although my practice was carried on in a financially responsible manner, since my business has been closed I have been without income and I am financially unable to deal with accounts payable. I shall advise you when my situation improves." The Member states that it was obvious on April 12, 1995 when he wrote these letters, he believed his financial situation would improve. He says he was working in real estate in British Columbia but that Revenue Canada was garnishing him for money owed and he was pursuing a law suit with the Toronto-Dominion Bank (the final results of which were unfavourable to him). On April 7, 1998, the Member declared bankruptcy. He stated to us in evidence that it was "unfortunate that I was unable to pay ... I would have been happy to pay my bills ..."

The Member entered as Exhibits 9 and 10 in these proceedings, copies of his 1996 and 1997 tax returns. Although they show a poor state of affairs, the tax returns in and of themselves, were insufficient to lead this Committee to the conclusion that he could not have met the financial obligations referred to herein at some time, most particularly, when the obligations arose. The Member gave no other evidence of his insolvency and without ruling on the point, this Committee is sceptical that inability to pay for financial reasons constitutes a complete defence to failure to pay. In the circumstances, this is not a case where inability to pay was established by the Member.

The Committee therefore found that particulars to 2(a), (c), (e) and (g) of Complaint No. D380/97 were made out.

The Committee declined to make finding on particulars 2(b), (d), (f) and (h) of Complaint No. D380/97 which allege that the Member had failed to provide a full and meaningful reply to the Law Society in a timely manner regarding the four different complaints of failure to pay financial obligations set out above. This Committee was not satisfied that there had been a failure to reply. There was evidence in the letters exchanged between the Law Society and the Member that the Member had replied. Granted, most of his replies were brief. In many cases, the replies cited his lack of memory or available documentation to confirm or deny details. However, he did make the effort and this Committee is not prepared to rule on the niceties of "full and meaningful".

Finding on Complaint No. D54/98

The Agreed Statement of Facts and Exhibit Book filed contained proof that the Member was notified at his last known address that he had failed to file with the Society, within the time prescribed by the Regulation, the forms required under Section 16 of Regulation 708 of the *Law Society Act* for the fiscal period subsequent to his fiscal year ending January 31, 1994. The Member took no issue with respect to the truth of this proof but stated that he could not remedy the situation because of his financial circumstances. The Committee therefore makes a finding of Professional Misconduct as set out in paragraph 2(a) of Complaint No. D54/98.

Summary of Findings

The Committee made findings on the following:
Complaint D128/96 2(a) and 3(a)(ii);
Complaint D380/97 2(a), (c), (e) and (g);
Complaint D54/98 2(a).

Prior Discipline

A Complaint was sworn against the Member for acting in a conflict of interest, borrowing from clients, guaranteeing a mortgage loan from the client to the Member's wife, preparing and registering mortgage documents held by the Member's wife that provided for an interest rate in excess of the rate pursuant to the Criminal Code on three separate occasions and failing to disclose to a client that the Member's wife was receiving "placement fees" in relation to mortgage loans being made by that client to six other clients. On September 22, 1994, Convocation ordered the Member be suspended for two months commencing November 1, 1994 and pay costs in the amount of \$11,000.00.

Recommendation as to Penalty

The Committee recommends that the Member be suspended for six months definite and from month-to-month thereafter until his filings are brought up-to-date.

Reasons for Recommended Penalty

Because this matter was adjourned on a number of occasions, the Committee had an opportunity to hear from the Member a number of times. It became obvious to the Committee that the Member is his own worst enemy. The matters on which he was before us should never have been. With respect to the Breach of the Order of Convocation for failing to pay \$11,000.00 in costs, the Member got caught by his own game. The Member readily admitted that he agreed to that amount in costs, because he wanted to receive a reprimand from Convocation instead of a suspension and he was hoping to entice Convocation into granting the reprimand because he could not be suspended if he had to pay those costs. The Member said the Society's counsel knew of his poor financial situation, but does not explain how the Society counsel knew, nor the detail that the Society's counsel was supposed to know and still blamed the Society's counsel for not bringing it to Convocation's attention that he may not have been able to pay the \$11,000.00. Yet the opportunity was there for the Member to tell Convocation himself that he would not be able to pay and he admitted he did not do so. The Member also admitted he knew the recommendation of the Committee to Convocation was a suspension plus \$11,000 in costs.

The Member took self-help measures on his own behalf when his landlord seized his goods for non-payment of rent. This resulted in the criminal offence. He served ten days in jail for both charges and his sentence appeal was not successful. However, the Appeal Court did state that "we would not have been inclined to impose a term of imprisonment on this conviction, being of the view that a fine and probation would have been more appropriate".

The financial obligations unmet total \$3,158.14. The failure to file is an administrative matter that strikes to the heart of the ability of the Law Society to govern its' members in the public interest. The failure to file is for the fiscal year of the Member ending January 31, 1994.

The Member's explanation for this behaviour is his financial troubles. This Committee has no doubt the Member's difficulties snowballed but it cannot be said that any of it was due to factors beyond his control.

Nonetheless, the Committee finds that the Member is a sympathetic character. He is 42 years old and married and living with his wife and four children, ages 11 to 15 years old. He has moved a number of times, including from Ontario to British Columbia and now resides in Victoria. He has been suspended since 1994 in Ontario. He is not presently employed, but working learning a computer program. His wife is working and is the major bread-winner in the family at the time.

Taking into consideration the previous discipline findings, the multitude of complaints before us presently and all of the circumstances, this Committee finds that a total suspension of six months definite to continue thereafter until the Member's filings are brought up-to-date, is the appropriate recommendation to Convocation.

The Member was Called to the Bar on April 18, 1985.

ALL OF WHICH is respectfully submitted

DATED this 29th day of April, 1999

Tamara Stomp, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 6 months definite and from month to month thereafter until his filings are brought up to date.

Both Counsel and Duty Counsel made submissions in support of the recommended penalty and that the suspension commence immediately.

There were questions from the Bench.

A correction was made to the Report as follows:

- at page 2 under the heading Complaint D54/98 that paragraph "1." a) should read "2." a).

It was moved by Ms. Ross, seconded by Mr. Topp that the recommended penalty be adopted, that is, that the solicitor be suspended for a period of 6 months definite effective June 24th, 1999 and from month to month thereafter until his filings are completed.

Carried

Re: Josefino C. RIVERA - North York

The Secretary placed the matter before Convocation.

Messrs. Topp, Swaye and Crowe and Ms. Puccini withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 23rd February, 1999, together with an Affidavit of Service sworn 23rd March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 15th March, 1999 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 21st April, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gerald A. Swaye, Q.C., Chair
Marshall Crowe
Helene Puccini

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

Amanda Worley
For the Society

JOSEFINO C. RIVERA
of the City
of North York
a barrister and solicitor

Peter M. Gakiri
For the solicitor

Heard: January 6, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

Complaint D28/98 was issued on June 17, 1998 against Josefino C. Rivera alleging that he was guilty of professional misconduct.

The matter was heard in public on January 6, 1999 before this Committee composed of Gerald A. Swaye, Q.C., Chair, Marshall Crowe and Helene Puccini. The Solicitor attended the hearing and was represented by Peter M. Gakiri. Amanda Worley appeared on behalf of the Law Society.

DECISION

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

Complaint D28/98

2. a) Between October 17 and December 29, 1997, the Solicitor misappropriated the sum of \$122,160.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients, including his client Emelyn Lopez;
- b) Between October 17 and December 30, 1997, the Solicitor misapplied the sum of \$14,200.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients, including his client Emelyn Lopez;
- c) Between February 7, 1996 and October 3, 1997, the Solicitor misappropriated the sum of \$1,600.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients;
- e) Between March 18 and November 17, 1997, the Solicitor received funds in trust from clients for retainers in the sum of \$13,606.00 in total, which he failed to deposit into a trust account at a chartered bank, principal savings office or registered trust corporation, in breach of subsection 14(1) and (3) of Regulation 708 made under the *Law Society Act*;
- f) The Solicitor failed to maintain proper books and records, in breach of section 15 of Regulation 708 made under the *Law Society Act*; and
- g) In or about December 1997, the Solicitor abandoned his law practice.

The Law Society did not proceed on particular 2(d) in the alternative as the Solicitor admitted particular 2(c).

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D28/98 and is prepared to proceed with a hearing of this matter on November 3 and 4, 1998.

II. IN PUBLIC / IN CAMERA

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

III. COMPLAINT

3. Complaint D28/98 was issued on June 17, 1998 against the Solicitor, alleging the following acts of professional misconduct:

- (a) Between October 17 and December 29, 1997, the Solicitor misappropriated the sum of \$122,160.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients, including his client Emelyn Lopez;
- (b) Between October 17 and December 30, 1997, the Solicitor misapplied the sum of \$14,200.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients, including his client Emelyn Lopez;
- (c) Between February 7, 1996 and October 3, 1997, the Solicitor misappropriated the sum of \$1,600.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients;
- (d) In the alternative to (c), the Solicitor improperly withdrew money from his mixed trust account in that he failed to allocate the withdrawals to clients and failed to comply with subsection 14(9) of Regulation 708 made under the *Law Society Act*, in making the withdrawals;
- (e) Between March 18 and November 17, 1997, the Solicitor received funds in trust from clients for retainers in the sum of \$13,606.00 in total, which he failed to deposit into a trust account at a chartered bank, principal savings office or registered trust corporation, in breach of subsection 14(1) and (3) of Regulation 708 made under the *Law Society Act*;
- (f) The Solicitor failed to maintain proper books and records, in breach of section 15 of Regulation 708 made under the *Law Society Act*; and
- (g) In or about December 1997, the Solicitor abandoned his law practice.

IV. ADMISSIONS

4. The Solicitor has reviewed Complaint D28/98 with his solicitor, Peter M. Gakiri, and admits particulars (a) (b) (c) (e) (f) and (g) contained therein. Further, the Solicitor admits the facts in the within Agreed Statement of Facts. The Solicitor admits that particulars (a) (b) (c) (e) (f) and (g) as alleged in the Complaint and supported by the facts of hereinafter stated constitute professional misconduct.

V. FACTS

Background

5. The Solicitor was born on March 19, 1947 and was called to the Bar on February 16, 1995. The Solicitor practised as a sole practitioner at his offices at Suite 410, 45 Sheppard Avenue East in North York until he abandoned his practice in December of 1997. The Solicitor was suspended for non-payment of his annual fees on June 1, 1998.

6. The Law Society authorized an audit of the Solicitor's practice due to deficiencies noticed in his annual filing for the year ending December 31, 1995. In particular, the annual filing for this period disclose overdrawn client trust ledger cards. A copy of the annual filing is found at Tab 1 of the Document Book.

7. Janet Merkley, an Investigation Examiner with the Audit and Investigation Department of the Law Society, was assigned to conduct the audit of the Solicitor's practice.

8. The audit investigation revealed several deficiencies with respect to the operation of the Solicitor's mixed trust account and the maintenance of his books and records as required by Regulation 708 of the *Law Society Act*.

9. The Solicitor maintained his bank account #77 12510 for his mixed trust account at the 7125 Woodbine Avenue, Markham branch of the CIBC (the "Trust Account") and maintained his current bank account #77 12413 for his general account also at the 7125 Woodbine Avenue, Markham branch of the CIBC (the "General Account").

Failure to maintain books and records

Particular 2(f) The Solicitor failed to maintain proper books and records, in breach of section 15 of Regulation 708 made under the *Law Society Act*

10. Ms. Merkley attended at the Solicitor's office for the first time to interview the Solicitor and to review his books and records on December 10, 1997. The Solicitor did complete a questionnaire with Ms. Merkley indicating that he had only one mixed trust account. A copy of the questionnaire is found at Tab 25 of the Document Book.

11. On December 10, 1997, when Ms. Merkley asked the Solicitor to produce his books and records, the Solicitor advised that his bookkeeper had his books and records at his home and that he was unavailable. When asked if his books and records were up to date, the Solicitor responded "Yes to the end of November, 1997". When Ms. Merkley asked the Solicitor if he could telephone his bookkeeper and ascertain when he could retrieve his books, the Solicitor replied "No, he has another job, not at home know". The Solicitor and Ms. Merkley agreed that she would return on December 19, 1997 to audit his books and records. The Solicitor assured Ms. Merkley that his books and records would be available on that date. A copy of Ms. Merkley's interview notes for December 10, 1997 are found at Tab 24 of the Document Book.

12. On December 16, 1997, Ms. Merkley received a faxed letter from the Solicitor, a copy of which is found at Tab 26 of the Document Book. In his letter, the Solicitor indicated that his bookkeeper had left for Los Angeles to be with his sick mother and would not be returning to Toronto after the Christmas holidays. In addition, the Solicitor indicated that he had a great deal of paper work and other court appointments, along with personal commitments, which would leave him very little time to deal with the examination of his books and records. Therefore, the Solicitor requested that the examination be re-scheduled to January 12, 1998 at 10 a.m.

13. After receiving the Solicitor's letter, Ms. Merkley telephoned him on the same day and left a message on his answering machine asking him to telephone her. Ms. Merkley's message stated that she did not have a problem waiting until after the holidays, but would at least like to see a trust comparison for November, 1997 to show that the Solicitor was up to date. The Solicitor did not respond. A copy of Ms. Merkley's telephone transaction dated December 16, 1997 is found at Tab 27 of the Document Book.

14. On December 17, 1997, Ms. Merkley again attempted to telephone the Solicitor. As he was not there she left a message with his secretary asking that the Solicitor call her that afternoon. The secretary stated that the Solicitor was in court. The Solicitor did not respond. A copy of Ms. Merkley's telephone transaction dated December 17, 1997 is found at Tab 28 of the Document Book.

15. On December 19, 1997, Ms. Merkley attended at the Solicitor's office even though the appointment had been cancelled. The receptionist did not know where the Solicitor was. Ms. Merkley waited for the Solicitor's secretary to come into the office. The secretary, Susan, stated that the Solicitor was in court in Newmarket. Ms. Merkley handed her business card to Susan and asked her to have the Solicitor telephone her as soon as possible, and Susan agreed. The Solicitor did not respond. A copy of Ms. Merkley's notes of her visit dated December 19, 1997 are found at Tab 29 of the Document Book.

16. The Solicitor did not produce his books and records. However, after the Solicitor had abandoned his practice and the Law Society had received a trusteeship order, as detailed below, partial books and records were received through Ray Olamit, the Solicitor's bookkeeper. Ms. Merkley's review of the partial books and records revealed that they had not been maintained on a current basis. As the books were incomplete, a full audit could not be conducted on the Solicitor's practice.

17. As the Solicitor's books and records were not up to date, they could not be reconstructed. However, Ms. Merkley was able to do a partial reconstruction of the Solicitor's books as they applied to his mixed trust account, based on the bank statements and the cancelled cheques produced by the CIBC. Appendix "A", found at Tab 41 of the Document Book depicts the misappropriation of the \$122,160.00 and the misapplication of \$14,200.00, detailed below. Appendix "B", found at Tab 42 of the Document Book, depicts receipts and disbursements on the Solicitor's mixed trust account for the period October to December, 1997.

18. The following chart details the status of the partial books and records when examined by Ms. Merkley on January 12, 1998:

Date	Current Monthly Trust Comparisons, including Trust Listings and Reconciliations Section 15(1)(h)& (2)(a)	Trust Receipts Journal 15(1)(a)	Trust Disbursement Journal 15(1)(b)	Clients Trust Ledgers 15(1)(c)	General Receipts Journal 15(1)(e)	General Disbursement Journal 15(1)(f)	Fees Book and/or Chronological File of Copies of Billings 15(1)(g)
Dec.10/97	Not Produced	Not Produced	Not Produced	Not Produced	Not Produced	Not Produced	Not Produced
Jan. 12/97	1996 & 1997 - Not Produced	Produced to 1996	Produced to November, 1997 * (Partial)	1996 & 1997 - Not Produced	Produced to Dec/1996	Produced to Nov/1997	Produced to 1996

*partial refers to the fact that cash withdrawals were not listed

Abandonment of Practice

Particular 2(g) In or about December 1997, the Solicitor abandoned his law practice

19. On December 30, 1997, Edgar Hielema telephoned the Law Society. He was the solicitor acting for the vendor on a real estate transaction in which the Solicitor acted for the purchaser, Emelyn Lopez. The transaction was initially to close on October 16, 1997 but was extended to the following dates as Ms. Lopez was not in funds for the remainder of her down payment:

October 31, November 28, December 3, December 4, December 15 and December 19, 1997.

20. Mr. Hielema was concerned because the Solicitor had missed the final closing date of the Lopez purchase and he feared that the Solicitor may have left his law practice and could not be located. Mr. Hielema believed that the CIBC had advanced mortgage funds to the Solicitor to close the purchase. A message was taken by Jan Walker of the Complaints Department of the Law Society, and left for Ms. Merkley. A copy of Ms. Walker's telephone transaction dated December 30, 1997, is found at Tab 30 of the Document Book.

21. Upon Ms. Merkley's return from Christmas vacation on January 5, 1998 she also spoke to Mr. Hielema who advised that he had spoken to the Solicitor before Christmas, that they had discussed the closing and that the Solicitor had advised that he was having trouble getting funds from Ms. Lopez. Mr. Hielema advised that after Christmas he contacted Mr. Gakiri who told him that the Solicitor was on sick leave and he did not know when he would be back. Mr. Hielema further stated that the Solicitor held \$107,000.00 from the CIBC on behalf of Ms. Lopez and the funds had not been forwarded to his client for closing. A copy of Ms. Merkley's telephone transaction dated January 5, 1998 is found at Tab 33 of the Document Book.

22. On January 5, 1998, Ms. Merkley attempted to telephone the Solicitor at his office. The Solicitor's answering machine at his office had the following recording on it: "Joe Rivera is on leave of absence. For any inquiries, please contact Peter Gakiri at 512-7999". A copy of Ms. Merkley's telephone transaction dated January 5, 1998 is found at Tab 31 of the Document Book.

23. On January 5, 1998, Ms. Merkley telephoned Mr. Gakiri, who shared space with the Solicitor at his offices at Suite 410, 45 Sheppard Avenue East. Mr. Gakiri advised that the Solicitor had left him a note. Mr. Gakiri could not tell Ms. Merkley where the Solicitor was or when or if he was returning to his practice. A copy of Ms. Merkley's telephone transaction dated January 5, 1998 is found at Tab 32 of the Document Book.

24. On January 5, 1998, Ms. Merkley also spoke to Laurie MacFarlane, a solicitor with the CIBC. Ms. MacFarlane confirmed that the Lopez mortgage funds in the amount of \$107,535.26 had been deposited into the Solicitor's Trust Account, but that several withdrawals had been made from his Trust Account reducing the balance to less than \$2,000.00. Details of Ms. Merkley's conversation with Ms. MacFarlane are found in Ms. Merkley's affidavit at Tab 34 of the Document Book.

25. On January 7, 1998, Ms. Merkley telephoned Mr. Gakiri to determine whether the Solicitor had in fact abandoned his practice. In that conversation, Mr. Gakiri advised Ms. Merkley that he had come into his office on December 27, 1997 and found a letter addressed to him from the Solicitor. In that letter, the Solicitor advised that he was depressed and was taking a leave of absence. The Solicitor had requested that Mr. Gakiri look after his clients. Mr. Gakiri confirmed that the Solicitor had not discussed this matter with him prior to this. Details of Ms. Merkley's telephone conversation with Mr. Gakiri are in Ms. Merkley's affidavit found at Tab 34 of the Document Book.

26. On January 7, 1998, Ms. Merkley telephoned Patria Rivera, the Solicitor's wife. Mrs. Rivera advised Ms. Merkley that she and her husband had signed a Separation Agreement on December 27, 1997, a copy of which is found at Tab 39 of the Document Book. She advised that the Solicitor had come to the matrimonial home on December 26, 1997 and advised her that he was leaving his practice and moving to Vancouver to set up an immigration law practice. Mrs. Rivera advised Ms. Merkley that her husband called again on December 28, 1997 and January 1, 1998 and in those calls he indicated that he was in Vancouver. A copy of Ms. Merkley's telephone transaction dated January 7, 1998 is found at Tab 3 of the Document Book.

27. On January 9, 1998, Ms. Merkley spoke to the Solicitor by telephone in Vancouver. He acknowledged that he had left his practice. He declined to discuss the transactions in his Trust Account. He advised that he would be returning to Toronto at the end of the month and could face Ms. Merkley then. When advised that the Law Society's intention was to seek a section 43 trusteeship order, he stated "*If you think it is wise. It is your decision.*" A copy of Ms. Merkley's telephone transaction dated January 9, 1998 is found at Tab 35 of the Document Book.

28. On January 9, 1998, the Law Society brought an *ex parte* application in the Ontario Court (General Division) for trusteeship over the practice of Mr. Rivera pursuant to section 43 of the *Law Society Act*. The Law Society brought the application asserting that Mr. Rivera had left the Province of Ontario and had made no provision for the protection of his client's interests. Ms. Merkley's swore an affidavit in support of the application which is found at Tab 34 of the Document Book.

29. On January 9, 1998, Mr. Justice Lissaman made an order granting the Law Society trusteeship over the practice of the Solicitor and authorizing the Law Society to, *inter alia*, to take possession of all documents, records, bank accounts and properties of every nature that was in the possession, power and control of the Solicitor, relating to his practice. A copy of Mr. Justice Lissaman's order is found at Tab 36 of the Document Book.

30. Following the granting of Mr. Justice Lissaman's order, Ms. Merkley and Stan Jenkins, a Staff Trustee with the Office of the Staff Trustee of the Law Society, attended at the offices of Suite 410, 45 Sheppard Avenue East, to review the Solicitor's practice on January 14, 1998. Mr. Jenkins' review of the Solicitor's practice disclosed, among other things, a file list which had been maintained by the Solicitor and his secretary indicating the status of his active files. A copy of this file list is attached at Tab 44 of the Document Book.

31. Photographs taken by Mr. Jenkins on January 14, 1998 of the various aspects of the Solicitor's offices are found at Tab 40 of the Document Book.

32. The Solicitor had not advised either the Law Society, his staff or his clients of his impending departure from his practice. In fact, following December 27, 1998, a number of clients or opposing counsel called wanting to know the status of their files and were surprised to learn that the Solicitor was not there. In addition, the Solicitor had not left any instructions for his staff or made any arrangements regarding the operation of his Trust Account.

33. The Solicitor's actions have prejudiced at least one of his clients namely, Ms. Lopez. The Solicitor did not close Ms. Lopez's purchase in December, 1997 as agreed, or at all. In fact, since December 16, 1997, when Ms. Lopez delivered the down payment balance to him for the closing, he has not contacted Ms. Lopez nor has returned the mortgage funds of \$107,535.26 advanced by the CIBC.

34. The Lopez purchase eventually closed in January, 1998, after Ms. Lopez had retained another solicitor, Mark Viner, and the CIBC had advanced another set of mortgage funds to Ms. Lopez.

35. The CIBC eventually recovered \$28,365.71 from the \$107,535.26 it had advanced to the Solicitor, when it froze the Solicitor's and his wife's accounts.

Misappropriation of \$122,160.00 and Misapplication of \$14,200.00

Particular 2(a) Between October 17 and December 29, 1997, the Solicitor misappropriated the sum of \$122,160.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients including his client Emelyn Lopez;

Particular 2(b) Between October 17 and December 30, 1997, the Solicitor misapplied the sum of \$14,200.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients, including his client Emelyn Lopez;

36. The misappropriation in the total amount of \$122,166.00 is comprised of 8 instances of misappropriation in amounts of \$500.00, \$2,500.00, \$2,200.00, \$1,185.00, \$16,000.00, \$72,575.00, \$25,000.00 and \$2,200.00. The misapplication in the total amount of \$14,200.00 is comprised of 2 instances of misapplication in the amounts of \$13,000.00 and \$1,200.00.

The Lopez Transaction

37. The Solicitor was retained by Emelyn Lopez, in October 1997, to act for her on the purchase of a condominium at 224 Rosemount Avenue, Unit 5, Toronto. Ms. Lopez's mortgage had been approved on February 28, 1997 with CIBC. A copy of the mortgage approval is found at Tab 16 of the Document Book. Prior to the original closing date of October 16, 1997, the CIBC advanced mortgage funds in the amount of \$107,535.26 in a cheque made payable to "J. Rivera in trust". A copy of the cheque is found at Tab 15 of the Document Book.

38. The closing date of October 16, 1997 had to be extended several times because Ms. Lopez required additional time to come up with \$15,000.00, being the balance of her down payment. Ms. Lopez had already made a deposit of \$9,400.00 to the builder.

39. On October 17, 1997, the Solicitor deposited the CIBC cheque into his Trust Account as evidenced by the stamps on the reverse of the cheque found at Tab 15 of the Document Book. At the time the Solicitor deposited the cheque into his Trust Account, the balance in his Trust Account was \$92.42, as evidenced by the bank statements for the Trust Account for the period October, 1997 found at Tab 4 of the Document Book. This event establishes that the Solicitor's Trust Account should always have had a balance of at least \$107,535.26 until the Lopez transaction closed.

The Misappropriations and Misapplications

40. To the Solicitor's knowledge, the purpose of the funds he had received from the CIBC was to pay the vendor of Ms. Lopez's condominium on the closing date. However, on October 17, 1997, the Solicitor disbursed \$13,000.00 from his Trust Account by drawing cheque #414 made payable to another client, Dr. Elnora Inandan. A copy of the bank statement of the Trust Account and a copy of the cancelled cheque, evidencing this disbursement are found at Tab 4 of the Document Book.

41. The Solicitor misapplied \$13,000.00 in this matter as all but \$92.42 on deposit in his Trust Account was designated to be used in the Lopez purchase. The Solicitor should have had an additional \$13,000.00 on deposit in his Trust Account for the payment of the Inandan matter.

42. On October 30, 1997, the Solicitor signed an Undertaking to the vendor's Solicitor whereby he personally undertook to close the Lopez transaction as soon as Ms. Lopez was in funds. A copy of the Solicitor's Undertaking is found at Tab 16 of the Document Book. At this point, the \$13,000.00 from the Lopez transaction had already been misapplied.

43. On October 31, 1997, the Solicitor obtained a second mortgage in the amount of \$20,000.00 from Beneficial Realty Ltd. on his matrimonial home at 48 Baywood Court, Thornhill. The mortgage is evidenced by the title search documents showing the registration of the mortgage on the matrimonial home, found at Tab 18 of the Document Book.

44. On November 3, 1997, the Solicitor deposited a cheque in the amount of \$14,777.27 made payable to "Peter Gakiri in trust", being the remainder of the mortgage proceeds, into his Trust Account as demonstrated by a copy of the deposit slip and cheque found respectively at Tabs 5 and 17 of the Document Book and the bank statement for the Trust Account for November, 1997 found at Tab 7 of the Document Book. This amount effectively repaid the trust funds held on account of Ms. Lopez, which had been improperly disbursed by the Solicitor to Dr. Inandan.

45. On October 31, 1997, the Solicitor disbursed cheque #417 in the amount of \$500.00 from his Trust Account to himself on account of fees on the Lopez matter. A copy of the cancelled cheque is found at Tab 7 of the Document Book. The cheque was deposited into the Solicitor's General Account on November 3, 1998. This disbursement and subsequent deposit are evidenced by the bank statements respectively for the Trust Account and General Account for November, 1997 found respectively at Tabs 7 and 8 of the Document Book. The Solicitor had not earned these fees and was not authorized by Ms. Lopez to withdraw this money and thus, a misappropriation in the amount of \$500.00 occurred. A review of the bank statement for the Trust Account shows that the balance at the time of this withdrawal was below the \$107,535.26 that should have been held on account of the Lopez closing.

46. On October 31 and November 3, 1997, the Solicitor disbursed cheques #419 in the amount of \$2,200.00 and #421 in the amount of \$2,500.00 to himself from his Trust Account. Copies of these cancelled cheques are found at Tab 7 of the Document Book. These cheques were deposited to the Solicitor's General Account on November 4, 1997. These disbursements and subsequent deposits were evidenced by the bank statement for the Trust Account and General Account for November, 1997, found respectively at Tabs 7 and 8 of the Document Book. No client names were designated on these cheques; there was only a notation that they were for legal fees. No allocation was made to any client as the Solicitor was not entitled to withdraw this money. Therefore, misappropriations in the amount of \$2,500.00 and \$2,200.00 occurred.

47. On December 16, 1997, Ms. Lopez finally received the funds to close her transaction and delivered a cheque in the amount of \$16,185.00 to the Solicitor to be held in trust pending the closing. On December 16, 1997, the Solicitor only deposited \$15,000.00 of these monies to his Trust Account as evidenced by the bank statement for his Trust Account for December, 1997, found at Tab 6 of the Document Book and the accompanying deposit slip for the Trust Account found at Tab 5 of the Document Book. The Solicitor admits that although he was not entitled to this money, he applied it to his own personal use and therefore, a misappropriation of \$1,185.00 occurred.

48. On December 22, 1997, the Solicitor transferred \$16,000.00 from his Trust Account to his General Account by instant teller as demonstrated by the bank statements for the Trust Account and the General Account for December, 1997, found respectively at Tabs 6 and 8 of the Document Book. Prior to the deposit, the Solicitor's General Account was overdrawn in the amount of \$(8,775.89). A review of the bank statement for the Trust Account shows that the balance at the time of this withdrawal was below the \$107,535.26 that should have been held on account of the Lopez closing. The Solicitor was aware at all times that this transfer was not authorized and therefore a misappropriation in the amount of \$16,000.00 occurred.

49. On December 23, 1997, the Solicitor disbursed cheque #467 in the amount of \$72,575.00 from his Trust Account to his wife, Patria Rivera. A copy of this cancelled cheque is found at Tab 6 of the Document Book. The Solicitor proceeded to deposit this cheque into his and his wife's joint account at the Leslie & Finch branch of the CIBC, on December 23, 1997. No endorsement appears on the reverse of the cheque. Ms. Rivera denies ever having seen the cheque prior to it being shown to her by the Law Society and denies that she deposited it into their joint account. A review of the bank statement for the Trust Account shows that the balance at the time of this withdrawal was below the \$107,535.26 that should have been held on account of the Lopez closing. The Solicitor was aware at all times that this disbursement was not authorized and therefore, a misappropriation of \$72,575.00 occurred.

50. On December 23, 1997, the Solicitor transferred \$25,000.00 from his Trust Account to his General Account by instant teller as evidenced by the bank statements for the Trust Account and General Account for December, 1997, found respectively at Tabs 6 and 8 of the Document Book. A review of the bank statement for the Trust Account shows that the balance at the time of this withdrawal was below the \$107,535.26 that should have been held on account of the Lopez closing. The Solicitor was at all times aware that this transfer was unauthorized and therefore a misappropriation in the amount of \$2,500.00 occurred. This left a balance in the Trust Account of \$43.00.

51. On December 24, 1997, the Solicitor made a partial restitution for the misappropriations by transferring \$20,000.00 from his General Account to his Trust Account as demonstrated by the bank statements for the Trust Account and General Account for December, 1997, found respectively at Tabs 6 and 8 of the Document Book.

52. On December 26, 1997, after Ms. Lopez had received a telephone call from the builder's secretary advising her that her purchase had not closed, she telephoned the Solicitor. Ms. Lopez spoke to the Solicitor's secretary Susan, who advised her that the Solicitor was taking a two-week leave of absence and he was not going to close her deal. However, Susan advised Ms. Lopez to come and pick up her down payment cheque and her file.

53. On December 30, 1997, the Solicitor disbursed cheque #470 in the amount of \$16,200.00 from his Trust Account to Ms. Lopez. A copy of the cancelled cheque is found at Tab 5 of the Document Book. As the Solicitor had originally deposited only \$15,000.00 into his Trust Account on account of Ms. Lopez's down payment, by returning \$16,200.00, the Solicitor misapplied \$1,200.00 of other clients' trust monies in his Trust Account to Ms. Lopez.

54. On December 29, 1997, the Solicitor transferred \$2,200.00 from his Trust Account to his General Account as evidenced by the bank statements for the Solicitor's Trust Account and General Account for December, 1997, found respectively at Tabs 6 and 8 of the Document Book. A review of the bank statement for the Trust Account shows that the balance at the time of this withdrawal was below the \$107,535.26 that should have been held on account of the Lopez closing. The Solicitor was at all times aware that this transfer was unauthorized and therefore a misappropriation in the amount of \$2,200.00 occurred.

Transfer of the Misappropriated Funds to Mrs. Rivera

55. On January 7 and February 6, 1998, Ms. Merkley interviewed the Solicitor's wife, Patty Rivera. Mrs. Rivera advised that on the night of December 22, 1997, her husband had told her that he was putting some money into the joint account as part of their separation agreement. Mrs. Rivera advised that her husband told her that the money was to be used to pay off the second mortgage on the home at 48 Baywood Court, and the remainder was to be used to support her and the children.

56. Mrs. Rivera advised Ms. Merkley that when they separated her husband left her a letter dated December 27, 1997 on a computer disk, which confirmed the directions that the Solicitor had given to Mrs. Rivera as to how to apply the funds he had deposited into their joint bank account. A copy of this letter is found at Tab 14 of the Document Book.

57. Mrs. Rivera believed that the money was earned by her husband from his clients. Mrs. Rivera has no knowledge that her husband had issued a cheque #467 the amount of \$72,575.00 (referred to in paragraph 47) in her name on December 23, 1997. All Mrs. Rivera knew was that her husband had deposited some money into their joint account at the Leslie & Finch branch of the CIBC, as evidenced by the bank statement for the joint account for December, 1997, found at Tab 11 of the Document Book. She discovered that the Solicitor had just that day deposited \$72,575.00 and then withdrawn \$20,000.00 from their joint account, leaving \$51,000.00 for her. When she asked him what he had done with the \$20,000.00 he replied he used it to pay off debts.

58. On December 23, 1997, Mrs. Rivera transferred \$21,000.00 from their joint account to her personal account at the Yonge & St. Clair branch of the CIBC by instant teller as evidenced by the bank statement for her personal account for December, 1997, found at Tab 12 of the Document Book. In addition, Mrs. Rivera transferred \$30,000.00 from her joint account to her personal account at the Yonge & Queen branch of the CIBC as evidenced by the bank statement for this personal account for December, 1997, found at Tab 13 of the Document Book.

59. On December 24, 1997, Mrs. Rivera transferred \$5,000.00 of the money her husband had given her from her personal account at the Yonge & St. Clair branch of the CIBC back to their joint account, as her husband had told her there should be sufficient money in their joint account to pay for life insurance and leases on the cars. This transfer is evidenced in Mrs. Rivera's bank statement for her personal account and for the joint account found respectively at Tabs 12 and 11 of the Document Book.

60. On January 3, 1998, Mrs. Rivera paid \$20,654.96 to Beneficial Realty Ltd. from her personal account at the Yonge & Queen branch of the CIBC, to discharge the second mortgage on the matrimonial home. Mrs. Rivera was instructed to do this by her husband with the money he had given her. This payment is evidenced by the bank statement for this personal account for January, 1998, found at Tab 13 of the Document Book.

61. When Mrs. Rivera later learned that the monies she had received from her husband were misappropriated funds, she contacted Beneficial Realty Ltd. to ask that they return the monies as the monies were never hers to give. Beneficial Realty Ltd. refused to refund the money.

Solicitor's Representations

62. On February 10, 1998, Ms. Merkley again spoke to the Solicitor in Vancouver by telephone. The Solicitor stated that *"I was in Toronto last week. I want to pay back what I owe. I would have to do it in instalments - \$20,000.00 by April, 1998; \$20,000.00 by July 1, 1998; balance on October 1, 1998. Looking at \$50,000.00 owing above what's in account. Only \$20,000.00 went to me. Most of \$20,000.00 gone to debts. Most of money went to accounts - to my creditors - to pay. I was very indebted. Yes - I admit I took the money to pay creditors."* A copy of Ms. Merkley's telephone transaction dated February 10, 1998 is attached at Tab 37 of the Document Book.

63. On February 12, 1998 Ms. Merkley again spoke to the Solicitor in Vancouver by telephone. The Solicitor stated *"Yes - there were problems prior to Dr. Inandan. I think I started taking trust money in October, 1997. I think Inandan sale. I do not remember details. I dipped into trust monies. I lost a handle on things. \$20,000.00 almost gone - to pay creditors. I want to pay money back;"* a copy of Ms. Merkley's telephone transaction dated February 12, 1998 is attached at Tab 38 of the Document Book.

Misappropriation of \$1,600.00

Particular 2(c) Between February 7, 1996 and October 3, 1997, the Solicitor misappropriated the sum of \$1,600.00 in total, more or less, from the funds which he held in his mixed trust account on behalf of his clients;

64. On 17 occasions between February 7, 1996 and October 3, 1997, the Solicitor withdrew amounts from his Trust Account by way of withdrawals from the instant teller machine. These withdrawals were not reported in the Solicitor's trust disbursements journal and were not allocated to any client(s). The following chart illustrates the 17 unallocated withdrawals:

Date	Amount From Trust	Particulars
February 7, 1996	100.00	Instant Teller Withdrawal
April 2, 1996	100.00	Instant Teller Withdrawal
May 9, 1996	100.00	Instant Teller Withdrawal
May 10, 1996	100.00	Instant Teller Withdrawal
May 13, 1996	100.00	Instant Teller Withdrawal
May 21, 1996	100.00	Instant Teller Withdrawal
May 27, 1996	40.00	Instant Teller Withdrawal
June 3, 1996	100.00	Instant Teller Withdrawal
June 4, 1996	100.00	Instant Teller Withdrawal
June 17, 1996	60.00	Instant Teller Withdrawal
July 5, 1996	100.00	Instant Teller Withdrawal
July 15, 1996	100.00	Instant Teller Withdrawal
July 2, 1997	100.00	Instant Teller Withdrawal
July 4, 1997	100.00	Instant Teller Withdrawal
July 14, 1997	100.00	Instant Teller Withdrawal
July 16, 1997	100.00	Instant Teller Withdrawal
October 3, 1997	100.00	Instant Teller Withdrawal
<i>Total</i>	1,600.00	

These withdrawals are evidenced by the Solicitor's bank statement for the Trust Account for the indicated months between February 1996 to October 1997 found at Tab 9 of the Document Book.

65. When Ms. Merkley spoke to Ray Olamit, the Solicitor's bookkeeper, by telephone on January 27, 1998, Mr. Olamit told her *"I recorded from cheque stubs and deposit books. I could not allocate the cash withdrawals from trust to clients as I did not know what client to charge to"*. Ms. Merkley's telephone transaction regarding this telephone call is found at Tab 19 of the Document Book.

66. When Ms. Merkley spoke to the Solicitor by telephone on February 10, 1998, and asked the Solicitor about these withdrawals, the Solicitor admitted *"I should have transferred to general - not taking cash. Difficult to keep track"*. Ms. Merkley's telephone transaction of this telephone call is found at Tab 37 of the Document Book.

67. The Solicitor was aware at all times that these withdrawals in the total amount of \$1,600.00 from his Trust Account were not authorized. In addition, the Solicitor admits that the \$1,600.00 in withdrawals benefited him personally.

Failure to deposit retainers into trust

Particular 2(e) Between March 18 and November 17, 1997, the Solicitor received funds in trust from clients for retainers in the sum of \$13,606.00 in total, which he failed to deposit into a trust account at a chartered bank, principal savings office or registered trust corporation, in breach of subsections 14(1) and (3) of Regulation 708 made under the *Law Society Act*

68. On several occasions, the Solicitor received retainer funds from clients for future services and/or future disbursements, which were not deposited into his Trust Account. Some of the retainers were deposited into the Solicitor's General Account as opposed to his Trust Account. The whereabouts of the remaining retainers are unknown, as the Solicitor did not record the deposits. The following chart illustrate the 20 occasions between March 18, 1997 and November 17, 1997, when the Solicitor received retainers from clients totalling \$13, 606.10 and failed to deposit them into his Trust Account;

Date	Client	Amount	Deposited to Trust Account	Deposited to General Account
March 18, 1997	Monsterrat	1,000.00	No	Yes
March 18, 1997	Pomfries	200.00	No	No
April 8, 1997	Valencia	100.00	No	No
April 11, 1997	Vasquez	250.00	No	Yes
April 12, 1997	Sanchez	700.00	No	No
April 14, 1997	Vasquez	250.00	No	Yes
April 22, 1997	Lanskngan	500.00	No	Yes
April 29, 1997	Lopez, Chie	1,800.00	No	Yes
May 10, 1997	Dahiliq	400.00	No	No
May 29, 1997	Abaur	800.00	No	Yes
June 24, 1997	Afable	1,500.00	No	Yes-\$ 1,000. only
July 3, 1997	Rahlevan	500.00	No	No
July 4, 1997	Alamacio	750.00	No	No
July 9, 1997	Sta Ana	400.00	No	No
July 18, 1997	Kamogsnakon	250.00	No	No

Date	Client	Amount	Deposited to Trust Account	Deposited to General Account
August 14, 1997	Cortez	300.00	No	No
August 18, 1997	DeOCampo	2,000.00	No	Yes
August 19, 1997	Monsterrat	1,306.00	No	Yes
October 9, 1997	Guerra	400.00	No	No
November 17, 1997	Camaganaan	200.00	No	No
<i>Total</i>		13,606.00		

69. At the time the Solicitor received the retainers, he issued receipts to his clients as evidence by the Cash Receipt Vouchers found at Tab 22 of the Document Book. The fact that the Solicitor deposited some of these retainers into his General Account is evidenced by the General Account Deposit Slips found at Tab 23 of the Document Book.

70. In respect of these above matters, the Solicitor takes the position that he had performed the work for these clients at the time he received the retainers from them. However, the Solicitor has no evidence to adduce in support of his position. The Solicitor does admit that he has never delivered fee billings to these clients and therefore improperly dealt with these monies by failing to deposit them into his Trust Account.

VI. DISCIPLINE HISTORY

71. The Solicitor does not have a discipline history.

DATED at Toronto, this 2nd day of November, 1998"

RECOMMENDATION AS TO PENALTY

The Committee recommends that Josefino C. Rivera be disbarred.

REASONS FOR RECOMMENDATION

The allegations set out in 2(a-g) with the exception of 2(d) constitute professional misconduct. The most serious, of course, is the misappropriation of \$122,160.00 . Of this amount, some has been recovered, but approximately \$70,000.00 more or less is still outstanding.

The Solicitor took money that did not belong to him and, in essence, stole the funds.

The Law Society has submitted that disbarment is the appropriate penalty. The Solicitor submitted that he should be given permission to resign and he bases his argument mainly on the psychological report of Dr. Gerald Young, dated December 4, 1998, attached to these reasons.

The Solicitor was born on March 9, 1947, and called to the Bar on February 16, 1995. He abandoned his practice in December of 1997. It did not take him too long from the time he commenced practising law to, in fact, misappropriate funds. We glean from Dr. Young the following information:

1. The Solicitor came to Canada in 1987 as a landed immigrant from the Philippines and is now a Canadian Citizen. He was an overachiever in school and won scholarships. While in the Philippines, when martial law was imposed, he had to go "on the run" because he was an activist, who had organized mine workers. His friends were jailed. Subsequently he came to Canada.
2. He married in 1971 and had four daughters. After he came to Canada and graduated from law school, he opened his own office and became a general practitioner. He did a lot of pro bono work.
3. By 1996, he was torn between the time he was spending at his office and the time that his family required. He started having marital difficulties and then met another woman.
4. In February of 1997, he started having an affair and by July of 1997, he and his wife decided to get a legal separation that was finalized in December 1997.
5. In May of 1997, his third daughter attempted suicide, overdosing on Tylenol. He continued seeing his girlfriend, however.
6. In May of 1997, he started losing control of his practice and did not pay much attention to it. He began using trust funds improperly in October of 1997.
7. By December of 1997, he decided to run away. He withdrew mortgage funds belonging to his client in trust "to put an end to everything". In other words, he stole money that did not belong to him. He used some of these funds to pay his debts and left some funds to his family.
8. He abandoned his practice and ran away to Vancouver, and while there he was considering "to put an end to life". He was considering suicide.
9. At the recommendation of the Law Society, he saw a psychologist in Vancouver on two occasions because of his depression. He was considering overdosing or jumping off a bridge.
10. The Panel was advised that he negotiated with a bank to pay back the money he stole, but there was no evidence before the Panel from the Bank that, in fact, this had been done.
11. He then decided to come back to Ontario to "meet his fate".
12. Currently he is living on social assistance and he is indebted to a total of about \$60,000.00. It was reported that his wife was helping him get through this stressful situation, but there was no viva voce evidence presented to the Panel in that regard.
13. Since May of 1997, his stresses have been quite intense and he has been suffering from severe headaches, almost daily.
14. He was suffering from guilt feelings due to the fact that he wanted to have his family and his girlfriend, and knew that this could not happen. It was at that stage that he decided to run away and get lost, even to die. That is when he decided to go to the bank, get the money, give the money to his wife, and pay his debts.

15. As set out in the psychological report, he accepts being penalized; however, if the penalty is disbarment, rather than being allowed to resign and start over as a legal assistant or possibly as a lawyer in another province, he may become suicidal again.
16. In the report, he acknowledged that he knew what he was doing and knew that he was running away from his obligations. He was weak. He fell apart.
17. He acknowledged to the Psychologist that he wronged his family, his wife and children, his clients, his profession, and his community. He indicated that he had a good record in helping his community and, at the time he took the funds, he was not in control of himself. He is remorseful. He has gone to religious retreats and to Social Workers for counselling.
18. He does not think that he would misappropriate funds again in the future. He does not have an expensive lifestyle.
19. Dr. Young's report indicates that the validity of his report was supposed to be his MCMI results and by the Solicitor's honesty in admitting that he may still return to his girlfriend, and that he could not be sure that he would not misappropriate funds again. Also, most of the stresses that Mr. Rivera had, at the time of his actions, were derived from the consequences of his decisions, beginning with the one taken to initiate an affair with the girlfriend, and the emotional state that these decisions and consequences induced.
20. Also, it should be pointed out that Mr. Rivera has not paid back, nor is there any evidence of arrangements to pay back the funds outstanding that he took in regard to this matter. Likely, as a practical matter, due to the fact that he is now living on social assistance, the likelihood of him paying funds back in the near future would be nil.

In summary, we have a Solicitor who only practised for a very short period of time, coming to Canada from the Philippines. When he was graduated from law school and called to the Bar, he was a mature student. He, in fact, should have known better. He was not happy with his family situation, and he found himself with a girlfriend. This is the stressful area that caused most, if not all, of his difficulties in regard to all of his subsequent actions. Certainly, his wife and children have suffered significantly from Mr. Rivera's conduct. There was no evidence before the Panel from his family.

In Bolton v. The Law Society, it states:

"The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is part of the price."

In the matter of Ronald Paul Milrod, Mr. Milrod misappropriated \$75,000.00 from an estate. This came before Convocation in 1986. Not only did Mr. Milrod co-operate fully with the Law Society, but in addition he made complete restitution of the misappropriated funds and had an unblemished record for 17 years. Mr. Milrod requested permission to resign, but Convocation indicated that:

"The Society cannot countenance theft and fraud by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities; experience shows that the penalty attends to the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career."

In the matter of Roger Peter Patrick Cooney in 1994, Mr. Cooney misappropriated at least \$249,000.00. Arrangements had been made to repay the sums taken. Evidence was given of the Solicitor's ill health. Mr. Cooney's wife, in fact, gave evidence and attempted to assume responsibility for the misappropriation. Permission to resign was requested and that would better enable him to find other employment. The Committee found insufficient unusual circumstances to recommend that the Solicitor be permitted to resign. He was disbarred by Convocation.

The Solicitor here, on the other hand, has argued the case of David John Fraser heard in 1992. Mr. Fraser misappropriated \$300,000.00 more or less. In the Fraser case, criminal charges had been laid as well. Convocation granted him permission to resign. He was suffering from alcoholic problems and this combined with depression episodes and his workload stresses impaired his judgment as to his financial conduct.

Taking everything into consideration, this Committee recommends to Convocation that Mr. Rivera be disbarred.

Josefino C. Rivera was called to the Bar on February 16, 1995.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of February, 1999.

Gerald A. Swaye, Q.C., Chair

Ms. Worley advised that the solicitor had been served in accordance with the Act.

Counsel for the Society requested that the following correction be made to the Report:

- at page 15, end of paragraph 50 the amount "\$2,500.00" should read "\$25,000.00".

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

Carried

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

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

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

Carried

Convocation took a brief recess.

Re: Bernard Jacob KAMIN - Toronto

The Secretary placed the matter before Convocation.

Ms. Curtis and Mr. Gottlieb withdrew for this matter.

Ms. Christina Budweth appeared on behalf of the Society and Ms. Chalmers appeared on behalf of the solicitor. The solicitor was not present.

Ms. Budweth advised that there were 2 preliminary matters: (1) a request for an adjournment by the solicitor and (2) the extent of representation given by Duty Counsel.

Both Counsel and Duty Counsel made submissions on the issue of the level of representation afforded by a Duty Counsel.

Two Reports to Convocation containing excerpts relating to Duty Counsel were circulated to the Benchers.

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

It was moved by Mr. Topp, seconded by Mr. Porter that Convocation reject the interpretation of the duties of Duty Counsel as put forward by the solicitor.

Carried

Counsel, Duty Counsel, the reporter and the public were recalled and informed of Convocation's decision that the motion be dismissed, that Convocation rejected the interpretation of the duties of Duty Counsel as put forward by the solicitor.

Ms. Chalmers made submissions on the solicitor's behalf that the matter be adjourned based on the psychiatric Report from Dr. Bruce Sutton and the letter from the Jewish Family and Child Service.

The psychiatric Report and letter from the Jewish Family and Child Service were filed as Exhibit 1 and circulated to the Benchers.

Ms. Budweth made submissions opposing the request for an adjournment.

Ms. Chalmers made further submissions in reply.

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

It was moved by Mr. Topp, seconded by Mr. Swaye that the adjournment be granted peremptory to the solicitor to the September Convocation and that at the Society's expense the solicitor be examined by a psychiatrist and any other health care officials selected by the Society and that the solicitor forthwith execute authorization for release to the Society the Reports of Dr. Sutton and the Jewish Family and Child Service and any other medical Reports requested.

Carried

Counsel, Duty Counsel, the reporter and the public were recalled and informed of Convocation's decision that the adjournment be granted peremptory to the solicitor to the September Convocation and that at the Society's expense the solicitor be examined by a psychiatrist and any other health care officials selected by the Society and that the solicitor execute authorization for release to the Society the Reports of Dr. Sutton and any other medical Reports requested.

Re: Alan Murray ZUKER - Brampton

The Secretary placed the matter before Convocation.

Mr. Topp withdrew for this matter.

Mr. Glenn Stuart appeared on behalf of the Society and Mr. Ken McPherson appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 25th March, 1999, together with an Affidavit of Service sworn 30th March, 1999 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 26th March, 1999 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 24th June, 1999 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

W. Michael Adams, Chair
Elvio L. DelZotto, Q.C.
Jane Harvey

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

Glenn Stuart
For the Society

ALAN MURRAY ZUKER
of the City
of Brampton
a barrister and solicitor

Ken McPherson
For the solicitor

Heard: January 27, 1999

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 25, 1998 Complaint D78/98 was issued against Alan Murray Zuker alleging that he was guilty of professional misconduct.

The matter was heard in public on January 27, 1998 before this Committee composed of W. Michael Adams, Chair, Elvio L. DelZotto, Q.C. and Jane Harvey. The Solicitor attended the hearing and was represented by Ken McPherson. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D78/98

2. a) the Solicitor sexually harassed his client AT in the course of their solicitor-client relationship in 1992 and 1993, by making unwelcome comments and overtures of a sexual nature to her.

REASONS FOR DECISION

At the beginning of the hearing the Society moved on behalf of the client for an order that the complaint be amended to refer to the complainant by her initials and that she be referred to by her initials in the report. The member objected on the basis that the sexual conduct in this case was not of such a nature that would justify this treatment and on the basis that his name would be fully publicized. The panel deferred the decision on this motion until the conclusion of the hearing. After we became satisfied that a case of sexual harassment had been made out, it was apparent that the subject matter of the case was very personal and embarrassing to the client. The fear of publicity in these personal situations could impede the successful detection and prosecution of cases of sexual harassment. We felt it appropriate to alleviate this difficulty if we could do so without prejudicing the member's right to a fair hearing and we did so in this case by granting the Society's request.

The Evidence

In or about December, 1991, AT came to the member after having signed a separation agreement her previous lawyer, Michael O'Connor, prepared. She was unhappy with a clause in the agreement that restricted her from removing her child from the Regional Municipalities of Peel, Halton or Toronto without the husband's written consent. This was becoming an issue for her because she expected to graduate from her Bachelor of Education course at York in June, 1992 and she was not sure she would get a job within the permitted area. As things turned out, she was unsuccessful in getting any teaching job for the 1992-93 school year and took a job as a child care worker for that year.

AT said that she briefed the member on her problem at their first meeting and that she gave him a \$500. retainer then and a further \$1,500. in January, 1992. In April, 1992, his actions towards her became inappropriately personal; he would shut the office door and put his hands on her shoulders and bring her closer to him. She was uncomfortable with this and would push him away. She would tell him that it was unnecessary to greet her as he had already done so in the reception area. His response was that he liked to greet all his clients this way, particularly the pretty ones. She told him that she did not appreciate it; there was no need to become personal and she reminded him of his professional obligations and that he was old enough to be her father. In spite of this, the member's conduct did not change. After April, 1992, there were several meetings but AT did not remember how many. She did say that the meetings became less frequent as her frustration with the lack of progress grew. She took her four year old son to some of these meetings at which times the offensive conduct did not occur.

AT said that on another occasion he told her he found her attractive and he referred to a couch he once had in his office and that he would like to show her a good time on it. She told him that he should know better and that he could get in trouble for his actions. He asked her if she thought she was the first one who tried. He said he knew the loopholes and could get himself out of such a problem. She said he tried to kiss her and said he would like to kiss her but he did not act on these expressions of interest. She said he asked if she had a boy friend and she said that she did.

AT said she was becoming frustrated with his progress and told him about her concerns. She said she continued in spite of his actions because she felt vulnerable; she trusted him; she thought he would come around if she gave him another chance.

On July 17, 1993 the Sineonokway Education Authority offered her a one year teaching contract at Kasabonika, Ontario. She was therefore required to move to Northern Ontario in August, 1993. By this time, AT had already been discussing her case with a new lawyer. She apparently told the member about her new job because he prepared motion material and AT swore an affidavit on July 27, 1993. However, the member demanded a further \$1,500 retainer which she did not pay. On August 5, 1993, before AT had paid the member's account, he sent her the motion record he had prepared for her, the cross motion record received from the husband, the husband's statement of fact and law and the husband's notice to file a financial statement. On August 26, 1993, after she had paid his account, the member sent AT various other documents from the file.

In her examination in chief, AT claimed that her reason for changing lawyers was her growing frustration with the member's lack of progress and her growing need for a rapid resolution of her problem. She denied that her reason for terminating the retainer was related to the member's conduct or his demand for money. This is not consistent with her statement in her letter of complaint (Exhibit 5) in which she said that she could not afford to pay the lump sum and it is not consistent with her evidence on cross examination that she probably wouldn't have continued with the member even if he had not dragged his feet on the motion and even if he had not demanded more money.

AT did not complain until August 5, 1994. She said that she was too far away when she was in Northern Ontario and, in any event, she did not then know about the complaint procedure. The mobility issue was eventually dealt with on consent: she had her son with her for the first and third terms and he stayed with his father for the middle term. Mobility was no longer an issue between her and husband because she had obtained a teaching position in Peel. She had done nothing further on her divorce and did not want to upset her relationship with her husband by moving on the mobility issue.

Mr. Zuker responded to the complaint with a 3 page letter on November 21, 1994 (Exhibit 11) in which he denied with specific particularity each of the statements that AT had made against him. He baldly stated that AT "is lying in all respects in her letter".

"I deny her allegations that 'on almost every occasion I made serveral remarks that, had sexual overtones and were very suggestive'. I deny remarking each time about her physical appearance. I deny saying to her that I would show her how attractive I found her if my secretary wasn't present in the office at the time. I deny ever attempting to kiss this person. I deny this person's statement that she resisted my attempts. I deny her statement that she told me that my sexual advances were unwanted because she came as a client and I was old enough to be her father.

I deny that she ever told me that if I continued my misconduct that she could report me to the Law Society. I deny laughing and saying to her 'do you think that you are the only one who tried. I am a lawyer, I know all the legal loopholes to get myself out of situations'.....

I deny all of the allegations specifically referred to by her in her statement. I deny hugging her and attempting to kiss her when she entered the office and when she left the office. Mrs. T never indicated to me that she was made to feel uncomfortable by anything that I did or said. I deny telling her on any occasion that I liked to hug all my pretty clients. I deny that she was ever put in the position where she physically pushed herself away from me. I deny that she ever indicated to me that my behaviour was inappropriate. I deny telling Mrs. T that I used to have a couch in my office and that if I still had the couch that I would have a good time with her on it. I deny that she told me that

I should know better than to make such remarks to her. I deny shrugging my shoulders and saying 'why, what could happen?'. I deny being told by Mrs. T that I could get into a lot of legal problems if I did this. I deny telling Mrs. T that I was a lawyer and knew all the loopholes to get myself out of such a problem. I deny telling Mrs. T 'do you think that you are the only one who tried?' I deny ever telling Mrs. T that I would like to be her boyfriend. Mrs. T usually came into my office with her son David. I deny telling Mrs. T that if her son were not here I would have kissed her.

I did not represent Mrs. T in the summer of 1993. Mrs. T fired me without any prior notice after I had completed all of the paper work with respect to her matter.

There were no sexual advances made by me. There was no intimate relationship between me and the complainant nor was one ever suggested. There was no use of sexually explicit language. There was no use of sexual terms or off-coloured jokes. There was nothing said or done by the complainant to make me aware that whatever it was she believed I was saying was in fact unwelcome or exceeded the bounds of usual social interaction. There was no sexually aggressive conduct and explicit conversation on my part. There was no request for outside activity of any nature or kind. There was no telling of bawdy jokes and the use of vulgar language. Mrs. T was not sexually harassed nor did I think she believed she was being sexually harassed. She did not specifically complain about the activity until after she dismissed me. She could reasonably have complained at any time before dismissing me; in fact, she states that the reason she dismissed me was because she felt that her matters were being delayed. She never expressly or implicitly made it known to me that whatever she says I may have said or done was unwelcome. I deny having said or done anything in any event."

He said that he told AT from the start that it would not be wise to bring the motion to alter the mobility clause until she had a job in place. He said that he knew how very important to AT it was to be permitted to move; he was very sympathetic to her and moved quickly to bring her motion as soon as he heard of the job offer. From the evidence, this certainly was the case: he had his client's affidavit sworn 10 days after the employment offer as made.

In his examination in chief, to the question of how he conducted himself at his meetings with AT, Mr. Zuker responded "mostly professionally" but that it was his nature to be overly caring; he may have been paternalistic to this young woman who had signed a separation agreement she should not have signed. He said that he never got the impression that she was offended by anything he said. He admitted that he may have tried to hug her or kiss her but he denied it was sexually motivated; it was to make her feel more at ease. He admitted this took place more than once but not on every occasion. He admitted in his examination in chief that AT may have discussed his conduct with him but he did not take her comments seriously but after hearing her reaction he did not continue with the conduct. He did not remember when AT first complained but said it was probably at the end of his dealing with her. He said their disagreement was over money. He said he had never before pressured her for money but, at the final stage of their dealings, when she had received the job offer and he was going to have to bring the motion on quickly, he insisted on receiving the further retainer of \$1,500.

Findings

Counsel for the Law Society asked us to prefer AT's evidence to Mr. Zuker's whenever their evidence was in conflict. He argued that the inconsistencies in her testimony were minor and were actually badges of truth. Mr. MacPherson for the member argued that there was no corroboration for the client's evidence and that there were discrepancies in her evidence. He questioned the fact that she apparently did not take the member's conduct seriously enough to come forward with her complaint at an early date. He suggested that her real issue with Mr. Zuker was financial. He submitted that we should prefer Mr. Zuker's evidence to hers.

Even on his examination in chief, Mr. Zuker retracted several aspects of his denials. In cross-examination he explained that he was made nervous by the letter from the Law Society; he believed he had done everything he could have done professionally for AT; he was angry because his reputation was put in question. He said he did not move to correct the denials because the Society did nothing for 3 years after the first complaint was in. But he didn't respond to the Society's letter by Susan Carlyle on May 24, 1995 inviting further comments. He at first denied the reference to the couch but he admitted having a couch in one of his previous offices. He then said that he may have said something about a couch but not about using it with AT. Later, he said he did not believe he had said anything about a couch.

We find that on an undetermined number of occasions after April, 1992, the member, despite the client's protests:

- a. greeted her in an inappropriate physical manner when she entered his office and also when she was leaving by approaching her closely and placing his hands on her shoulders;
- b. tried to kiss the client;
- c. hugged her;
- d. inquired about her personal relationships;
- e. made sexually suggestive remarks to her suggestions;
- f. inappropriately commented on her appearance.

We find that the client did not complain because she felt vulnerable and thought that the member would stop. She needed to get a solution to her problem and thought that the member would provide that solution. Indeed, it appears that the member's legal advice to the client was sound and that he proceeded promptly and appropriately when the facts that would support the proposed motion came to his attention.

Commentary 1 to Rule 27 defines sexual harassment as:

"one or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature,

- i. when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group;..."

Commentary 2 sets out several examples of types of behaviour which constitute sexual harassment including:

"sexually suggestive or obscene comments or gestures
unwelcome inquiries or comments about a person's sex life
unwelcome sexual flirtations, advances, propositions
requests for sexual favours
unwanted touching"

The member's actions constituted sexual harassment as defined in Commentary 1 (i) and as exemplified in the passages set out in Commentary 2. We therefore find that the complaint of professional misconduct has been made out.

Background

Mr. Zuker is 64 years of age and was called to the Bar in 1962. His practice has consisted largely of family law for twenty or more years but he does do some criminal and commercial work.

Discipline History

In 1989 the Member was found guilty of the following complaints and reprimanded in Convocation:

D91/88

- 2(a) During the period August to October, 1984, he attempted to engage in sexual activity with his female client, _____
- 2(b) During the years 1981 to 1983, more or less, he attempted to engage in sexual activity with his client, _____

D77/89

- 2(a) During the years 1983 to 1985, more or less, he engaged in sexual activity with his client, _____

In 1995 the member was found guilty of the following complaint and reprimanded in Committee:

D490/94

- 2(a) In or about December 1988 he misapplied \$14,000.00 more or less belonging to the estate of Pearl Tepperman;
- (b) In the period October 1982 to December 1988 he failed to maintain a record of assets of the Tepperman estate under his control as required by Section 15 of Regulation 708;
- (c) During the period August 1988 to January 1990 he borrowed a total of \$67,500 from his client, James Patterson, contrary to Rule 7 of the Rules of Professional Conduct.

RECOMMENDATIONS AS TO PENALTY

The essence of a lawyer's position with a client is fiduciary. It is a breach of trust for a lawyer to use his or her position or any power imbalance in the lawyer-client relationship for his or her own purposes. A breach of trust which also constitutes sexual harassment is of additional concern because it demeans the victim and it stands as yet another obstacle to the attainment of sexual equality in society. This point was made in the context of the workplace in *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 352 (S.C.C.) by Dickson J. at p. 375 where he quoted with approval the dictum of the United States Court of Appeals for the Eleventh Circuit in *Henson v. Dundee*, 682 F. 2d 897 (1982):

"Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

This is the first case to the Committee's knowledge in which a member has been found guilty of sexual harassment for a second time. None of the mitigating factors present at the time of the 1989 hearing are present on this occasion:

- (a) In 1989, Mr. Zuker cooperated with the prosecution while in this case, he put the client to the embarrassment of a hearing.
- (b) The panel in 1989 heard psychiatric evidence that the member's behaviour was an aberration and would not likely recur.
- (c) Expressions of remorse present at the 1989 occurrence were absent on this occasion.

The primary issues for us in recommending a penalty are the protection of the public and the protection of the reputation of the profession.

We find that a suspension alone would be inadequate protection of the public because there is little assurance that the member will not reoffend. We pondered various means of protecting the public from repetitions of this conduct including prohibiting the member from practising in the area of family law, requiring him to have a chaperon when meeting female clients or prohibiting him from having female clients altogether. We recommend that the member be suspended for a period of three months and that he undertake in a manner suitable to the Law Society that he will not at any time in the future attend unaccompanied with any female clients. We recommend that the member pay the Society's costs of \$2,500.

Alan Murray Zuker was called to the Bar on April 13, 1962.

ALL OF WHICH is respectfully submitted

DATED this 25th day of March, 1999

W. Michael Adams, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 3 months and the solicitor undertake in a manner suitable to the Society that he will not at any time in the future attend unaccompanied with any female clients. In addition the solicitor is to pay costs in the amount of \$2,500.

Counsel for the Society opposed the recommendation of the Discipline Committee and made submissions for the penalty to be increased to disbarment.

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

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

It was moved by Mr. Bindman, seconded by Ms. Clarkson that the solicitor be disbarred.

Lost

It was moved by Ms. Curtis, seconded by Mr. Wilson that the solicitor be suspended for a period of 2 years with an undertaking to obtain counselling.

Lost

It was moved by Mr. Ducharme, seconded by Ms. Puccini that the recommended penalty include that the solicitor undertake to enrol in an educational program mandated by the Society.

Withdrawn

It was moved by Mr. Gottlieb, seconded by Mr. Swaye that the solicitor be suspended for 6 months, pay costs in the amount of \$2,500 and attend a counselling program approved by the Society. Further, that there be a plan of supervision approved by the Law Society whereby the solicitor undertakes not to attend unaccompanied with any female client at any time in the future.

There being no other motion before Convocation the Treasurer ruled that the Gottlieb/Swaye motion be adopted, that is, that the solicitor be suspended for 6 months, pay costs in the amount of \$2,500, attend a counselling program approved by the Law Society and that there be a plan of supervision approved by the Law Society whereby the solicitor undertakes not to attend unaccompanied with any female client at any time in the future.

Ms. Pilkington's motion to challenge the Treasurer's ruling was voted on and defeated.

Counsel, the solicitor, the reporter and the public were recalled and informed there had been an error in principle on the part of the Discipline Committee and it was Convocation's decision that the solicitor be suspended for a period of 6 months, pay costs in the amount of \$2,500 and attend a counselling program approved by the Society. Further, that there be a plan of supervision approved by the Society whereby the solicitor undertakes not to attend unaccompanied with any female client at any time in the future.

Mr. McPherson on behalf of the solicitor requested that the suspension commence September 1st, 1999.

Mr. Stuart requested that the suspension commence July 15th or August 1st, 1999.

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

It was moved by Ms. Curtis, seconded by Mr. Chahbar that the suspension commence July 15th, 1999.

Lost

It was moved by Ms. Puccini, seconded by Mr. Bobesich that the suspension commence August 1st, 1999.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the suspension commence August 1st, 1999.

The Treasurer advised that Reasons for the majority are to be prepared as well as a dissent.

MOTION TO AMEND THE MINUTES OF APRIL 29TH, 1999

It was moved by Mr. MacKenzie, seconded by Mr. Crowe that the Minutes of April 29th, 1999 be amended by adding the following at the end of the proceedings:

"Convocation adjourned and resumed at 7:30 p.m. in the Benchers' Dining Room.

It was moved by Susan Elliott, seconded by Heather Ross that Philip Epstein and David Scott be granted the "Freedom of the Hall" including the right to lockers in the Benchers' Locker Room for life.

The vote was carried unanimously."

Carried

CONVOCATION ROSE AT 2:00 P.M.

Confirmed in Convocation this ²⁹ day of *October*, 1999.

Harvey T. Stussberg

Treasurer