

22nd January, 1998

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 22nd January, 1998  
9:00 a.m.

PRESENT:

The Treasurer (Harvey T. Strosberg, Q.C.), Aaron, Adams, Angeles, Arnup, Backhouse, Bobesich, Carey, Carter, Chahbar, Cole, Cronk, DelZotto, Epstein, Gottlieb, MacKenzie, Manes, Marrocco, Puccini, Ross, Ruby, Scott, Sealy, Swaye, Topp, Wilson and Wright.

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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 Mr. Paul Monahan who acted as Duty Counsel.

Re: Brian Terence PENNELL - Brantford

The Secretary placed the matter before Convocation.

Messrs. Ruby, Epstein, Aaron, Wilson and Carey and Ms. Angeles and Ms. Cronk withdrew for this matter.

Ms. Janet Brooks appeared on behalf of the Society and Mr. Glenn Hainey and Ms. Lynn Mahoney appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 11th December, 1997, together with an Affidavit of Service sworn 2nd January, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th December, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 15th January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Philip M. Epstein, Q.C.  
Nora Angeles

22nd January, 1998

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

Janet Brooks  
for the Society

BRIAN TERENCE PENNELL  
of the City  
of Brantford  
a barrister and solicitor

Glenn A. Hainey and K. Lynn Mahoney  
for the solicitor

Heard: September 30, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

### REPORT

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On December 5, 1996 Complaint D318/96 was issued against Brian Terence Pennell alleging that he was guilty of professional misconduct.

The matter was heard in public on September 30, 1997 before this Committee composed of Clayton C. Ruby, Philip M. Epstein, Q.C. and Nora Angeles. The Solicitor attended the hearing and was represented by Glenn A. Hainey and K. Lynn Mahoney. Janet Brooks appeared on behalf of the Law Society.

### DECISION

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

#### Complaint D318/96

2. a) In the period May 1989 to October 1992, he misappropriated \$60,700.00 from his client Meta Spitler, by way of a Power of Attorney which he held on her behalf.

#### 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 D318/96 and is proceeding with a hearing of this matter on September 30 and October 1, 1997.

##### II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D318/96 with his counsel, Glenn A. Hainey and admits the particular contained therein. The Solicitor further admits that the said particular supported by the facts hereinafter set out constitutes professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in 1975. He articulated at Wyatt, Purcell in 1974 and 1975. He practised in his own firm, Pennell and Underwood (later Pennell, Underwood & Ion) from 1976 to 1989. He then left that firm to begin a sole practice in criminal law.

5. On December 13, 1995, the Solicitor, through his counsel, admitted that he had misappropriated funds from Meta Spitler. At that time, the Solicitor voluntarily gave an undertaking not to practise law until the final disposition of these proceedings by Convocation. Also at that time, the Solicitor, through counsel, provided the Law Society with a detailed memorandum setting out the facts regarding the misappropriation as well as background facts (Document Book, Tab 1).

Particular 2(a) In the period May 1989 to October 1992, he misappropriated \$60,700.00 from his client Meta Spitler, by way of a Power of Attorney which he held on her behalf.

6. In 1982, the Solicitor was retained by Meta Mae Spitler to prepare a codicil to her will. In 1987, the Solicitor was contacted by the John Noble Home, where Ms. Spitler was residing. The John Noble Home is a home for the aged and Ms. Spitler had been residing there as a resident of their long term care facility since 1983 (Document Book, Tab 2). Ms. Spitler had approached the administration of the home and advised that she wished to have the Solicitor act as her power of attorney to look after her affairs. Ms. Spitler was in a position where it was becoming difficult for her to deal with her affairs. She requested and the Solicitor agreed in September 1987 to be the person to exercise a power of attorney over her bank accounts and financial affairs (Document Book, Tab 3). The Solicitor commenced exercising the power of attorney immediately. Soon after, Ms. Spitler became cognitively impaired such that she was unable to handle her affairs.

7. At the time that she entered the nursing home, Ms. Spitler declared her total assets as \$87,036.58.

8. Through a reconstruction of accounts, it has been determined that at time that the Solicitor obtained the Power of Attorney in 1987, Ms. Spitler had assets of approximately \$118,036.58 in daily interest savings accounts, guaranteed investment certificates and Canada Savings Bonds as follows:

a. Daily Interest Savings Accounts:

Name of Bank	Account #	Date	Amount
Province of Ontario	1038830	August 24, 1988	\$ 35,210.36
Bank of Montreal	5085-133	October 30, 1987	29,300.78
Bank of Montreal	7025-935	September 7, 1987	1,479.57
TOTAL:			\$ 65,990.71

b. Guaranteed Investment Certificates

Name of Bank	Amount	Date matured	Deposited to
First City Trust	\$15,000.00	February 11, 1993 paid into Province of Ontario account on April 8, 1993.	Province of Ontario A/C #1039930.
Bank of Montreal	25,000.00	July 1990 re-purchased for \$20,000.00 matured October 31, 1991	Bank of Montreal A/C #7025-935
Canada Trust	3,000.00	May 2, 1991	Bank of Montreal A/C # 7025-935
Canada Trust	2,000.00	April 26, 1991	Bank of Montreal A/C #7025-935
TOTAL:	\$45,000.00		

c. Canada Savings Bonds

Name of Bank	Amount
Canada Savings Bonds	Unknown, although at the time of Mrs. Spitler's death there was approximately \$7,000 to 8,000.00, which had matured in 1993

9. By letter to the John Noble Home dated January 8, 1993, the Solicitor advised that there were limited funds available to maintain Ms. Spitler at her current rate (Document Book, Tab 4).

10. In the period August 1993 through December 1993, the Administration of the John Noble Home requested payment from the Solicitor for Ms. Spitler's expenses. In its letter of December 21, 1993 and telephone messages, the John Noble Home advised that the Solicitor's failure to pay Ms. Spitler's expenses had affected the quality of care they were able to provide. They also advised that if funds were no longer available, to advise them so that an application for a supplement and comfort allowance could be sought for her. A copy of the correspondence of the John Noble Home and the record of the telephone calls are at Tab 5 of the Document Book.

11. The Solicitor failed to respond to John Noble Home. As a result, by letter dated March 10, 1994, Janice Mills of the John Noble Home complained to the Law Society with respect to the Solicitor's conduct (Document Book, Tab 6). Ms. Mills' complaint led to the investigation by the Law Society (Document Book, Tabs 7 and 8) and the issuance of Complaint D221/94 against the Solicitor for his failure to respond to the Law Society with respect to its communications regarding the complaint of Ms. Mills (Document Book, Tab 9).

12. The hearing into Complaint D221/94 commenced on November 30, 1994 at which time a finding of professional misconduct was made. The Solicitor requested and was granted an adjournment for the penalty portion of the hearing on his Undertaking (Document Book, Tab 10). On July 20 and July 27, 1995, the penalty portion of the hearing took place.

13. On July 20, 1995, the Solicitor testified as follows in cross-examination:

Q. With respect to the Janice Mills complaint, you indicated that in 1993 you advised Noble House that money was running out?

A. Yes.

Q. There has been a seven-month adjournment in these proceedings. Can you advise the committee when it was that you retained the law firm to assist you in providing a response?

A. The law firm ... it was approximately three months ago that the initial request was made to Mr. Percel of that firm. I met with Mr. Percel about that file a month ago. I was in a position to pay the retainer on June 30th.

Q. Why the delay then? You were aware, you were before this committee on November 30, 1994, that Miss Spitler was, in the words of Ms. Mills, in severe financial straights and not entitled to some of the amenities that she required; nevertheless, you waited four months prior to retaining counsel.

A. There are two factors: No. 1 is that the monies left, right, it had dwindled down to essentially nothing. Again I don't have the file but I think it is something like \$500, is No. 1; No. 2 was that I was hoping that someone on behalf of her family would come in and take over; No. 3 was that I didn't start receiving any treatment, if you will, until March 29th before I actually got enrolled in a treatment programme; and that prior three-month delay may well have been a symptom of what had been going on for ten years.

Q. How long have you known the balance of that account was nothing or \$500?

A. A year or two. I can't give you the exact date.

Q. And yet you failed to provide a letter to Noble House indicating that there was, in effect, no money left?

A. Other than the letter that I had sent to them to say the money was running out and gave the relative figures, yes.

(Document Book, Tab 11: Transcript, pp. 10-12)

14. On July 27, 1995, the Solicitor testified as follows with respect to the funds of Ms. Spitler:

MR. THOM: Mr. Pennell, did you keep any ledger statement or running account in your disbursements on this woman's behalf?

THE SOLICITOR: Quite frankly, what was kept would not dignify the word 'ledger', sir. It was a mish-mash of things that were being kept by various secretaries over the years and by myself and that created the difficulty and why I need somebody who is professional in it to pull it all together. And the other aspect of it that never struck me at the time was that these accounts - you never got the cheques back. They were kept by the banking institution, so that when I made certain enquiries, they - the cheques, most of them weren't even kept in the City of Brantford anymore, they were moved to some central depository and I also discovered over the last little while, the whole question of computer time and lines and when the bank can do these certain things and have time on line to pull back a lot of their old stuff.

(Document Book, Tab 12: Transcript, page 6, lines 25-30; page 7, lines 1-14)

15. On July 27, 1995, the Committee reprimanded the Solicitor on the condition that he provide his undertaking to, *inter alia*, use his best efforts to provide a complete accounting of the assets of Ms. Spitler by October 31, 1995 (Document Book, Tab 13). The Solicitor had advised the Law Society that he had retained Jack Purcell of Wyatt, Purcell, Stillman and Crozier to assist him in preparing the accounting (Document Book, Tab 14 ).

16. Ms. Spitler died on September 29, 1995.

17. By letter to the Law Society dated October 27, 1995 and copied to the Solicitor, Mr. Purcell reported to the Law Society regarding the Solicitor's handling of Ms. Spitler's assets in accordance with the Solicitor's Undertaking. Mr. Purcell's letter stated that there were "considerable discrepancies in the account". His report indicated that withdrawals exceeding \$60,000 had been made by the Solicitor (Document Book, Tab 15).

18. The Solicitor misappropriated \$60,700 of Ms. Spitler's funds for his own benefit as follows (Document Book, Tabs 16-35):

a. From the Province of Ontario Savings Office, account number 1038830:

	Date/Cheque No.	Amount	Payee
i)	July 19, 1990	\$10,000.00	"Receiver General"
ii)	September 1, 1990 Cheque #001	\$5,000.00	"Brian Pennell"
iii)	September 28, 1990 Cheque #004	\$5,000.00	"Brian Pennell"
iv)	November 30, 1990	\$2,000.00	Cash Withdrawal
v)	February 1, 1991 Cheque #006	\$4,000.00	"Brian Pennell"
vi)	May 8, 1991 Cheque #007	\$500.00	"Cash"
vii)	February 12, 1992 Cheque #010	\$3,000.00	"Brian Pennell"
viii)	July 31, 1992 Cheque #011	\$2,500.00	"Brian Pennell"
ix)	October 5, 1992 Cheque #012	\$6,000.00	"Brian Pennell"
	SUB-TOTAL	\$38,000.00	

b) From the Bank of Montreal, chequing and savings accounts:

Date/Cheque No.	Amount	Payee
x) May 12, 1989	\$500.00	"Petty Cash - John Noble Home" paid to the Solicitor
xi) July 11, 1990 Cheque #049	\$200.00	"Cash"
xii) July 19, 1990	\$200.00	"Brian Pennell"
xiii) December 5, 1990	\$800.00	Cash Withdrawal
xiv) April 26, 1991	\$500.00	"Cash"
xv) April 30, 1991 Cheque #024	\$5,000.00	"Brian Pennell"
xvi) May 2, 1991	\$2,500.00	Withdrawal - "Central Guaranty Trust"
xvii) November 4, 1991	\$10,000.00	"Central Guaranty Trust"
xviii) November 1, 1991	\$3,000.00	"Brian Pennell"
SUB-TOTAL	\$22,700.00	

TOTAL MISAPPROPRIATION: \$60,700.00

19. In the period 1987 to April 1993, the Solicitor made proper withdrawals from the accounts totalling approximately \$79,000, which were applied towards the debts of Ms. Spitler, including to the account of the John Noble Home.

20. The Solicitor admitted to the Law Society that he used the misappropriated funds of \$60,700 as follows:

- a. to pay his personal debt to Revenue Canada in the amount of \$10,000;
- b. to fulfill his obligation under his separation agreement to make repairs to his matrimonial home;
- c. to fund the operation of his law practice, including funds applied to his personal line of credit at Central Guaranty Trust;
- d. to meet his support payments to his former spouse; and
- e. to help meet the expenses of the Junior "B" hockey team of which he was a one-half owner and president.

21. In October 1995, \$31,422.34 was paid directly to the John Noble Home in satisfaction of Ms. Spitler's debt to the nursing home.

22. In October and November 1995, a total of \$42,000 was delivered to Jack Purcell, in trust, to be placed in an interest bearing account pending settlement for purposes of restitution to the estate of Ms. Spittler in respect of the monies misappropriated together with interest after deduction of the payment to the John Noble Home (Document Book, Tab 36). Counsel for the estate and other counsel for the Solicitor are in the process of negotiating settlement of the issue of interest. The Solicitor has taken all reasonable steps to effect restitution.

V. DISCIPLINE HISTORY

23. The first Complaint against the Solicitor was sworn March 15, 1979. The Solicitor failed to reply to letters from the Law Society requesting his comments in relation to a complaint by Valerie F. McKinney. Ms. McKinney's complaint arose as a result of the Solicitor's failure to respond to her with respect to a motor vehicle matter for which she had retained the Solicitor. The Solicitor was reprimanded in Committee on May 3, 1979.

24. The second Complaint issued against the Solicitor was sworn on June 24, 1980. The Solicitor failed to reply to four specific letters from the Law Society concerning the filing of his Forms 2 and 3. The Solicitor was reprimanded in Committee on January 22, 1981.

25. The third Complaint, D135/90, was issued against the Solicitor on August 20, 1990. The Solicitor received a Reprimand in Committee on February 19, 1991. The Solicitor's misconduct was particularized as follows:

- a. After being retained on June 28, 1983 he failed to follow the instructions of his client, Edwin Kline, by failing to file an action against Mr. Kline's former employers, Atlas Chemical Industries Inc., and Atkemix Inc., thereby prejudicing the interests of his client;
- b. During the period of June 28, 1983 to October 26, 1989, he misled his client respecting the action which he was instructed to institute in order to cover up his failure to follow Mr. Kline's instructions;
- c. He then failed to reply to the communications from his fellow solicitor, Bruce Dawe, who was attempting to assist his former client, Edwin Kline; and
- d. He failed to promptly report to the Society's Errors and Omissions Insurance Department when he knew or ought to have known that his actions had caused prejudice to his client.

26. More recently Complaint D202/94 and Complaint D221/94 were issued against the Solicitor on July 7, 1994 and September 6, 1994 respectively. Both Complaints were heard together. Complaint D202/94 was particularized as follows:

- a. He failed to answer with reasonable promptness letters to him from D. Kevin Davis, a fellow solicitor, that required a reply;
- b. He failed to release the file of his client, Arnold Douglas, to the client's new Solicitor, D. Kevin Davis, despite a Direction signed November 25, 1993;
- c. He failed to comply with his Undertaking to the Law Society to respond promptly to communications from other lawyers;
- d. He failed to reply to the Law Society regarding the complaint of D. Kevin Davis;
- e. He failed to comply with his Undertaking to the Law Society to respond promptly to letters from the Law Society; and
- f. He failed to comply with his Undertaking dated February 13, 1991 by failing to co-operate in the review process of the Professional Standards Department of the Law Society.

27. Complaint D221/94 related to the Solicitor's failure to reply to the Law Society regarding the complaint of the Janice E. Mills of the John Noble Home referred to in paragraph 12 herein and his failure to comply with his Undertaking to respond promptly to the Law Society with respect to that complaint. The Committee hearing Complaints D202/94 and D221/94 issued a Reprimand in Committee on July 27, 1995 on the Solicitor's undertaking to (a) restrict his practice to criminal law; (b) practise under supervision; (c) provide psychiatric reports to the Law Society; (d) use his best efforts to provide an accounting of the assets of Ms. Spittler on or before October 31, 1995; and (e) pay costs of \$2,500.

DATED at Toronto, Ontario this 30th day of September, 1997."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Brian Terence Pennell be granted permission to resign.

#### REASONS FOR RECOMMENDATION

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This is a case of serious theft. On the face of it, it is clearly inconsistent with continued membership of the Law Society. The issue for us is whether the Solicitor should be disbarred or whether he should be permitted to resign.

We are dealing in this case with a joint submission that the Solicitor be permitted to resign. That is a submission with which we agree in the circumstances of this case. Let me indicate our reasons for that agreement.

First, it is clear that there must be compelling circumstances to justify permission to resign in cases involving misappropriation where the funds involved are substantial.

We note that there are a number of mitigating factors present in this case:

1. In October 1995, partial repayment of the total loss of \$60,700.00, not counting interest, was made. Thereafter, the sum of \$42,000.00 was placed in trust for the purpose of effecting restitution in full. The Solicitor has done his best to effect restitution in full, and the Society accepts this.

There are negotiations ongoing to agree on the appropriate rate of interest that should have accrued on this money, and that issue will be resolved before this matter reaches Convocation, so that one is able to say that the interest that would have been owing will also be paid in this case.

2. The most significant aspect in this case, which takes it out of the mandatory disbarment category, is the psychiatric disorder suffered by the Solicitor.

In December 1994, (over two years after the last incident of misappropriation), the Solicitor was first diagnosed as suffering from "dysthymia", a psychological illness which involves chronic mild to moderate depression with superimposed major depressive disorder. According to Dr. Klassen of the Clarke Institute of Psychiatry, the Solicitor suffered a major depressive episode from approximately 1989 to 1993/94, which would have

"further impaired this individual's ability to function in the role of a lawyer, to meet the demands of running a practice, and would have significantly further impaired his judgment and coping strategies. The sense of hopelessness and despair that is intrinsic to a major depressive episode often contributes to individuals engaging in self-defeating behaviour, which further reinforces the depressive episode. Put another way, when individuals feel that they have little or no future, they may act in a fashion that is irresponsible and uncharacteristic of them, and is further undermining of their ability to emerge from that depression".

While the Solicitor is not an alcoholic, his use of alcohol in conjunction with his psychiatric disorder further impaired his judgment during the events leading to this complaint. In Dr. Klassen's opinion, the Solicitor's use of alcohol was likely "a contributor to his current social and professional imbroglio".

The Solicitor is genuinely remorseful with respect to the events leading to this complaint. According to Dr. Klassen, the Solicitor "struggles with shame and guilt over his recent history (he was tearful in expressing this)" and "did present as clearly remorseful over his past misdeeds".

The Solicitor has a 15 year old severely physically and mentally disabled son who is able neither to feed nor to dress himself and has a very limited ability to speak. The difficulties associated with the care of his son were an enormous strain on the Solicitor and his wife. The Solicitor's marriage culminated in divorce in January, 1995. Since the Solicitor's divorce, he has continued to assist his wife in the care of his disabled son. He does so by contributing financially when possible, and by caring for his son when his wife is away. The Solicitor lost all of his teeth beginning in 1990. The loss of his teeth was devastating to him, particularly as the false teeth initially had an adverse effect upon his speech. The extensive loss of bone made fitting of false teeth most difficult.

3. It is clear that this behaviour is out of character for a Solicitor who appears, from the letters filed and the offer of proof by way of *viva voce* evidence from those who know him, to be completely out of character. There is genuine remorse and shame, and we take that into account.

4. There was in this case full cooperation with the investigation of the Law Society, and the Solicitor has worked in conjunction with the Staff Trustee in closing his practice.

In December, 1995, the Solicitor voluntarily undertook not to practise law until the conclusion of this proceeding.

With all these circumstances we think it appropriate that the Solicitor be permitted to resign and that is our recommendation to Convocation.

Brian Terence Pennell was called to the Bar on March 21, 1975.

ALL OF WHICH is respectfully submitted

DATED this 11th day of October, 1997

Clayton C. Ruby, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be granted permission to resign.

Both counsel made submissions in support of the joint submissions made at the discipline hearing that the solicitor be permitted to resign.

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

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

Carried

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

Not Put

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

The Treasurer who was ineligible to sit on the next discipline matter, withdrew from Convocation and Mr. Epstein took the Chair as Acting Treasurer.

Re: Robert Alan EAGLESON - Toronto

The Secretary placed the matter before Convocation.

The Treasurer, Messrs. Topp, Ruby, Swaye, DelZotto, MacKenzie and Scott and Ms. Cronk withdrew for this matter.

Mr. Glenn Stuart appeared for the Society and Mr. Brian Greenspan appeared for the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 21st January, 1998, delivered by hand to Mr. Brian Greenspan, on behalf of the solicitor on 21st January, 1998 (marked Exhibit 1), together with the Acknowledgement and Consent signed by Mr. Brian Greenspan, counsel for the solicitor on 22nd January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Gavin MacKenzie, Chair

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

Glenn Stuart  
for the Society

ROBERT ALAN EAGLESON  
of the City  
of Toronto  
a barrister and solicitor

Brian H. Greenspan  
for the solicitor

Heard: January 20, 1998

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On January 19, 1998 Complaint D7/98 was issued, alleging that Robert Alan Eagleson (the "Solicitor") is guilty of conduct unbecoming a barrister and solicitor.

The matter was heard in public on January 20, 1998 before Gavin MacKenzie sitting as a single bench. The written consent of the parties to the Complaint being heard by a single bench pursuant to Section 9(3.1)(b) of Regulation 708 of the Law Society Act, R.R.O. 1990, as amended by O.Reg. 513/95, was marked Exhibit 2 at the hearing. Exhibit 2 records the parties' understanding that "due to the nature of the Complaint, the parties, or either of them, have the right to a hearing before a Committee of three Benchers and the parties specifically waive that right."

Mr. Eagleson did not attend the hearing. He was represented at the hearing by his counsel, Brian H. Greenspan. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

- (a) on January 7, 1998, the Solicitor was convicted of three counts of the offence of fraud exceeding \$5,000 contrary to section 380(1)(a) the Criminal Code of Canada, in relation to the benefits he obtained from the sale of rinkboard advertising for the Canada Cup of Hockey international hockey tournaments in 1984, 1987 and 1991; and
- (b) on January 6, 1998, the Solicitor was convicted of the offence of mail fraud, contrary to sections 1341 and 1346 of Volume 18 of the United States Code, in relation to international hockey events, his recovery of personal expenses from National Hockey League Players' Association Funds, and his handling of a disability insurance claim on behalf of Glen Sharpley.

EVIDENCE

The entirety of the evidence before the Committee consisted of an Agreed Statement of Facts. Paragraphs 1 through 12 of the Agreed Statement of Facts are relevant to the issue of whether the Solicitor is guilty of conduct unbecoming a barrister and solicitor as alleged in the Complaint. Those paragraphs read as follows:

"I. JURISDICTION AND SERVICE

1. Robert Alan Eagleson (the "Solicitor") admits service of Complaint D7/98 and is prepared to proceed with a hearing of this matter on January 20, 1998. The Solicitor, on the advice of his counsel, agrees to waive any longer period of notice of this hearing which would otherwise be required under the provisions of the Law Society Act.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D7/98 and this agreed statement of facts with his counsel Brian H. Greenspan, and admits the particulars and facts contained therein. The Solicitor also admits that the facts alleged in the Complaint supported by the facts as hereinafter stated constitute conduct unbecoming a barrister and solicitor.

4. The parties agree that Complaint D7/98, the Consent to a Hearing before a single bench Discipline Committee, and this Agreed Statement of Facts constitute all of the evidence which will be adduced at the hearing into this Complaint before both the Discipline Committee and Convocation.

IV. FACTS

5. The Solicitor was called to the Bar in 1959. At all times relevant to the criminal charges, the Solicitor practised as a sole practitioner. He was also the Executive Director of the National Hockey League Players' Association ("NHLPA") until 1991, and the Chair of the Canada Cup Committee of Hockey Canada. He is currently employed outside the practice of law, having undertaken to the Law Society on August 8, 1995, not to engage in the practice of law until the completion of the discipline proceedings then pending against him.

6. The Solicitor was indicted by a grand jury in Boston, Massachusetts on March 4, 1994, on 32 criminal charges in relation to his dealings with the NHLPA, international hockey and individual hockey players. This was substituted by a superseding indictment alleging 34 criminal charges in August 1994.

7. On December 3, 1996, the Solicitor was charged in Toronto with eight counts of theft and fraud under the Criminal Code in relation to his involvement with the 1984, 1987 and 1991 Canada Cup hockey tournaments.

8. On October 24, 1997, the Solicitor entered into a plea agreement with the United States Attorney for the District of Massachusetts in relation to the U.S. charges. Pursuant to this agreement, the Solicitor agreed to enter the United States and plead guilty to an information containing the following three counts:

- (a) Count one - mail fraud (re: international hockey events) in violation of sections 1341 and 1346 of Volume 18 of the United States Code;
- (b) Count two - mail fraud (re: personal expenses from NHLPA funds) in violation of sections 1341 and 1346 of Volume 18 of the United States Code; and,
- (c) Count three - mail fraud (re: Sharpley disability claim) in violation of sections 1341 and 1346 of Volume 18 of the United States Code.

9. Under the plea agreement, the Solicitor agreed to a sentence whereby he was to pay \$1,000,000 (Cdn.) in restitution prior to entering his plea and sentencing, and to serve one year unsupervised probation. This agreement was conditional on the Solicitor pleading guilty to Canadian charges and receiving a jail sentence of not less than 18 months, to be served in Canada. The Solicitor further agreed with the Crown in Ontario that, upon pleas of guilty to three counts of fraud, a joint submission of 18 months imprisonment would be advanced.

10. On January 6, 1998, in Boston, Massachusetts, the Solicitor pleaded guilty to an information containing the three counts of mail fraud identified in paragraph 8. The Solicitor was convicted on all counts and sentenced in accordance with the terms of the plea agreement. The indictment alleging 34 criminal charges was dismissed pursuant to the plea agreement.

11. On January 7, 1998, the Solicitor pleaded guilty in the Ontario Court of Justice (General Division) at Toronto, Ontario to the following three counts of fraud:

- (a) He, between the 1st day of January 1983 and the 31st day of March 1985 at or near the City of Toronto, in the Toronto Region, in the Province of Ontario and elsewhere in the Province of Ontario, did by deceit, falsehood and other fraudulent means defraud Labatt Brewing Company Limited of money, property or valuable security, of a value exceeding \$5,000.00 in relation to the ice hockey rink board advertising rights for the rink boards at the ends of the arena for ice hockey games played during the 1984 Canada Cup Hockey Tournament, contrary to section 380(1)(a) of the Criminal Code.

- (b) He, between the 1st day of January 1987 and the 8th day of January 1988 at or near the City of Toronto, in the Toronto Region, in the Province of Ontario and elsewhere in the Province of Ontario, did by deceit, falsehood and other fraudulent means defraud Hockey Canada, the National Hockey League and the National Hockey League Players Association of money, property or valuable security, of a value exceeding \$5,000.00 in relation to a payment to Harcom Consultants Limited in the amount of \$113,250.00 with respect to an alleged right of refusal or as a commission relating to the 1987 Canada Cup Hockey Tournament, contrary to section 380(1)(a) of the Criminal Code.
- (c) He between the 1st day of January 1990 and the 31st day of December 1992 at or near the City of Toronto, in the Toronto Region, in the Province of Ontario and elsewhere in the Province of Ontario, did by deceit, falsehood and other fraudulent means defraud Labatt Brewing Company Limited of money, property or valuable security, of a value exceeding \$5,000.00 in relation to rink board advertising rights for all rink boards at the ends of the arena, during the 1991 Canada Cup hockey tournament for hockey games played by Team Canada and for playoff and final games, contrary to section 380(1)(a) of the Criminal Code.

The remaining charges pending against him were withdrawn.

12. The Solicitor was convicted of the three counts of fraud to which he pleaded guilty and was sentenced to 18 months in jail. He began serving his sentence the same day."

Based upon the agreed facts, including the admissions in paragraph 3, the Committee found the Solicitor guilty of conduct unbecoming a barrister and solicitor as alleged in the complaint.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Robert Alan Eagleson be disbarred.

#### REASONS FOR RECOMMENDATION

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The Solicitor was called to the Ontario Bar in 1959. He has no prior discipline record.

No evidence was introduced on the Solicitor's behalf in mitigation of penalty. Indeed, the Solicitor joined with the Law Society's counsel in submitted that he should be disbarred.

The Solicitor recently pleaded guilty to three counts of mail fraud in the United States. The following day, he pleaded guilty in the Ontario Court of Justice (General Division) to three counts of criminal fraud. Based on his guilty pleas, he was convicted on each of these charges. His sentences included 18 months' imprisonment and a payment of \$1,000,000 restitution, among other things. He is at present incarcerated.

The Law Society's responsibility in such a case is not to impose a supplementary punishment; rather, its responsibilities include the protection of the public and the preservation of public confidence in the legal profession. The preservation of public confidence in the profession in the present case requires the Law Society to express the disapproval of the profession unambiguously by ordering his disbarment.

DATED at Toronto this 21st day of January, 1998

Gavin MacKenzie

There were no submissions.

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

Carried

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

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

It was moved by Mr. Carter, seconded by Mr. Aaron that the solicitor be disbarred.

Carried

The Treasurer returned to Convocation.

Re: Richard Michael ITTLEMAN - Richmond Hill

The Secretary placed the matter before Convocation.

Messrs. Scott and Marrocco and Ms. Cronk withdrew for this matter.

Ms. Cameron appeared on behalf of the Society and Mr. Robert Warren, Q.C. was present by way of a conference call. The solicitor was present.

Convocation had before it the Report of the Discipline Committee dated 28th October, 1997, together with an Affidavit of Service sworn 19th November, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 11th November, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Frank N. Marrocco, Q.C.

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

Rhonda Cohen  
for the Society

RICHARD MICHAEL ITTLEMAN  
of the Town  
of Richmond Hill  
a barrister and solicitor

Robert D. Warren, Q.C.  
for the solicitor

Heard: August 18, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On August 1, 1996 Complaint D214/96 was issued against Richard Michael Ittleman alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced by Complaint D214b/96 issued on August 15, 1997.

The matter was heard in public on August 18, 1997. On the consent of both parties it was heard by Frank N. Marrocco, Q.C. sitting as a single bencher. The Solicitor attended the hearing and was represented by Robert D. Warren, Q.C. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D214b/96

2. a) (i) He failed to maintain books and records for the trust account that he held for the Estate of Cheryl Goldblatt.
- (ii) He failed to produce all evidence, vouchers, records, books and papers for the accounts he held in trust on behalf of the Estate of Cheryl Goldblatt and failed to provide explanations regarding the Estate trust accounts as required for the Law Society's investigation.
- b) During the period August 30, 1989 to July 6, 1991, he misappropriated \$17,778.20, more or less, from the Estate of Cheryl Goldblatt.
- c) He failed to provide conscientious, diligent and efficient service to his client, the Estate of Cheryl Goldblatt, by failing to complete the Estate in a timely manner.
- d) In his capacity as Trustee under the Will of Cheryl Goldblatt, the Solicitor breached his fiduciary duty to Alana Bendavid, beneficiary, by failing to properly report upon and disclose the assets and liabilities of the trust created by the Will.

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 D214b/96 and is prepared to proceed with a hearing of this matter on August 18, 1997, before Frank Marrocco, Q.C., sitting as a Single Bencher Discipline Committee.

II. ADMISSIONS

3. The Solicitor has reviewed Complaint D214b/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars supported by the facts hereinafter set out constitute professional misconduct.

III. FACTS

4. The Solicitor is a sole practitioner. His law practice consists of 80% family law, 15% civil litigation and 5% other.

Particular 2(b) During the period August 30, 1989 to July 6, 1991, he misappropriated \$17,778.20, more or less from the Estate of Cheryl Goldblatt.

Background  
*Cheryl Goldblatt*

5. Until 1986, the late Cheryl Goldblatt (a.k.a. Cheryl Bendavid) was married to Larry Bendavid. Ms. Goldblatt and Mr. Bendavid had two children of the marriage: Alana (born in 1975) and Elly (born in 1979). In 1986, Ms. Goldblatt and Mr. Bendavid divorced. Ms. Goldblatt was awarded custody of the children (Document Book, Tab 78).

6. Since her early childhood, Ms. Goldblatt's close friend and confidant was Rita Ittleman (nee Rubenstein). Mrs. Ittleman and Ms. Goldblatt were born on the same day and grew up together in the City of Hamilton. The Solicitor and Mrs. Ittleman are husband and wife. Prior to their divorce, Ms. Goldblatt and Mr. Bendavid were friends of the Ittlemans.

7. Because of her close friendship with the Ittlemans, the Solicitor represented Ms. Goldblatt in connection with a number of legal matters.

8. In or about February, 1988, Ms. Goldblatt was involved in a motor vehicle accident in which she was a passenger in a vehicle driven by the Solicitor's wife, Rita.

9. As a result of the motor vehicle accident, Ms. Goldblatt commenced a lawsuit against Rita Ittleman and others. R. Richard Stone, of the law firm, Stone & Yack, was retained to act on Ms. Goldblatt's behalf. The law suit did not affect the close personal relationship between Ms. Goldblatt and the Ittlemans.

10. Some time before the summer of 1989, Ms. Goldblatt learned that she had terminal cancer.

11. In or about August, 1989, Ms. Goldblatt instructed the Solicitor to prepare a Will. The Will appointed the Solicitor as sole executor of Ms. Goldblatt's estate (the "Estate"). The beneficiaries of the Estate were Ms. Goldblatt's children, Alana (then 14 years old) and Elly (then 10 years old). The children were to divide the Estate equally when they reached 18 years of age, respectively (Document Book, Tab 50).

12. In addition to acting as executor under her Will, prior to Ms. Goldblatt's passing, the Solicitor's wife, Rita, took into her possession jewellery belonging to Ms. Goldblatt. It was Ms. Goldblatt's wish, expressed to the Solicitor, that the jewellery be held by the Solicitor until such time as Alana reached 18 years of age, at which time it was to be dealt with under the terms of the Will.

13. On or about August 30, 1989, the Solicitor opened an account in his name with Central Guaranty Trust Company (account # 10-11898) for the purposes of accounting for Ms. Goldblatt's assets (Appendix A).

14. On or about December 12, 1989, Ms. Goldblatt passed away. As at this date, the Central Guaranty Trust Company account held in it approximately \$5,514.00.

15. Following the mourning period, in late December, 1989, a meeting was held between the Solicitor, Alana and Elly. At that meeting, the Solicitor advised the children that their mother's Will stated that they would share equally in her Estate when they reached the age of 18, respectively. The Solicitor also stated that he would ensure that Ms. Goldblatt's jewellery was kept safe, and it was Alana's understanding from that meeting that her share of the Estate would include her mother's jewellery.

16. In or about March, 1990, the Solicitor, as executor for the Estate, instructed Mr. Stone to settle the motor vehicle accident claim for the sum of \$16,835.00. A Full and Final Release was signed by the Solicitor in his capacity as Executor (Document Book, Tab 51). The Solicitor executed an Authorization and Direction directing R. Richard Stone to pay the net proceeds of the settlement to the Solicitor "In Trust" (Document Book, Tab 52).

17. On or about March 30, 1990, Mr. Stone wrote to the Solicitor enclosing a statement of account dated March 12, 1990, for services rendered on behalf of Ms. Goldblatt. The account was in the sum of \$5,185.60. The balance to be paid to the Estate was therefore \$11,599.40 (Document Book, Tabs 53 and 54). Mr. Stone issued a trust cheque dated March 20, 1990, payable to the Solicitor, in the sum of \$11,599.40 (Document Book, Tab 55).

18. On or about April 7, 1990, the Solicitor deposited the settlement proceeds into the Central Guaranty Trust Company account. As at this date, the account balance was approximately \$18,675.00. On June 27, 1991, the Solicitor closed this account. During the period the account remained open, the Solicitor misappropriated funds in the amount of \$17,778.20.

19. On or about July 6, 1991, the Solicitor opened a new account in his name with National Bank of Canada (account # 10-067-99). Into this new account the Solicitor deposited the sum of \$12,872.21 in an attempt to re-create the assets of the Estate from the time of Ms. Goldblatt's death (Document Book, Tab 9).

20. As at today's date, the Solicitor has not yet returned to the Estate misappropriated funds in the amount of \$4,905.00. As at today's date, there remains frozen in the National Bank account the sum of approximately \$2,828.92.

Particular 2(d) In his capacity as Trustee under the Will of Cheryl Goldblatt, the Solicitor breached his fiduciary duty to Alana Bendavid, beneficiary, by failing to properly report upon and disclose the assets, debts and liabilities of the trust created by the Will.

21. During the period 1989 to 1993, in response to inquiries from Alana, the Solicitor had a few brief conversations with her and a meeting on November 26, 1993 (described below). The Solicitor, however, did not report to Alana, Elly or their father regarding the status or administration of the Estate, including that there had been a settlement of an accident claim.

22. During January, 1993, Alana made several attempts to contact the Solicitor about the balance of any monies to be divided with her brother, and about her mother's jewellery. The Solicitor did not respond to Alana. To the best of Alana's knowledge, her mother owned the following pieces of jewellery at the time of her death:

1. 1 silver bracelet;
2. 1 pearl necklace with pearl earrings to match;
3. 1 pair of diamond earrings heart-shaped encased in gold;
4. 1 thick gold bracelet;
5. 1 thick gold chain;
6. 1 gold ring with a band of Onyx and a row of approximately 7 diamonds;
7. 1 gold ring with a big tear-shaped diamond and 5-7 diamonds running vertically;
8. 1 old gold ring with several rubies; and
9. 1 pair of gold earrings.

23. Having received no response from the Solicitor, in or about January 1993, Alana retained the services of another solicitor, Elliot Berlin.

24. By letter dated January 28, 1993, Mr. Berlin wrote to the Solicitor as follows:

“As you may know, Alana Bendavid will turn 18 this summer. She has asked that I correspond with you to review certain aspects of the Estate and would appreciate it if you could bring me up to date on the disposition of any funds that were received and any chattels that have been dealt with.

Alana has also asked that I inquire about her late mother’s jewellery.”

(Document Book, Tab 71)

25. As a result of circumstances arising out of the illness, hospitalization and death of his father in early 1993, and a religious period of mourning throughout 1993, the Solicitor did not appropriately respond to communications from his clients, including Alana and, on her behalf, Mr. Berlin. Specifically, in respect of communications between the Solicitor and Mr. Berlin, although the extent of the Solicitor’s failure to appropriately respond to Mr. Berlin is not clear, the Solicitor nevertheless acknowledges that he did not respond appropriately to Alana or Mr. Berlin, and that this failure to respond constitutes professional misconduct.

26. On August 7, 1993, Alana turned 18 years of age. Thereafter, she attempted to communicate with the Solicitor. He did not meet with her until November, 1993.

27. On November 26, 1993, Alana met with the Solicitor at his office. At that time, the Solicitor advised Alana of the following:

- (a) that he was not aware of the exact whereabouts of her mother’s jewellery, but he confirmed that he had the jewellery in his control; and
- (b) that there were no Estate assets available for distribution.
- (c) the Solicitor was holding approximately \$4,000.00 on behalf of the Estate;
- (d) the Solicitor was holding funds to cover an outstanding Estate debt to Revenue Canada which if not paid might result in serious consequences to the Solicitor; and
- (e) the Solicitor intended to inquire whether Revenue Canada would settle the debt in such a way as to allow the Estate assets to be distributed to Alana and her brother.

28. Following their meeting in November 1993, Alana made many attempts to contact the Solicitor. Frustrated with the Solicitor’s lack of response, on one occasion Alana asked a friend to contact the Solicitor under an alias with a view to setting up an appointment. Alana’s friend left a message for the Solicitor. He returned that call on the next business day.

29. Having received little response from the Solicitor, by letter dated March 29, 1994, Alana reiterated the difficulties she was having with the Solicitor to Mr. Berlin and sought his assistance (Document Book, Tab 72).

30. By letter dated April 4, 1994, Mr. Berlin wrote to the Solicitor as follows:

“Alana Bendavid has written to me expressing her distress at her inability to deal with you to finalize the affairs of her late mother’s estate. She feels that you have specifically avoided communicating with her and certainly have not reported to her on any of the matters on which she has questions.

I request that you provide a full report on the status of the estate for both Alana and Elly at this time. I would like to deal with this matter on a quite informal basis without the necessity of extensive correspondence. Alana is now of age. If you do not wish to continue to act as executor, perhaps you might consider renouncing and I will take the appropriate steps to have her appointed as Administratrix.

May I hear from you in the next 10 days.”

(Document Book, Tab 73)

The Solicitor did not respond.

31. Mr. Berlin wrote a follow-up letter dated May 11, 1994 (Document Book, Tab 74).
32. The Solicitor responded in writing in September 1994:

“Unfortunately we have been unable to connect on the telephone to discuss this matter. Therefore, I wish to provide you with a brief report on this matter.

At the time of her passing, Cheryl’s debts were greater than her assets. Some of these debts have been paid, but others have not. There remains a small sum of money on hand, but an Income Tax Clearance Certificate is not available due to outstanding taxes. I believe that, in the Divorce settlement, Larry agreed to pay some of Cheryl’s taxes that were outstanding at that time. Apparently, they were never paid. There are also additional arrears relating to taxes that Cheryl did not pay after the divorce. In addition, she did not file Returns for at least the last couple of years prior to her passing, her income apparently having been nominal.

The Divorce settlement provided that, upon Cheryl’s passing, Larry would be entitled to all of the contents of the former matrimonial home. Larry and the children picked up these items many, many months ago. In addition, the children have been given most of the other household contents and personal effects.

Cheryl also had in her possession a few items of personal property and mementos from the Goldblatt family residence in Hamilton, which had been left to she and her brother, Harvey, when their parents passed away. Prior to her passing, Cheryl gave these items to my wife for safe-keeping and they have been in the basement of my home. Harvey will be picking these items up in the near future and he has indicated that, when all of the children (both his and Cheryl’s) are older and settled, then he will pass these items on to them.

I would be pleased to discuss this matter with you. If I am not available when you call, please ask my Law Clerk to schedule a telephone appointment for a mutually convenient time.”

(Document Book, Tab 75)

33. Mr. Berlin responded to the Solicitor by letter dated September 8, 1994.

“I acknowledge your letter of September 1, 1994. My client had been trying for several years to receive information from you and has been completely shocked by your disclosure. I am not interested in such a brief report on this estate. I require the following information and documentation:

- (1) copy of the last Will and Testament of Cheryl Bendavid/Goldblatt;
- (2) copy of Letters Probate;
- (3) detailed inventory of the estate assets;

- (4) details of the estate debts including all backup documentation;
- (5) all documentation supporting proof of payment of these debts.

With this documentation I will review matters with my client. I have been specifically asked to ascertain what became of the late Cheryl Bendavid's jewellery.

As to the issue of the divorce settlement, do you have any specifics of the alleged breaches. As you know Mr. Bendavid is my law clerk and I am prepared to review the question of outstanding obligations. He, however, has indicated to me that Mr. Schipper (his solicitor at the time) made all arrangements for payments of taxes and that there is nothing owed by him.

Mr. Bendavid picked up portions of the furniture and furnishings but believes that there was other furniture and furnishings for Alana Bendavid. Alana has been waiting for this furniture and that is one of the reasons she was calling you when she turned 18."

(Document Book, Tab 76)

34. The Solicitor responded to Mr. Berlin by letter dated September 28, 1994. He did not address the substantive issues raised in Mr. Berlin's letter (Document Book, Tab 77). The Solicitor requested that Larry Bendavid make arrangements to pick up what was left of the Estate. Mr. Bendavid picked up approximately 13 boxes and a desk.

35. The within Complaint was authorized by the Chair of the Discipline Committee on July 17, 1996.

36. The Solicitor retained counsel on or about February 10, 1997. On February 13, 1997, the Solicitor, in the presence of counsel, delivered to Alana, on behalf of herself and her brother, certain pieces of her late mother's jewellery.

37. As at today's date, the Solicitor has not further communication with any of Mr. Berlin, Alana, Elly or Mr. Bendavid. The Solicitor has not accounted to the beneficiaries.

Particular 2(c) He failed to provide conscientious, diligent and efficient service to his client, the Estate of Cheryl Goldblatt, by failing to complete the Estate in a timely manner.

38. The Estate file was opened by the Solicitor in or about December, 1989. Alana came of age and was entitled to her inheritance in August, 1993. As at today's date, the Solicitor's file remains open and incomplete and he has not taken steps to complete the file since in or about 1990.

39. The following chart sets out the Solicitor's failure to take reasonable and timely steps to complete the Estate file:

DATE	EVENT
December 1989	Ms. Goldblatt died.
January 12, 1990	The Solicitor wrote to Taxpayer Services at Revenue Canada Taxation to inquire into the status of Ms. Goldblatt's file (Document Book, Tab 62).
March 8, 1990	Revenue Canada responded to the Solicitor indicating that Revenue Canada was making every effort to respond to the Solicitor's request (Document Book, Tab 63).
March 23, 1990	Revenue Canada advised the Solicitor that a Clearance Certificate could not be issued until all required Income Tax Returns had been filed and assessed and all taxes contributions, interest and penalties made or secured on behalf of the Estate (Document Book, Tab 64).
April 9, 1990	The Solicitor determined the Estate's outstanding tax liability to be in the amount of \$6,981.85 (Document Book, Tabs 65 and 34).
June 28, 1990	Revenue Canada wrote to the Solicitor advising that the Estate's tax liability was \$5,149.12 for the calendar years 1985 and 1986 (Document Book, Tab 66 - page 2 of this document could not be located in the Solicitor's file).
May 31, 1994	An Estate search conducted by Mr. Berlin's office revealed that the Estate has not yet been probated (Document Book, Tab 68).
June 5, 1996	The Law Society confirmed with Revenue Canada that, as at that date, outstanding taxes were in the amount of more than \$6,000.00, and the Estate had not filed Tax Returns since 1986 (Document Book, Tab 67).

40. As at today's date, the Solicitor has taken no further steps to complete the Estate file.

- Particular 2(a)
- (i) He failed to maintain books and records for the trust account that he held for the Estate of Cheryl Goldblatt.
  - (ii) He failed to produce all evidence, vouchers, records, books and papers for the accounts he held in trust on behalf of the Estate of Cheryl Goldblatt and failed to provide explanations regarding the Estate trust accounts as required for the Law Society's investigation.

41. In or about November, 1992, the Law Society authorized an audit of the Solicitor's books and records. The audit was based upon information received from The Ontario Legal Aid Plan that the Solicitor was having difficulty paying client disbursements (Document Book, Tab 1).

42. The following chart sets out the Law Society's attempts to obtain the Solicitor's books and records for the purposes of conducting the audit, and the Solicitor's failure or refusal to produce the requisite documentation:

DATE	EVENT
January 19, 1993	A Law Society examiner, Ms. Anita McCann, attended at the Solicitor's office to commence the audit. The Solicitor's secretary advised that he was in court. Ms. McCann left her business card and asked the Solicitor to contact her (Document Book, Tab 2). He did not.
January 20, 1993	Ms. McCann called the Solicitor by telephone, however, he was not available. The Solicitor returned the call that day and requested a one week extension to produce his books and records. It was agreed that the Solicitor would produce his records on or before February 16, 1993 (Document Book, Tab 2).
February 12, 1993	Ms. McCann and the Solicitor confirmed that they would meet on March 2 and 3, 1993, to review the Solicitor's books and records (Document Book, Tab 2).
March 1, 1993	Ms. McCann cancelled the meeting for that day and thereafter, the Solicitor cancelled the meeting scheduled for March 2 and 3, 1993. His father had been hospitalized on February 28, 1993.
March 1993	Ms. McCann made a number of attempts to contact the Solicitor by telephone. He did not respond (Document Book, Tab 2).
April 1, 1993	Ms. McCann, attended at the Solicitor's office to conduct an audit of his books and records.  The Solicitor's books and records were in arrears. The last trust reconciliation which had been completed was for September 30, 1992. The Solicitor was given one week to update his books and records.

<p>April 8, 1993</p>	<p>Ms. McCann returned to the Solicitor's office to resume the audit. She found, <i>inter alia</i>, the following:</p> <p><i>Re: The Estate of Cheryl Goldblatt</i></p> <p>The Solicitor produced a ledger for an account which he had opened for the Estate with National Bank of Canada. The account was not a trust account - it was a personal account in the Solicitor's name (Document Book, Tab 9).</p> <p>Among other things, the ledger revealed a withdrawal from the account made on June 8, 1992 in the sum of \$4,280.00 (Document Book, Tab 9). Ms. McCann asked the Solicitor to explain the basis for the withdrawal. The Solicitor was unable to do so, indicating that he did not know the reason for the withdrawal (Document Book, Tab 2).</p> <p>The Solicitor did not produce supporting source documentation for the Estate ledger account or the Estate file.</p> <p>At Ms. McCann's request, co-signing controls were placed against each of the Estate accounts. At the time, the balance in the National Bank account was \$2,825.01 (Document Book, Tabs 5, 6 &amp; 8).</p>
<p>June 1, 1993</p>	<p>Ms. McCann left a message for the Solicitor asking for a return call.</p> <p>The Solicitor did not respond (Document Book, Tab 3).</p>
<p>June 14, 1993</p>	<p>Ms. McCann left a message for the Solicitor again asking for a return call (Document Book, Tab 4).</p> <p>The Solicitor did not respond.</p>
<p>August 30, 1993</p>	<p>The manager of the Law Society's Examiner Program, Margot Devlin, wrote to the Solicitor to confirm deficiencies regarding his books and records in relation to the Estate (Document Book, Tabs 12 &amp; 12A).</p> <p>The Solicitor did not respond.</p>
<p>October 1, 1993</p>	<p>A follow up letter was sent to the Solicitor (Document Book, Tab 13).</p> <p>The Solicitor did not respond.</p>
<p>January 13, 1994</p>	<p>In respect of other deficiencies arising out of the audit, a Discipline Complaint was issued against the Solicitor for failing to maintain sufficient trust funds (\$7,668.75), failing to reply to the Law Society (D362/93) (Document Book, Tab 15).</p>

July 11, 1994	On the day of this discipline hearing, an agreement was made between the Solicitor and the Law Society's then Discipline Counsel, Stephen Foster, to produce the Estate file for review (Document Book, Tab 16).
July 19, 1994	<p>Ms. McCann attended at the Solicitor's office to review the Estate file. No Estate banking records or source documents were produced. The Solicitor advised that he would make them available on July 26, 1994 (Document Book, Tab 4).</p> <p>During her review of those file documents which were made available, Ms. McCann discovered an account between the Solicitor and the Estate dated July 8, 1991 in the amount of \$3,884.10 (Document Book, Tab 56). The account did not set out the relevant time period and included little narrative. Some of the services referred to in the account pre-dated Ms. Goldblatt's death. Ms. McCann subsequently learned that the Solicitor had deposited the said \$3,884.10 into his general bank account (Document Book, Tab 57). Ms. McCann requested time dockets to support this account. The Solicitor was unable to produce those dockets until October 1994.</p> <p>A follow-up meeting was scheduled for July 26, 1994.</p>
July 25, 1994	The Solicitor cancelled the meeting scheduled for the following day (Document Book, Tab 4).
July 26, 1994	<p>Ms. McCann left a message for the Solicitor advising that she would re-attend on August 3, 1994.</p> <p>The Solicitor confirmed the August 3, 1994 meeting (Document Book, Tab 4).</p>
August 3, 1994	<p>Ms. McCann re-attended at the Solicitor's office to continue her review of the Estate file and accounting records. The Solicitor did not produce Estate accounting records, bank records or source documents (Document Book, Tab 4).</p> <p>It was agreed that Ms. McCann would return on August 8, 1994.</p>

August 8, 1994	Ms. McCann re-attended at the Solicitor's office to conduct the audit. No further documentation was produced by the Solicitor.
August 18, 1994	<p>Ms. McCann re-attended at the Solicitor's office to review the Estate file. During this meeting the Solicitor produced an updated ledger of the National Bank account. This ledger identified the \$4,280 withdrawal of June 5, 1992 as having been made by the Solicitor directly (Document Book, Tab 9A). The Solicitor had deposited that sum into his general account (Document Book, Tab 59). The Solicitor also produced an account (Document Book, Tab 58). The account did not set out a time period and contained no narrative whatsoever.</p> <p>Ms. McCann requested that the Solicitor produce time docketts reflecting the Estate account billings. The Solicitor advised that he required time to complete the task and requested a month extension to do so. Ms. McCann agreed and scheduled the next appointment to take place on September 16, 1994 at 11:30 a.m.</p> <p>During this meeting, the Solicitor:</p> <ul style="list-style-type: none"><li>(a) did not advise Ms. McCann that he was holding jewellery on behalf of the Estate;</li><li>(b) did not advise Ms. McCann of the motor vehicle accident claim or settlement;</li><li>(c) advised Ms. McCann that he was in the process of dealing with the outstanding Estate debt to Revenue Canada but was not sure how much was owing by the Estate; and</li><li>(d) advised Ms. McCann that he had taken and stored the contents of Ms. Goldblatt's home in his basement and thereafter distributed same to Alana and Elly.</li></ul> <p>(Document Book, Tab 61).</p>
September 14, 1994	Ms. McCann received a facsimile from the Solicitor advising that he would be out of the office on business on September 16, 1994, and requesting a new appointment date.
September 15, 1994	<p>Ms. McCann left a telephone message on the Solicitor's answering service asking the Solicitor to advise of a time when the two could speak.</p> <p>The Solicitor did not respond.</p>

September 20, 1994	Ms. McCann contacted the Solicitor's office and spoke with his secretary, Krista, who advised that the Solicitor was not available due to a religious holiday. She requested that Ms. McCann call back on Thursday, September 22, 1994 at 3:00 p.m.
September 22, 1994	<p>At 3:00 p.m. Ms. McCann contacted the Solicitor's office but was advised that he was not available to take her call.</p> <p>The Solicitor's secretary advised that Ms. McCann could meet with the Solicitor on September 28 or 29, 1994. Ms. McCann agreed to either date and suggested to his secretary that she confirm same with him and leave a message on Ms. McCann's voice mail.</p> <p>The Solicitor did not respond.</p>
September 26, 1994	<p>At approximately 6:06 p.m. Ms. McCann received a voice mail from the Solicitor explaining that the following Tuesday and Wednesday were religious holidays and further that he was involved in a trial continuation on Thursday. The Solicitor undertook to contact Ms. McCann on Thursday, September 29, 1994, to arrange a time to meet.</p> <p>The Solicitor did not contact Ms. McCann.</p>
October 12, 1994	<p>Ms. McCann wrote to the Solicitor to confirm her efforts to contact him and to advise that she would attend his office on Wednesday, October 19, 1994, to review his time docket relating to the Estate. Ms. McCann further advised that should the Solicitor fail to comply she would report this matter to the Discipline Committee for failure to cooperate and failure to produce.</p> <p>(Document Book, Tab 17)</p>
October 18, 1994	<p>The Solicitor delivered his account with the Estate dated June 5, 1992, and time docket in respect of the Estate for the period December, 1989 to July 1991 (Document Book, Tabs 18 &amp; 58).</p> <p>The Solicitor now acknowledges that part of the funds withdrawn by him on June 8, 1992, in the amount of \$4,280.00, on account of fees, would likely be reduced on taxation and, therefore, ought to be returned to the Estate.</p>

43. As at today's date, the Solicitor has failed to complete production of his books and records, and all evidence, vouchers, records, books and papers for the accounts held on behalf of the Estate. The following chart details relevant books and records which have been requested by the Law Society, have been produced by the Solicitor and/or remain outstanding:

Estate Books and Records Required (per section 15 of Regulation 708)	Produced	Outstanding as at June, 1996
Bank statements	<u>National Bank of Canada</u>  April 8, 1993: One statement for the period ending January 15 1993 (Document Book, Tab 8).  <u>Central Guaranty Bank</u>  No statements produced.	Remainder of National Bank of Canada bank statements covering the period August 15 1991 to December 15 1992.  Central Guaranty Trust Company bank statements.
Cancelled cheques	None produced	all
Deposit books	None produced	all
Estate ledger	<u>National Bank of Canada</u>  August 18, 1994: Updated estate trust ledger (Document Book, Tab 9a).	N/A
	<u>Central Guaranty Bank</u>  None	Ledger outstanding for Central Guaranty Bank account.
Estate billing dated June 5, 1992 - \$4,280.00.	October 18, 1994: Dockets (Document Book, Tab 18).	

44. Because the Solicitor did not produce the required books and records, including source documentation, it was necessary for Ms. McCann to obtain the source documentation from the financial institutions directly. Appendix A is Ms. McCann's reconstruction of the Estate account with Central Guaranty Trust Company during the period August, 1989 to June, 1991. Appendix B is Ms. McCann's reconstruction of the Estate with National Trust account during the period July, 1991 to February 1996.

45. It was during the reconstruction of activity in the respective Estate accounts, that Ms. McCann first learned about the motor vehicle accident settlement. The Solicitor had not previously disclosed the fact of the settlement or that the Solicitor had deposited the settlement funds in a account purportedly for the benefit of Ms. Goldblatt.

46. On March 22, 1995, Ms. McCann questioned the Solicitor about the whereabouts of Ms. Goldblatt's jewellery. The Solicitor confirmed that his wife was holding jewellery on behalf of the beneficiaries, possibly in a safety deposit box. He undertook to confirm this with his wife and report back.

47. Also on March 22, 1995, Ms. McCann inquired of the Solicitor why he had not advised the beneficiaries of the motor vehicle claim which he had settled on behalf of the Estate in March, 1990. The Solicitor advised Ms. McCann that he wished to deal with Elliot Berlin directly, and would not discuss the matter further. In fact, at no time has the Solicitor discussed with Mr. Berlin the subject matter of the motor vehicle accident settlement (Document Book, Tab 69).

48. On March 26, 1995, Ms. McCann received a voice mail message from the Solicitor. He advised that he would contact Elliot Berlin to make arrangements to transfer the jewellery to the beneficiaries, and that his wife Rita would not speak to Ms. McCann directly (Document Book, Tab 70). The jewellery was not returned to Alana until February 13, 1997.

49. Ms. McCann wrote to the Solicitor by letter dated October 30, 1995:

“You received a cheque in settlement of a motor vehicle accident claim. A copy of the cheque dated March 20, 1990 in the sum of \$11,559.40 is provided for your information.

The back of the cheque indicates that the cheque was deposited into Central Guaranty Trust Company account #10-11898.

Central Guaranty has since merged with the Toronto Dominion Bank. The Toronto Dominion Bank provided the Law Society with a complete history regarding the status of the account which is enclosed for your information. Furthermore, the Toronto Dominion Bank advised that this is not an estate account but a personal account. All source documents (i.e. bank statements and cancelled cheques) were returned to you; therefore, we request production of the bank statements and cashed cheques for the period August 30th 1989 to June 27th 1991. Please remit documentation supporting each disbursement (i.e. third party invoices).

We further request a complete and detailed accounting of all estate monies received and disbursed in regard to the Goldblatt estate.

Please forward your reply to the Law Society no later than November 30th 1995. In the absence of a full reply, we will be obliged to seek authorization for disciplinary charges alleging your failure to produce documents as required by Section 18 of Regulation 708 made under the Law Society Act.”

(Document Book, Tab 19)

The Solicitor did not respond.

50. As at today's date, the Solicitor has not responded to Ms. McCann's letter, nor has he produced any further documentation in relation to his books and records or the Estate file.

#### Solicitor's Explanation

51. The Solicitor's practice is primarily family law. He has little or no experience as an estate lawyer. Shortly after Ms. Goldblatt's death, the Solicitor determined that the Estate debts were greater than its assets (Document Book, Tab 34). The administration of the Estate then became a low priority for the Solicitor who acknowledges that his failure to serve the Estate and the beneficiaries constitutes serious misconduct.

52. In addition to the foregoing, and specifically in respect of the Estate assets, the Solicitor states that, initially, because the Estate debts exceeded its assets, he believed that if he ignored the various requests for payment from the Estate creditors, and kept the Estate funds in an account, they, the creditors, might abandon their respective claims against the Estate, thereby leaving the assets for distribution to the beneficiaries. As time passed, however, the Solicitor gave less and less attention to the Estate and to the beneficiaries and ultimately misappropriated Estate funds. The Solicitor states that it was not his intention to permanently deprive the Estate of its assets, as evidenced by the fact that a substantial portion of the funds were returned shortly after the misappropriation, and Ms. Goldblatt's jewellery was kept safe, as promised. The Solicitor nevertheless acknowledges that his conduct is inexcusable and constitutes serious misconduct.

Particular 2(a)(iii) He failed to maintain books and records for his general bank account.

53. On or about March 2, 1996, the Solicitor filed his Forms 2/3 for his fiscal year ending January 31, 1994 (Document Book, Tab 14A ). On page 2 of Form 3, the Solicitor's accountant states that the Solicitor has not maintained general books and records for receipts and disbursements.

Administrative Suspensions

54. The Solicitor has been suspended administratively throughout the following periods:

March 28, 1991	-	April 2, 1991	(non-payment of annual fee)
May 24, 1991	-	June 6, 1991	(non-payment of errors & omissions levy)
November 29, 1991	-	December 2, 1991	(non-payment of errors & omissions levy)
March 6, 1992	-	March 26, 1992	(non-payment of annual fee)
May 1, 1993	-	May 10, 1993	(non-payment of annual fee)
January 24, 1997	-	February 4, 1997	(non-payment of errors & omissions levy)

IV. DISCIPLINE HISTORY

55. In or about July 1994, the Solicitor was Reprimanded in Committee and ordered to pay costs fixed in the amount of \$500.00 for:

- (i) failing to file his Forms 2 and 3 within six months of his fiscal year ending January 31, 1993;
- (ii) failing to maintain sufficient trust funds on hand to meet client liabilities in the amount of \$7,668.95; and
- (iii) failing to reply to the Law Society in relation to the investigation of the said insufficient trust funds in the Solicitor's trust account.

56. In or about January 1995, the Solicitor was Reprimanded in Convocation and ordered to pay costs fixed in the amount of \$450.00 for failing to file his Forms 2 and 3 within six months of his fiscal year ending January 31, 1994.

DATED at Toronto this 18th day of August, 1997."

APPENDIX A

RECONSTRUCTION OF ITTLEMAN "IN TRUST" a/c #10-11898  
 CENTRAL GUARANTY TRUST COMPANY  
 (now the Toronto-Dominion Bank)

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
Aug 30 /89 - account is open		1273.65	1273.65	- unknown source deposit is listed as the opening entry for the account on August 30, 1989 (Document Book, Tab 21).
Aug 31/89		0.51	1274.16	- interest
Sept 18/89		1089.48	2363.64	- cash deposit - source unknown (deposit slip does make reference to "credit account of R.M. Ittleman) (Document Book, Tab 22).
Sept 30/89		10.41	2374.05	- interest
Oct 3/89		718.63 CPP 300.00 65.48Fam. Allow. <u>900.00 (cash)</u> 1984.11	4358.16	- deposit source unknown (deposit slip makes reference to "credit account of Trust for Cheryl Goldblatt) (Document Book, Tab 23).
Oct 5/89	1600.00		2758.16	Cheque #001 to Cheryl Bendavid (a.k.a Cheryl Goldblatt) signed by the Solicitor and indicates the initials CB, possibly initialled by (Cheryl Bendavid).  The cheque appears to have been deposited to an account at Canada Trust #316-503705  (Document Book, Tab 24).
Oct 18/89		1260.00	4018.16	- deposit source unknown - deposit slip makes reference to "credit account of Ittleman" (Document Book, Tab 25).

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
Oct 27/89	100.00		3918.16	Cheque #002 - to Rita Rubenstein (a.k.a. Rita Ittleman) is signed by Richard Ittleman (Document Book, Tab 26).
Oct 28/89	400.00		3518.16	Cheque #003 - to CASH is signed by the Solicitor. The left corner on the cheque makes reference to "Re - Cheryl" (Document Book, Tab 27).
Oct 31/89		20.93	3539.09	- interest
Nov 22/89		718.63 CPP 65.48 Fam. Allow. 784.11	4323.20	- deposit source unknown. Deposit slip makes reference to "credit account of R.M. Ittleman In Trust" (Document Book, Tab 28).
Nov 30/89		22.69	4345.89	- interest
Dec 4/89		50.00 718.63 CPP 400.00 (Cash) 1168.63	5514.52	- deposit source unknown. Deposit slip makes reference to "credit account of (Goldblatt - R. Ittleman)" (Document Book, Tab 29).
Dec 12/89				Cheryl Goldblatt died.
Dec 30/89		41.72	5556.24	- interest
Jan 31/90		43.57	5599.81	- interest
Feb 3/90		1076.30	6676.11	\$73.19 Consumer Gas Refund  \$65.48 December family allowance  \$718.63 December CPP  <u>\$219.00 - Cash</u>  1076.30  (Document Book, Tab 30)

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
Feb 28/90		46.83	6722.94	- interest
Mar 31/90		54.01	6776.95	- interest
Apr 7/90		11898.64	18675.59	- the Solicitor trust for Goldblatt  \$11,599.40 MVA insurance settlement  \$24.04 Canada Trust bank account - 316503705  \$138.00 Citadel Insurance refund  \$137.20 Citadel Insurance refund  <hr/> \$11,898.64  (Document Book, Tab 31)
Apr 30/90		125.72	18801.31	- interest
May 16/90	5000.00		13801.31	Cheque #001 to the Solicitor signed by the Solicitor.  This money was deposited to the Solicitor's general account.  (Document Book, Tab 32)
May 28/90	2100.00		11701.31	Cheque #002 to Fifth Avenue Window Fashion signed by the Solicitor (Document Book, Tab 60).  This was not a debt of the Estate (Document Book, Tab 34).
May 29/90		2100.00	13801.31	- deposit source unknown. Deposit slips makes reference to "credit account of Ittleman" (Document Book, Tab 35) .

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
May 31/90		133.32	13934.63	- interest
June 30/90		111.90	14046.53	- interest
July 12/90	2100.00 - correcting entry		11946.53	unknown (RTD) returned cheque taken out of wrong account (RTD to correct entry error) (Document Book, Tab 36).
July 17/90	2500.00		9446.53	Cheque #004 to the Solicitor signed by the Solicitor.  This money was deposited to the Solicitor's general account.  (Document Book, Tab 37)
July 23/90	3000.00		6446.53	Cheque #006 to the Solicitor signed by the Solicitor.  This money was deposited to the Solicitor's general account.  (Document Book, Tab 38)
July 31/90	1480.00		4966.53	Cheque #007 to Fidelity Moving signed by the Solicitor. The cheque makes reference to "re: moving 124 Cottonwood Crt" and Rita Ittleman's name is in the corner.  This was a debt of the Estate (Document Book, Tab 39).
July 31/90		98.97	5065.50	- interest
Aug 2/90	1500.00		3565.50	Cheque #008 to the Solicitor signed by the Solicitor.  This money was deposited to the Solicitor's general account (Document Book, Tab 40).
Aug 11/90		84.37	3649.87	- interest

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
Aug 11/90	98.97 - correcting entry		3550.90	- bank correction
Aug 31/90		23.07	3573.97	- interest
Sept 29/90		21.19	3595.16	- interest
Oct 31/90		21.28	3616.44	- interest
Nov 30/90		20.49	3636.93	- interest
Dec 4/90	2000.00		1636.93	Cheque #010 to the Solicitor signed by the Solicitor.  This money was deposited to the Solicitor's general account (Document Book, Tab 41).
Dec 31/90		8.54	1645.47	- interest
Jan 31/91		6.53	1652.00	- interest
Feb 28/91		5.46	1657.46	- interest
Mar 30/91		5.90	1663.36	- interest
Apr 30/91		5.44	1668.80	- interest
May 31/91		5.32	1674.12	- interest
June 27/91		4.30	1678.42	- interest

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
June 27/91	1678.20		0.22	- there is a .22 cent difference between the Law Society's addition and the Toronto Dominion Bank's addition.  The account was closed by Richard Ittleman evidenced by a Withdrawal Slip (Document Book, Tab 42).
	TOTAL DEBITS minus CORRECTING ENTRIES  21358.17	TOTAL CREDITS minus CORRECTING ENTRIES  21358.39		.22 reconciling item (bank error)

APPENDIX B

RICHARD ITTLEMAN PERSONAL ACCOUNT 10-067-99  
NATIONAL BANK OF CANADA

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
July 6, 1991 account opened (Document Book, Tab 43)		12872.21	12872.21	Deposit Slip - Account name Richard Ittleman  \$4,000.00 source of cheque deposit unknown  \$6,000.00 source of cheque deposit unknown  \$3,100.00 (Cash deposit)  <hr/> \$13,100.00 (Total deposit) - 227.79 (Less Cash from deposit) \$12,872.21 (Total Deposit)  (Document Book, Tab 44)

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
July 8/91	3884.10		8988.11	Cheque #2 to the Solicitor signed by the Solicitor and deposited to his general account.  This cheque to the Solicitor was for fees billed to the Estate (Document Book, Tab 45).
July 8/91		10.01	8998.12	interest
July 16/91	2.50		8995.62	service charge (Document Book, Tab 43)
Aug 15/91		38.83	9034.45	interest
Sept 15/91		38.89	9073.34	interest
Oct 16/91		34.19	9107.53	interest
Nov 18/91		34.69	9142.22	interest
Dec 16/91		27.84	9170.06	interest
Jan 16/92		28.45	9198.51	interest
Jan 16/92	2207.18		6991.33	Cheque #003 dated Jan 15/92 (Document Book, Tab 46)  Baycrest Centre for Geriatric Care.  This cheque was signed by the Solicitor in payment of an account to Cheryl Goldblatt. This was a debt of the Estate (Document Book, Tab 34).
Feb 17/92		19.56	7010.89	interest
Feb /92	2.50		7008.39	service charge
Mar 16/92		17.52	7025.91	interest

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
Apr 16/92		17.36	7043.27	interest
May 19/92		18.53	7061.8	interest
June 8/92	4280.00		2781.8	Certified Cheque dated June 5/92  This cheque is made payable to "Richard Ittleman Barrister" and signed by the Solicitor. This cheque withdrawal is for fees billed to the estate and deposited to the general account (Document Book, Tab 47).
June 16/92		12.34	2794.14	interest
June 92	2.50		2791.64	service charge
July 16/92		4.91	2796.55	interest
Aug 17/92		4.68	2801.23	interest
Sept 16/92		3.46	2804.69	interest
Oct 16/92		4.31	2809.00	interest
Nov 16/92		6.06	2815.06	interest
Dec 16/92		5.96	2821.02	interest
Jan 18/93		3.99	2825.01	interest
Feb 15/93		2.24	2827.25	interest
Mar 15/93		1.87	2829.12	interest
Apr 15/93		1.77	2830.89	interest

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
May 15/93		1.77	2832.66	interest
June 15/93		1.71	2834.37	interest
July 15/93		1.69	2836.06	interest
Aug 15/93		1.17	2837.23	interest
Sept 15/93		1.17	2838.40	interest
Oct 15/93		1.21	2839.61	interest
Nov 15/93		1.10	2840.71	interest
Dec 15/93		1.05	2841.76	interest
Jan 15/94		.98	2842.74	interest
Feb 15/94		.58	2843.32	interest
Mar 15/94		.30	2843.62	interest
Apr 15/94		.27	2843.89	interest

Date	Debit Amount	Credit Amount	Balance	Reason/Explanation
May 15/94		.22	2844.11	interest
	TOTAL DEBITS \$10378.78	TOTAL CREDITS \$13222.89		
As of February 2, 1996		\$2,828.82		<p>ACCOUNT BALANCE</p> <p>2844.11 - 2828.82 = 15.29 (Document Book, Tab 48)</p> <p>A difference of \$15.29 exists between the bank balance of April 8, 1993 (2844.11) to February 2, 1996 (2828.82). National Bank have advised that it is possible that the difference relates to either bank errors or bank service charges accumulated over that period of time.</p>

RECOMMENDATION AS TO PENALTY

The Committee recommends that Richard Michael Ittleman be given permission to resign.

REASONS FOR RECOMMENDATION

At the conclusion of the hearing in this matter there was a joint submission on the recommended penalty. Counsel for the Society and counsel for Mr. Ittleman urged that he be given permission to resign his membership in the Society. Joint submissions concerning penalty should not be disregarded by a committee unless they are wholly inappropriate, having regard to the nature of the conduct and the circumstances of the member. If support is needed for this proposition, regard might be had to the decision of the Discipline Committee in *Re Orzech*, which decision was adopted by Convocation on March 21, 1996.

The Committee adopts the joint submission in this matter.

Mr. Ittleman did not set out to deprive the children of Cheryl Goldblatt of their inheritance. It became clear to him that the estate's debts exceeded its assets and therefore the children would receive none of the \$18,675.00 that he was holding in an account for the benefit of the estate and, as well, it appeared to him that the jewellery that his wife was holding for the deceased and her children would similarly be subject to creditors' claims. Accordingly he set out upon the ill-advised conduct described in the Agreed Statement of Facts.

Both counsel submitted and the Committee finds that Mr. Ittleman was not motivated by a sense of greed in this matter. Mr. Ittleman's motivation appears from a letter of apology that he wrote to the children of Mrs. Goldblatt. In that letter Mr. Ittleman states:

“...I believed that your mother’s debts exceeded her assets and I acted inappropriately in dealing with the estate and attempting to shield your mother’s assets from creditors. When I determined that this was an ill-conceived scheme, I procrastinated in making this matter a priority for a number of personal reasons.”

In addition, it was agreed by counsel that Mr. Ittleman was suffering from psychiatric problems in the form of either clinical depression or burn-out. The clinical depression may have had its roots in his inability to deal with the death of his father, with whom he had a very close relationship; alternatively the “burn-out” may have had its roots in the fact that he has not had a vacation of any significance since he started practising as a sole practitioner in 1988. While the evidence is unclear concerning when these psychiatric problems began, it is clear that they affected Mr. Ittleman’s ability to respond to both the Law Society and the children of Mrs. Goldblatt, with the result that he compounded his own difficulties.

By conducting himself as he did at this hearing, Mr. Ittleman relieved the children of Mrs. Goldblatt of the difficulty of testifying and shortened the conduct of his hearing. When this matter was heard, full restitution of both the money and the jewellery had been made to the estate and the expectation was that both the money and the jewellery would be turned over to the children of Mrs. Goldblatt as the estate’s potential creditors, with the exception of Revenue Canada, have not pursued their claims.

Mr. Ittleman presented himself with a number of personal circumstances in addition to his psychiatric problems which helped the Committee recommend that resignation was an appropriate form of termination of his membership. Mr. Ittleman’s wife has been in ill health for several years during their thirteen-year marriage. She has been diagnosed now with cancer and while her condition is stable, he recognizes that her health will pose an increasing problem for him and the one child of the marriage. He is also receiving nutritional and personal counselling to assist him in dealing with his excessive weight gain.

With respect to his practice, Mr. Ittleman has cooperated with the Society since its audit. He has regularly provided a list of his clients as well as a list of fees and other funds received. Mr. Ittleman has not been operating a trust account and the Law Society, through its counsel, indicated that it received Mr. Ittleman’s full cooperation during the currency of this matter.

Finally, it has been observed by Convocation in the past that two significant objectives of the discipline process are the protection of the public and the protection of the reputation of the profession (see in *Re O’Donnell*, September 28, 1995). For the reasons set out above, neither of these two objectives will be compromised if Mr. Ittleman is permitted to terminate his membership by resigning.

Richard Michael Ittleman was called to the Bar on April 11, 1980.

ALL OF WHICH is respectfully submitted

DATED this 28th day of October, 1997

Frank N. Marrocco, Q.C.

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be granted permission to resign.

Both counsel made submissions in support of the joint submissions made at the discipline hearing that the solicitor be permitted to resign.

It was moved by Mr. Topp, seconded by Ms. Sealy that the solicitor be granted permission to resign.

Carried

Ms. Cameron made preliminary remarks regarding those discipline matters dealing with failure to file and the issue of the new self-reporting forms and whether the new forms could be used.

A discussion followed.

The Treasurer advised that the Professional Regulation Committee would consider the issue and that Convocation in the meantime would deal with failure to file Reports on an individual basis.

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IN CAMERA

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IN CAMERA Content Has Been Removed

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IN PUBLIC

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Re: Weldon Frederick GREEN - Toronto

The Secretary placed the matter before Convocation.

Messrs. Wilson, Swaye and Chahbar and Ms. Carpenter-Gunn and Ms. Cronk withdrew for this matter.

Ms. Brooks appeared on behalf of the Society and Mr. Gregory Johnstone appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 21st October, 1997, together with an Affidavit of Service sworn 27th October, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 22nd October, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 7th November, 1997 (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  
Kim Carpenter-Gunn  
Abdul A. Chahbar

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

Janet Brooks  
for the Society

WELDON FREDERICK GREEN  
of the City  
of Toronto  
a barrister and solicitor

Gregory P. Johnstone  
for the solicitor

Heard: July 29, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On December 11, 1996 Complaint D320/96 was issued and on April 21, 1997 Complaint D172/97 was issued against Weldon Frederick Green alleging that he was guilty of professional misconduct.

The matter was heard in public on July 29, 1997 before this Committee composed of Gerald A. Swaye, Q.C., Chair, Kim Carpenter-Gunn and Abdul A. Chahbar. The Solicitor attended the hearing and was represented by Gregory P. Johnstone. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D 320/96

2. a) He breached the Order of Convocation dated May 26, 1995 by continuing to practise periodically while suspended in the period May 1995 to May 1996; and
- b) He breached his Undertaking to the Law Society dated November 1, 1995 that he file the Form 2/Form 3 report by December 31, 1995 for the fiscal year ended April 30, 1995.

Complaint D172/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended April 30, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

Evidence

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

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D320/96 and D172/97 and is prepared to proceed with a hearing of this matter on July 29 and 30, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D320/96 and D172/97 with his counsel, Gregory P. Johnstone, and admits the particulars contained in each Complaint. The Solicitor further admits that the said particulars, together with the facts as hereinafter set out, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on June 26, 1958. He is also a patent and trademark agent. He practised as a sole practitioner in Toronto, Ontario. He was administratively suspended on May 26, 1995.

Complaint D320/96

Particular 2(a) He breached the Order of Convocation dated May 26, 1995 by continuing to practise periodically while suspended in the period May, 1995 to May, 1996;

5. On or about December 20, 1994, the Solicitor was sent a first Notice advising him that his errors and omissions insurance levy was due on January 1, 1995. He was further advised that all members are required to pay the levy except those who file a valid claim for exemption. He was further advised that:

"Pursuant to Section 36 of the *Law Society Act*, if a Member fails to pay any fee or levy payable by that Member to the Society, within four months after the day on which payment is due, Convocation may, by order, suspend such Member's rights and privileges as a Member for such time and on such terms as it considers proper in the circumstances."

A sample of the first Notice is Exhibit 1 to this Agreed Statement of Facts.

6. On or about April 10, 1995, the Solicitor received a second and final Notice advising him that his errors and omissions insurance levy was due. The Notice included the statement that "any balance owing must be paid by the close of business (5:00 p.m.) on May 5, 1995 to avoid suspension. You will receive no other notice before suspension" It also cautioned the Solicitor that,

"Pursuant to Section 36 of the *Law Society Act*, if a Member fails to pay any fee or levy payable by that Member to the Society, within four months after the day on which the payment is due, Convocation may, by order, suspend such Member's rights and privileges as a Member for such time and on such terms as it considers proper in the circumstances."

A sample of the second and final Notice is Exhibit 2 to this Agreed Statement of Facts.

7. On May 26, 1995, the Solicitor's rights and privileges as a member of the Society were suspended by Order of Convocation pursuant to Section 36 of the *Law Society Act*.

8. On June 1, 1995, the Solicitor received a registered letter dated May 29, 1995 confirming that his rights and privileges as a member of the Society had been suspended effective May 26, 1995 as ordered by Convocation pursuant to Section 36 of the *Law Society Act*. The Solicitor was also provided with a memorandum setting out the restrictions and obligations imposed on suspended members. He was advised that "failure to comply with these restrictions and obligations may result in disciplinary proceedings being instituted against you." A copy of the letter and acknowledgment of receipt of a registered item by the Solicitor's secretary are Exhibit 3 to this Agreed Statement of Facts.

9. On August 15, 1995, February 26, 1996 and February 28, 1996, the Society's examiner attempted to arrange a meeting to review the Solicitor's books and records. On February 28, 1996, the examiner spoke with the Solicitor and advised him that he was suspended. He advised her that he was not practising law but is a patent and trademark agent and professional engineer and was in his office in that respect, not with respect to his law practice. He told her that he had "not practised law since about June, 1995". A copy of the examiner's notes of her conversations with the Solicitor and his office are Exhibits 4 and 5 to this Agreed Statement of Facts.

10. On March 1, 1996, co-signing controls were placed on the Solicitor's trust account since he was suspended. Exhibit 6 to this Agreed Statement of Facts is the Solicitor's instructions to his bank, his Undertaking to the Law Society to accept no further trust money until he is reinstated, the Solicitor's acknowledgement to the Law Society of the deficiencies in his books and records and a Member Questionnaire completed on May 1 and May 6, 1996.

11. On April 10, 22, 29 and 30, 1996, the Society attempted to examine the Solicitor's books and records. Exhibit 7 to this Agreed Statement are the examiner's notes of her conversations with the Solicitor, his bookkeeper and his assistant.

12. On May 6, 1996, the Solicitor also completed a questionnaire with respect to his suspension for non-payment of the errors and omissions levy. In that questionnaire he confirmed receipt of the Society's Notices referred to at paragraphs 5 and 6 herein as well as the registered letter of May 29, 1995 referred to in paragraph 8 and attached as Exhibit 8. In the questionnaire, the Solicitor was asked what he thought were the implications of continuing to practise after receiving the Society's letter of May 29, 1995. The Solicitor's response, recorded by the examiner, was: "Knew couldn't practise, knew full implications, just holding line, haven't tried to represent anyone, doing patent work trade mark work". A copy of the questionnaire is Exhibit 8 to this Agreed Statement of Facts.

13. In the period May 30, 1995 to May 2, 1996, the Solicitor represented PVO Properties Inc. (formerly Consumers Distributing Company Limited) in respect of an action in the Federal Court of Canada, being court file #T-2779-84 and provided his opinion to his client regarding the status of this and another action against the company, as described in subparagraphs 13 (a) through (r) as follows:

- a. On May 30, 1995, the Solicitor wrote to Gowling, Strathy & Henderson, counsel for a co-defendant in the proceedings requesting a copy of a settlement agreement between that party, another co-defendant and one of the plaintiffs. He advised that he was requesting the information in order to provide an opinion to his client as to the outcome of the matter. A copy of the letter is Exhibit 9 to this Agreed Statement of Facts.
- b. On May 30, 1995, the Solicitor wrote to Smart & Biggar, counsel for the plaintiff in the action advising that he would respond to that firm's letters of April 4, 1995 and May 24, 1995. A copy of this letter is Exhibit 10 to this Agreed Statement of Facts.
- c. On or about July 5, 1995, the Solicitor received from Gowling, Strathy & Henderson, a draft form of judgment for execution by his client.

- d. On August 10, 1995, the Solicitor received a revised draft form of judgment from Gowling, Strathy & Henderson. A copy of this letter is Exhibit 11 to this Agreed Statement of Facts.
- e. By letter dated August 18, 1995, the Solicitor wrote to his client, to the attention of its Vice-President, Legal Affairs, reporting on his correspondence with counsel for the plaintiffs and co-defendants in the action. In his letter, the Solicitor recommended that his client consent to a dismissal of the main action without costs. He also recommended that his client agree to a dismissal of its counter-claim without costs and sought instructions. A copy of this letter is Exhibit 12 to this Agreed Statement of Facts.
- f. On November 1, 1995, the Solicitor received a letter dated October 30, 1995 from Smart & Biggar requesting the consent to Judgment, on behalf of his client. A copy of the letter is Exhibit 13 to this Agreed Statement of Facts.
- g. By letter dated November 2, 1995, the Solicitor wrote to Smart & Biggar requesting a copy of the signed consent to Judgment executed by the co-defendants, as well as a copy of the documents to be executed on behalf of his client. A copy of the letter is Exhibit 14 to this Agreed Statement of Facts.
- h. On November 10, 1995, the Solicitor received a letter dated November 7, 1995 from Smart & Biggar enclosing documents which the Solicitor requested in his letter of November 2, 1995. A copy of the letter is Exhibit 15 to this Agreed Statement of Facts.
- i. On December 22, 1995, the Solicitor received a letter dated December 15, 1995 from Smart & Biggar advising that they were requesting a response to their letter of November 7, 1995. A copy of this letter is Exhibit 16 to this Agreed Statement of Facts.
- j. On January 17, 1996, the Solicitor received a further letter from Smart & Biggar dated January 17, 1996 requesting his response to their letter of November 7, 1995. A copy of this letter is Exhibit 17 to this Agreed Statement of Facts.
- k. On February 5, 1996, the Solicitor received a letter of the same date from Smart & Biggar requesting the consent to judgment on behalf of the Solicitor's client. A copy of the letter is Exhibit 18 to this Agreed Statement of Facts.
- l. By letter dated February 12, 1996, the Solicitor wrote to Smart & Biggar requesting a copy of the settlement agreement between other parties in the action before making any recommendation with respect to settlement to his client. In this letter he requested an amendments to the proposed judgment as well as an amended draft judgment providing for the disposition of his client's counter-claim. A copy of the letter is Exhibit 19 to this Agreed Statement of Facts.
- m. On February 23, 1996, the Solicitor received a letter of the same date from Smart & Biggar in response to his letter of February 12, 1996. That letter enclosed a copy of the settlement agreement between the other parties and addressed the Solicitor's comments in his letter of February 12, 1996 regarding the counter-claim and whether an injunction should be part of the order. A copy of the letter is Exhibit 20 to this Agreed Statement of Facts.
- n. On February 29, 1996, the Solicitor received a letter from his client dated February 21, 1996. The Solicitor's advice was sought for audit purposes as to the description and evaluation of potential losses relating to two actions against the client company. A copy of the letter is Exhibit 21 to this Agreed Statement of Facts.

- o. On or about March 26, 1996, the Solicitor received a letter dated March 26, 1996 from his client advising that it agreed with the proposed settlement attached to the Solicitor's letter of August 18, 1995 and requested that he take steps to promptly settle the matter. A copy of the letter is Exhibit 22 to this Agreed Statement of Facts.
- p. By letter dated March 28, 1996, the Solicitor responded to his client's letter of February 21, 1996 by reporting on the status of the two actions. A copy of the letter is Exhibit 23 to this Agreed Statement of Facts.
- q. On April 10, 1996, the Solicitor received a letter from Smart & Biggar date April 4, 1996, requesting a response to their letter of February 23, 1996. A copy of the letter is Exhibit 24 to this Agreed Statement of Facts.
- r. On May 2, 1996, the Solicitor received a letter of the same date from his client requesting his opinion as to the description and evaluation of two actions against the client as of May 12, 1996. A copy of the letter is Exhibit 25 to this Agreed Statement of Facts.

14. In the period August 25, 1995 to April 17, 1996, the Solicitor acted for Ruko of Canada Limited in a civil action in the Ontario Court (General Division), being court file no. 1466/87, as described in sub-paragraphs 14 (a) through (i) as follows:

- a. On August 25, 1995, the Solicitor served on opposing counsel a pre-trial conference memorandum, among other things, with respect to a pre-trial conference scheduled for August 28, 1995. A copy of the Solicitor's letter and the first page of the pre-trial conference memorandum are Exhibit 26 to this Agreed Statement of Facts.
- b. By letter dated August 25, 1995 from the Solicitor to the Trial Co-ordinator's office of the Ontario Court (General Division), Brampton, the Solicitor confirmed the pre-trial conference scheduled for August 28, 1995 and forwarded documentation to the court. The Solicitor's letter was copied to opposing counsel. A copy of the Solicitor's letter is Exhibit 27 to this Agreed Statement of Facts with the handwritten note of his assistant with respect to service of documents. A further copy without the note is Exhibit 28 to this Agreed Statement of Facts.
- c. On August 28, 1995, the Solicitor attended at the pre-trial conference before a Justice of the Ontario Court (General Division). At that time, the Solicitor delivered the report of his client's expert.
- d. On October 18, 1995, the Solicitor received a letter from opposing counsel requesting an adjournment of the trial scheduled for October 31, 1995. Counsel requested new dates for trial on or before October 20, 1995 in order to avoid an attendance at the Assignment Court. A copy of the letter is Exhibit 29 to this Agreed Statement of Facts.
- e. By letter dated October 18, 1995 to opposing counsel, the Solicitor advised that he was agreeable to an adjournment, that he had alerted his client, and that he would contact counsel with respect to suitable dates. A copy of the letter is Exhibit 30 to this Agreed Statement of Facts.
- f. By letter dated October 19, 1995 to opposing counsel, the Solicitor suggested trial dates of July 8, 9 and 10, 1996. A copy of the letter is Exhibit 31 to this Agreed Statement of Facts.
- g. On October 24, 1995, the Solicitor attended at court with respect to the matter. He confirmed his attendance by letter dated October 24, 1995 to opposing counsel. He advised that the case had been struck from the list and that there were no sittings of the court in July, 1996. He asked opposing counsel to apply to the court for inclusion of the matter in the list. A copy of the letter is Exhibit 32 to this Agreed Statement of Facts.

- h. On March 26, 1996, the Solicitor received a letter from opposing counsel to Regional Senior Justice Carnwath requesting a new trial date. A copy of the letter is Exhibit 33 to this Agreed Statement of Facts.
- i. On April 18, 1996, the Solicitor received a copy of the letter from the Regional Co-ordinator of the office of the Regional Senior Justice, Central West Region. The letter advised that before the matter could be considered for a fixed trial date, counsel for all parties would be required to undertake certain conditions. A copy of the letter is Exhibit 34 to this Agreed Statement of Facts.

#### Complaint D320/96

Particular 2(b) He breached his Undertaking to the Law Society dated November 1, 1995 that he file the Form 2/Form 3 report by December 31, 1995 for the fiscal year ended April 30, 1995

15. On May 4, 1995, Complaint D51/95 was issued against the Solicitor alleging that he failed to file with the Society within six months of the termination of his fiscal year ending April 30, 1994, a certificate in the form prescribed by the rules and a report completed by a public accountant and signed by the member in the form prescribed by the rules, thereby contravening section 16(2) of Regulation 708 made pursuant to the *Law Society Act*. A copy of the Complaint is Exhibit 35 to this Agreed Statement of Facts.

16. On November 1, 1995, Complaint D51/95 was heard by a Discipline Committee. The Solicitor admitted the particular of the Complaint and that it constituted professional misconduct. At the time the matter was before the Discipline Committee, the Solicitor had filed Forms 2/3 with respect to the fiscal year ending April 30, 1994 but there were deficiencies in the reports. As well, at that time, the Solicitor's Forms 2 and 3 filings for the fiscal year ended April 30, 1995 were outstanding, having been due on or before October 31, 1995.

17. The Discipline Committee made a finding of professional misconduct and issued a reprimand in Committee in consideration of the Solicitor's Acknowledgment and Undertaking dated November 1, 1995. This Acknowledgment and Undertaking provided, among other things, that the Solicitor acknowledged his responsibility to file Forms 2 and 3 in accordance with the Regulation to the *Law Society Act*. It included the Solicitor's undertaking and agreement to, among other things:

"... file with the Law Society by December 31, 1995, a certificate in the form prescribed by the Rules and a report completed by the public accountant and signed by me in the form prescribed by the Rules pursuant to section 16(2) of the Regulation made pursuant to the *Law Society Act*, for the fiscal year ended April 30, 1995".

It also included the Solicitor's acknowledgment that any breach of the Acknowledgement and Undertaking may lead to further discipline proceedings. A copy of the Solicitor's Acknowledgment and Undertaking is Exhibit 36 to this Agreed Statement of Facts.

18. The Solicitor breached his Acknowledgement and Undertaking dated November 1, 1995, by failing to complete his filings for the fiscal year ended April 30, 1995 by December 31, 1995.

19. By letter dated January 2, 1996, the Solicitor advised the Law Society to that his bookkeeper was in the process of updating his records in order that he could complete his Form 2 and 3 filings for the period ended April 30, 1995. The Solicitor requested an extension of one month within which to furnish the report of the public accountant (Form 3) for the fiscal period ended April 30, 1995. A copy of the January 2, 1996 letter is Exhibit 37 to this Agreed Statement of Facts.

20. The Solicitor did not file Forms 2/3 for the fiscal period ended April 30, 1995 by February 2, 1996 in accordance with his request for an extension of time to file.

21. The Solicitor had not filed for the fiscal period ended January 30, 1995 on June 14, 1996. Accordingly, on that date the Society sent a letter to the Solicitor referring to his letter of January 2, 1996 and enclosing a copy of his Undertaking dated November 1, 1995. The Solicitor was advised that if the filing was not received by June 28, 1996, the matter would be referred to the Discipline Committee for authorization of a formal complaint respecting its failure to file and failure to comply with his Undertaking. The Society's letter was received by the Solicitor on June 14, 1996. A copy of the Society's letter and the Acknowledgement of receipt of a registered item are Exhibit 38 to this Agreed Statement of Facts.

22. The Solicitor did not file for the fiscal period ended April 30, 1995 by June 28, 1996. On July 2, 1996, the Solicitor telephoned and left a message with the Law Society advising that he would telephone later that day to speak with Ms. Pasceri, who had written the Society's letter dated June 14, 1996. Ms. Pasceri did not receive a telephone call from the Solicitor that day. A copy of Ms. Pasceri's note to her supervisor and the senior litigation clerk of the Discipline Department is Exhibit 39 to this Agreed Statement of Facts.

23. On June 20, 1997, the Solicitor filed with the Law Society with respect to his fiscal year ended April 30, 1995 a report completed by a public accountant and signed by the member in the form prescribed by the Rules (Form 3).

24. On July 24, 1997, the Solicitor filed with the Law Society with respect to his fiscal year ended April 30, 1995, a certificate in the form prescribed by the Rules (Form 2, Private Practitioner Form).

#### Complaint D172/97

Particular 2(a) He failed to file with the Society within six months of the termination of his fiscal year ended April 30, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules, thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

25. The Solicitor's filing for the fiscal year ended April 30, 1996 was due on or before October 30, 1996. The Solicitor did not file his Forms 2 and 3 within six months of his fiscal year ended April 30, 1996, as required by section 16(2) of Regulation 708 under the *Law Society Act*.

26. A Notice of Default in Annual Filing, dated November 14, 1996 was sent by the Law Society to the Solicitor. A sample of the Notice and the Law Society's record of the mailing is Exhibit 40 to this Agreed Statement of Facts.

27. A Final Notice of Default in Annual Filing, dated December 13, 1996, was sent by the Law Society to the Solicitor. The Notice advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised that failure to comply with section 16 of Regulation 708 of the *Law Society Act* would result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. A sample of the Law Society's Final Notice and the Law Society's record of the mailing is Exhibit 41 to this Agreed Statement of Facts. The Solicitor did not reply to this correspondence.

28. A Law Society staff employee attempted to contact the Solicitor on February 25, 1997 regarding his default in annual filing. A message was left for the Solicitor to return the call upon his return. A copy of the Law Society's handwritten Telephone Transaction form dated February 25, 1997 is Exhibit 42 to this Agreed Statement of Facts.

29. On February 26, 1997, the Solicitor returned the Law Society's telephone message. He was advised that discipline proceedings had been sought with respect to his failure to file for the fiscal year ended April 1996. A copy of the Law Society's handwritten Telephone Transaction form dated February 26, 1997 is Exhibit 43 to this Agreed Statement of Facts.

30. On June 20, 1997, the Solicitor filed with the Law Society with respect to his fiscal year ended April 30, 1996 a report completed by a public accountant and signed by the member in the form prescribed by the Rules (Form 3).

31. On July 24, 1997, the Solicitor filed with the Law Society with respect to his fiscal year ended April 30, 1995, a certificate in the form prescribed by the Rules (Form 2, Private Practitioner Form).

V. PRIOR DISCIPLINE

32. As stated in paragraphs 15, 16 and 17 herein, on November 1, 1995, the Solicitor received a reprimand in Committee with respect to his failure to file Forms 2 and 3 for the fiscal year ended April 30, 1994 within the time prescribed by Regulation 708 made under the *Law Society Act*.

DATED at Toronto, this 29th day of July, 1997.”

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RECOMMENDATION AS TO PENALTY

The Committee recommends that Weldon Frederick Green be suspended for a period of nine months.

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REASONS FOR RECOMMENDATION

The Committee has considered the totality of the Solicitor's conduct in arriving at the disposition of a nine month suspension.

Counsel for the Law Society submitted that a suspension from nine to twelve months was within the range of penalty for this type of offence. The Solicitor submitted that the penalty ought to be a six month suspension.

The Solicitor gave evidence at the hearing. He admitted that he continued to practise law while he was under suspension. He indicated that in one of the cases in which he was involved, the case began in 1984 and continued until 1995, and was not resolved. His client was P.V.O. Properties Inc. He was under the misapprehension that he could attempt to finalize one of his matters, in terms that would have been acceptable to his client. He felt he was acting in his client's best interest. He was of the view that if other counsel had been retained, they would have to digest some eleven years of negotiation. He was of the view that that was not a benefit for his client. Apparently, he was successful in finalizing this matter in a satisfactory way for his client, although he was under suspension at the time.

In the second matter that he was involved in, the Solicitor gave evidence that he acted for a large corporation, namely Ruko of Canada Limited, in a civil action in Ontario Court (General Division). He served on opposing counsel a Pre-Trial Conference Memorandum, among other things, and in fact attended at a Pre-Trial Conference. At that time he delivered the report of the client's expert. He acknowledged that he appeared as his client's lawyer. At that point in time, he had not paid his errors and omissions insurance. He knew that he was under suspension. The Solicitor candidly admitted that nothing had stopped him from getting other counsel for his client. It was the Committee's view that he realized that he was completely wrong in that he was acting for clients while under suspension, without insurance coverage, and if an error had been made his clients would suffer for it.

He indicated that since 1958 he has acted as a trademark agent, and has been successful in that endeavour, but not necessarily in the practice of law.

He indicated that his practice has stumbled since the 1980's. His staff diminished.

He indicated that he had an unfortunate circumstance before Master Clark in regard to an assessment of an account in excess of one million dollars. Ultimately, this assessment was released to the press, and it was advertised throughout the country that he was faulted, and that he had not fulfilled his responsibility to his client. Apparently this unfortunate situation was widely publicized, including being reported in the Financial Post, MacLeans Magazine, and other publications. An appeal was taken before The Honourable Mr. Justice Spence, and ultimately the Master's findings were reversed. Apparently this situation took a great toll upon him.

He gave an explanation in regard to his failure to make the necessary Law Society filings. He went through a number of bookkeepers, and presently his books and records are in order. He explained that at one time he had an office with many personnel, but this has been decreased significantly.

It was noted by the Committee that throughout the Solicitor's testimony, he was extremely contrite; he was forthright in the positions that he took; he did not make excuses for his conduct; he was extremely humble, and apologized for his behaviour. This conduct on his part extremely impressed the Committee. It was the Committee's view that he did not make excuses for his conduct. His behaviour was wrong, and he acknowledged that it was wrong.

Re: Submissions as to penalty by the Law Society

Counsel for the Law Society submitted that a nine to twelve month suspension would be appropriate under the circumstances. The Solicitor should be suspended one month for each month practising, plus one month. He should not be in a better position that he would ordinarily be in than others who are not suspended, and the Committee should not reward a solicitor who breaches an Order of Convocation. There is no doubt that Convocation ordered, on May 26, 1995, that he be suspended.

Counsel for the Law Society brought to the Committee's attention the Botond Gabor Fejes decision, a decision of the Discipline Panel dated May 9, 1994. The Chair of that Committee indicated the following at Page 13:

*"A solicitor who practises while under suspension necessarily engages in a wilful breach or disobedience of an order or orders existing for the purposes of protecting the public. Such conduct may be especially serious, as in the instant case, where insurance levies are unpaid. This serves to put the public at risk and engenders public disrespect for the profession. The suspended solicitor, who practises in contravention of the professional obligation not to do so, is prepared to gamble that he/she will not be caught, and if discovered by the governing body, that the penalty incurred, will de facto amount to a lesser sanction than having foregone practice during the relevant period of suspension. In other words, the solicitor hopes to be "better off", or in effect rewarded, for having taken the risk even if ultimately sanctioned by Convocation. This mentality, on the part of a minority, but increasing, segment of the profession will not be tolerated and must be deterred."*

In the matter before us, the Solicitor held himself out to be able to practise law, to two large corporations, namely P.V.O. Properties Inc. (formerly Consumers Distributing Company Limited), as well as Ruko of Canada Limited.

In a manner styled John Victor Patrick O'Donnell, the Committee states at Page 9 the following:

*"The solicitor admits to practising while under suspension for two periods in a ten month period which totalled approximately five weeks. The solicitor said he practiced knowing he was suspended out of a concern for the interests of his clients. Any problem that solicitors identify between balancing the interests of their clients against an Order of Convocation is not, in fact, a problem: any conflict must be resolved in favour of the Order of Convocation. Lawyers who practice while suspended are not protecting their clients interests, since during the period of suspension lawyers are not covered by insurance...."*

The Solicitor indicated that during his period of suspension he was also operating as a patent agent. He is also an engineer. He explained that his conduct giving rise to his suspension was a lack of funds. He did not have sufficient funds to put himself back into good standing.

Re: Submissions as to penalty by the Solicitor

The Solicitor's Counsel submitted that he was not seeking any other business during the period of time while he was under suspension; that his acting on behalf of his two clients as a solicitor was sporadic; and that differentiates his situation from other reported decisions.

The Counsel for the Solicitor submitted that a six month suspension would "get the message clearly through".

The Committee further considered the following:

The Solicitor was called to the Bar of Ontario in 1958. In the same year he was registered as a patent agent in Canada as well as in the United States. Also he was registered as a professional engineer for the Province of Ontario in 1958. The Solicitor filed his C.V. indicating various eminent counsel with whom he has practised before the Courts.

Insofar as his late filings were concerned, the previous Discipline Committee Hearing, dated November 1, 1995, was brought to our attention. At that time, he was reprimanded in Committee in regard to his failure to file. He gave an undertaking at that time but failed to honour the same in a timely fashion.

The Committee was further concerned in regard to the Solicitor not being completely forthright with the examiner from the Law Society as set out particularly in the Agreed Statement of Facts at paragraphs 9 and 12, namely that under the guise of being a patent and trademark agent, and a professional engineer, he was not practising law during the period of suspension.

Taking everything into consideration, the Committee's view is that the Solicitor should be suspended for a period of nine months, as submitted by the Law Society, and not for a six month period, as submitted by the Solicitor.

Weldon Frederick Green was called to the Bar on the 26th day of June, 1958.

ALL OF WHICH is respectfully submitted

DATED this 21st day of October 1997

Gerald A. Swaye, Q.C., Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 9 months.

Ms. Brooks advised that the solicitor was administratively suspended as of today's date.

Both counsel made submissions in support of the recommended penalty.

It was moved by Mr. Topp, seconded by Mr. Carter that the solicitor be suspended for a period of 9 months following his administrative suspension.

Carried

Re: Michael Theodore ROSS - Mississauga

The Secretary placed the matter before Convocation.

Messrs. Scott, Wilson, Ruby and Epstein and Ms. Angeles and Ms. Cronk withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 11th December, 1997, together with an Affidavit of Service sworn 2nd January, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th December, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 4th January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Philip M. Epstein, Q.C.  
Nora Angeles

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

Christina Budweth  
for the Society

MICHAEL THEODORE ROSS  
of the City  
of Mississauga  
a barrister and solicitor

Thomas C. Wright, Q.C.  
for the solicitor

Heard: September 30, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 25, 1996 Complaint D184/96 was issued, and on June 4, 1997 Complaint D196/97 was issued, against Michael Theodore Ross alleging that he was guilty of professional misconduct.

The matter was heard in public on September 30, 1997, with the Exhibit Book being received *in camera*. The Committee hearing the matter was composed of Clayton C. Ruby, Chair, Philip M. Epstein, Q.C. and Nora Angeles. The Solicitor attended the hearing and was represented by Thomas C. Wright, Q.C.. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D184/96

2. a) He failed to provide a meaningful reply to the Law Society with respect to the complaint of Ann Plummer despite letters dated December 20, 1995 and March 7, 1996 and telephone messages on February 22 and 28, 1996;
- b) He failed to provide a meaningful reply to the Law Society with respect to the complaint of Jack Kwan despite letters dated September 22, 1995, December 15, 1995, January 25, 1996 and March 7, 1996 and a telephone message on February 28, 1996;
- e) He breached Rule 9 of the Rules of Professional Conduct by accepting a fee from Homeland Funding Inc. in the amount of \$321.00 for services which he does not recall performing on behalf of Sherbank Management Ltd. and Wilfred Leopold McCarthy.

Particulars (c) and (d) were withdrawn on consent.

Complaint D196/97

2. a) He failed to reply to the Law Society regarding a complaint by Sam Laufer despite letters dated January 21, 1997 and February 25, 1997 and telephone communications on February 11, 19 and 24, 1997.

Evidence

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

Re: Complaint D184/96

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D184/96 and is prepared to proceed with a hearing of this matter on September 30, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D184/96 with his counsel, Tom Wright and admits the particulars contained therein. The Solicitor admits only that particulars (a), (b) and (e) together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar April 9, 1981. He is 50 years old. He is currently not practising.

Particular 2

The Solicitor is guilty of professional misconduct, in that:

(a) he failed to provide a meaningful reply to the Law Society with respect to the complaint of Ann Plummer despite letters dated December 20, 1995 and March 7, 1996 and telephone messages on February 22 and 28, 1997;

5. By letter dated March 29, 1994 (Document Book, Tab 20), Ann Plummer (the "Complainant"), one of the executors of the estate of Reginald Mayne, wrote to the Law Society to request that it investigate the conduct of the Solicitor with respect to the circumstances surrounding a mortgage transaction that Mr. Mayne became involved in shortly before his death. Her concerns are summarized as follows:

- i. the Solicitor did not properly represent Mr. Mayne's interest in the mortgage in that he allowed an elderly, possibly incompetent individual to enter into a high risk investment without all the information required to make an intelligent decision;
- ii. the Solicitor did not follow proper procedures, as a title search was not completed prior to the registration of the mortgage which would have revealed Ms. Clue's judgement against Mr. McCarthy. She wondered why the mortgage had been registered in favour of Sherbank Investments prior to its assignment to Mr. Mayne on December 11, 1991, two months after he had provided a cheque to Homeland Funding Inc. and one day after the registered owner on title to the property had changed;
- iii. the Solicitor did not contact Mr. Fromstein or the executors of Mr. Mayne's estate to advise with respect to the proceedings which arose upon the mortgagor's default; and
- iv. the Solicitor acted in a conflict of interest by acting for all parties to this transaction.

6. By letter dated April 19, 1994, the law Society forwarded a copy of the Complainant's letter to the Solicitor and requested his comments on the circumstances therein described within two weeks (Document Book, Tab 21).

7. By letter dated April 26, 1994, the Solicitor advised the Law Society that he was not aware that he had acted in any capacity on Mr. Mayne's behalf, as he could not find a reporting letter nor could he remember dealing with the mortgage transaction at all. He advised that in May of 1992 he had a similar instance where his name appeared on documentation not prepared by him. He enclosed the material pertaining to that matter, as he suspected that the current situation arose from similar circumstances. The Solicitor advised that he would provide the Law Society with a more comprehensive report after his meeting on May 2, 1994 with Ponton Coleshill Edwards, the adjuster for the Lawyers' Professional Indemnity Company (Document Book, Tab 22).

8. By letter dated June 10, 1994, the Law Society requested that the Solicitor provide the report he had promised further to his meeting with the insurance adjuster within two weeks and to confine his report to the issues surrounding the complaint (Document Book, Tab 23).

9. By letter dated June 10, 1994, the Law Society asked the Complainant to advise whether Mr. Mayne dealt directly with Mr. Handelman prior to retaining Mr. Ross (Document Book, Tab 24).

10. By letter dated June 21, 1994, the Complainant advised that Mr. Mayne had dealt with Mr. Handelman directly on one occasion prior to being introduced to the Solicitor. She reiterated that Mr. Handelman had suggested that Mr. Mayne retain the Solicitor instead of his own in order to avoid legal costs related to the transaction (Document Book, Tab 25).

11. By letter dated December 20, 1995, the Law Society advised the Solicitor that it had reviewed the June 6, 1994 adjuster's report but it needed more detail from the Solicitor as to the extent of his involvement with Mr. Mayne, as it appeared that the Solicitor had acted on his behalf and received fees for those services. The Solicitor did not reply to the correspondence (Document Book, Tab 26).

12. On February 22, 1996, the Law Society attempted to contact the Solicitor by telephone. The Solicitor's wife answered and advised that she would forward the message to the Solicitor, however, he would not be returning home until the next week (Document Book, Tab 27).

13. On February 28, 1996, the Law Society again spoke to the Solicitor's wife who advised that she was no longer certain when the Solicitor would return. She advised that the Solicitor was not avoiding the Law Society; he just wasn't available. She said she would give him the message. The Solicitor did not return the message (Document Book, Tab 27).

14. By registered letter dated March 7, 1996, the Law Society advised the Solicitor among other things, that it had not yet received a response to its previous letters or its telephone messages. The Law Society reminded the Solicitor of his obligation to respond promptly to communications from the Law Society and stated it would refer the matter to the Chair of the Discipline Committee if it did not receive a response within two weeks. This letter was received by the Solicitor on March 11, 1996 (Document Book, Tab 28). To date, the Solicitor has not replied to the letter.

Particular 2(e)

He breached Rule 9 of the Rules of Professional Conduct by accepting a fee from Homeland Funding Inc. in the amount of \$321.00 for services which he does not recall performing on behalf of Reginald Mayne.

15. The Solicitor's position continues to be that he does not recall acting at all on a mortgage transaction with respect to Mr. McCarthy. He continues to deny that he acted on mortgage transaction involving McCarthy and Mayne. He does however, admit that he accepted and cashed a cheque in the amount of \$321.00 from Homeland Funding Inc., the mortgage broker, in relation to a McCarthy mortgage, a copy of the cheque is attached as Schedule "A" to this agreed statement of facts. The Solicitor admits that not having any recollection of this transaction, it was improper for him to accept a fee for doing so.

Particular 2(b)

He failed to provide a meaningful reply to the Law Society with respect to the complaint of Jack Kwan despite letters dated September 22, 1995, December 15, 1995, January 25, 1996 and March 7, 1996 and a telephone message on February 28, 1996;

16. A complaint regarding the conduct of the solicitor in his representation of a client, P.H. Atlantic Plumbing & Heating, in two separate matters, was received by letter dated July 26, 1994, from Jack Kwan, President of the company (Document Book, Tab 29). In this letter, Mr. Kwan advised the Law Society that the Solicitor misled him about the status of two separate court actions in which P.H. Atlantic Plumbing & Heating was involved.

17. By letter dated August 24, 1994 (Document Book, Tab 30), the Law Society forwarded a copy of Mr. Kwan's July 26, 1994 letter to the Solicitor and requested he provide a response within two weeks. No response was received.

18. The Law Society again requested a response to Mr. Kwan's July 26, 1994, by letter dated September 19, 1994 (Document Book, Tab 31). The Solicitor's response was that he believed the proper forum for this matter was in the courts, as civil litigation had been commenced by Mr. Kwan.

19. The Law Society, by letter dated October 18, 1994 (Document Book, Tab 32), advised the Solicitor that the issue being investigated by the Society was that of the Solicitor's conduct as a professional, which was outside the realm of the civil litigation. Consequently, the Solicitor was requested to provide his response within 10 days. The Law Society also indicated the contents of the Solicitor's response would not be disclosed, as its contents were the subject of ongoing litigation.

20. The Solicitor's response, contained in his letter dated November 4, 1994, raised further questions regarding his conduct. By letter dated September 22, 1995 (Document Book, Tab 33), the Law Society requested the Solicitor to provide answers to questions raised out of his November 4, 1994 letter. The Solicitor did not respond.

21. A staff member of the Law Society left telephone messages for the Solicitor on October 31 and November 3, 1995 (Document Book, Tab 34). The Solicitor did not return the telephone calls.
22. By registered letter dated November 7, 1995 (Document Book, Tab 35), the Law Society requested the Solicitor provide a response to the September 22, 1995 letter within 7 days, failing which the matter would be referred to the Chair of the Discipline Committee. This letter was received by the Solicitor on November 17, 1995. In his response dated November 23, 1995 (Document Book, Tab 36), the Solicitor advised the Law Society he had already responded to the Law Society and that, because of ongoing litigation, any other questions should be answered in court.
23. The Law Society again requested a response, by letter dated December 15, 1995 (Document Book, Tab 37), stating the Society's questions relating to the Solicitor's professional conduct may never be determined in the litigation. The Society indicated if the response was not received within two weeks the matter would be referred to the Discipline Committee.
24. The Solicitor's response dated December 26, 1995 (Document Book, Tab 38), again requested assurances that his substantive responses not be disclosed to Mr. Kwan due to the ongoing litigation. He also requested that no action or disciplinary procedures be taken by the Law Society until after the disposition of the litigation. The Solicitor requested a response to this letter in his letter of January 15, 1996 (Document Book, Tab 39).
25. By letter dated January 25, 1996 (Document Book, Tab 40), the Law Society indicated the undertaking not to disclose the Solicitor's response to Mr. Kwan would be given, insofar as the response related to facts and matters connected specifically with the litigation and information upon which he would be relying in defence of the litigation. The Society again requested a response to the questions raised in its letter of September 22, 1995.
26. On January 25, 1996, the Law Society attempted to contact the Solicitor by telephone, but the Solicitor's line was busy. On February 28, 1996, a staff member of the Law Society spoke to the Solicitor's wife, who stated that the Solicitor was away from the office and she was not certain when the Solicitor would return. The Society requested the Solicitor return the call (Document Book, Tab 41). The call was not returned.
27. By registered letter dated March 7, 1996 (Document Book, Tab 42), the Law Society advised the Solicitor that it had not yet received a response to the questions in its September 22, 1995, December 15, 1995 and January 25, 1996 letters. The Law Society reminded the Solicitor of his obligation to respond promptly to communications from the Law Society and stated that it would refer the matter to the Chair of the Discipline Committee if it did not receive a response within two weeks. This letter was received by the Solicitor on March 11, 1996. To date no reply has been received.
28. The Solicitor provided a form of reply to the Law Society on December 9, 1996 (Document Book, Tab 43). The Solicitor provided a proper reply to the Law Society by letter dated July 8, 1997.

#### V. PRIOR DISCIPLINE

29. On September 9, 1993, the Solicitor was found guilty of failing to serve a client. The Solicitor received a Reprimand in Committee.

DATED at Toronto this 30th day of September, 1997.”

Re: Complaint D196/97

#### “AGREED STATEMENT OF FACTS

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D196/97 and is prepared to proceed with a hearing of this matter on July 15 and 16, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D196/97 with his counsel, Tom Wright and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar April 9, 1981. He is 50 years old. He is currently suspended and has been since November 15, 1996.

Particular 2

The Solicitor is guilty of professional misconduct, in that:

(a) he failed to reply to the Law Society regarding a complaint by Sam Laufer despite letters dated January 21, 1997 and February 25, 1997 and telephone communications on February 11, 19 and 24, 1997.

5. In February of 1996 the Solicitor acted for Brett McGowan in connection with a mortgage financing. By letter dated April 3, 1996, the Solicitor reported to the Mallard Group with respect to this transaction. The April 3, 1996 letter with enclosures is attached as Exhibit A to this Agreed Statement of Facts.

6. By letter dated August 29, 1996, Mr. McGowan wrote to his own counsel, Sam Laufer, to complain about the Solicitor's conduct (Exhibit B).

7. By letter dated December 12, 1996, Mr. Laufer made a claim to the Compensation Fund respecting Mr. McGowan's complaint (Exhibit C).

8. The Law Society acknowledged receipt of Mr. Laufer's letter by letter dated January 21, 1997 (Exhibit D).

9. The Law Society corresponded with the Solicitor respecting the Laufer/McGowan complaint by letter dated January 21, 1997 (Exhibit E).

10. Staff of the Complaints Department telephoned the Solicitor's office on February 11, 19 and 24, 1997 (Exhibit F) to request a reply to the Society's January 21, 1997 correspondence. No reply was received.

11. By registered letter dated February 25, 1997, the Society corresponded with the Solicitor, again requesting a reply to its January 21, 1997 letter. The Solicitor was advised that his failure to respond to the letter within 7 days would result in disciplinary action being taken against him (Exhibit G).

12. The Solicitor made a reply, of sorts, to the Law Society by way of letter dated July 8, 1997. His letter is not considered an adequate reply by the Law Society. The Solicitor has been advised of same. The Society will correspond further with the Solicitor to define the inadequacies.

V. PRIOR DISCIPLINE

13. On September 9, 1993, the Solicitor was found guilty of failing to serve a client. The Solicitor received a Reprimand in Committee.

DATED at Toronto this 15th day of July, 1997.”

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Michael Theodore Ross be reprimanded in Convocation if he has made a satisfactory reply to the Law Society concerning the complaint in D196/97 by the time this matter is before Convocation, failing which, that he be suspended until such reply is received.

The Committee further recommends that he pay Law Society costs in the amount of \$500, payable at the rate of \$50 per month, commencing September 30, 1997.

REASONS FOR RECOMMENDATION

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We are urged to accept a joint submission, which we do, in fact, accept. That joint submission has been given approval not only by the parties but by the single complainant who was present at the hearing. We give that a good deal of weight.

The recommendation we make to Convocation is that the Solicitor be reprimanded in Convocation, and that he pay costs of the Law Society in the matter amounting to \$500.00, at the rate of \$50.00 per month, commencing September 30, 1997.

In addition, we recommend to Convocation that all of this be contingent upon a reply being made concerning the complaint in D196/97, which is the one respecting Mr. Sam Laufer. And if no satisfactory reply has been received by the time this matter is before Convocation, we recommend that the Solicitor be suspended until such reply is received.

This case arose out of the tangled and tortuous affairs of one Handelman who advertised for mortgage investments. Mr. Mayne was one such person who responded to those investments. At least in respect of some of the transactions, that is estimated at eight to ten, Mr. Ross did essentially the legal work, though all the arranging, preparatory work and the actual spade work of transferring and certifying titles was done by Mr. Handelman.

Indeed, it would appear that there was a significant involvement with Mr. Handelman in the ongoing work, and that the record-keeping of the firm was utterly inadequate. All of these transactions apparently wound up in a single file.

In these circumstances, we note that Mr. Ross has executed an Undertaking. He has not been practising in the recent past. But the Undertaking provides that he will, in the future, not act on both sides of any real estate transaction, and that he will participate in the Practice Review Program and co-operate with the Society in that regard.

It is only fair to say that we have not received a full picture of the complex dealings between Mr. Handelman and Mr. Ross. In some sense we are grateful we have been spared this, because I suspect it would make none of us happy. But it does appear that in the circumstances that have been disclosed, fragmentary though they are, this penalty is an appropriate one, and we recommend it to Convocation.

Michael Theodore Ross was called to the Bar on April 9, 1981.

ALL OF WHICH is respectfully submitted

DATED this 11th day of December, 1997

Clayton C. Ruby, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he has made a satisfactory reply to the Society concerning Complaint D196/97, failing which he be suspended until such reply is received as well as pay costs in the amount of \$500 payable at the rate of \$50 per month commencing September 30th, 1997.

Ms. Budweth advised that the solicitor has replied satisfactorily to the Society regarding Complaint D196/97 and submissions were made in support of the recommended penalty.

The solicitor made brief submissions in support of a reprimand in Convocation.

It was moved by Mr. Manes, seconded by Mr. Topp that the solicitor be reprimanded in Convocation and pay costs in the amount of \$500.

Carried

The Treasurer administered the reprimand.

Re: David Gerard CASEY - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Wilson, Ruby, Gottlieb and Chahbar and Ms. Cronk withdrew for this matter.

Mr. Glenn Stuart appeared on behalf of the Society and the solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 16th August, 1997, together with an Affidavit of Service sworn 21st August, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 20th August, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th November, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Gary L. Gottlieb, Q.C.  
Abdul A. Chahbar

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

Glenn Stuart  
for the Society

DAVID GERARD CASEY  
of the City  
of Ottawa  
a barrister and solicitor

Charles M. Rotenberg  
for the solicitor

Heard: June 18, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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Complaint D223/96 was issued on August 15, 1996, Complaint D254/96 was issued on December 20, 1996 and Complaint D194/97 was issued on June 5, 1997 against David Gerard Casey alleging that he was guilty of professional misconduct.

The matter was heard in public on June 18, 1995 before this Committee composed of Clayton C. Ruby, Chair, Gary L. Gottlieb, Q.C. and Abdul A. Chahbar. The Solicitor attended the hearing and was represented by Charles Rotenberg. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D223/96

2. a) He failed to reply to the Law Society regarding a complaint by Allan Lutfy despite letters dated March 6, 1996 and April 11, 1996 and telephone messages left on April 1, 1996, April 3, 1996 and June 12, 1996.
- b) He failed to comply with his Undertaking to the Law Society dated March 18, 1996 by failing to respond to a written communication from the Law Society dated April 11, 1996 within two weeks of receipt and by failing to respond to telephone communications from the Law Society on April 1, 1996, April 3, 1996 and June 12, 1996 within two business days.

Complaint D254/96

2. a) He failed to serve his client Gordon Kennedy in a conscientious, diligent and efficient manner in that he did not take steps to advance his client's action in court.
- b) He misled his client Gordon Kennedy with respect to the status of his court action in that he advised his client repeatedly that a pre-trial had been scheduled when, in fact, the matter had not been set down for trial.
- c) He failed to serve his client Giles Leo, in a conscientious, diligent and efficient manner in that he:
  - (i) did not take steps to file a Statement of Defence in an action against his client, thereby permitting default judgment to be entered against his client;
  - (ii) did not take prompt action to set aside the default judgment against his client, and
  - (iii) did not respond to correspondence from the plaintiff's counsel in relation to an examination of his client in aid of execution.
- d) He misled his client Giles Leo with respect to the status of the court action in which his client was a defendant in that:
  - (i) he advised his client repeatedly that the case was proceeding normally toward trial, and that he was discussing examinations for discovery with the plaintiff's counsel, when, in fact, the time for filing a Statement of Defence had passed and he had been advised that the plaintiff's counsel would not consent to the late filing of same, and
  - (ii) subsequently, he advised his client that he was taking steps to set aside the default judgment when, in fact, he did not take such steps.
- e) He failed to reply to the Law Society in a timely manner regarding a complaint by Gordon Kennedy;
- f) He failed to reply to the Law Society in a timely manner regarding a complaint by Gilles Bertrand;
- g) He failed to reply to the Law Society in a timely manner regarding a complaint by Giles Leo;
- h) He failed to fulfil his Undertaking to the Law Society, dated March 18, 1996, wherein he undertook, among other things, to provide a full and complete written response to written communications from another lawyer or the Law Society within two weeks of receipt and to respond to telephone communications from another lawyer or the Law Society within two business days, with respect to the following:
  - (i) correspondence from the Law Society regarding a complaint by Gordon Kennedy,
  - (ii) correspondence from the Law Society regarding a complaint by Gilles Bertrand, and
  - (iii) correspondence from the Law Society regarding a complaint by Giles Leo.

Complaint D194/97

2. a) He failed to reply to the Law Society regarding deficiencies discovered in his annual filings; and

- b) He failed to comply with his undertaking to the Law Society dated March 18, 1996 by failing to provide a full and complete written response to written communications from another lawyer or the Law Society within two weeks of receipt and to respond to telephone communications from another lawyer or the Law Society within two business days.

Evidence

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

Re: Complaints D223/96 and D254/96

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D223/96 and D254/96 and is prepared to proceed with a hearing of these matters on June 18, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D223/96 and D254/96 with his counsel, Charles M. Rotenberg, and admits the particulars contained therein in addition to the facts set out in this Agreed Statement of Facts. The Solicitor admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 17, 1967. He is 55 years of age. He practised as a sole practitioner in Ottawa until November 1996. Since November 1, 1996, he has been suspended administratively for his failure to pay his annual fee.

Complaint D223/96

Particular 2a) He failed to reply to the Law Society regarding a complaint by Allan Lutfy.

Particular 2b) He failed to comply with his Undertaking to the Law Society dated March 18, 1996.

5. By letter dated November 10, 1995 (Document Book, Tab 1), Allan Lutfy, a barrister and solicitor, made a complaint to the Law Society regarding the Solicitor. The Solicitor had represented Clement Marchand Natural Gas Services Ltd. in litigation commenced against that company at the request of the company's liability insurer, Federated Insurance Company of Canada (“Federated”). Federated had requested Mr. Lutfy bring this matter to the Law Society's attention. Mr. Lutfy summarized the immediate concerns as follows:

- the Solicitor's failure to respond to Mr. Lutfy's correspondence and telephone messages, and to earlier requests for information made by Federated;
- the payment of \$5,000 to the Solicitor by Federated in 1992, which was in payment of a settlement with the co-defendant, whose counsel had advised that the funds had not been received;
- the possibility that Mr. Lutfy had not received all of the Solicitor's file material which could explain certain representations made by the Solicitor to Federated concerning the status of the proceedings.

6. By letter dated December 11, 1995 (Document Book, Tab 2), the Law Society forwarded to the Solicitor a copy of Mr. Lutfy's letter of November 10, 1995. The Solicitor was requested to provide his comments on Mr. Lutfy's letter within two weeks. No reply was received.

7. A Law Society employee spoke with the Solicitor by telephone on January 19, 1996 (Document Book, Tab 3). The Solicitor advised that he had not responded earlier because the Law Society's letter had been placed accidentally in another file. The Solicitor advised he would respond by January 22, 1996, by facsimile transmission. No written reply was received.

8. A Law Society employee spoke with the Solicitor by telephone on February 6, 1996 (Document Book, Tab 3). The Solicitor advised he could not locate the file, but he would respond by February 7, 1996 by facsimile transmission. No reply was received.

9. The Solicitor left a voice mail message for the Law Society on February 7, 1996 (Document Book, Tab 4), advising that he had located the file. The Solicitor advised that he was reviewing the file and would try to contact the Law Society further that same day. The Solicitor did not return the call.

10. By letter dated February 8, 1996 (Document Book, Tab 5), to Mr. Lutfy, the Solicitor apologized for not writing earlier as he had been unable to locate the file. The Solicitor advised that the file had been located last Saturday during a physical search of a basement storage area. The Solicitor enclosed a package of material which was supposed to represent his file.

11. By letter dated February 9, 1996 (Document Book, Tab 6), the Solicitor advised the Law Society that he had located the file and had delivered the same to the Mr. Lutfy's office. The Solicitor enclosed a copy of his February 8, 1996, letter to Mr. Lutfy.

12. By letter dated March 6, 1996 (Document Book, Tab 7), Mr. Lutfy returned to the Solicitor the majority of the material enclosed with the Solicitor's letter of February 8, 1996, as it involved an unrelated matter. Mr. Lutfy advised the Solicitor that he had kept two small folders concerning Bronson Bakery, but that the material regarding Bronson Bakery did not address any of the concerns he raised in his earlier correspondence.

13. By letter dated March 6, 1996 (Document Book, Tab 8), the Law Society advised the Solicitor that he had not responded to Mr. Lutfy's concern regarding an accounting of the \$5,000. The Solicitor was request to respond within two weeks. No reply was received.

14. On March 18, 1996, the Solicitor provided the Law Society with a written Undertaking (Document Book, Tab 9), which stated, in part:

I HEREBY UNDERTAKE to provide a full and complete written response to written communications from another lawyer or the Law Society within two weeks of receipt and to respond to telephone communications from another lawyer or the Law Society within two business days.

I ACKNOWLEDGE that any breach of this Acknowledgement may lead to further discipline proceedings, and I hereby consent to this document being introduced in evidence in those proceedings.

15. A Law Society staff employee left telephone messages for the Solicitor at his office on April 1, 1996 and April 3, 1996 (Document Book, Tab 10), requesting he return the calls. The calls were not returned.

16. By registered mail dated April 11, 1996 (Document Book, Tab 11), the Law Society reminded the Solicitor of its communications to him. The Solicitor was reminded of his obligation to promptly respond to communications from the Law Society. The Solicitor was advised that the matter would be referred to the Chair of the Discipline Committee if a written response was not received within seven days. This letter was signed for and delivered on April 15, 1996.

17. A Law Society staff employee left a telephone message for the Solicitor at his office on June 12, 1996 (Document Book, Tab 12), reminding him of his overdue response and his requirement to respond to communications from the Law Society pursuant to his Undertaking, dated March 18, 1996. The call was not returned.

18. Mr. Lutfy ultimately settled the litigation on behalf of Federated without the Solicitor's file or assistance.

19. To date, the Solicitor has not responded in a meaningful way to either Mr. Lutfy or the Law Society regarding Mr. Lutfy's complaint.

Complaint D254/96

Particular 2a) He failed to serve his client, Gordon Kennedy, in a conscientious, diligent and efficient manner in that he did not take steps to advance his client's action in court.

Particular 2b) He misled his client, Gordon Kennedy with respect to the status of his court action in that he advised his client repeatedly that a pre-trial had been scheduled when, in fact, the matter had not been set down for trial.

20. Gordon Kennedy was employed by the County of Renfrew for approximately twenty years after which time, in July 1992, he was dismissed. The Solicitor was retained by Mr. Kennedy in or about February 1993, on a Legal Aid Certificate, to represent him in connection with a wrongful dismissal action. In May 1993, the statement of claim was served upon the County of Renfrew; the action was subsequently defended. The Solicitor submitted an account to Legal Aid for services he had rendered prior to the issuance of the claim at that time. He has not submitted any further accounts to Legal Aid.

21. Examinations for Discovery were completed on December 1, 1993. On December 6, 1993, the Solicitor prepared an opinion letter to the Ontario Legal Aid Plan. The Solicitor's recommendations to Legal Aid were to present an offer to settle and to list the action for trial. A copy of the Solicitor's letter to the Ontario Legal Aid Plan is contained at Tab 13 of the Document Book.

22. In January 1994, Mr. Kennedy signed an offer to settle which was forwarded to the defendant. Thereafter, Mr. Kennedy heard nothing from the Solicitor with respect to this offer. Consequently, Mr. Kennedy contacted the Solicitor by telephone several times in the period from February to April 1994 and was advised by the Solicitor to await a response to the written offer. Mr. Kennedy again heard nothing and continued to call the Solicitor's office.

23. The Solicitor corresponded with counsel for the County of Renfrew, Andre Champagne, in March 1994. At the time, the Solicitor was to provide further documentation to Mr. Champagne. The Solicitor has not contacted Mr. Champagne since March 1994. A copy of Mr. Champagne's letter of March 10, 1994, and the Solicitor's response, dated March 30, 1994, are contained at Tab 14 of the Document Book.

24. In September 1994, in response to one of his calls, Mr. Kennedy was advised by the Solicitor that no response had been received from the defendant regarding the offer and that the pre-trial was scheduled for October 1994. The Solicitor subsequently advised Mr. Kennedy that this pre-hearing had been adjourned to January 1995. In fact, no pre-hearing had been arranged by the Solicitor at that time or at any subsequent time.

25. In or about March 1995, Mr. Kennedy called the Ontario Court - General Division and was advised that the matter had not been set down for trial and that the only documents contained in the court file were the claim and the defence. Mr. Kennedy informed the Solicitor of his findings; the Solicitor promised to resolve the matter. The Solicitor took no steps to set the matter down for trial at any time subsequently.

26. Between May and September 1995, Mr. Kennedy made several further efforts to contact the Solicitor regarding the status of the matter. The Solicitor advised Mr. Kennedy that he was awaiting the appointment of a judge to the case.

27. In January 1996, Mr. Kennedy contacted the Court Office, having heard nothing further from the Solicitor regarding this action. The Court confirmed that no steps had been taken in the case since the defence had been filed.

28. Mr. Kennedy contacted the Solicitor in February 1996, after several attempts. The Solicitor assured Mr. Kennedy that he would correct the matter when he was at the Pembroke Court Office on February 27, 1996.

29. Mr. Kennedy contacted the Solicitor again in March 1996. The Solicitor informed him that all documentation had been rectified with the Court and that the case would go to trial by summer. The Solicitor also advised Mr. Kennedy that his Legal Aid Certificate had been cancelled but assured him that he did not need to be concerned.

30. Mr. Kennedy contacted the Court Office again on April 1, 1996, and was advised that the status of his case had not changed. Mr. Kennedy has been unable to contact the Solicitor since that time.

31. The Solicitor has taken no steps to advance Mr. Kennedy's action since January 1994.

32. By letter dated May 7, 1996 (Document Book, Tab 15), Mr. Kennedy made a complaint to the Law Society regarding the foregoing.

33. Mr. Champagne has advised the Law Society subsequently that his client intends to move to dismiss Mr. Kennedy's action.

Particular 2e) He failed to reply to the Law Society in a timely manner regarding a complaint by Gordon Kennedy.

34. By letter dated June 6, 1996 (Document Book, Tab 16), the Law Society wrote to the Solicitor enclosing a copy of Mr. Kennedy's letter, dated May 7, 1996, and requested his comments within two weeks. The Solicitor did not respond.

35. On June 28, 1996 and July 3, 1996, a Law Society employee telephoned the Solicitor and left messages with the receptionist requesting his response. The Solicitor did not return the calls and did not provide a response. A copy of the notes of the telephone messages are contained at Tab 17 of the Document Book.

36. By registered mail dated July 5, 1996 (Document Book, Tab 18), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The Law Society's letter was signed for and delivered on July 9, 1996. The Solicitor did not respond.

37. On August 21, 1996, a Law Society employee called the Solicitor and asked if he would be responding to the complaint. The Solicitor advised that his response would be delivered by August 28, 1996. The Solicitor was reminded of his Undertaking to the Law Society dated March 18, 1996 to respond to inquiries from the Law Society. A copy of the notes of the telephone conversation is contained at Tab 19 of the Document Book.

38. To date, the Solicitor has not responded to the Law Society regarding a complaint by Gordon Kennedy.

Particular 2f) He failed to reply to the Law Society in a timely manner regarding a complaint by Gilles Bertrand.

39. Gilles Bertrand retained the Solicitor on or about May 21, 1993, with respect to the sale of his business. Mr. Bertrand contacted the Solicitor several times concerning the status of his case over the following two years but was given no satisfactory response. On May 26, 1995, Mr. Bertrand wrote to the Solicitor about his lack of communication and advised the Solicitor that he expected some improvement by the Solicitor in this regard by June 30, 1995. A copy of Mr. Bertrand's letter to the Solicitor is contained at Tab 20 of the Document Book. The Solicitor did not respond to or address Mr. Bertrand's concerns.

40. In June 1996, Mr. Bertrand attended at the Solicitor's office to see the Solicitor as he had not been able to contact the Solicitor by telephone. Although Mr. Bertrand waited for an entire morning, the Solicitor did not arrive, and Mr. Bertrand was unable to speak with him.

41. On June 14, 1996, Mr. Bertrand completed a Law Society Complaints HelpForm, which was received by the Law Society on June 18, 1996, regarding his concerns about the Solicitor. A copy of the completed Complaints HelpForm is contained at Tab 21 of the Document Book.

42. By letter dated July 3, 1996 (Document Book, Tab 22), the Law Society wrote to the Solicitor enclosing a copy of Mr. Bertrand's Complaints HelpForm, dated June 14, 1996. The Law Society reminded the Solicitor of his professional obligation to respond promptly to the Law Society and requested his comments within two weeks. The Solicitor did not respond.

43. On each of August 13, 16, 20 and 27, 1996, the Law Society called the Solicitor and left messages for him to return the calls. A copy of the notes of the telephone messages are contained at Tab 23 of the Document Book. The Solicitor did not return the calls or otherwise respond.

44. On September 23 and 30, 1996, the Law Society again called the Solicitor and left messages for him to return the calls. A copy of the notes of the telephone messages are contained at Tab 24 of the Document Book. The Solicitor did not return the calls or otherwise respond.

45. By registered mail dated October 1, 1996 (Document Book, Tab 25), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The registered letter was signed for and delivered on October 4, 1996.

46. To date, the Solicitor has not responded to the Law Society regarding a complaint by Gilles Bertrand.

Particular 2c) He failed to serve his client, Giles Leo, in a conscientious, diligent and efficient manner.

Particular 2d) He misled his client, Giles Leo, with respect to the status of the court action in which his client was a defendant.

47. On or about September 9, 1988, Dr. Giles Leo and Dr. Joel Eisenstat entered into a two year employment agreement known as an associate agreement at Pinecrest Dental Centre in Ottawa. Dr. Leo was represented by the Solicitor at the time of entering into the agreement.

48. In or about November 1989, Dr. Leo expressed an interest in becoming Dr. Eisenstat's partner and buying an interest in the dental practice. Discussions between the parties proceeded; at the same time, Dr. Leo was considering other options.

49. Dr. Eisenstat subsequently discovered that Dr. Leo was looking at other options and, on May 5, 1990, forwarded a memorandum to Dr. Leo setting out three options for his consideration (Document Book, Tab 26). Dr. Leo accepted the first option which stated that "thirty day notice of termination of the associate agreement shall be invoked on May 16, 1990 unless written assurances are given by Dr. Leo that negotiations with third parties regarding Lincoln Fields Dental Clinic are stopped for a period of one year." The associate agreement was terminated on May 16, 1990 (Document Book, Tab 27).

50. The Solicitor subsequently acted for Dr. Leo during the summer of 1990 in corresponding with Dr. Eisenstat's counsel with respect to certain unresolved matters flowing from the associate agreement. This correspondence was discontinued by both sides by the fall of 1990.

51. The Solicitor contacted Dr. Leo in November 1993 to advise that Dr. Eisenstat's new solicitor, Mr. David Elhadad, had written to him to determine if the Solicitor was still representing Dr. Leo and if the Solicitor would accept service of court documents on Dr. Leo's behalf (Document Book, Tab 28). Dr. Leo instructed the Solicitor to accept service on his behalf, and the Solicitor advised Mr. Elhadad accordingly.

52. On or about June 15, 1994, the Solicitor was served by Mr. Elhadad with a statement of claim naming Dr. Leo as the defendant and alleging breach of contract, and, in particular, breach of a non-solicitation clause in the agreement. The Solicitor provided a copy of the claim to his client (Document Book, Tab 29). Dr. Leo subsequently met with the Solicitor to review the claim and provided instructions to prepare a statement of defence.

53. After he instructed the Solicitor to prepare a statement of defence, Dr. Leo only spoke to the Solicitor on a few occasions. In those discussions, the Solicitor assured Dr. Leo that matters were firmly in hand and that the case would eventually proceed to trial. The Solicitor at no time advised Dr. Leo that Dr. Leo had been noted in default or that there was a risk of a judgment being entered against him.

54. On September 7, 1994, the Solicitor wrote to Dr. Leo advising that he was awaiting word from the plaintiff's solicitor as to whether he wished to proceed with examinations of documents [sic] or examinations for discovery. The Solicitor also thanked Dr. Leo for reviewing the statement of defence with him (Document Book, Tab 30). However, at that time, the Solicitor was aware, from correspondence sent to him by Mr. Elhadad, that the plaintiff's solicitor would not agree to accept service of the statement of defence and that the defendant would be proceeding with a motion for judgment (Document Book, Tabs 31 & 32.). The Solicitor did not provide copies of Mr. Elhadad's correspondence to Dr. Leo.

55. Dr. Leo was noted in default on September 29, 1994. The Solicitor did not advise Dr. Leo that he had been noted in default.

56. The Solicitor failed to serve and file a statement of defence in this action. In September 1995, default judgment was obtained against Dr. Leo. The Solicitor did not advise Dr. Leo of the default judgment. Dr. Leo ultimately discovered same when he was personally served with a Notice of Examination in Aid of Execution, on or about September 15, 1995, along with a copy of the Default Judgment. Upon receipt of these materials, Dr. Leo contacted the Solicitor who assured him repeatedly that he would remedy the situation and that there was no risk to Dr. Leo from this development.

57. On September 21, 1995, the Solicitor attended the Examination in Aid of Execution on behalf of Dr. Leo and advised that he intended to bring a motion to set aside the judgment (Document Book, Tab 33).

58. Between September 1995 and January 1996, Dr. Leo called the Solicitor several times. On the few occasions when he succeeded on contacting the Solicitor, the Solicitor advised that he would bring a motion to set aside the default judgment but that he was having difficulties in obtaining a court date. The Solicitor failed to bring a motion to set aside the default judgment.

59. In January 1996, Dr. Leo was again served with a Notice of Examination in Aid of Execution. The plaintiff's solicitor advised Dr. Leo that he was being served personally as the Solicitor had failed to respond to inquiries as to whether he would accept service (Document Book, Tab 34).

60. In February 1996, Dr. Leo retained new counsel who filed a Notice of Motion to set aside the default judgment (Document Book, Tab 35). This motion was successful, and Dr. Leo was given an opportunity to file a defence.

61. In July 1996, Dr. Leo commenced third party proceedings against the Solicitor. A copy of the third party claim is contained at Tab 36 of the Document Book.

62. By letter dated August 7, 1996 (Document Book, Tab 37), Dr. Leo made a complaint to the Law Society regarding the foregoing.

Particular 2g) He failed to reply to the Law Society in a timely manner regarding a complaint by Giles Leo.

63. On August 20, 1996, a Law Society employee called the Solicitor and left a message for him to return the call. On August 21, 1996, a Law Society employee succeeded in contacting the Solicitor by telephone. The Law Society reminded the Solicitor of his Undertaking to respond to the Law Society. The Solicitor advised that he had dictated a letter reporting the matter to Lawyers' Professional Indemnity Company and that he would respond to the Law Society also. A copy of the notes of the telephone communications are contained at Tab 38 of the Document Book.

64. Contrary to his representation to the Law Society, the Solicitor has not reported Dr. Leo's claim to LPIC to date.

65. By letter dated August 28, 1996 (Document Book, Tab 39), the Law Society wrote to the Solicitor confirming the telephone conversation with him on August 21, 1996, and enclosed a copy of Dr. Leo's letter, dated August 7, 1996. The Solicitor was asked to provide his comments within two weeks in accordance with his Undertaking to the Law Society. The Solicitor did not respond.

66. On September 20 and 24, 1996, a Law Society employee called the Solicitor again and left messages for him to return the calls. A copy of the notes of the telephone messages are contained at Tabs 40 & 41 of the Document Book. The Solicitor did not return the calls.

67. By registered mail dated September 30, 1996 (Document Book, Tab 42), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Chair of the Discipline Committee. The registered letter was signed for and delivered on October 2, 1996.

68. To date, the Solicitor has not responded to the Law Society regarding a complaint by Dr. Giles Leo.

Particular 2h) He failed to fulfil his Undertaking to the Law Society dated March 18, 1996 wherein he undertook, among other things, to provide a full and complete written response to written communications from another lawyer or the Law Society within two weeks of receipt and to respond to telephone communications from another lawyer or the Law Society within two business days.

69. On March 18, 1996, the Solicitor undertook to the Law Society, in writing, to respond fully to communications from the Law Society within two weeks of receiving written correspondence and within two business days of receiving telephone communications (Document Book, Tab 43). By failing to reply to the Law Society's correspondence regarding the complaints of Gordon Kennedy, Gilles Bertrand and Giles Leo, the Solicitor breached this Undertaking.

## V. DISCIPLINE HISTORY

70. The Solicitor does not have a discipline history.

DATED at Toronto this 18th day of June, 1997."

Re: Complaint D194/97

### "AGREED STATEMENT OF FACTS

#### I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D194/97 and is prepared to proceed with a hearing of this matter on June 17 and 18, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D194/97 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 17, 1967. He has been suspended for non-payment of his annual fees since November 1, 1996 but prior to his suspension, the Solicitor practised as a sole practitioner.

Particular 2a) He failed to reply to the Law Society regarding deficiencies discovered in his annual filings.

5. The Solicitor filed his Forms 2 and 3 for the fiscal year ended November 30, 1995 on March 15, 1996 (Tab 1, Document Book). Upon review of the forms, the Law Society discovered the following inadequacies:

- i. the reconciliation of the trust bank account showed a bank error in the amount of \$50.00;
- ii. an overdrawn trust ledger account which was permitted to exist uncorrected over a period in excess of one month; and
- iii. an overdrawn account in the amount of \$61.32.

By letter dated August 15, 1996 (Tab 2, Document Book), the Solicitor was advised of the foregoing and was requested to correct the inadequacies. The Solicitor did not respond.

6. By letters dated September 16 and October 15, 1996 (Tabs 3 & 4, Document Book), the Solicitor was asked to respond to the Law Society's letter dated August 15, 1996. The Solicitor did not respond.

7. By registered mail dated January 17, 1997 (Tab 5, Document Book), the Solicitor was reminded of the previous letters to him and of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was advised that if his response was not received within seven days, the matter would be referred to the Discipline Committee. The Law Society's letter was delivered on January 24, 1997. The Solicitor did not respond.

8. To date, the Solicitor has not responded to the Law Society regarding the deficiencies discovered in his annual filings.

Particular 2b) He failed to comply with his undertaking to the Law Society dated March 18, 1996 by failing to provide a full and complete written response to written communications from another lawyer or the Law Society within two weeks of receipt and to respond to telephone communications from another lawyer or the Law Society within two business days.

9. On March 18, 1996, the Solicitor provided the Law Society with an undertaking to respond to communications from the Law Society. By failing to reply to the above matter, the Solicitor breached the undertaking. A copy of the undertaking is contained at Tab 7 of the Document Book.

V. PRIOR DISCIPLINE

10. The Solicitor does not have a discipline history.

DATED at Toronto, this 18th day of June, 1997."

## RECOMMENDATION AS TO PENALTY

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The Committee recommends that David Gerard Casey be suspended for a period of one month, commencing at the conclusion of his present administrative suspension, and continuing indefinitely thereafter until a medical report satisfactory to the Secretary is provided confirming that he is fit to practise law, and that he be required to enter into an undertaking on the terms set out below.

## REASONS FOR RECOMMENDATION

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The complaints which gave rise to these proceedings are serious. They involve breaches of obligations to clients and to the profession. If unexplained, those breaches would lead to the conclusion that the Solicitor was ungovernable and had failed in the minimum standards necessary to maintain a practice of law and would lead inevitably to disbarment.

We have had the benefit of considerable evidence and helpful submissions on the issue of the explanation in this case, which leads us to conclude that disbarment is not the appropriate approach to these offences and this offender. It is clear from the material before us that the Solicitor, now age 55, who has had no previous discipline record, fell into difficulty because of the combination of clinical depression and alcoholism. Ron Hendry, the addictions counsellor at Rideauwood Addiction and Family Services agency in Ottawa, tells us that on June 6, 1996, the Solicitor contacted the agency and began an extensive treatment programme with them. They identified a psychiatric - or as they put it - "emotional" component to the difficulties and as part of the ongoing programme, they recommended that he attend Homewood Treatment Centre in Guelph, Ontario, for a period of thirty days as an in-patient.

The Solicitor successfully completed that and returned to the ongoing programme offered by Rideauwood. That involved group meetings on a weekly basis which, as of the date of the hearing, have been completed. The next phase of the ongoing programme involves individual counselling and the creation of support in the community through groups such as Alcoholics Anonymous.

The key finding is this - "To the best of our knowledge [the Solicitor] has maintained his sobriety to date".

This assessment is supplemented by the opinion of Dr. Pierre Steyn, a specialist in family medicine and addictive disorders who practises in Ottawa.

The Solicitor recognized that he had problems beyond mere alcoholism, expressed by him as being, I think, a perception that he himself was "as dysfunctional sober as when I was drunk".

He tells us that the Solicitor found himself in a vicious circle whereby his law practice had virtually collapsed and he had come to the attention of the Society. During the progression of his alcoholism, he became less and less able to initiate and complete tasks; he became fearful and quite incapacitated and this in turn led to a vicious circle in which there was more alcohol consumption and increasing incapacity.

The ability of the Solicitor to deal with his practice was not suddenly reinstated. Five months into his recovery programme, he was still not able to deal effectively with the problems of his practice which were, in this case, compounded by increasing marital stress and financial ruin brought on by his difficulties. He commenced treatment by way of individual therapy with Dr. Steyn as well. He has received medication and treatment for depression and he intends to continue in that endeavour.

The doctor, at the time of the discharge, stated that his prognosis was favourable, "providing he continues with the recovery plan and his treatment". He notes that he is now someone in whom there have been major changes in his approach to his tasks and problems, his marriage and life in general. He is considerably less depressed and quite active in trying to rebuild his life as a sober person and systematically repairing what damage could be repaired. "He has sustained the momentum of recovery". He should remain in treatment for a year or two, but if he remains sober, in the doctor's opinion, and continues on his present path, then it is anticipated that he will be fit to practise law again. "This competent lawyer was rendered incapacitated by his addiction, but he is well on his way to be a responsible and useful member of his profession and of society. He has been sober since July 8th, 1996".

Members of the Bench and Bar have written in support and their assessment is that this was a Solicitor with a good reputation, who did quality work, who has fallen upon difficult times because of alcoholism. Typical is the remark of C.H. McArthur, a judge of the Tax Court of Canada, "Outside the clutches of alcohol, David Casey is one of the finest persons I know. His integrity is beyond question; he is a good lawyer. Prior to recent times, he was a credit to the legal profession, and I am confident he will be in the future. He is well on the road to recovery."

We have had the assistance of Mr. Adrian Hill, who has taken a leadership position in dealing with problems of addiction, and alcohol addiction particularly, within the profession in Ontario. He is Chair of the Ontario Bar Assistance Program and President of the Ontario Bar Alcoholism Program, among other organizations. He has extensive experience in working with problems of alcoholism in our profession and we are grateful for his assistance.

First, it must be noted that alcoholism is today much more extensive in the profession than once was thought. Many professional alcoholics successfully conceal their alcoholism and indeed their drinking patterns from those around them.

Second, we must devise, as a profession, more effective ways of dealing with this problem. One proposition follows from the other.

Mr. Hill's evidence makes it clear that there are two important aspects of understanding alcoholism. First, denial is an important part of the disease of alcoholism. It is that process whereby the victim of alcoholism tells him or herself that they are not addicted, that they are still in control, and this fiction is maintained, despite obvious evidence to the contrary which is apparent to any impartial observer.

Second, there is a very powerful fear of stopping drinking. It seems to the person suffering from this illness impossible to live without alcohol. Alternatives are not easily contemplated.

So, it is clear that this is not an easy process, but it is time that we brought our approach as a disciplinary body in line with a more modern understanding and with the availability of programs in our community. Certainly, we all live in this community and none of the panel before whom this case appeared is without family or friends who have become the victims of an addictive illness. It is indeed common.

The Law Society requires a policy of openness where this is not a "dirty secret" but a problem that has to be dealt with in the public interest. Our responsibility is, first and foremost, to protect the public, but where it is possible to do so, the best way to protect the public is to see our member treated successfully. That obligation is twofold. First, it is an obligation on the member who must seek help, and as a professional obligation, if he finds himself in the grip of this kind of illness, that member must take effective steps to find help in the community.

Second, it is an obligation of the profession as a whole to see that programs are available to assist our members in recovery.

And so, it seems to us that a dual policy of diversion from the punitive stream and monitoring of the ongoing recovery process is the most appropriate. This involves some change in the traditional penalty process.

First, the penalty will not reflect the gravity of the offence, but if one views these problems as an illness and is satisfied by appropriate evidence that there is a reasonable prospect of rehabilitation, then that is not an anomaly which cannot be easily tolerated within an enlightened discipline system.

Second, an important component is to establish a scheme of ongoing monitoring of the progress of our member in conjunction with the various groups and organizations that are available. One such group is that in which Mr. Hill is active. It is significant that his experience in dealing with our members in a context which is collegial and where there is a voluntary support of an intensive nature is that they approach an eighty percent success rate in terms of ongoing recovery. That is an extremely high number and we are grateful to those members of the profession who put their time and effort into assisting that process in the achievement of a level so impressive.

At the same time, we must monitor to see that those who fail do not inflict themselves upon the public and the profession in a way that does not meet professional standards. That means there must be ongoing monitoring which is actually effective. In some cases, urinalysis would be an appropriate measure to ensure continued abstinence in cases where, for example, there have been lapses which have caused damage to the public. At some point, of course, the profession can no longer hold the member out with reasonable confidence that they are capable of serving the public, but this should be as a last resort. If in fact we can bring a number at all approaching eighty percent of those who come forward with this problem to full functioning within society, then the public is best protected.

Accordingly, in this case, we make the following order. First, the Solicitor is ordered to co-operate fully with the Society in taking steps to mitigate and remedy damage caused by him to the various clients in this case, in the manner outlined orally before us, prior to the hearing of this matter in Convocation.

Second, we recommend to Convocation that following the present administrative suspension which is in force, that Convocation impose a suspension for one month definite and thereafter, indefinitely until a medical report satisfactory to the Secretary is produced confirming that the Solicitor is fit to practise law and that, in any event, the Solicitor be required to enter into an undertaking as follows:

1. That he will continue his involvement in Alcoholics Anonymous or some equivalent organization unless his physician approves;
2. That he will continue receiving treatment from his physician, as long as may be required by the physician;
3. That for a period of 12 months following his reinstatement, he will practise in association with, or under the supervision of, a member in good standing, approved by the Secretary of the Law Society.
4. That prior to the commencement of his period of supervision, his approved supervisor will read the Report and Decision of the Discipline Committee and will acknowledge to the Law Society, in writing, that he or she has done so and accepts the terms of the supervision of his practice;
5. That he will maintain logs of all phone calls and correspondence received by his office;
6. That he will meet with his supervisor once a week to review his logs to ensure that he is responding to communications promptly;
7. That he will meet with his supervisor once a month to review all of his files with him or her;
8. That he acknowledge that his supervisor shall report any problems in his practice, including a relapse of his illness, to the Law Society forthwith; and,
9. That he will enrol in and co-operate with the Practice Review Programme and abide by any recommendations made to him in the course of that programme.

Finally, without pronouncing on it definitively, because the evidence we have heard is from an expert on alcoholism alone, it appears to us that the Society should explore structuring a similar approach to cases involving mental illness and stress where these principles might well be equally applicable, but we leave that decision for a case which involves those factors as primary causative indicators and make no definitive statement because we have no evidence from experts in those fields.

David Gerard Casey was called to the Bar on March 17, 1967.

ALL OF WHICH is respectfully submitted

DATED this 16th day of August, 1997

Clayton C. Ruby, Chair

Mr. Stuart advised that the following corrections be made to the Report:

- (1) page 1, under the heading "Report" 2nd paragraph, 1st line - the date June 18, 1995 should be changed to "June 18, 1997";
- (2) page 22, 3rd paragraph, last line - the word "traditional" should be changed to "tradition".

The solicitor waived the re-service of the Report.

It was moved by Mr. MacKenzie, seconded by Mr. Manes that the Report as amended be adopted.

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month commencing at the conclusion of his present administrative suspension, and continuing indefinitely thereafter until a medical report satisfactory to the Secretary is provided confirming that he is fit to practise law, and that he be required to enter into an undertaking as set out on pages 23 and 24 of the Report.

Mr. Stuart made submissions in support of the recommended penalty and advised that the solicitor was co-operating with the Society regarding his clients.

There were no submissions by the solicitor.

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

It was moved by Mr. Topp, seconded by Mr. Bobesich that item 1 of the Undertaking on page 23 of the Report regarding continued involvement in Alcoholics Anonymous, be deleted.

Lost

It was moved by Ms. Backhouse but not put that the words "until relieved of the obligation by the Secretary" be added to items 5, 6 and 7.

It was moved by Mr. Bobesich, seconded by Ms. Puccini that the clause with the words "until relieved of the obligation by the supervisor at his/her discretion" be added to items 5, 6 and 7 of the Undertaking.

Carried

The recommended penalty as amended was voted on and adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the recommended penalty be adopted with an amendment to items 5, 6 and 7 of the Undertaking with the words "until relieved of the obligation by the supervisor at his/her discretion" being added.

Re: Clinton Vernol ELLIS - North York

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Manes, Wright and Cole and Ms. Cronk withdrew for this matter.

Ms. Amanda Worley appeared for the Society and Mr. Brian Greenspan appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 22nd October, 1997, together with an Affidavit of Service sworn 27th October, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 23rd October, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes, Chair  
Thomas E. Cole  
Bradley H. Wright

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

Georgette Gagnon  
for the Society

CLINTON VERNOL ELLIS  
of the City  
of North York  
a barrister and solicitor

Brian Greenspan  
for the solicitor

Heard: April 8, 9 and July 29, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 4, 1996 Complaint D70/96 was issued, and on February 21, 1997 Complaint D58/97 was issued against Clinton Vernol Ellis alleging that he was guilty of professional misconduct.

Complaint D70/96 was heard in public on April 8 and 9, 1997 and July 29, 1997, and Complaint D58/97 was also heard on July 29, 1997 before this Committee composed of Ronald D. Manes, Chair, Thomas E. Cole and Bradley H. Wright. The Solicitor attended the hearing and was represented by Walter Fox on April 8 and April 9, and by Brian Greenspan on July 29.

DECISION

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

Complaint D70/96

- 2. a) The Solicitor borrowed money from clients as follows:

DATE OF BORROWING	CLIENT	AMOUNT OF BORROWING
March 1987	Gloria Preddie	\$35,000.00
October 1988	Beneca Prince	\$50,000.00
August 1989	Ella Gordon	\$40,000.00
May 1990	Norma Clarke	\$60,000.00
November 1990	Corletta Bourne	\$41,929.54
TOTAL		\$226,929.54

- b) The Solicitor acted in a conflict of interest by representing two clients, Harry London and Norma Clarke respecting loans from Harry London to Norma Clarke as follows:

DATE OF LOAN	AMOUNT
October 1991	\$6,000.00 loan
October 1992	Renewal of October 1991 loan
October 1993	\$8,000.00 loan

- c) The Solicitor filed false Forms 2 for his fiscal years ending January 31, 1990 to January 31, 1994. The Solicitor declared on his Forms 2 that he was not indebted to clients for money borrowed from them when he was in fact indebted to the clients.
- d) The Solicitor accepted money from clients that was not for payment for fees or disbursements, when he was an undischarged bankrupt.

Complaint D58/97

- 2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*;

- b) He failed to comply with his undertaking to the Law Society, dated July 13, 1992, by failing to file within six months of the termination of his fiscal year ended January 31, 1996 a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statements of facts:

Re: Complaint D70/96

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

- 1. The Solicitor admits service of Complaint D70/96 and is prepared to proceed with a hearing of this matter on April 8, 1997.

II. IN PUBLIC/IN CAMERA

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

III. THE COMPLAINT

- 3. a) The Solicitor borrowed money from clients as follows:

DATE OF BORROWING	CLIENT	AMOUNT OF BORROWING
March 1987	Gloria Preddie	\$35,000.00
October 1988	Beneca Prince	\$50,000.00
August 1989	Ella Gordon	\$40,000.00
May 1990	Norma Clarke	\$60,000.00
November 1990	Corleta Bourne	\$41,929.54
TOTAL		\$226,929.54

- b) The Solicitor acted in a conflict of interest by representing two clients, Harry London and Norma Clarke respecting loans from Harry London to Norma Clarke as follows:

DATE OF LOAN	AMOUNT
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October 1992	Renewal of October 1991 loan
October 1993	\$8,000.00 loan

- c) The Solicitor filed false Forms 2 for his fiscal years ending January 31, 1990 to January 31, 1994. The Solicitor declared on his Forms 2 that he was not indebted to clients for money borrowed from them when he was in fact indebted to the clients.
- d) The Solicitor accepted money from clients that was not for payment of fees or disbursements, when he was an undischarged bankrupt.

IV. ADMISSIONS

4. The Solicitor has reviewed Complaint D70/96 with his counsel, Walter Fox, and admits particulars (a), (b), (c) and (d). The Solicitor admits that these particulars together with the facts as set out in this Agreed Statement of Facts constitute professional misconduct. The Solicitor intends to call evidence in mitigation of penalty regarding the borrowing of funds from his client, Norma Clarke.

V. FACTS

5. The Solicitor was called to the Bar in 1982. The Solicitor practised law in association with another solicitor, Peter Abrahams from 1984 to 1992. The Solicitor made an assignment in bankruptcy on June 8, 1995. He currently practices as a sole general practitioner in the City of North York, Ontario.

Particular 2(a) - Borrowing from clients - \$226, 929.54

6. Summary of Solicitor's borrowing from clients:

DATE OF LOAN	LENDER	AMOUNT	SECURITY FOR LOAN	PURPOSE OF LOAN	STATUS
March 1987	Gloria Preddie	\$35,000.00	First Mortgage on 10 Martha Eaton Way, North York	Unknown	Repaid in June 1987 and mortgage discharged.
October 1988	Beneca Prince	\$50,000.00	Promissory Note	Deposit on 290 Sheppard Ave. West, Willowdale	The Solicitor states that the loan was paid off in August 1989 with the Gordon loan.

August 1989	Ella Gordon	\$40,000.00	Second Mortgage on 19 Virgilwood Dr., North York	To pay balance of Prince loan	Loan paid in Nov. 1990 with the Bourne loan.
May 1990	Norma Clarke	\$60,000.00	Third Mortgage on 290 Sheppard Ave. West	For renovations to 290 Sheppard Ave. West, Willowdale	Investment "loss" due to Solicitor's bankruptcy.
November 1990	Corleta Bourne	\$41,929.54	Second Mortgage on 19 Virgilwood Dr., North York	To pay Ella Gordon loan	Loan repaid and mortgage discharged in April 1995.

Gloria Preddie (\$35,000)

7. Gloria Preddie was the Solicitor's client over several years. In or about March, 1987, the Solicitor borrowed funds in the amount of \$35,000.00 from Ms. Preddie. On March 1, 1987 the Solicitor provided her with a first mortgage in the amount of \$35,000.00 as security for her loan. The mortgage was placed on a condominium unit at 10 Martha Eaton Way in North York. Attached at Tab 1 of the Document Book is a copy of the charge/mortgage of land between the Solicitor as chargor and Gloria Preddie as chargee in the amount of \$35,000.00 dated March 31, 1987.

8. The Solicitor purchased the condominium unit at 10 Martha Eaton Way in March 1987 for \$85, 500.00 and gave Ms. Preddie a first mortgage for \$35,000.00 at the time of the purchase. The sum of \$35,000.00 borrowed from Ms. Preddie was used to finance the Solicitor's purchase of the condominium. Attached at Tabs 2 and 3 of the Document Book, are pages from the unit register for unit 8, level 21, York Condominium, Plan #446 and a transfer/deed of land between Richard and Joan Knight as transferees and the Solicitor as transferor dated March 31, 1987.

9. In June 1987, the Solicitor repaid Gloria Preddie the full amount of \$35,000.00 and discharged her first mortgage.

10. The Solicitor admits that Gloria Preddie was his client when he borrowed monies from her. The Solicitor admits that Gloria Preddie did not receive independent legal advice or representation on the loan transaction.

Beneca Prince (\$50,000)

11. In or about October 1988, the Solicitor borrowed the sum of \$50,000.00 from his client Beneca Prince. The Solicitor had acted for Ms. Prince on the sale of her home. She loaned him sale proceeds in the amount of \$50,000.00 and agreed that he could invest the funds in a mortgage. The Solicitor provided a promissory note dated October 27, 1988 as security for the loan wherein the Solicitor promised to repay Ms. Prince with interest at 14 percent. Attached at Tab 4 of the Document Book is a copy of the Solicitor's promissory note to Beneca Prince dated October 27, 1988.

12. The Solicitor admits that he borrowed money from his client, Beneca Prince. The Solicitor admits that Beneca Prince did not receive independent legal advice or independent legal representation on the loan transaction.

13. It is the Solicitor's position that he repaid Ms. Prince's loan of \$50,000.00. The Solicitor produced a trust cheque in the amount of \$30,000.00 payable to Ms. Prince dated August 29, 1989. Attached at Tab 5 of the Document Book is a copy of the Solicitor's trust cheque payable to Beneca Prince dated August 29, 1989. The trust cheque was posted to the Solicitor's client ledger for Ella Gordon, another client of the Solicitor's. Attached at Tab 6 of the Document Book is a copy of the Solicitor's client trust ledger for Ella Gordon. The Solicitor cannot produce any documentation to show how the balance of \$20,000.00 was repaid to Ms. Prince.

14. Beneca Prince states that the Solicitor has not repaid the full amount of funds that she loaned to him. Ms. Prince states that the Solicitor has made payments to her totalling approximately \$43,000.00 which includes the sum of \$30,000.00 as described in the above paragraph, a cheque in the amount of \$10,000.00, a cheque in the amount of \$1,000.00 and \$2,000.00 in cash.

Ella Gordon (\$40,000)

15. In 1988 the Solicitor acted for Ella Gordon on the sale of real estate owned by her in Brampton. Ella Gordon is 64 years old and a retired nurse. Ella Gordon's sale proceeds were deposited to and held in the Solicitor's trust account. In 1989, the Solicitor also acted for Ella Gordon in two motor vehicle accident claims.

16. In August 1989, the Solicitor borrowed \$40,000.00 from his client Ella Gordon. The loan funds were obtained from the funds that the Solicitor held in trust for Ella Gordon. Ella Gordon states that the Solicitor did not inform her about the identity of the borrower at the time of the loan and advised her that she would receive \$400.00 to \$500.00 per month on her loan. It is the Solicitor's position that he advised Ms. Gordon about the borrower's identity at the time the loan was made. The Solicitor did not discuss security for the loan with Ella Gordon and Ella Gordon did not ask the Solicitor about any specific security for the loan.

17. The Solicitor obtained a second mortgage on property at 19 Virgilwood Drive in North York with the funds borrowed from Ella Gordon. Attached at Tab 7 of the Document Book is a copy of the charge/mortgage of land for 19 Virgilwood Drive in North York showing Ella Gordon as chargee and Clinton and Olga Ellis (the Solicitor's sister) as chargors dated August 24, 1989.

18. The Solicitor used the amount of \$30,000.00 from funds that included Ella Gordon's loan proceeds to make a loan payment to Beneca Prince. The Solicitor used the sum of \$9,000.00 to make a mortgage payment to Nenita and Rogelio Pinuela on a vendor takeback mortgage connected to the property at 19 Virgilwood Drive, North York.

19. The Solicitor made monthly payments to Ella Gordon by cheque.

20. In December 1990, the Solicitor repaid the amount of \$40,000.00 to Ella Gordon and discharged the second mortgage to her. Attached at Tab 8 of the Document Book is a copy of the abstract index of title page for 19 Virgilwood Drive, North York.

21. The Solicitor admits that Ella Gordon was his client when he borrowed the amount of \$40,000.00 from her. The Solicitor admits that Ella Gordon did not receive independent legal advice or independent legal representation on the loan transaction.

22. It is the Solicitor's position in mitigation that he did not have a beneficial interest in the property at 19 Virgilwood Drive as the property was co-owned and co-mortgaged with his sister, Olga Ellis. The Solicitor states that Ella Gordon was aware that he did not have a beneficial interest in the property at 19 Virgilwood Drive. The Solicitor states that his sister, Olga Ellis was the true borrower of the funds borrowed from Ella Gordon. The Solicitor states that he had an arrangement with Olga Ellis regarding the property at 19 Virgilwood Drive wherein Olga Ellis would make mortgage payments on the first mortgage and the Solicitor would make mortgage payments on the vendor takeback mortgage, which was replaced by the mortgage in favour of Ella Gordon. The Solicitor admits that he made mortgage payments to Ella Gordon.

23. It is the evidence of Ella Gordon that the Solicitor did not make her aware nor advise her about any security that the Solicitor had arranged regarding her loan. It is the evidence of Ella Gordon that the Solicitor failed to advise her that he did not have a beneficial interest in 19 Virgilwood Drive. Ms. Gordon states that the Solicitor never mentioned the Virgilwood address to her and that she never signed a discharge of mortgage when the loan was repaid as she was not aware that she had a mortgage as security for the loan. It is Ella Gordon's evidence that when she asked the Solicitor for return of the entire amount of funds loaned to him, the Solicitor advised her for the first time that he could not pay back the full amount of funds as the real borrower was the Solicitor's sister, Olga Ellis. Ms. Gordon states that at all times she believed the Solicitor was the borrower of her funds.

24. It is the Law Society’s position that the Solicitor had a beneficial interest in the property at 19 Virgilwood Drive as he was both a joint owner and joint chargor on the property. The Solicitor was legally entitled and legally liable on the property and on the mortgage in favour of Ella Gordon.

Norma Clarke (\$60,000)

25. The following chart describes the history of the Solicitor’s relationship with his client, Norma Clarke:

DATE	MATTER	REFERENCE TO DOCUMENT BOOK
December 1989	Separation and Custody Matter	Tab 9, client ledger card
January 1990	Purchase of 164-A Edmonton Ave., North York	Tab 10, client ledger card
March 1990	Sale of 21 Sepia Drive, Willowdale	Tab 11, client ledger card
March 1990	Sale of 1950 Kennedy Road, Scarborough	Tab 12, client ledger card
October 1991	\$6,000.00 mortgage loan from Harry London	Tab 13, charge
October 1992	\$6,000.00 mortgage to Harry London discharged and replaced with a new \$8,000.00 mortgage to London extending the term to October 1993	Tab 14
November 1992	Increase of mortgage to Harry London	Tab 15, charge

26. In 1989, Norma Clarke retained the Solicitor regarding a matrimonial matter. At the time, Norma Clarke was 29 years old and employed as a nursing unit clerk at the Wellesley General Hospital.

27. In 1990, the Solicitor represented Ms. Clarke on the sale of two properties and the purchase of another property related to her matrimonial matter. As a result, the Solicitor held funds in trust for Norma Clarke representing real estate sale proceeds and funds held on retainer for the matrimonial matter.

28. The Solicitor admits that in May 1990 he borrowed the amount of \$60,000.00 from his client, Norma Clarke. The Solicitor admits that the funds were used to finance the purchase and renovation of property at 290 Sheppard Avenue West in North York, an office building, owned by the Solicitor and his associate, Peter Abrahams. Ms. Clarke received a third mortgage on the property with a monthly payment of \$791.44 and interest at 16 percent. Attached at Tab 16 is a copy of the charge/mortgage of land between the Solicitor and Peter Abrahams as chargors and Norma Clarke as chargee dated May 7, 1990. The mortgage document was not signed by Norma Clarke.

29. On May 7, 1990, the Solicitor and Peter Abrahams signed a Direction to Norma Clark and to GNEP Ventures Limited represented by Earl Thompson, a mortgage broker, regarding the mortgage to Norma Clarke directing payment of funds to “our solicitor, C. Emmanuel Irish”. Attached at Tab 16(a) of the Document Book is a copy of the Direction re funds dated May 7, 1990.

30. In 1991, while attending at the Solicitor's office, Norma Clarke received a packet of documents from the Solicitor regarding her matrimonial and real estate matters. The Solicitor denies giving Ms. Clarke the packet and takes the position that the documents were sent to Norma Clarke by Emmanuel Irish. Included in the documents was a letter to "Ms. Doreen Clarke" at an address in Brampton dated May 11, 1990 from C. Emmanuel Irish, a solicitor. The letter referred to a third mortgage on 290 Sheppard Avenue West with named mortgagors as the Solicitor and Peter Abrahams. The letter was a reporting letter and stated that a third mortgage had been registered on the property with a maturity date of April 30, 1992 and that the first two mortgages were in good standing. Attached at Tab 17 of the Document Book is a copy of a letter to Ms. Doreen Clarke from C. Emmanuel Irish dated May 11, 1990.

31. Initially the Solicitor and Peter Abrahams made payments on the mortgage to Ms. Clarke in one cheque. Later, payments were made to Ms. Clarke through separate cheques of Peter Abrahams and the Solicitor.

32. In January 1992, the Solicitor's mortgage payments to Norma Clarke were late and many of the payments were returned NSF by the bank. In April 1992, on the maturity date of the mortgage, the Solicitor advised Norma Clarke that he could not repay the entire loan but would increase the monthly payments to \$1,000.00 per month. For a period of time Ms. Clarke received monthly payments from the Solicitor in the amount of \$1,000.00. At some point the payments were increased to \$1,500.00 per month until late 1993 when the Solicitor's payments were made directly to Harry London to pay off Ms. Clarke's loan to Harry London. Monthly payments in the amount of \$750.00 were received from Peter Abrahams for a period of time.

33. In June 1992, the Solicitor provided Norma Clarke with a handwritten promissory note as further security for her loan. Attached at Tab 18 of the Document Book is a copy of the Solicitor's handwritten promissory note to Norma Clarke.

34. In October 1992, the property was sold under power of sale by the first mortgagee, Sunlife Trust Company for \$410,610.00. Sunlife's first mortgage was in the amount of approximately \$435,000.00. A shortfall of funds occurred for the second mortgage held by Shoppers Mortgage and Loan Corporation in the amount of approximately \$125,000.00 and for Norma Clarke's third mortgage in the amount of \$60,000.00. The Solicitor and Mr. Abrahams made payments on a sporadic basis to Norma Clarke after October 1994 until the Solicitor's bankruptcy in June 1995. Mr. Abrahams made payments to Ms. Clarke until July 1996. The Solicitor stated to the Law Society's auditor in June 1995 that approximately \$45,000.00 is due and owing on Ms. Clarke's mortgage.

35. Norma Clarke states that approximately \$53,000.00 is owing on her loan to the Solicitor.

36. It is the Solicitor's position that he borrowed funds from his client, Norma Clarke and that she received legal services and independent advice regarding her loan to the Solicitor and on the mortgage transaction involving the Solicitor. The Law Society agrees with the Solicitor that he was in a solicitor/client relationship with Ms. Clarke when he borrowed the amount of \$60,000.00 from her. It is the Law Society's position that Ms. Clarke did not receive independent legal advice or independent advice, legal services or legal representation regarding her loan to the Solicitor and on the mortgage transaction with the Solicitor.

#### Corleta Bourne (\$41,929.54)

37. In November 1990, the Solicitor borrowed the amount of \$41,929.54 from his client Corleta Bourne. He used the loan proceeds to repay the mortgage to Ella Gordon on property at 19 Virgilwood Drive in North York. Ms. Bourne received a second mortgage on 19 Virgilwood Drive. Attached at Tab 19 of the Document Book is copy of the mortgage/charge of land between the Solicitor and Olga Ellis as chargor and Corleta Bourne as chargee dated November 15, 1990.

38. The mortgage to Corleta Bourne was paid off and discharged in April 1995. Attached at Tab 8 of the Document Book is a copy of abstract index page of title for the property at 19 Virgilwood Drive showing a discharge of charge in favour of Corleta Bourne.

39. The Solicitor admits that Corleta Bourne was a client when he borrowed money from her. The Solicitor admits that Corleta Bourne did not receive independent legal advice or independent legal representation regarding the loan transaction.

40. It is the Solicitor's position in mitigation that he did not have a beneficial interest in the property at 19 Virgilwood Drive as the property was co-owned and co-mortgaged with his sister, Olga Ellis. The Solicitor states that Corleta Bourne was aware that he did not have a beneficial interest in the property at 19 Virgilwood Drive. The Solicitor states that his sister, Olga Ellis was the real borrower of the funds borrowed from Corleta Bourne. The Solicitor states that he had an arrangement with Olga Ellis regarding the property at 19 Virgilwood Drive which was that Olga Ellis would make mortgage payments on the first mortgage and the Solicitor would make mortgage payments on other mortgages. The Solicitor admits that he made mortgage payments to Corleta Bourne.

41. It is the Law Society's position that the Solicitor had a beneficial interest in the property at 19 Virgilwood Drive as he was both a joint owner and joint chargor on the property. The Solicitor was legally entitled and legally liable on the property and regarding the mortgage in favour of Corleta Bourne.

Particular 2(b) - Conflict of interest

42. In 1991, the Solicitor acted for two clients, Norma Clarke and Harry London regarding a \$6,000.00 mortgage loan from Harry London to Norma Clarke. The Solicitor asserts that Harry London was a sophisticated mortgage lender.

43. In 1992, the Solicitor acted for both Norma Clarke and Harry London when the \$6,000.00 loan was extended for one year. In 1993, the Solicitor again acted for Norma Clarke and Harry London when the mortgage was increased to \$8,000.00.

44. In these transactions, the Solicitor failed to provide adequate disclosure to enable his clients, Norma Clarke and Harry London, to make an informed decision about whether he should act in spite of the presence or possibility of the conflicting interest. He failed to advise these clients that if a conflict developed which could not be resolved, he could not continue to act for both or all of them and might have to withdraw completely. The Solicitor failed to obtain his clients' written consent to act in spite of the presence or possibility of a conflicting interest or a waiver of consent. The Solicitor also failed to advise each client to obtain independent legal advice or representation.

45. In 1993, the mortgage in the amount of \$6,000.00 was discharged and a new \$8,000.00 mortgage was registered in favour of Harry London against the title of Norma Clarke's property at 164 A Edmonton Drive in Willowdale. The \$8,000.00 mortgage was discharged in late 1993 by the Solicitor as part of the mortgage payments due by the Solicitor to Norma Clarke. Attached at Tabs 13, 14 and 15 of the Document Book are copies of the aforementioned mortgages.

Particular 2(c) Filing of false forms 2

46. From 1990 to 1994 the Solicitor filed Form 2s declaring that he was not indebted to clients. The following chart summarizes the dates of the Solicitor's filings and the clients' to whom he was indebted at the time of the filing:

FORM 2	DATE FILED	CLIENTS INDEBTED TO AS AT FILING DATE	REFERENCE TO DOCUMENT BOOK
1990	Aug. 31/90	Gordon & Clarke	Tab 20
1991	Aug. 7/91	Bourne & Clarke	Tab 21
1992	July 31/92	Bourne & Clarke	Tab 22
1993	Aug. 5/93	Bourne & Clarke	Tab 23
1994	July 28/94	Bourne & Clarke	Tab 24

47. The Solicitor admits that he filed false Form 2s from 1990-1994 by declaring that he was not indebted to any clients for monies borrowed when he knew he had outstanding loans from these clients. At all material times, Ella Gordon, Corleta Bourne and Norma Clarke were in a solicitor/client relationship with the Solicitor.

Particular 2(d) Receiving Trust funds as a Bankrupt Solicitor

48. The following chart describes the Solicitor's handling of trust funds as a bankrupt solicitor:

DATE	EVENT
June 8/95	The Solicitor made an assignment in bankruptcy. Document Book-Tab 25
June 12/95	Solicitor wrote to Michael Seto, Staff Trustee, stating that he had selected a lawyer to assist with his trust account. Document Book-Tab 26
June 13/95	Letter from Michael Seto, Staff Trustee, to the Solicitor stating that the Solicitor shall not receive trust money and asking the Solicitor to confirm his office procedures accommodating the restrictions on his trust account. Document Book-Tab 27  \$800.00 deposit to the Solicitor's trust bank account #106-279-3 maintained at the Royal Bank of Canada, 1820 Bayview Avenue, Toronto, Ontario. Document Book-Tab 28
June 15/95	\$489.00 deposit to the Solicitor's trust bank account # 106-279-3. Document Book-Tab 29
June 23/95	The Solicitor's faxed a letter dated June 22, 1995 to the bank manager at the location of his mixed trust bank account, advising that Daved Muttart has been nominated to administer his trust account. Document Book-Tab 30
June 27/95	\$1,750.00 deposit to the Solicitor's trust bank account #106 2793. Document book-Tab 31

July 7/95	\$920.00 deposit to the Solicitor's trust bank account #106-279-3. Document Book-Tab 32
July 13/95	Michael Seto, Staff Trustee, received a telephone call from the Royal Bank advising that the bank would not accept cheques written on the Solicitor's trust account and signed by Mr. Muttart because Mr. Muttart had not attended to sign the signature cards.
July 24/95	The Law Society sends a follow up letter to the Solicitor. Document Book-Tab 33
July 27/95	Trust bank account opened in name of Daved Muttart, solicitor on behalf of the Solicitor and balance in the Solicitor's trust account transferred to the new Muttart trust bank account.
Aug. 1/95	The Solicitor advised the auditor that prior to making his assignment in bankruptcy, he was aware that a bankrupt solicitor could not handle trust funds.
Aug. 17/95	The Solicitor replied to Mr. Seto's letter of June 13, 1995. Document Book-Tab 34

49. The Solicitor admits that prior to making his assignment in bankruptcy he was aware that a bankrupt solicitor is prohibited from handling and receiving trust funds.

50. In the above-noted chart, with the exception of the amount of \$500.00 and \$20.00 received in trust on June 13, 1995 and on July 7, 1995 from clients, the monies received in trust from clients were retainers. The amount of \$500.00 included in the \$800.00 deposit of June 13, 1995 was a payment for fees billed on June 1, 1995 that could have been deposited to the Solicitor's general bank account. The amount of \$20.00 was included in the \$920.00 deposit made on July 7, 1995 and received from the client to pay a disbursement. Attached at Tab 35 of the Document Book are copies of the client ledgers for the monies deposited by the Solicitor to his mixed trust account after making his assignment in bankruptcy that confirms the funds deposited to trust were client retainers.

VI. PRIOR DISCIPLINE

51. The Solicitor does not have a discipline history.

DATED at Toronto this 8th day of April, 1997."

Re: Complaint D58/97

"AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D58/97 and is prepared to proceed with a hearing of this matter on July 29, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D58/97 and admits the particular contained therein. The Solicitor admits that the particular together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 7, 1982. He practises as a sole practitioner.

5. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 31, 1996, as required by S.16(2) of Regulation 708 under the Law Society Act.

6. Complaint D61/92 was issued against the Solicitor with respect to his failure to file for the fiscal year ended January 31, 1989. Complaint D61/92 was withdrawn and converted to an invitation to attend based upon the Solicitor's written Undertaking, as follows:

To make my annual filings as required by Section 16 of Regulation 573 made under the Law Society Act within the time period prescribed by that section.

I confirm receipt of a copy of this Undertaking and I understand and agree that this Undertaking may be tendered in evidence in any future disciplinary proceedings.

A copy of the Solicitor's July 13, 1992 Undertaking is attached as Exhibit "A" to this Agreed Statement of Facts.

7. By letter dated August 9, 1996 the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended January 31, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's August 9, 1996 is attached as Exhibit "B" to this Agreed Statement of Facts.

8. A Law Society staff employee spoke with the Solicitor by telephone on August 15, 1996. The Solicitor requested a five week extension to provide the outstanding filing. The Law Society granted the Solicitor the extension. A copy of the Law Society's August 15, 1996 handwritten note is attached as Exhibit "B" to this Agreed Statement of Facts.

9. By letter dated September 9, 1996, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. A copy of the Law Society's letter is attached as Exhibit "C" to this Agreed Statement of Facts.

10. A Law Society staff employee spoke with the Solicitor by telephone on September 24, 1996. The Law Society advised he would provide the outstanding filing by the end of October, 1996. A copy of the Law Society's September 24 handwritten note is attached as Exhibit "C" to this Agreed Statement of Facts.

11. The Solicitor filed for the fiscal year ended January 31, 1996 on March 19, 1997.

V. DISCIPLINE HISTORY

12. The Solicitor does not have a discipline history.

DATED at Toronto this 29th day of July, 1997."

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Clinton Vernel Ellis be suspended for a period of six months and that he pay Law Society costs in the amount of \$2,500 payable over a period of ten months.

REASONS FOR RECOMMENDATION

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Mr. Ellis was called to the Bar in 1982 and has practised as a sole practitioner. From 1984 to 1992, he practised in association with another solicitor, Peter Abrahams. In June of 1985, Mr. Ellis made an assignment into bankruptcy. Since being discharged from bankruptcy, he has practised as a sole general practitioner in North York.

Mr. Ellis stands charged in Complaint D70/96 essentially with borrowing from clients, falsifying Form 2s in respect of same or not disclosing same on Form 2s and being in conflict of interest with two clients in the course of the borrowings.

The dealings in the trust account during the bankruptcy are technical in nature. Complaint D58/97 relates to failure to file during the bankruptcy year. The heart of the matter is the borrowing from the clients, and the implications for the clients, the other solicitors involved and Mr. Ellis. Mr. Ellis borrowed approximately \$227,000 over approximately three and three quarter years from five clients starting in mid-1987, ending at the end of 1990, although the Rules presume vulnerability in respect to lawyers dealing with clients and especially in respect to lawyers who borrow money from clients.

One client, Mrs. Clarke, suffered particular prejudice in respect of a loan of \$60,000 that she made to Mr. Ellis. She was 29 and a single mother with three children, and had sought matrimonial advice. She had a nest egg of approximately \$77,000, sixty of which Mr. Ellis advised her to invest as a third mortgage in his office building so that he could renovate it.

It is clear to us that she had little if any appreciation as to her place in the mortgage chain, and that a third mortgage at the best of times is very vulnerable to the extent that any competent solicitor would caution a client with whom he or she is dealing at arm's length about investing their nest egg in a third mortgage.

Mrs. Clarke was encouraged to invest and the bottom line is that she is an unsecured creditor of a discharged bankrupt. Any hope she has of recovery apparently rides on the lawsuit with Mr. Ellis' former associate, Mr. Abrahams, which is problematic.

Although Mrs. Clarke is not satisfied that she lost her investment under the circumstances which I have just described, she has given evidence, and we have been told by Law Society counsel, that she is satisfied regarding the disposition of the funds from her trust account with Mr. Ellis, which amounts to approximately \$77,000.

The Panel wishes to make it clear that we are not dealing with, and make no finding regarding, the propriety of a lawyer dealing with a trust account for his client, a wife, when another party and likely a client, a husband, may have had an interest in that trust account, where that trust account has been or could have been used to avoid the husband's interest.

Mr. Ellis has no record prior to these findings. There has been no repetition of any of the conduct. Mr. Ellis comes from a modest background in Jamaica. He came to this country with little relative formal education. He worked his way through high-school, through grade 13, through university and through law school. He has prevailed in circumstances that may have discouraged others. The charges of which he has been found guilty stand in stark contrast to his antecedents and his accomplishments.

He has practised as a sole practitioner which has not been particularly financially remunerative. The suspension will be destructive of his practice, which he will have to reconstruct upon the completion of his suspension.

We have reviewed the character material put before us and have no reluctance in concluding that prior to these complaints, Mr. Ellis was a man of sterling character and that this course of conduct, again, is in striking contrast to what we have read and heard about Mr. Ellis.

These findings must be of great personal embarrassment and no doubt will cause substantial pain to Mr. Ellis. He will need the resolve he has demonstrated in the past in acquiring his law degree and building his practice in order to deal with the findings here.

There was some discussion as to whether the six-month joint recommendation was a minimum or a maximum. After full enquiry and consideration of the relevant factors, it is our view that it is a penalty that Mr. Ellis deserves and that the interests of the public are served by imposing it. For these reasons we adopt the joint submission.

Clinton Vernel Ellis was called to the Bar on April 7, 1982.

ALL OF WHICH is respectfully submitted

DATED this 22nd day of October, 1997

Ronald D. Manes, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 6 months and pay the Society's costs in the amount of \$2,500 over a period of 10 months.

Ms. Worley made submissions in support of the joint submissions made at the discipline hearing for the recommended penalty.

Ms. Worley advised that the solicitor requested the suspension begin March 1st, 1998 in order that the solicitor could wind up his practice and that the costs be paid after the solicitor returns to practice.

Counsel for the Society took no position on these requests.

Mr. Greenspan made submissions in support of the recommended penalty and requested that the costs be paid at the rate of \$250 a month with the first payment starting October 1st, 1998.

At page 20 of the Report, first paragraph under the heading "Reasons for Recommendation", the date of "June of 1985" at the end of the 2nd line should be corrected to read "June of 1995".

There were questions from the Bench for Mr. Greenspan.

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

It was moved by Mr. Topp, seconded by Mr. Aaron that the solicitor be granted permission to resign failing which he be disbarred.

Withdrawn

It was moved by Mr. Topp but not put that the adoption of the Report be rescinded and the matter be sent back to a new committee.

It was moved by Ms. Sealy, seconded by Mr. MacKenzie that upon the solicitor's return to practice that he practise under the supervision of another lawyer for a period of 2 years, the supervisor to be approved by the Secretary.

Carried

Convocation agreed to the suspension commencing March 1st, 1998 and the first payment of costs on October 1st, 1998 at the rate of \$250 a month over a 10 month period.

The recommended penalty as amended was voted on and adopted.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months commencing March 1st, 1998, that upon the solicitor's return to practice he practise under the supervision of another lawyer for a period of 2 years, the supervisor to be approved by the Secretary and the first payment of costs begin October 1st, 1998 at the rate of \$250 a month over a 10 month period.

Convocation took a brief recess at 11:10 a.m. and resumed at 11:25 a.m.

Re: Brian Francis ADAMSON - Haliburton

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Scott, Wilson and Ruby and Ms. Angeles and Ms. Cronk withdrew for this matter.

Ms. Cameron 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 11th December, 1997, together with an Affidavit of Service sworn 2nd January, 1998 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th December, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 2nd January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

CLayton C. Ruby, Chair

Paul D. Copeland

Nora Angeles

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

Lesley Cameron  
for the Society

BRIAN FRANCIS ADAMSON  
of the County  
of Haliburton  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: January 15 & September 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On October 4, 1996 Complaint D146/96 was issued, and on November 26, 1996 Complaint D276/96 was issued against Brian Francis Adamson alleging that he was guilty of professional misconduct.

The matter was heard partially *in camera* on January 15, 1997 and September 16, 1997 before this Committee composed of Clayton C. Ruby, Paul Copeland and Nora Angeles. The Solicitor participated in the hearing by teleconference on January 15. He did not attend on September 16, nor was he represented. Lesley Cameron appeared on behalf of the Law Society.

DECISION

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

Complaint D146/96

2. a) He failed to reply to the Law Society's letters dated June 20, 1995 and July 17, 1995 and its telephone calls of July 11 and 13, 1995 regarding a complaint by Charles Appleton;
- b) He failed to serve his client, Charles Appleton in a conscientious, diligent and efficient manner in that he:
  - i) failed to answer his client's reasonable requests for information;
  - ii) failed to follow his client's instructions to obtain a grant of easement over property adjoining the client's property;
- c) He failed to reply to the Law Society's letter dated July 21, 1995 and telephone message left August 14, 1995 regarding a complaint by Donald H. Gillespie;
- d) He failed to serve his client, Donald Gillespie in a conscientious, diligent and efficient manner in that he failed to follow his client's instructions to fulfill the client's undertaking to obtain a survey of a road crossing a property and deed same to Lutterworth Township within a reasonable time after closing;
- e) He failed to reply to the Law Society's letters of November 9, 1995 and January 7, 1996 and telephone calls of December 20, 1995, January 4 and 8, 1996 and April 19, 1996 regarding a complaint by S. Dean Elliott;
- f) He borrowed money from his client, S. Dean Elliott, or in the alternative Deanwood Limited, in the amount of \$25,000 in November of 1990 contrary to Rule 7 of the Rules of Professional Conduct.

Complaint D276/96

2. a) He has breached Section 18 of Regulation 708 under the *Law Society Act* by failing to produce to the Law Society the books and records for his law practice despite:
- i) the Law Society's letters dated March 13, 1996, May 24, 1996 and June 4, 1996; and
  - ii) the Law Society's telephone calls of February 21, 1996, March 18, 1996, April 18, 1996, April 23, 1996, April 30, 1996, May 1, 1996, May 2, 1996 and June 17, 1996.

Evidence

Part of the evidence before the Committee consisted of the following Agreed Statement of Facts signed by the Solicitor in this draft form and accepted by the Committee:

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D146/96 and D276/96 and is prepared to proceed with a hearing of this matter on January 15 and 16, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D146/96 and D276/96 and this agreed statement of facts and admits the particulars contained in Complaints D146/96 and D276/96. The Solicitor also admits that the facts alleged in these complaints as supported by the facts set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 6, 1979. He has been suspended from practice for non-payment of his Errors and Omissions Insurance levy since May 25, 1995.

D146/96

- b) he failed to serve his client, Charles Appleton in a conscientious, diligent and efficient manner in that he:
- i) failed to answer his client's reasonable requests for information;
  - ii) failed to follow his client's instructions to obtain a grant of easement over property adjoining the client's property;

5. By letter dated June 2, 1994 and faxed on June 3, 1994, the Solicitor wrote to Mr. and Mrs. Charles Appleton (the "Appletons") offering his services ((Tab -, Document Book). The Solicitor advised that he was acting for the vendor of a cottage located next to the Appleton's cottage property in the Township of Lutterworth, in the County of Haliburton. The Solicitor advised that there was a problem with the right of way to the Appletons' cottage and to neighbouring cottages. The Solicitor offered to remedy the problem and requested a \$300 retainer.

6. The Appletons accepted the Solicitor's offer and by facsimile transmission dated June 3, 1994, forwarded a witnessed authorization appointing the Solicitor as their agent for the purposes of a Land Division Application. By letter dated June 4, 1994, the Appletons forwarded an original authorization and cheque for \$300 (Tab -, Document Book).

7. In August of 1994, Mr. Appleton called the Solicitor four times and left messages with his secretary asking him to return the call. The Solicitor did not return any of these calls.
8. By letter dated January, 1995, Mr. Appleton wrote to the Solicitor indicating that he was anxious to learn how things stood and requesting that the Solicitor respond. The Solicitor did not reply. A copy of the gist of the letter sent is at Tab - of the Document Book.
9. On February 3, 1995, Mr. Appleton telephoned the Solicitor from his winter residence in British Columbia. Mr. Appleton was told that the Solicitor was on another line. At Tab - of the Document Book is a copy of the Appletons' telephone bill dated February 20, 1995 from BCTEL which shows this telephone call to the Solicitor's office in Minden, Ontario. The Solicitor did not return this call.
10. On February 16, 1995, Mr. Appleton faxed a letter to the Solicitor, again requesting a response and advice as to what progress had been made (Tab -, Document Book). The Solicitor did not reply.
11. On March 14, 1995, Mr. Appleton again telephoned the Solicitor's office but was told that he was on another line. At Tab - of the Document Book is a copy of the Appleton' telephone bill dated March 20, 1995 from BCTEL which shows this telephone call to the Solicitor's office in Minden, Ontario. The Solicitor did not return this call.
12. By letter dated May 11, 1995, sent by facsimile transmission and by registered mail, Mr. Appleton again wrote to the Solicitor setting out a history of his efforts to reach him and requesting a response on or before May 25, 1995. At Tab - of the Document Book are this letter and the Acknowledge of Receipt of Registered Item card showing that the letter was picked up on May 16, 1995. The Solicitor did not reply.
13. By letter dated May 30, 1995, Mr. Appleton wrote to the Law Society setting out the history of the proceedings and enclosing copies of correspondence (Tab -, Document Book).
14. The matter was finally resolved in June of 1996, when counsel for the purchaser of the cottage next to the Appleton' cottage did the work, with the consent of the Appleton. The \$300 retainer was applied to the resulting bill.
  - a) he failed to reply to the Law Society's letters dated June 20, 1995 and July 17, 1995 and its telephone calls of July 11 and 13, 1995 regarding a complaint by Charles Appleton;
15. By letter dated June 20, 1995, a Complaints Officer in the Law Society wrote to the Solicitor requesting the Solicitor's comments on Mr. Appleton's complaint (Tab -, Document Book). The Solicitor did not reply.
16. On July 11, 1995, a Society representative called the Solicitor and left a message asking that the Solicitor return the call. The Solicitor did not return this telephone call.
17. On July 13, 1995, a Society representative again called the Solicitor's office and left a message asking that the Solicitor return the call. The Solicitor did not return this telephone call. The handwritten notes of the Society's telephone calls to the Solicitor's office on July 11 and 13, 1995 are at Tab - of the Document Book.
18. By registered letter dated July 17, 1995, a Complaints Officer in the Society again wrote to the Solicitor requesting a response. A copy of this letter and the Acknowledgement of Receipt of a Registered Item card showing that the letter was picked up on July 24, 1995 are at Tab - of the Document Book.
  - d) he failed to serve his client, Donald Gillespie in a conscientious, diligent and efficient manner in that he failed to follow his client's instructions to fulfill the client's undertaking to obtain a survey of a road crossing a property and deed same to Lutterworth Township within a reasonable time after closing;

19. In 1987, the Solicitor acted for Mr. Gillespie on the sale of his house in the Township of Lutterworth, in the County of Haliburton. In order to transfer title, it was necessary for Mr. Gillespie to undertake to obtain and register a survey of a Township road crossing and to deed this road crossing to the Corporation of the Township of Lutterworth within a reasonable time after closing. At Tab - of the Document Book is an undertaking signed by Mr. Gillespie on October 6, 1987 in which he undertakes to do so and to provide a correcting deed, if necessary, to the purchasers after the conveyance to the Municipality had been registered.

20. On closing, the Solicitor withheld \$2,500 to cover his estimated legal fees to fulfill the undertaking given by Mr. Gillespie. At Tab - of the Document Book is a reporting letter dated October 7, 1987 which indicates that the Solicitor held back this sum for this purpose.

21. By letter dated July 12, 1995, Donald Gillespie wrote to the Society complaining about the Solicitor's conduct (Tab -, Document Book).

22. By letter dated November 8, 1995, the Solicitor wrote to Mr. Gillespie advising that he had closed his law practice in Minden, that he had paid the surveyor the sum of \$2,000 on February 2, 1988 and enclosing a cheque in the sum of \$559.79, representing the balance held in trust for Mr. Gillespie (Tab -, Document Book).

23. Mr. Gillespie advises that the surveyor who did the survey has now left the area and refuses to sign the survey. The company which took over the surveyor's business has advised Mr. Gillespie that it will require an additional \$1,000 in order to review and sign the survey. Mr. Gillespie also advises that the Township has no record of receiving the preliminary survey.

c) he failed to reply to the Law Society's letters dated July 21, 1995 and telephone message left August 14, 1995 regarding a complaint by Donald H. Gillespie;

24. By letter dated July 21, 1995, a Complaints Office in the Law Society wrote to the Solicitor enclosing Mr. Gillespie's letter of complaint dated July 12, 1995 and requesting the Solicitor's comments (Tab -, Document Book). The Solicitor did not reply.

25. On August 9 and 10, 1995, a Society representative called the Solicitor at his office number and at a home number supplied by Bell Canada. There was no answer at either number.

26. On August 14, 1995, a Society representative again called the Solicitor's office and residence and left a message at the Solicitor's residence with his son "Drew", asking the Solicitor to call. At Tab -, Document Book is a copy of the Society representative's handwritten notes of all telephone calls or attempted telephone calls to the Solicitor concerning Mr. Gillespie's complaint.

27. By registered letter dated August 15, 1995, a Complaints Officer again wrote to the Solicitor requesting his comments and advising that if no written response was received, the matter would be referred to Discipline. At Tab - of the Document Book is a copy of this letter and the envelope which indicates that the letter was returned unclaimed.

f) he borrowed money from his client, S. Dean Elliott, or in the alternative Deanwood Limited, in the amount of \$25,000 in November of 1990 contrary to Rule 7 of the Rules of Professional Conduct.

28. In or about November of 1990, S. Dean Elliott, a Justice of the Peace in Minden, Ontario was approached by the Solicitor, requesting a loan. The Solicitor states that the initial approach was made on behalf of a client to arrange for a mortgage. The Solicitor states that Mr. Elliott indicated that he would loan the Solicitor the sum of \$25,000 in lieu of lending it directly to the client and that the Solicitor did not consider the arrangement to be a personal loan to the Solicitor as the money was borrowed on behalf of the client. Mr. Elliott states that he understood that \$25,000 was required for a development project in the Muskoka area that the Solicitor and another person were actively engaged in.

29. In exchange for the loan, Mr. Elliott received a signed promissory note from the Solicitor. All payments were to be made by the Solicitor until the amount owing was renegotiated as a mortgage.

30. Mr. Elliott states that at the time he was asked to provide the loan he and his company, Deanwood Limited, had been clients of the Solicitor for over ten years. The Solicitor states that while he did act for Deanwood Limited in 1982, he did not act for Mr. Elliott personally prior to 1986.

31. In December of 1992, security was provided for the loan by a second mortgage on a rental property owned by the Solicitor, registered as instrument #188790 on December 23, 1992 (Tab 1-, Document Book) and a third mortgage on his office property, registered as #188791 on December 23, 1992 (Tab -, Document Book).

32. In March and April of 1994, the Solicitor's monthly interest cheques were returned for not sufficient funds (Tab -, Document Book). By letter dated August 17, 1994, Mr. Elliott requested that the mortgages be paid by August 19, 1994 (Tab -, Document Book).

33. By letter dated August 19, 1994, the Solicitor responded advising that he was not in a position to pay the mortgages on two days notice (Tab -, Document Book).

34. By letter dated September 13, 1995, Mr. Elliott complained to the Law Society (Tab -, Document Book).

35. By letter dated September 25, 1995, a Staff Lawyer in the Complaints Department of the Society wrote to the Solicitor enclosing Mr. Elliott's correspondence dated September 13, 1995 and requesting the Solicitor's comments (Tab -, Document Book).

36. By letter dated October 25, 1995, the Solicitor responded to the Society advising that he had borrowed the money from Mr. Elliott on behalf of a client, confirming that Mr. Elliott was a client at the time and advising that Mr. Elliott is a very astute businessman who did not require legal advice concerning the loan (Tab -, Document Book). The Solicitor also advised that Mr. Elliott was satisfied with the promissory note as security for the loan which provided for an interest rate of 18% and a monthly cash bonus of \$600. The letter indicated that after approximately two years of payments to Mr. Elliott on the terms set out in the promissory note, the Solicitor advised Mr. Elliott that he could not continue these payments and the mortgages were provided.

e) he failed to reply to the Law Society's letters of November 9, 1995 and January 7, 1996 and telephone calls of December 20, 1995, January 4 and 8, 1996 and April 19, 1996 regarding a complaint by S. Dean Elliott;

37. By letter dated November 9, 1995, a staff lawyer in the Complaints Department wrote to the Solicitor requesting the name of the client on behalf of whom the Solicitor had borrowed the \$25,000, copies of the promissory note, the cancelled cheque in favour of his client and other documents (Tab -, Document Book). The letter also requested any information which might support the Solicitor's position that Mr. Elliott's loan was not really made to the Solicitor but to the Solicitor's client. The Solicitor did not reply.

38. On December 5, 1995, a Society representative attempted to reach the Solicitor at his office number but there was no answer. On December 20, 1995, the Society representative again tried to reach the Solicitor at both his business and residence telephone numbers and left a message at the office number requesting that he return the call and advising that no response had been received to the Society's letter of November 9, 1995 (Tab -, Document Book).

39. No response was received and on January 4, 1996, the Society's representative again telephoned the Solicitor and left a message requesting that he return the call (Tab -, Document Book). No reply was received.

40. On January 8, 1996, the Society's representative again called the Solicitor and left a message requesting that he return the call (Tab 22, Document Book). No reply was received.

41. By registered letter dated January 17, 1996, the Law Society wrote to the Solicitor requesting a written response within seven days, failing which the matter would be referred to Discipline. This letter was picked up on January 30, 1996, as indicated by the Acknowledgement of Receipt of a Registered Item card (Tab -, Document Book). No reply was received.

42. On April 19, 1996, a Society representative again called the Solicitor and left a message asking him to return the call (Tab -, Document Book). No reply was received.

D276/96

a) he has breached Section 18 of Regulation 708 under the *Law Society Act*; by failing to produce to the Law Society the books and records for his law practice despite:

i) the Law Society's letters dated March 13, 1996, May 24, 1996 and June 4, 1996 and

ii) the Law Society's telephone calls of February 21, 1996, March 18, 1996, April 18, 1996, April 23, 1996, April 30, 1996, May 1, 1996, May 2, 1996 and June 17, 1996.

43. On or about December 20, 1994, the Solicitor was sent a first notice that his Errors and Omissions Insurance Levy was due for the period January 1, 1995 to June 30, 1995. A copy of a sample first notice is at Tab - of the Document Book.

44. On or about April 10, 1995, the Solicitor was sent a second and final notice that his Errors and Omissions Insurance Levy was due. A sample second and final notice is at Tab - of the Document Book.

45. The Solicitor did not pay his Errors and Omissions Insurance Levy and by letter dated May 29, 1995, the Solicitor was advised that he was suspended effective May 26, 1995. At Tab - of the Document Book is a copy of this letter and the Acknowledgement of Receipt of a Registered Item card which indicates that the letter was picked up on June 2, 1995.

46. On February 21, 1996, a representative of the Society's Audit Department called the Solicitor and left a message that she would like to speak to the Solicitor or meet with him. A copy of her handwritten notes are at Tab - of the Document Book.

47. On March 7, 1996, the Solicitor called the Society's Audit representative and agreed to meet on March 21, 1996 to review his books and records (Tab -, Document Book). He requested that she call him the next week to set up a meeting place as he had just moved all of his documents from the office and needed a chance to get them organized.

48. By letter dated March 13, 1996, the Society's Audit representative wrote to the Solicitor outlining the documents which she wished to see at their meeting of March 21, 1996 (Tab -, Document Book).

49. On March 18, 1996, the Society's Audit representative called the Solicitor, who indicated that he had not received her letter and that all his information was in 17 boxes and not organized. As a result of this conversation, the letter dated March 13, 1996 was sent to the Solicitor by fax on March 18, 1996 (Tab -, Document Book).

50. On April 18, 1996, the Society's Audit representative again called the Solicitor and left a message on an answering machine. The Solicitor did not return this call.

51. On April 23, 1996, the Society's Audit representative called the Solicitor at home and an appointment was set up for May 2, 1996 for a meeting.

52. On April 30, 1996, the Society's Audit representative called the Solicitor to confirm the appointment and to get directions. A number was left on the Solicitor's business number requesting that he return the call.

53. He did not return the call and on May 1, 1996, the Society's Audit representative telephoned the Solicitor's residence at which there was no answer. She also left a message on the office answering machine requesting that he return her call. The Solicitor called her back and advised that he had been busy working on his income tax as he was two years in arrears, that he had not been able to do any work on the trust information and that he would need the balance of that week to complete his income tax.

54. On May 2, 1996, the Society's Audit representative again called back and left a message on the Solicitor's answering machine acknowledging his message of May 1, 1996 that he was not ready for the meeting and suggesting Tuesday or Thursday of the following week and requesting that the Solicitor return her call. The Solicitor did not return this call. At Tab - of the Document Book are the Society representative's handwritten notes of the telephone calls to and from the Solicitor on March 18, April 18, 23, 30, May 1 and 2, 1996.

55. On May 23, 1996, the Society's representative again called the Solicitor at his residence and business number and there was no answer at either number (Tab -, Document Book).

56. By letter dated May 24, 1996, the Society's Audit representative wrote to the Solicitor requesting that he contact her immediately in order to arrange for a review of the documents as requested in her letter of March 13, 1996 and advising that a failure to reply would be regarded as a failure to cooperate with the Society and referred to Discipline (Tab -, Document Book). No reply was received.

57. By registered letter dated June 4, 1996, the Society's Audit representative again wrote to the Solicitor advising that unless she heard from the Solicitor by June 12, 1996, the matter would be referred to Discipline. This letter was signed for on June 10, 1996 (Tab -, Document Book). No reply was received.

58. On June 17, 1996, the Society's Audit representative again called the Solicitor and left a message requesting that the Solicitor contact her (Tab -, Document Book). The Solicitor did not do so.

#### V. DISCIPLINE HISTORY

59. On November 23, 1995, the Solicitor was found guilty of professional misconduct for failing to file his forms with the Society within six months of the termination of his fiscal year ending April 30, 1994. He was suspended for one month and indefinitely thereafter until his filings were made, such suspension to commence at the end of his current suspension.

60. On January 25, 1996, the Solicitor was found guilty of professional misconduct for failing to serve his clients and failing to reply to the Law Society. He was given a 3-month suspension consecutive to the current administrative suspension and consecutive to the one month plus indefinite suspension imposed by Convocation in November of 1995.

DATED at Toronto this 15th day of January, 1997."

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Brian Francis Adamson be suspended for a period of six months definite and indefinitely thereafter until he replies to the Law Society and until his books and records are produced.

REASONS FOR RECOMMENDATION

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This is a case where the conduct of a solicitor needs careful evaluation. The counts that are established involve matters which are not excessively serious in terms of the moral culpability and professional lapses involved, together with a series of non-replies and non-responsibility to the Law Society itself. The latter if unexplained, would lead to an inference of ungovernability.

In this case, we have received an explanation by way of a phone conversation with the Solicitor. (See appended transcript of the proceedings dated January 15, 1997). The Committee considers this material to be credible and reliable and we take it into account in negating the need for a finding equivalent to ungovernability or penalty based upon that assumption.

The Solicitor has a discipline history as referred to above in the Agreed Statement of Facts. The Committee regrets that further contact with Mr. Adamson has not been achieved. We were advised that it seems likely that he has sold his home and moved from Minden, Ontario. His telephone is no longer connected and his present whereabouts are unknown. There is no indication that he is practising law, nor indeed that he has in the past practised while under suspension.

In these circumstances, we think it appropriate to accept the submission of the Law Society that the appropriate penalty to recommend to Convocation is a suspension of a duration of six months definite to be followed thereafter by an indefinite suspension until he replies to the Law Society and until his books and records are produced.

We do not recommend that he be given permission to resign but Convocation should know that we have considered that question in the light of a comment in a letter from the Solicitor directly to the Law Society at an earlier stage where he indicated that he would like to resign. We would think that that is his choice to make and that if he wants to resign, that decision should be facilitated but we do not make that part of our recommendation to Convocation in a formal way.

Brian Francis Adamson was called to the Bar on April 6, 1979.

ALL OF WHICH is respectfully submitted

DATED this 11th day of December, 1997

Clayton C. Ruby, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 6 months definite and indefinitely thereafter until he replies to the Law Society and until his books and records are produced.

A letter from the solicitor requesting permission to resign was circulated to the Bench.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

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

Carried

Duty Counsel indicated he had not been able to reach the solicitor.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months definite and indefinitely thereafter until he replied to the Society and his books and records were produced.

Re: David Joseph COLEMAN - Toronto

The Secretary placed the matter before Convocation.

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

Ms. Katherine Seymour appeared for the Society and Mr. Monahan, Duty Counsel appeared on behalf of the solicitor. The solicitor was not present.

Convocation had before it the Report of the Discipline Committee dated 25th November, 1997, together with an Affidavit of Service sworn 15th December, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th December, 1997 (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 C. Topp

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

Audrey Cado  
for the Society

DAVID JOSEPH COLMAN  
of the City  
of Toronto  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: June 11, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On December 16, 1996 Complaint D345/96 was issued, and on April 8, 1997 Complaint D168/97 was issued against David Joseph Colman alleging that he was guilty of professional misconduct.

The matter was heard in public on June 11, 1997 before Robert C. Topp sitting as a single benchman. The Solicitor did not attend the hearing nor was he represented. Audrey Cado appeared on behalf of the Law Society.

### DECISION

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

#### Complaint D345/96

2. a) He failed to produce to the Law Society the books and records for his law practice despite a Law Society Examiner's visit on August 7, 1996, Law Society letters dated August 21, 1996, August 30, 1996, September 16, 1996 and October 2, 1996 and telephone requests on August 14, 1996, August 16, 1996 and October 10, 1996.

#### Complaint D168/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

#### Service Issue

The Solicitor failed to attend. As a result, the Law Society established via Affidavit evidence that the Solicitor had been served at his last known address and that the material was returned to the Law Society of Upper Canada with the notation 'moved'. Your Committee was satisfied that the Solicitor was served at his last known address and proceeded in the absence of the Solicitor.

#### The Facts

The Law Society established by the Affidavit evidence of Anita McCann that she is an auditor with the Law Society of Upper Canada and that she attended at the Solicitor's office on August 7th, 1996 and finding the office closed, she left a note and asked the Solicitor to contact her by telephone.

The Solicitor left a voice mail message for Ms. McCann on August 7th, 1996 and Ms. McCann spoke with the Solicitor on August 8th, 1996 - an appointment was scheduled for August 15th, 1996 to review his books and records.

On or about August 13th, 1996 the Solicitor via voice message cancelled the appointment with Ms. McCann "as he was required in Court". On August 14th, 1996 Ms. McCann left a voice mail message for the Solicitor requesting his availability and also by facsimile transmission a request for his trust reconciliation for June 1996. No response was received to either.

A further telephone message was left on the Solicitor's answering machine on August 16th, 1996 requesting a return call and reminding him that he had not forwarded his up-to-date trust reconciliation. Again on August 21st, 1996 by both registered and ordinary mail, the Society again requested information from the Solicitor. That letter was not returned to the Law Society.

On August 29th, 1996 the Solicitor via voice mail advised the Society that he would be available to have his books and records reviewed on September 26th, 1996 anytime during the day. The Society confirmed that the auditors would attend on September 26th, 1996 between 9:00 and 9:30 a.m. This message was sent by facsimile transmission and by ordinary mail. On September 16th, 1996 the Society again advised the Solicitor they were awaiting receipt of his trust bank reconciliations and no reply was received.

On September 25th, 1996 the Solicitor cancelled his appointment for September 26th, 1996 alleging he had "the flu".

By registered mail and facsimile transmission dated October 2nd, 1996 the Solicitor was reminded of his obligations.

On October 10th, 1996 another message was left for the Solicitor on his answering machine requesting responses to the letters of August 21st, August 30th and September 16th, 1996. The Solicitor was also advised at that time, should he fail to respond by 4:00 p.m. of that day, the matter would be referred to the Discipline Committee.

To the date of the hearing, the Solicitor has not produced his books and records to the Audit Department.

In regard to the allegation that he failed to file financial reporting material for the year ended January 31st, 1996 evidence was lead by Affidavit of Irene Andrighetti wherein she established that notwithstanding sufficient notice, the Solicitor had failed to provide a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed.

At the time of the hearing, the Solicitor had failed to complete his financial reporting material.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that David Joseph Colman be reprimanded in Convocation if he has made his filing and produced the books and records of his practice by the time this matter is considered by Convocation, failing which that he be suspended for one month, and month to month thereafter until he has made his filing and produced the books and records of his practice to the satisfaction of the Law Society. Such suspension to commence at the conclusion of any administrative suspension. The Committee further recommends that the Solicitor pay Law Society costs in the amount of \$800.

#### REASONS FOR RECOMMENDATION

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Your Committee finds that the Solicitor appears to be continuing to practise while failing to produce his books and records and while failing to comply with the legitimate request of the Law Society to review his financial records by audit.

In this case, it is not possible to determine whether the Solicitor is ungovernable or whether he is simply unable to produce the books and records, but it is clear that the Solicitor is close to ungovernability and unless he complies with his professional obligations, a penalty may need to be imposed in the future which terminates the Solicitor's membership in the Society.

At this time however, your Committee is satisfied that if the Solicitor has made his filings and produced the books and records by the time this matter is considered by Convocation that he should be reprimanded and failing that he should be suspended month to month indefinitely until he has complied with his financial reporting requirements and produced the books and records in full.

Your Committee further recommends that the Solicitor pay the Law Society costs in the sum of \$800.

The suspension recommended to Convocation in the absence of the production of the financial reporting material will commence at the conclusion of any administrative suspension.

David Joseph Colman was called to the Bar on February 9, 1993.

ALL OF WHICH is respectfully submitted

DATED this 25th day of November, 1997

Robert C. Topp

Ms. Seymour advised that it was the Society's position that the matter could proceed that the solicitor had failed to produce his books and records in addition to his failure to file.

Mr. Monahan was in agreement.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if he has made his filing and produced the books and records of his practice, failing which he be suspended for a period of 1 month and month to month thereafter until he has made his filing and produced the books and records to the satisfaction of the Law Society, such suspension to commence at the conclusion of any administrative suspension and further that the solicitor pay costs in the amount of \$800.

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

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

Carried

Re: Alice Dianne CUSTANCE - Russell

The Secretary placed the matter before Convocation.

Ms. Backhouse and Ms. Cronk withdrew.

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

The Report of the Discipline Committee dated October 24th, 1997 together with the Affidavit of Service was filed as Exhibit 1.

Mr. Monahan, Duty Counsel raised the issue of the new filing procedures under Regulation 708.

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

It was moved by Mr. Scott, seconded by Ms. Ross that the matter be adjourned to the Convocation Management Tribunal.

Carried

Counsel, Duty Counsel, the reporter and the public were recalled and informed of Convocation's decision that the matter be adjourned to the next Convocation Management Tribunal.

The following Reports and Decisions were also adjourned on the same basis:

Michael Brian DELMAN and Laurie Ann DUPUIS

Re: Robert Wesley KEW - Northumberland

The Secretary placed the matter before Convocation.

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

Ms. Seymour 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 25th November, 1997 addressed to the solicitor at 31 Main Street, Warkworth, Ontario, together with the Affidavit of Service sworn 15th December, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th December, 1997 (marked Exhibit 1), together with the Report of the Discipline Committee addressed to the solicitor at Percy Township, R. R. 1, Warkworth, Ontario, together with the Affidavit of Service sworn 15th December, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th December, 1997. Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Robert C. Topp

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

Audrey Cado  
for the Society

ROBERT WESLEY KEW  
of the County  
of Northumberland  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: June 11, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 5, 1997 Complaint D86/97 was issued against Robert Wesley Kew alleging that he was guilty of professional misconduct.

The matter was heard in public on June 11, 1997 before Robert C. Topp sitting as a single benchman. The Solicitor did not attend the hearing, nor was he represented. Audrey Cado appeared on behalf of the Law Society.

#### DECISION

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

##### Complaint D86/97

2. a) He failed to file with the Society since the commencement of his sole practice on January 12, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 of Regulation 708 made pursuant to the *Law Society Act*.

##### Service

In the absence of the Solicitor attending the hearing, your Committee was presented with evidence of service of the Complaint at the last known address of the Solicitor and therefore the hearing was held in the absence of the Solicitor.

##### The Facts

The facts in this matter were established by the Affidavit of Irene Andrighetti and the Affidavit of Nadine Freed.

The Solicitor Robert Wesley Kew began to practise as a sole practitioner on January 12, 1995. Since that date, he has not filed the appropriate forms with the Forms Service Department.

The Solicitor was contacted by the Law Society of Upper Canada on June 10, 1996 by ordinary mail. No response was received from the Solicitor at that time.

On July 12, 1996 the Law Society again advised the Solicitor to take the necessary steps to bring his filings up to date and that failure to do so may result in disciplinary action being taken against him. The Solicitor failed to respond to that correspondence.

In fact, the Law Society also telephoned the Solicitor and left a message at his office on October 11, 1996 requesting he return the call. That call was not returned by the Solicitor.

The evidence clearly establishes that the Solicitor has failed to file a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16 of Regulation 708 made pursuant to the Law Society Act.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Robert Wesley Kew be suspended for a period of six months and continuing thereafter until he has made his filings to the satisfaction of the Law Society, and that he pay Law Society costs in the amount of \$800.

REASONS FOR RECOMMENDATION

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The facts establish that the Solicitor while a sole practitioner has failed to comply with his financial reporting requirements.

This Solicitor has not co-operated at all with the Law Society nor did he attend for his hearing.

At the same time, it is clear that on October 11, 1996 the Solicitor was maintaining a practice and was engaged in the practice of law. The fact that the Solicitor has failed to file any financial information since the commencement of his sole practice on January 12, 1995 is worrisome in the extreme. Your Committee believes that the only appropriate remedy under these circumstances is a suspension for six months and continuing thereafter until he has made his filings to the satisfaction of the Law Society and that he pay the Law Society costs in the amount of \$800.

This does not appear to be a case of impecuniosity, rather, on its face, appears to be a clear flouting of the financial reporting requirements. In addition, if this conduct were to continue, it appears that the Solicitor is totally ungovernable.

Robert Wesley Kew was called to the Bar on March 23, 1973.

ALL OF WHICH is respectfully submitted

DATED this 25th day of November, 1997

Robert C. Topp

Ms. Seymour addressed the question of an adjournment and advised that it was the Society's position that the matter should proceed.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Bobesich, seconded by Mr. Gottlieb that the matter be adjourned.

Lost

Counsel, the reporter and the public were recalled and advised that Convocation would proceed.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 6 months and continuing thereafter until he has made his filings to the satisfaction of the Law Society and that he pay costs in the amount of \$800.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

It was moved by Mr. Scott, seconded by Mr. Manes that the solicitor be reprimanded if he has made his filings on the date fixed at the next Convocation Management Tribunal failing which he be suspended for a period of 1 month definite and indefinitely thereafter until his filings are made, such suspension to commence at the conclusion of any administrative suspension.

Carried

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded if he has made his filings on the date fixed at the next Convocation Management Tribunal failing which the solicitor be suspended for a period of 1 month definite and indefinitely thereafter until his filings are made, such suspension to commence at the conclusion of any administrative suspension.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:05 P.M.

CONVOCATION RESUMED AT 2:15 P.M.

PRESENT:

The Treasurer, Aaron, Adams, Angeles, Arnup, Bobesich, Carey, Carpenter-Gunn, Carter, Chahbar, Cole, Gottlieb, MacKenzie, Puccini, Ross, Ruby, Scott, Sealy, Swaye, Topp, Wilson and Wright.

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IN PUBLIC

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Re: Donald Isamu KIMURA - Toronto

The Secretary placed the matter before Convocation.

Messrs. Wilson, Ruby, Topp and Gottlieb withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 27th July, 1997, together with an Affidavit of Service sworn 21st August, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th August, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 25th August, 1997 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Clayton C. Ruby, Chair  
Gary L. Gottlieb, Q.C.  
Robert C. Topp

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

Christina Budweth  
for the Society

DONALD ISAMU KIMURA  
of the City  
of Toronto  
a barrister and solicitor

Melvin I. Antflyck  
for the solicitor

Heard: July 15, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 18, 1997 Complaint D21/97 was issued against Donald Isamu Kimura alleging that he was guilty of professional misconduct.

The matter was heard in public on July 15, 1997 before this Committee composed of Clayton C. Ruby, Chair, Gary L. Gottlieb, Q.C. and Robert C. Topp. The Solicitor attended the hearing and was represented by Melvin I. Antflyck. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

Complaint D21/97

2. a) During the period May 11, 1995 to February 7, 1996, he misappropriated \$52,100.00, more or less, from his client Patricia Hargrave;
- b) He misapplied the sum of \$15,000.00, more or less, on September 19, 1995, from his mixed trust account in favour of his client George Reesor and subsequently debited said amount from the trust ledger of his client Patricia Hargrave without Ms. Hargrave's consent or authority;
- c) In the period December 21, 1994 to January 3, 1995, he breached section 14(8)(c) of Regulation 708 of the *Law Society Act* by drawing the sum of \$12,500.00 from his trust account towards payment of his fees without first having delivered a billing or other written notification to his client, Patricia Hargrave;

- d) During the period May 24, 1995 to March 12, 1996, he misappropriated \$37,800.00, more or less, from the mixed trust account;
- e) During the period August 16, 1995 to January 18, 1996, he misappropriated \$107,212.37, more or less, from his mixed trust account by causing a trust account held for personal purposes (Delta Temp) to be in overdraft by \$107,212.37;
- f) During the period December 20, 1995 to February 9, 1996, he misappropriated \$16,825, more or less, from his client George Reesor;
- g) He breached section 14(8)(c) of Regulation 708 of the *Law Society Act* by drawing the sum of \$13,425 from his trust account towards payment of his fees without first having delivered a billing or other written notification to his client, George Reesor; and
- h) During the period December 1995 to present, he failed to maintain his books and records in accordance with the provisions of section 15 Regulation 708 under the *Law Society Act*.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D21/97 and is prepared to proceed with a hearing of this matter on June 17 and 18, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D21/97 and admits the particulars contained therein. The Solicitor admits that the particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. BACKGROUND

4. The Solicitor is 54 years of age. He was called to the Bar in 1971. After his call he commenced a general practice. The Solicitor closed his office on October 1, 1996 as a result of the Law Society's audit. He wound up his practice on October 31, 1996 and since that time has engaged in business activity outside of the practice of law. The Solicitor has confirmed his non-practising status by an undertaking to the Society not to practice dated April 10, 1997.

V. FACTS

Background of the Hargrave Estate

5. The Law Society's investigation into the Solicitor's practice was initiated as a result of a complaint by a fellow solicitor, Douglas Best, counsel for James Hargrave the son of Patricia Hargrave. The Solicitor was at times material to this complaint the solicitor for Patricia Hargrave.

6. Patricia Hargrave is the surviving spouse of Donald Hargrave. Her son James is the sole executor of the estate of his late father ("the Estate"). Under the terms of Mr. Hargrave's will, Patricia Hargrave was to receive a life interest in her husband's Estate. As a result of the inadvertent mischaracterization of Estate income, Mrs. Hargrave incurred a potential indebtedness of the Estate to Revenue Canada. As security for this potential indebtedness, Mrs. Hargrave agreed to deposit \$125,000.00 in an interest bearing account to be held in trust by the Solicitor until the indebtedness could be determined. The deposit took place in January of 1995, the source of funds being the sale of Mrs. Hargrave's home. An additional \$10,000.00 was also to be held by the Solicitor to secure any future legal fees incurred by the firm of Miller, Thompson, Mr. Best's firm. A copy of the indemnity is attached as Exhibit 1 to this agreed statement of facts. A copy of Mrs. Hargrave's undertaking to indemnify the Estate is attached as Exhibit 2 to this agreed statement of facts.

Particular 2(c) - Payment of fees prior to fee billing - Patricia Hargrave

7. The Solicitor's trust ledgers indicate that on December 21, 1994 he received \$12,500.00 from Patricia Hargrave. On the same day, \$10,700.00 was transferred from the Solicitor's trust to his general account with no fee billing to support this transfer.

8. On January 3, 1995, a further \$1,800.00 was transferred to the general account with no fee billing. The file contains an account dated January 30, 1995 in which the Solicitor sets out fees owing by the Estate in the amount of \$21,293.00, exclusive of disbursements. The fee billing is not recorded in the file until March 31, 1995 and has never been received by Mrs. Hargrave.

9. The Solicitor admits that the course of conduct outlined above supports a finding of professional misconduct in regard to particular 2(c) of the complaint.

Particular 2(a) - Misappropriation \$52,000.00 from his client, Patricia Hargrave

10. The sale of Patricia Hargrave's home closed on January 27, 1995. On that date \$355,814.31 was transferred to the Solicitor's trust account. By reporting letter dated January 30, 1995, a copy of which is attached as Exhibit 3 to this agreed statement of facts, the Solicitor confirmed that he would invest the \$135,000.00 that Mrs. Hargrave had undertaken to make available to the Estate in a Canadian chartered bank as soon as possible. He also confirmed that the security could be released once Revenue Canada had provided the Estate with a certificate that they did not intend to reassess. Mrs. Hargrave would testify she did not receive a copy of the reporting letter. The Solicitor will not contest this evidence.

11. Following requests by Mr. Best contained in letters of January 31 and April 5, 1995, the Solicitor provided information to Mr. Best regarding the placement of Mrs. Hargrave's funds with the Canadian Imperial Bank of Commerce ("CIBC") in Stouffville. A copy of that letter is attached as Exhibit 4 to this agreed statement of facts.

12. The Solicitor's file contains a confirmation of renewal from the CIBC for the \$10,000.00 certificate. The certificate was not, however, renewed. The funds were transferred to the Solicitor's mixed trust account. The same arrangements were made with respect to the \$125,000.00 certificate which matured on August 1, 1995. During the period May 11, 1995 to February 7, 1996, the Solicitor made payments from the trust account totalling \$52,100.00 for his own purposes. A schedule evidencing these payments is attached as Exhibit 5 to this agreed statement of facts.

13. The Solicitor admits that the course of conduct outlined above supports a finding of professional misconduct in regard to particular 2(a) of the complaint

Particular 2(b) - Misapplication \$15,000.00

14. On September 19, 1995, the Solicitor made a payment of \$15,000.00 to Jonathan Griffiths from the trust ledger of Patricia Hargrave on behalf of George Reesor. This payment was not authorized by either James Hargrave or Patricia Hargrave.

15. The Solicitor admits that the course of conduct outlined above supports a finding of professional misconduct in regard to particular 2(b) of the complaint

Hargrave - Additional Facts

16. On February 23, 1996, Steven Frederick of RBC Dominion Securities contacted the Solicitor regarding the financial affairs of Mrs. Hargrave, at the request of Mrs. Hargrave. A copy of Mr. Frederick's letter is attached as Exhibit 6 to this agreed statement of facts. The Solicitor responded by letter attached as Exhibit 7 to this agreed statement of facts. In his March 15, 1996 letter, the Solicitor stated that amounts had been paid to Miller, Thompson and that a payment had also been made regarding an Anderson claim. The Solicitor did not mention the payment made to Griffiths (described above) nor did he indicate the diminished amount of the funds he was holding in trust for Mrs. Hargrave. The Solicitor admits that he did this in an attempt to disguise his misappropriations

Particular 2(d) - Misappropriation \$37,800.00

17. As is discussed in further detail on page 6 below, on June 5, 1996 when the auditor commenced her investigation, the Solicitor's trust reconciliations had not been performed for some time. The trust reconciliations were updated to May at her request. The May trust listing showed 14 cheques totalling \$37,800.00 payable to the Solicitor could not be posted to client accounts because they did not relate to a client. These cheques were written during the period May 24, 1995 to March 12, 1996. The copies of the cheques are attached collectively as Exhibit 8 to this agreed statement of facts. The Solicitor admits that he misappropriated the \$37,800.00 represented by these 14 cheques.

Particular 2(e) - Misappropriation \$107,212.37 from mixed trust

18. At the time of the auditor's attendance at the Solicitor's office, his trust list identified an account in the name of Don Kimura. That trust list was in an overdraft position in the amount of \$107,212.37. The client ledger further identifies this account as relating to 11117888 Ontario Limited operating under the business style MaxVent Systems. This company is a subsidiary of Delta-Temp Corporation. The Solicitor is the president and a director of that corporation. Delta-Temp has patent for a new water heater technology. In a letter of explanation to the Law Society dated September 8, 1995, the Solicitor stated the value of Delta-Temp's technology to be substantial.

19. The company was using the Solicitor's mixed trust account from August 16, 1995 to January 18, 1996. The amounts withdrawn from the trust on behalf of the company exceeded the amounts deposited to the trust thereby constituting a misappropriation.

Particular 2(f) - Misappropriation \$16,825.00 - George Reesor

Particular 2(g) - Withdrawal of \$13,425.00 in fees prior to rendering fee billings

20. Mr. Reesor retained the Solicitor to negotiate the settlement of a mortgage. Mr. Reesor owed a total of \$660,000.00 in regard to that mortgage. The Solicitor was able to negotiate a settlement which saved Mr. Reesor in excess of \$200,000.00. As part of the settlement, funds passed through the Solicitor's account which were to be paid as follows: \$100,000.00 to the mortgagees, \$15,000.00 to the mortgagees' lawyer, Jonathan Griffith and the balance of \$5,000.00 to be used in partial payment of the Solicitor's account. While the Solicitor and Mr. Reesor agreed that Mr. Reesor would pay \$17,000.00 in fees on account of the work the Solicitor had done for him, the Solicitor in fact drew \$33,825.00 from the Reesor trust ledger resulting in a misappropriation of \$16,825.00.

21. In addition, on a number of instances the Solicitor drew funds ostensibly representing fee billings without rendering those billings. The total of amounts improperly withdrawn in this manner was \$13,425.00.

Particular 2(h) - Failure to maintain books and records

22. At the time of the auditor's initial attendance at the Solicitor's office on June 5, 1996, the Solicitor's last trust reconciliation was for the month of January 1996. That trust reconciliation contained unposted reconciling items. The Solicitor's bookkeeper had asked the Solicitor for clarification regarding some items on June 26, 27 and 30, 1995 as well as September 27, 1995.

23. The Solicitor's books were not in fact updated until the auditor's attendance in his office as is detailed in paragraph 17 above. The reconciliation revealed the misappropriations discussed above.

VI. DISCIPLINE HISTORY

24. The Solicitor received a Reprimand in Committee on April 12, 1989 for failing to file his annual filings.

DATED at Toronto this 3rd day of June, 1997.”

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Donald Isamu Kimura be granted permission to resign providing he has made available to the Society prior to Convocation, an accounting of the monies taken which is satisfactory to the Society, and providing that full restitution has been made by that date, failing which we recommend that he be disbarred.

REASONS FOR RECOMMENDATION

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This is a case of a very substantial theft from trust funds. We are cognizant that ordinarily a theft of this magnitude would require disbarment. It appears that the Solicitor in making withdrawals amounting to \$210,000 improperly from trust over a period of time, produced a total loss suffered to clients of approximately \$152,000.

The Solicitor has co-operated fully with the Society. He has given an undertaking not to practise law and is not practising law. He has been extremely co-operative and in the words of prosecuting counsel, "very forthright", in his dealings with the Society. This is reflective of the fact that he was called to the Bar in 1971 and has been in no trouble since that date except for a minor reprimand in 1989 which is of no consequence.

The key to understanding this case and the issues of sentencing before us are found in material filed on behalf of the Solicitor by his counsel, particularly that of his wife and from Professor Ronald Billings of the Sunnybrook Health Centre. The letter was filed as exhibit 4.

“During the period that this money was misappropriated, Mr. Kimura was manager of MaxVent Systems, a subsidiary of Delta-Temp Corporation, a company with a patent on a new water heater and air conditioning system. He became manager of this company in April 1991. Although the company had significant potential it ran into financial problems. As manager, and in a state of depression, Mr. Kimura blamed himself, felt responsible to the investors, and took the route of misappropriating funds to keep the company solvent. He did this on his own, knew it was wrong, felt badly about it, but could see no alternative. It was always his belief that in the long run, the company would be successful and he would repay all the money.

Mr. Kimura, although a hard working practitioner, had never been happy with his choice of law as a profession. He questioned the integrity of many activities that he saw happening, both by himself and his colleagues. These feelings I believe are related to factors in his upbringing, problems in his relationship with others, and persecutions he felt as a result of living as a member of an oriental minority group in Western Canada.

It is important to note that the misappropriation of funds was totally out of character for Mr. Kimura.

Previously he had always been very concerned about the morals and ethics of the practice of law.

In November 1993, one year before his first offence occurred, Mr. Kimura began to feel depressed. The trigger for this was a conflict with one of his chief partners in the heating company that he felt could not be resolved and the project would not be able to be completed. Already the company had several investors, Mr. Kimura felt responsible, and that it was up to him, somehow to save it. Later there was a major problem with a venture capitalist that turned sour, and he was not informed until too late.

His depression increased and was characterized by depressed mood, a feeling of violation, poor concentration, poor memory, impaired sleep, impaired appetite, decreased energy, decreased motivation, constant fatigue, fear and anxiety, and suicidal preoccupation. He lost interest in his marriage, had no sexual feelings, enjoyed nothing, neglected his legal practice, had impaired judgement, found that he had difficulty sorting out legal problems and was concerned that he was not doing a good job in his practice. He did not return phone calls, was in a state of inner pain and believed suicide was the only relief.

He had all the symptoms of a Major Depressive Episode, but never having been depressed before, did not recognize this and did not seek treatment.

Therapy with Mr. Kimura has been successful. He is on Prozac 20 mg daily and also finds that meditation, reading and keeping active rather than procrastinating is helpful. Self analysis through his reading and through psychotherapy has been beneficial.

A further stress has been the fact that his wife, who is a social worker, has had breast cancer and was under treatment during this period. Fortunately her prognosis looks good. Their marriage is stable and a major support to him.

Mr. Kimura does not plan to practise law again and will resign.

In my opinion his behaviour resulting in the charge of professional misconduct would not have occurred if he were not in a Major Depression."

In addition his wife writes:

" Approximately a year ago, Don informed me that he had just called a client to tell him that he had 'stolen' money. Don then was overwhelmed by guilt and shame and he saw his whole life as meaningless.

The extent of Don's depression was now obvious and he spoke, every day, openly about his wish to die. A family friend of ours, (a family physician) stood on call in case it appeared that Don could or should be committed. On one occasion, I awoke at 4:00 a.m. to discover that Don was missing. I called police and friends who checked his office and then came to our home. Don returned at 6:00 a.m., having been frustrated in an attempt to end things.

It was clear that without a hospital admission and therapy, it was likely that Don would not survive. Shortly thereafter, Don agreed to go to an emergency and Sunnybrook Hospital recommended admission. His stay in hospital opened his perspectives so that he began to see meaning beyond the guilt regarding the state of the company.

22nd January, 1998

After Don had been in hospital for 3 or 4 weeks, I was given the diagnosis of breast cancer. A lump that had been benign for several years, had doubled in size over the past year and had become malignant. Don immediately checked out of the hospital and began to devote himself to caring for me as I went through the stages of surgery, radiation and chemotherapy. Don and I both understood that the stress of the previous year had probably contributed to this illness. In one way this crisis was helpful as Don's issues fell into perspective as he put everything aside in order to make sure that I would be as comfortable as possible given what I was dealing with."

We accept that though disbarment is usually the only possible recommendation to make to Convocation in a case of this magnitude, we also accept that there are mitigating circumstances of a substantial nature in this case.

Accordingly, we recommend to Convocation that providing an accounting of the monies taken, satisfactory to the Society, has been made available prior to Convocation hearing this matter, and providing the very small amount - estimated at \$8,000 - still unpaid, is repaid by that date so that restitution in full will have been shown to have been made, we recommend that the Solicitor be permitted by Convocation to resign. If the conditions are not fulfilled, our recommendation to Convocation must perforce be one of disbarment.

Donald Isamu Kimura was called to the Bar on March 26, 1971.

ALL OF WHICH is respectfully submitted

DATED this 27th day of July, 1997

Clayton C. Ruby, Chair

There were no submissions.

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

Carried

The recommended penalty was that the solicitor be granted permission to resign providing he has made available to the Society an accounting of the monies taken which is satisfactory to the Society and providing that full restitution has been made, failing which he be disbarred.

Ms. Budweth advised that a certified cheque in the amount of \$7,441.65 had been received representing full restitution. Submissions were made in support of the solicitor being granted permission to resign.

The solicitor made no submissions.

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

It was moved by Mr. Cole, seconded by Mr. Swaye that the solicitor be granted permission to resign.

Carried

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

Not Put

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

Re: Michael James MOBERG - Niagara Falls

The Secretary placed the matter before Convocation.

Ms. Catharine Braid 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 October, 1997, together with an Affidavit of Service sworn 19th November, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 11th November, 1997 (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

Nancy L. Backhouse

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

Dayna Simon, Student-at-Law  
for the Society

MICHAEL JAMES MOBERG  
of the City  
of Niagara Falls  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: July 9, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On February 7, 1997 Complaints D31/97 and D34/97 were issued against Michael James Moberg alleging that he was guilty of professional misconduct.

The matter was heard in public on July 9, 1997 before Nancy L. Backhouse sitting as a single bencher. The Solicitor did not attend the hearing nor was he represented. Dayna Simon, Student-at-Law, appeared on behalf of the Law Society.

DECISION

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

Complaint D31/97

2. a) He failed to reply to the Law Society regarding a deficiency in his annual filing for the fiscal year ended January 31, 1994 despite letters dated February 24, 1995, September 14, 1995, March 13, 1996 and August 1, 1996.

Complaint D34/97

2. a) He failed to file with the Society within six months of the termination of his fiscal year ended January 31, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

Evidence

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

“AGREED STATEMENT OF FACTS

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaints D31/97 and D34/97 and is prepared to proceed with a hearing of these matters on July 9, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D31/97 and D34/97 and admits the particulars contained therein. The Solicitor admits that the said particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

4. The Solicitor is 33 years of age. The Solicitor was called to the Bar on February 7, 1992. He has been suspended since September 27, 1996, for non-payment of his errors and omissions levy. Prior to his suspension, the Solicitor practised as a sole practitioner.

Complaint D31/97

- 2(a) he failed to reply to the Law Society regarding a deficiency in his annual filing for the fiscal year ended January 31, 1994 despite letters dated February 24, 1995, September 14, 1995 and March 13, 1996.
5. On November 30, 1994, the Solicitor forwarded his Forms 2/3 filing to the Law Society for the fiscal year ending January 31, 1994. A copy of the Solicitor's covering letter sent with his filing to the Law Society dated November 30, 1994, is at Tab 2 of the Document Book.

6. By letter dated December 12, 1994, the Society wrote to the Solicitor acknowledging receipt of the Solicitor's filing and requested additional information regarding the filing. The filing was returned to the Solicitor with this letter. The Law Society's December 12, 1994 letter is at Tab 3 of the Document book. By letter dated December 20, 1994, the Society wrote to the Solicitor requesting additional information regarding the filing sent to the Society on November 30, 1994. The Society's December 20, 1994, letter is at Tab 4 of the Document Book.

7. By letter dated February 24, 1994, the Law Society returned to the Solicitor his 1994 filing and requested additional information regarding a debit balance shown on the listing of trust obligations attached to the Form 3, but not particularized in item 5(ii) on page three of the report. The Society requested that the Solicitor have his accountant review the monthly trust listings for the fiscal period, complete the section, and return the report to the Annual Filings Department of the Society. A copy of the Law Society's letter dated February 24, 1995, is at Tab 5 of the Document Book. No reply was received.

8. By letter dated September 14, 1995, the Law Society wrote to the Solicitor, enclosing a copy of its letter of February 24, 1995, and advising that no response had been received to said letter. The Society requested a reply to its February 24, 1995 letter. A copy of the Law Society's September 14, 1995 letter is at Tab 6 of the Document Book. No reply was received.

9. By letter dated March 13, 1996, the Society wrote to the Solicitor and advised that a reply to the Society's letters dated February 24, 1995, and September 14, 1995, had not yet been received. The Society requested that the Solicitor give some priority to this matter so that it could be resolved without involving a Discipline Committee. A copy of the Law Society's letter dated March 13, 1996 is at Tab 7 of the Document Book. No reply was received.

10. By registered mail dated August 1, 1996, the Law Society advised the Solicitor that despite several communications from the Law Society, he had not responded to its requests for information. The Solicitor was reminded of his obligation to respond promptly to communications from the Law Society. The Solicitor was advised should he fail to provide a written response within two weeks, the matter would be referred to the Chair and Vice Chairs of the Discipline Committee. The Law Society's letter of August 1, 1996, was returned to the Society marked unclaimed. A copy of the Law Society's August 1, 1996, letter and the envelope marked "unclaimed" are at Tab 8 of the Document Book. No reply was received.

11. Complaint D31/97 was issued on February 7, 1997.

12. To date, the Solicitor has not replied to the Society's letter dated February 24, 1996, and has not returned his filing for the fiscal year ended January 31, 1994.

#### Complaint D34/97

2(a) he failed to file with the Society within six months of the termination of her fiscal year ended January 31, 1996, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

13. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ended January 31, 1996, as required by S. 16(2) of Regulation 708 under the Law Society Act.

14. By letter dated August 9, 1996, the Law Society advised the Solicitor that he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act. The Solicitor was advised the last filing received from him was for the period ended January 31, 1995. The Solicitor was requested to contact the Law Society should he believe his filing had already been made. A copy of the Law Society's August 9, 1996, letter is at Tab 9 of the Document Book.

15. By registered mail, dated September 9, 1996, the Law Society advised the Solicitor that he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised that failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him. The Solicitor was requested to give this matter his immediate attention. A Canada Post Acknowledgement of Receipt was signed by the Solicitor and stamped September 16, 1996. A copy of the Law Society's September 9, 1996, letter is at Tab 10 of the Document Book.

16. Complaint D34/97 was issued on February 7, 1997.

17. To date, the Solicitor has not provided the outstanding filing.

V. DISCIPLINE HISTORY

18. The Solicitor was found guilty of professional misconduct in April, 1997 respecting his failure to cooperate with the Law Society by failing to produce the books and records of his practice. Convocation ordered the Solicitor suspended for one month and month to month thereafter until the Solicitor's books and records are produced to the examiner, such suspension to commence at the conclusion of his current administrative suspension. The Solicitor was also ordered to pay costs of \$1,250.00.

DATED at Toronto this 8th day of July, 1997.”

RECOMMENDATION AS TO PENALTY

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The Committee recommends that Michael James Moberg be suspended for a period of three months to commence at the conclusion of any administrative suspension and consecutive to the suspension of one month previously ordered by Convocation. The suspension is to continue indefinitely until the Solicitor replies to the Law Society and makes the requisite filings which are the subject matter of the Complaints.

The Committee further recommends that the Solicitor pay Law Society costs in the amount of \$1,000.

REASONS FOR RECOMMENDATION

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The Solicitor has not made the requisite filings and has not made the required reply to the Law Society at the time this matter comes before me. Although the Solicitor demonstrated some co-operation by entering into an agreed statement of facts, he has chosen not to participate in the hearing and accordingly I have no background as to his failure to make the requisite filings and reply other than as set out in his letter dated June 24th, 1997, being Exhibit 4 to these proceedings.

In this letter he states that he has not made the filings to date as he unfortunately does not have in his possession the documents and records that are necessary to complete such filings. Beyond that bald statement, I have no information as to whether or not the Solicitor could create books and records through bank statements.

I am advised that the Solicitor is living in Long Island, New York and that he has not produced the books and records which were the subject matter of Convocation's order referred to in paragraph 18 of the Agreed Statement. The Solicitor is currently administratively suspended and seems to have abandoned his practice.

Under the circumstances, it is impossible for the Law Society to meet its obligations to govern members of the profession in the public interest, without imposing a penalty along the lines recommended. As I have no information with respect to the Solicitor's ability to pay costs, I accept the Law Society's submission that costs should be awarded in the amount of \$1,000.

Michael James Moberg was called to the Bar on February 7, 1992.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of October, 1997

Nancy L. Backhouse

Ms. Braid made preliminary remarks regarding the new procedure for the filing of forms and advised that it was the Society's position that this matter proceed.

It was moved by Ms. Sealy, 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 3 months to commence at the conclusion of any administrative suspension and consecutive to the suspension of 1 month previously ordered by Convocation and that the suspension continue indefinitely until the Solicitor replies to the Society and makes the requisite filings. In addition it is recommended that the solicitor pay costs in the amount of \$1,000.

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

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

Carried

Re: Brian Allen SHERMAN - Richmond Hill

The Secretary placed the matter before Convocation.

Messrs. Scott and Wilson withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 9th December, 1997, served personally on the solicitor on 8th January, 1998 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th January, 1998 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Paul D. Copeland

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

Janet Brooks  
for the Society

BRIAN ALLEN SHERMAN  
of the City  
of Richmond Hill  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: October 30, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On August 14, 1996 Complaint D203/96 was issued, and on February 4, 1997 Complaint D8/97 was issued, against Brian Allen Sherman alleging that he was guilty of professional misconduct.

The matter was heard in public on October 30, 1997 before Paul D. Copeland sitting as a single bencher. The Solicitor attended the hearing and represented himself. Janet Brooks appeared on behalf of the Law Society.

DECISION

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

Complaint D203/96

2. a) He failed to file with the Society within six months of the termination of his fiscal year ending January 1, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*;

Complaint D8/97

2. a) He breached the Order of Convocation that he suspend his practice for failure to pay his errors and omissions levy, by continuing to practise during the period June 1, 1995 to July 4, 1995.

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 D8/97 and is prepared to proceed with a hearing of this matter on October 30, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D8/97 and D203/96 and admits the particulars contained therein. The Solicitor further admits that the said particulars, supported by the facts hereinafter set out, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 29, 1977. On May 26, 1995 he was suspended from practise for non-payment of the annual fee. He remains under administrative suspension.

Complaint D8/97

2 a) he breached the Order of Convocation that he suspend his practice for failure to pay his errors and omissions levy, by continuing to practise during the period June 1, 1995 to July 4, 1995.

5. On or about December 20, 1994, the Solicitor received a first Notice (Tab 1 of the Document Book) dated December 20, 1994 which advised him that his Errors and Omissions insurance levy for the period January 1, 1995 to June 30, 1995 was due on January 1, 1995. The Notice further cautioned the Solicitor as follows:

Pursuant to section 36 of the Law Society Act, if a member fails to pay any fee or levy, payable by that member to the Society, within four months after the date on which payment is due, Convocation may by order suspend such member's rights and privileges as a member for such time and on such terms as it considers proper in the circumstances.

6. On or about April 10, 1995, the Solicitor received a second Notice (Tab 2 of the Document Book) dated April 10, 1995 which advised him that his Errors and Omissions insurance levy was due. This Notice also provided the caution noted in paragraph 5 that Convocation may suspend his rights and privileges.

7. On May 26, 1995, Convocation suspended the Solicitor's rights and privileges for non-payment of the Errors & Omissions levy.

8. On June 3, 1995, the Solicitor received the Law Society's registered letter dated May 29, 1995 (Tab 3 of the Document Book), notifying him that his rights and privileges had been suspended effective May 26, 1995. The letter stated that failure to comply with the restrictions and obligations set out in the memorandum may result in disciplinary proceedings being instituted.

9. On June 8, 1995, an employee of the Law Society telephoned the Solicitor's law office. The receptionist identified the office as the Solicitor's office and advised that he was out of the office. A copy of the notes of the telephone call are at Tab 4 of the Document Book.

10. On June 12, 1995, an employee of the Law Society telephoned the Solicitor's law office and left a message for the Solicitor to return the call as the receptionist advised that he was out of the office. The Solicitor returned the telephone call and stated that he had received the letter advising him of his suspension and, as a result, he had been avoiding everything. He advised that he had postponed two appearances and had contacted the Membership Records Department with respect to payment of his outstanding levy. A copy of the notes of the telephone conversations are at Tab 5 of the Document Book.

11. On August 1, 1995, Ms. Lean, an examiner with the Audit and Investigation Department of the Law Society, attended at the Solicitor's office. The Solicitor's secretary advised that he was not in the office. The examiner left her business card and made an appointment to return the following day. The examiner's notes of the attendance are at Tab 7 of the Document Book.

12. On August 2, 1995, Ms. Lean met with the Solicitor and provided her letter of introduction (Tab 6 of the Document Book). At this meeting the Solicitor and the examiner discussed the Solicitor's situation. A copy of the notes of the conversation are at Tab 8 of the Document Book. The Solicitor advised, among other things, that he was aware of the suspension and was winding down his practice and waiting to be "readmitted". The Solicitor produced some books and records as requested.

13. At the meeting of August 2, 1995, an Audit Questionnaire (Tab 8 of the Document Book) was completed as well as a supplementary questionnaire (Tab 9 of the Document Book) relating to the suspension of the Solicitor's rights and privileges. In the supplementary questionnaire the Solicitor was asked the question: "What did you think were the implications of continuing to practise after being suspended?" He responded: "I understand that it is misconduct to practice while you know that you are under suspension. While preparing for re-admission proceedings I have been winding up the practise so not to offend".

14. At the meeting of August 2, 1995, the Solicitor consented to the placement of co-signing controls on his trust account. A copy of the letter of instructions to the Solicitor's bank and the Solicitor's Undertaking not to accept trust money until reinstated is at Tab 10 of the Document Book.

15. In correspondence and meetings in the period August 3, 1995 and August 15, 1995, outlined in paragraphs 14 through 19 herein, the Solicitor questioned the authority of the Society to request production of client files.

16. In a meeting with Ms. Lean on August 3, 1995, the Solicitor took the position that he was not obliged to produce client files to the Society and requested confirmation of authorization of an audit for practising under suspension. A copy of the examiners' notes of the meeting is at Tab 11 of the Document Book.

17. By facsimile transmission dated August 3, 1995 (Tab 12 of the Document Book), the Solicitor wrote to James Yakimovich, the Director of the Audit & Investigation Department.

18. By letter dated August 3, 1995 (Tab 12 of the Document Book), Margot Devlin, the Manager, Examiner Programmes of the Audit & Investigation Department responded to the Solicitor. She confirmed that authorization had been obtained to conduct audits of his practice based on his failure to file Forms 2 and 3 for the fiscal year ended January 1, 1994 and additionally with respect to allegations of practising under suspension. A further copy of the memorandum to suspended members was enclosed.

19. By facsimile transmission dated August 4, 1995 (Tab 13 of the Document Book), the Solicitor wrote to Ms. Devlin in response to her letter of August 3, 1995.

20. By letter dated August 4, 1995 (Tab 13 of the Document Book), Ms. Devlin wrote to the Solicitor and confirmed that Ms. Lean and Ms. McCann would meet with him at his office at 10:00 a.m. on August 15, 1995.
21. By facsimile transmission dated August 9, 1995, the Solicitor wrote to the Law Society.
22. By letter dated August 9, 1995 (Tab 14 of the Document Book), Ms. McCann responded to the Solicitor. She confirmed authorization for the audit, set out sections 9 and 18 of Regulation 708 and, pursuant to the authorization granted under those sections, requested production of books and records of the Solicitor. She also confirmed the Society's position that the Solicitor was obliged to produce client files as requested in order to complete the investigation.
23. On August 15, 1995, Ms. Lean and Ms. McCann attended at the Solicitor's office. The Solicitor took the position that section 9 of the Regulation did not require members to cooperate with the Law Society. He also took the position that he would produce financial records in furtherance of the audit authorized under section 18 of the Regulation and produced documents relating to accounting and finances relating to client files. He advised that all he was doing was "shutting down". A copy of Ms. Lean's notes of the meeting are at Tab 15 of the Document Book. Due to the Solicitor's time constraints, the inspection of the documents produced could not be completed.
24. On August 15, 1995, the Solicitor requested payment of monies from trust to a client and to an expert witness. A copy of the Solicitor's memorandum is at Tab 16 of the Document Book.
25. On August 16, 1995, Ms. Lean left a message for the Solicitor advising that she obtained approval to distribute these funds. A copy of Ms. Lean's notes of her message are at Tab 17 of the Document Book. On August 18, 1995, she attempted unsuccessfully to send a letter to the Solicitor confirming the message. A copy of her notes of her attempt and her letter are at Tabs 18 and 19 respectively of the Document Book.
26. By letter dated August 21, 1995 to the Ms. McCann (Tab 20 of the Document Book), the Solicitor advised that he had made arrangements to start a new career in the bailiff industry and that on August 21 and the next few days would be "hectic" since he was closing his office. He advised that he wished to cooperate in the completion of "retired status with the Society". He asked to arrange to meet in the next couple of weeks.
27. On August 22, 1995, Ms. Lean and Ms. McCann returned to the Solicitor's office to continue the audit however the Solicitor advised that he was leaving the practice of law and was in the process of moving his office. Ms. Lean reviewed the trust account records and co-signed cheques to disburse the majority of the trust funds. The Solicitor indicated that he would produce client files. A copy of Ms. Lean's notes of the meeting are at Tab 21 of the Document Book.
28. By letter dated September 1, 1995 (Tab 23 of the Document Book), Ms. Lean and Ms. McCann requested the production of specified files and client ledgers and fee billings and requested an explanation for a certain disbursement from the trust account. The Solicitor was asked to contact the examiners to arrange a mutually convenient appointment. The Solicitor did not respond.
29. The examiners' review of the Solicitor's files revealed that the Solicitor practised in the period June 1, 1995 to July 4, 1995 to on behalf of three clients, described in paragraphs 30 to 32 herein.
30. In the period June 12, 1995 to June 19, 1995, the Solicitor acted on behalf of his client Maple Hill Contracting and Cave Hill Properties, including preparing banking documentation, corresponding with a bailiff and with counsel for the opposing party. Copies of the correspondence is at Tabs 24 and 25 respectively of the Document Book. The Solicitor's account dated July 31, 1997 for his services totalling 3.9 hours is at Tab 27 of the Document Book.

31. In the period June 1 to June 29, 1995, the Solicitor acted on behalf of his clients Mr. and Mrs. Minchella in the civil action involving a property dispute. In this time period, the Solicitor instructed an agent to prepare a quit claim deed and corresponded with his clients regarding the execution of the quit claim deed to clarify the clients' ownership of property which had apparently been resolved by order of the Court in the litigation. Copies of the Solicitor's correspondence is at Tabs 28 through 33 of the Document Book.

32. In the period June 8, 1995 to July 4, 1995, the Solicitor acted on behalf of his client, the Township of Matachewan in respect of a civil action by, among other things, filing a Notice of Change of Solicitors to place himself on the record in the proceedings, accepting service of motion materials, entering into settlement negotiations with opposing counsel including presenting offers and Minutes of Settlement, reporting to his client and receiving settlement funds. Copies of the Solicitor's correspondence is at Tabs 34 to 51 of the Document Book.

#### Complaint D203/96

- 2 a) he failed to file with the Society within six months of the termination of his fiscal year ending January 1, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the Law Society Act.

33. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 and Form 3 within six months of the fiscal year ending January 31, 1995, as required by S.16(2) of Regulation 708 under the Law Society Act.

34. By notice dated August 16, 1995, the Law Society advised the Solicitor he had not complied with the annual filing requirements of section 16 of Regulation 708 of the Law Society Act to file forms 2 and 3 for his fiscal year ended January 31, 1995.

35. By notice dated September 18, 1995, the Law Society advised the Solicitor he had not taken the necessary steps to bring his filings up-to-date. The Solicitor was advised failure to comply with section 16 of Regulation 708 of the Law Society Act may result in disciplinary action being taken against him.

36. To date, the Solicitor has not provided the outstanding filing.

## II. DISCIPLINE HISTORY

37. On May 1, 1990, the Solicitor was found guilty of professional misconduct for having failed to reply to communications from the Law Society. He received a Reprimand in Committee.

38. By Report and Decision dated May 28, 1991, the Solicitor was found guilty of professional misconduct for having (1) failed to reply to communications from the Law Society; (2) failed to comply with his Undertaking to the Law Society dated March 30, 1988 to respond promptly to communications; and (3) practised while his rights and privileges were suspended. On June 20, 1991, the Solicitor received a Reprimand in Convocation, was fined \$3,000, which was paid in full, and required to cooperate with the Professional Standards Programme.

39. By Report and Decision dated March 5, 1993, the Solicitor was found guilty of professional misconduct for having: (1) failed to reply to the Law Society with respect to complaints; (2) failed to answer with reasonable promptness communications regarding the release of a file from other solicitors; (3) failed to honour his Undertaking to the Law Society dated March 30, 1988 to respond promptly to communications; (4) practised in the period November 29, 1991 to February 12, 1992 while his rights and privileges were suspended for non-payment of the errors and omissions levy; (5) engaged in a course of conduct evidencing consistent and repeated failures to honour his financial obligations to the Law Society; and (6) breached both his Undertaking to the Law Society dated January 14, 1991 and the Order of Convocation dated June 20, 1991, requiring his cooperation in the Professional Standards Programme. On June 24, 1993, Convocation suspended the Solicitor's rights and privileges for six months commencing August 1, 1993 and thereafter until four conditions were met. These conditions of reinstatement were: (1) that he continue during

the suspension a structured psychotherapy program until such time as he can satisfy the Society that such treatment is no longer necessary; (2) upon seeking to return to practise, to provide a written opinion from his psychotherapist that he is, in the opinion of the psychotherapist, in a condition to resume the practice of law in a responsible manner and this report must be in a form acceptable to the Society; (3) he must put before the Society a program of supervision or partnership or employment acceptable to the Society, including enrollment in the Professional Standards Programme; and (4) that he continue to co-operate with the Errors & Omissions officials and counsel during his suspension and must respond in a prompt manner to all communications regarding any and all pending claims and prove that he has done so will have to be provided before he will be permitted to resume practise.

40. On March 28, 1994, the Solicitor was reinstated on the condition that he continue a structured psychotherapy program as directed by Dr. Clair, Ph.D., C. Psych.; and that he operate his practice under the supervision of Louis Cote, under certain conditions, until those conditions were waived by Senior Counsel-Discipline. The conditions were: (1) actual file review once every two weeks to see that file being acted upon; (2) telephone log being kept by the Solicitor and staff, and Cote to review once per week to see that phone calls are being returned in a timely fashion; (3) Correspondence and fax log to be kept by the Solicitor and staff, and Cote to review all incoming written communications once per week to ensure prompt follow up by the Solicitor; and (3) Cote must contact the Law Society should he become aware of any potential Errors & Omissions claims or instances of professional misconduct. A copy of the Society's letter to the Solicitor dated March 28, 1997 confirming the terms of reinstatement is at Tab 1 of the Supplementary Document Book. The Solicitor was supervised by Mr. Cote from March 28, 1994 to January 31, 1995 (Tabs 2, 3, 4, 5, 6 and 8 of the Supplementary Document Book) and was supervised by Gary Earl Levine from February 27, 1995 to the time of his suspension in May 1995 (Tabs 7 and 8 of the Supplementary Document Book).

41. On February 28, 1995, the Solicitor was found guilty of professional misconduct for having (1) failed to reply to communications from the Law Society regarding two complaints by one client; (2) failed to reply to communications from the Law Society regarding a complaint by another client. He received a Reprimand in Committee.

DATED at Toronto, this 28th day of October, 1997."

#### RECOMMENDATION AS TO PENALTY

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The Committee accepts the joint submission and recommends that Brian Allen Sherman be suspended for a period of four months and continuing indefinitely thereafter until the filings referred to in Complaint D203/96 have been made. The suspension is to commence at the conclusion of the current administrative suspension.

#### REASONS FOR RECOMMENDATION

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Mr. Sherman has a serious discipline history. Ms. Brooks on behalf of the Society indicated that the discipline history and the present matter may be a sign of ungovernability, but it was not something that the Society was advancing at this time.

The Solicitor has indicated that the psychological treatment, referred to in paragraph 39 of the Agreed Statement of Facts, commenced in January 1992 and continued on a weekly basis for approximately eight months. Thereafter he attended psychotherapy sessions less frequently and the sessions were completed in late 1993 or early 1994.

The Solicitor returned to practice under supervision in April 1994 and continued in that practice until summer of 1995.

Mr. Sherman indicated that the LPIC deductibles were a major problem for him at that time as well as the billings that he received for LPIC coverage. Initially, when he returned to practice his premium was \$18,000. The next bill that he received was for \$120,000. He initially thought that this was money owing to LPIC in relation to deductibles. What he later found, after some correspondence with LPIC, was that the \$120,000 was the LPIC premium for the first six months of his practice. It soon became clear to him that it was untenable to continue in the practice of law with LPIC premiums at \$240,000 per year.

The period that Mr. Sherman practised while under suspension was a suspension as a result of the failure to pay the \$120,000 to LPIC. Mr. Sherman decided to close his practice and during the course of doing that carried out the activities mentioned in the Agreed Statement of Facts starting at paragraph 29. He acknowledged that those activities constitute practising while under suspension, but he indicated that this was not a continuing renegade practice but that he was attempting to close his practice.

Subsequent to those activities he agreed to co-signing controls on his trust account and, subsequently worked with the Society to complete the closing of his office.

Mr. Sherman indicated that he went bankrupt in October 1995.

During the last two years Mr. Sherman has been working with a bailiff company. He hopes in the future to be in a position to consider working as in-house counsel with that bailiff company. He advised me that the bailiff company's activities are mainly involved in collecting municipal taxes.

It would appear that the penalty that is proposed is reasonable in the circumstances and it is within an appropriate range. It is slightly more than the suspension that would be imposed for practising under suspension for slightly over one month. The normal penalty is an extra month on top of the period practised under suspension. A somewhat greater penalty had been proposed by the Society and agreed to by Mr. Sherman in view of his fairly deplorable discipline history.

I would hope that the arrangements that Mr. Sherman has made in regard to earning a living and working with the bailiff company work out for him. Given the potential LPIC premiums for him, it is extremely unlikely that he is ever going to return to practice on a private basis. The in-house counsel work may be both of great assistance to him and of assistance to the bailiff company.

It would seem that based on that, the four months suspension which is proposed is reasonable, given what I regard as potential future work plans, at least in the short term. I do not think that the public is at risk by reason of Mr. Sherman being in a position at some point to return to the practice of law.

Brian Allen Sherman was called to the Bar on March 29, 1977.

ALL OF WHICH is respectfully submitted

DATED this 9th day of December, 1997

Paul D. Copeland

There were no submissions.

It was moved by Mr. Epstein, 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 4 months and continue indefinitely thereafter until the filings referred to in Complaint D203/96 have been made, the suspension to commence at the conclusion of the current administrative suspension.

There were submissions by Ms. Brooks and the solicitor in support of the recommended penalty.

It was moved by Mr. Epstein, seconded by Mr. Chahbar that the recommended penalty be adopted.

Carried

Re: Frank Andrew THERIAULT - Toronto

Ms. Cameron, counsel for the Society, requested that the matter be withdrawn because a prior discipline record had not put before the Discipline Committee.

It was moved by Ms. Ross, seconded by Mr. Ruby that the Report be quashed.

Carried

Re: Clayton James WALLACE - Hamilton

Mr. Scott withdrew.

Ms. Seymour, counsel for the Society requested that Complaints D77/97 and D218/97 be withdrawn and that Convocation proceed with Complaint D32/97.

It was moved by Mr. Wilson, seconded by Mr. Carter that Complaints D77/97 and D218/97 be quashed.

Counsel, the reporter and the public withdrew.

It was moved by Ms. Ross, seconded by Ms. Sealy that the Report be quashed and be sent back for a hearing before a new committee.

Carried

It was moved by Mr. Epstein, seconded by Mr. MacKenzie that Convocation proceed with Complaint D32/97 and render a decision.

Not Put

The Wilson/Carter motion was not put.

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

Re: Yaroslav MIKITCHOOK - Toronto

The Secretary placed the matter before Convocation.

Messrs. Gottlieb and Epstein and Ms. Ross withdrew for this matter.

Ms. Brooks appeared on behalf of the Society and Mr. Morris Singer appeared on behalf of the solicitor who was present.

Convocation had before it the Report dated 3rd October, 1997 and Dissent of the Discipline Committee together with the Affidavit of Service sworn 27th October, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 22nd October, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 27th November, 1997 (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

Tamara Stomp, Chair  
Vern Krishna, Q.C.  
Gary Gottlieb, Q.C.

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

Neil Perrier  
for the Society

YAROSLAV MIKITCHOOK  
of the City  
of Toronto  
a barrister and solicitor

Morris Singer  
for the solicitor

Heard: August 13, 1997

TO THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On March 14, 1996 Complaint D87/96 was issued against Yaroslav Mikitchook alleging that he was guilty of professional misconduct.

The matter was heard in public on August 13, 1996 before this Committee composed of Tamara Stomp, Chair, Vern Krishna, Q.C. and Gary Gottlieb, Q.C. The Solicitor attended the hearing and was represented by Morris Singer. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D87/96

2. a) He misappropriated trust funds in the total amount of \$10,102.00; and

- b) He misapplied trust funds in the total amount of \$5,810.67 in circumstances where monies were paid from the mixed pool of trust funds to or on behalf of clients who had no funds or insufficient funds on deposit.

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 D87/96 and is prepared to proceed with a hearing of this matter on August 13 and 14, 1996.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D87/96 and admits the particulars but does not admit that the particulars contained in paragraph 2(a) constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar in March, 1975. He currently practises as a sole practitioner in Toronto with an emphasis on litigation law.

V. BACKGROUND

5. An audit was authorized under Section 18 of Regulation 708 as the annual statutory declaration and forms filed by the Solicitor's accountant for the fiscal year ending March 31, 1992 revealed overdrawn trust ledger accounts.

6. The Solicitor's bookkeeper, Mr. Gord Navis, informed the Examiner that the Solicitor's prior bookkeeper quit in May of 1993 and that he was retained in February of 1994 at which time the books and records were in arrears from May 31, 1992.

7. On May 10, 1994, Mr. Navis experienced health (heart) problems and was told by his cardiologist to reduce his workload. Consequently, the Solicitor's bookkeeping arrears did not receive any attention from him until July 29, 1994.

8. When the Examiner commenced her audit in October, 1994, the most current trust comparison was at June 30, 1994, which showed overdrawn trust ledger balances of approximately \$24,294.62. In or about August of 1994, the accountant informed the Solicitor that there was a trust shortage, but an exact amount was not mentioned.

9. As the Solicitor was out of town on business an appointment was scheduled for October 19, 1994 at which time Mr. Navis undertook to provide trust comparisons for the months of July, August and September, 1994.

10. On October 21, 1994, Mr. Navis delivered the trust comparisons to the Society; the actual shortage as of September 30, 1994 was \$16,738.47.

11. Mr. Navis advised the Society that the trust shortage was reduced by approximately \$8,000 between June and September, 1994 from funds received on account of fees being injected into the trust account.

12. Co-signing controls were not placed against the trust account as the shortage of \$16,738.47 was replaced by the Solicitor on October 24, 1994 by:

1. transferring \$11,478.06 of earned and billed fees from his trust account to his general account;
2. depositing \$11,038.47 from his general account to his trust account; and
3. depositing a further \$5,700.00 of his personal funds to his trust account.

Particular 2(a) He misappropriated trust funds in the total amount of \$10,102.00

13. The client ledger accounts summarized at Appendix "A" relating to withdrawal from his trust account which resulted in trust shortages in the ScotiaBank trust account which the Solicitor transferred into his general account.

Particular 2(b) He misapplied trust funds in the total amount of \$5,810.67 in circumstances where monies were paid from the mixed pool of trust funds to or on behalf of clients who had no funds or insufficient funds on deposit.

14. The client ledger accounts summarized at Appendix "B" relating to withdrawal from his trust account which resulted in trust shortages in the ScotiaBank trust account which the Solicitor transferred to third parties or clients.

15. Although there was a shortage of approximately \$16,738.47 as of September 30th 1994 in the mixed trust account, it appears from Appendix "C" that there were funds in the amount of \$11,478.06 being held in the mixed trust account representing earned and billed fees.

16. Taking into account the amount of earned and billed fees remaining in the trust account as of September 30th 1994, the actual shortage in the mixed trust account as of this date is \$5,260.41.

Appendix 'A'	\$ 10,102.00
Appendix 'B'	\$ 5,810.67
Bank Charges	<u>\$ 825.80</u>
Total Shortage	\$ 16,738.47
Earned Fees	<u>\$ 11,478.06</u>
Actual Shortage	<u>\$ 5,260.41</u>

VI. PRIOR DISCIPLINE

17. The Solicitor was found guilty of professional misconduct on January 28, 1993, in regard to failing to reply to the Law Society; breaching his Undertaking to the Law Society; failing to serve a client and misleading a client. The Solicitor was reprimanded publicly in Convocation and ordered to pay \$3,000 in costs.

18. The Solicitor was found guilty of professional misconduct on June 23, 1994 in regard to failing to reply to the Law Society and failing to comply with his Undertaking to the Law Society. The Solicitor was reprimanded publicly in Convocation and ordered to pay \$500 in costs and perform 40 hours of community service work at the Toronto Food Bank.

19. The Solicitor was found guilty of professional misconduct on February 22, 1996 in regard to failing to file his Forms 2/3; failing to reply to the Law Society and another solicitor; failing to serve his clients; and failing to comply with his Undertaking to the Law Society. Convocation ordered that the Solicitor be suspended for a period of three months, commencing March 14, 1996, and that he pay costs in the amount of \$1,000.

DATED at Toronto, this 13th day of August, 1996.”

#### REASONS FOR FINDING

The facts contained in the Agreed Statement of Facts are not in dispute. In summary they are as follows.

The Member filed annual forms which revealed overdrawn trust ledger accounts. This triggered an audit by the Law Society. The Member had a bookkeeper who quit and the next bookkeeper fell ill for some time. When the audit was finally complete, a shortage was confirmed. As of September 30, 1994, that shortage was \$16,738.47. Within two or three days of discovering that shortage, the Member corrected it. He did so by transferring \$11,478.06 in earned and billed fees and disbursements out of trust to general and with \$11,038.47 of that, plus with a further \$5,700.00 of the Member's personal funds transferred back into trust, the shortage was replaced.

The shortage came about by:

1. The Member paying incurred expenses when funds were not available in trust on twelve occasions.
2. A client cheque returning NSF on one occasion.
3. Refunds made to seven clients in excess of the balance available in trust.
4. Fifteen occasions when the Member paid himself fees and disbursements when funds were not in trust.

The Member testified this happened when he was without the services of a bookkeeper who ordinarily opened a ledger card for each file. He admitted he “could not keep the ledger card current” and that “errors occurred because there were no entries on the card”. When paying out of trust the Member “thought I had funds in trust to cover it”. He testified “one knew what came in” and he would “keep within the limit” and if concerned he would “sit down and go through the deposit books”. The Member knew the purpose of the trust account was to keep his money separate from that of the clients. The Member testified that he was becoming increasingly reluctant to withdraw money from trust as it became increasingly difficult to know how much money was in there.

The issue to determine is whether the trust money that was transferred improperly to the Member under paragraph 2(a) of the Complaint is misappropriation or something less, perhaps misapplication or failure to keep proper books and records. That it constitutes professional misconduct is admitted by counsel for the Member. Particular 2(b) was admitted from the outset.

Having reviewed the authorities we were referred to, this Committee finds that misappropriation is the proper characterization. Monies in particular 2(a) were put to the Member's personal use. The Member's actions were deliberate and purposeful and he did transfer the money out, notwithstanding his uncertainty of entitlement to it. At the least, he was wilfully blind. He received a financial advantage on the fifteen occasions that the fees and disbursements were paid from trust.

As well as considering previous decisions of Convocation that we were referred to, we noted the case of Nebraska State Bar Association v. Veith, 470 N.W. 2d 549 (Neb. 1991) wherein it said:

“Misappropriation is ‘any unauthorized use ... of clients’ funds entrusted to [a lawyer], including not only stealing, but also unauthorized temporary use for the lawyer’s own purpose, whether or not he derives any personal gain or benefit therefrom”...”(an attorney’s failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation.) Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing.”

Findings of professional misconduct are made with respect to particulars 2(a) and 2(b) as set out in the Complaint.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that Yaroslav Mikitchook be suspended for a period of one month and pay Law Society costs in the amount of \$2,000.00.

#### REASONS FOR RECOMMENDATION

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As noted earlier, professional misconduct was admitted. The hearing of this matter was concerned with the characterization of the facts. Notwithstanding our characterization as misappropriation, we find an absence of any evidence showing mala fides on behalf of the Member. We find that the Member actually believed he was entitled to the money and was trying to get by without proper bookkeeping services and accounting records to confirm same. The fact that he was entitled to more than \$11,000.00 in billed fees and disbursements that was ultimately transferred out and that he replaced the shortage promptly upon determination of same are mitigating factors.

Counsel for the Society requests a minimum six month suspension plus \$2,000.00 in costs. The Member’s counsel seeks a reprimand in Convocation or short suspension and does not contest the figure of \$2,000.00 in costs if we are so disposed.

This Committee recommends a suspension of one month and costs of \$2,000.00 be paid by the Member. We have been influenced in our recommendations by the following:

1. The finding of fact of “misappropriation”;
2. The lack of mala fides but deliberate wilful blindness;
3. The numerous individual instances of shortages against clients and the overall size of the shortage;
4. The prompt restitution;
5. The admission of professional misconduct;
6. The letters of reference filed in support;
7. The prior discipline record of the Member;
8. The advice that the Member has hired another bookkeeper and put in a computerized program for assistance;
9. The advice from counsel for the Member that the Member has had no difficulties with his books and records in compliance with Law Society Regulations for the past three years;
10. The Member is seeing a psychologist.

Yaroslav Mikitchook was called to the Bar on March 20, 1975.

ALL OF WHICH is respectfully submitted

DATED this 3rd day of October, 1997

Tamara Stomp, Chair

Ms. Brooks advised that this matter had been before Convocation in November 1997 at which time a motion for a higher penalty was made and the matter was adjourned to today.

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month and pay costs in the amount of \$2,000.

Ms. Brooks advised that the hearing took place on "August 13th, 1996" not 1997 as set out on page 234 of the bound Reports.

Both counsel made submissions in support of the recommended penalty and that there was no error in principle.

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

It was moved by Ms. Sealy, seconded by Mr. Wilson that the solicitor be suspended for a period of 3 months with no costs.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 3 months with no costs.

Mr. Singer requested that the suspension commence March 14th, 1998.

Convocation granted the request.

Re: Farida Mir Mohammed SHAIKH - Toronto

The Secretary placed the matter before Convocation.

Ms. Cameron appeared for the Society and Ms. Janet Leiper appeared for the solicitor who was present.

Both counsel requested an adjournment on consent to the March Discipline Convocation in order that the solicitor could produce certain materials.

Convocation granted the adjournment to the March Discipline Convocation.

Re: Richard Alexander SUTTON - Toronto

The Secretary placed the matter before Convocation.

Messrs. Scott and Ruby, Mr. Carpenter-Gunn and Ms. Sealy withdrew for this matter.

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

Mr. Monahan, on behalf of the solicitor sought an adjournment in order that the solicitor might bring forward evidence of mental and psychiatric problems. He advised that the solicitor has made attempts to obtain the information needed from the psychiatrist.

Mr. Monahan said the solicitor would continue his undertaking not to practise and would execute his consent and direction to the psychiatrist to provide a report to the Law Society preemptory to the March Discipline Convocation.

The Society's counsel made submissions opposing the adjournment.

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

It was moved by Mr. Topp, seconded by Mr. Carey that Convocation accept the procedure agreed upon.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision to accept the procedure agreed by counsel in their submissions.

Re: David Roy SNIDER - Whitby

The Secretary placed the matter before Convocation.

Messrs. Scott and Topp and Ms. Carpenter-Gunn withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 2nd September, 1997, together with an Affidavit of Service sworn 22nd September, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 19th September, 1997 (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

Jane Harvey, Chair  
Kim A. Carpenter-Gunn  
W. A. Derry Millar

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

Jane Ratchford  
for the Society

DAVID ROY SNIDER  
of the Town  
of Whitby  
a barrister and solicitor

Not Represented  
for the solicitor

Heard: February 14 and July 11, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 1, 1995 Complaint D508/94 was issued, and on November 20, 1995 Complaint D351/95 was issued against David Roy Snider alleging that he was guilty of professional misconduct.

These matters were heard on February 14, 1996 and July 11, 1996 before this Committee comprising Jane Harvey, Chair; Kim A. Carpenter-Gunn; and W.A. Derry Millar. The Solicitor did not attend the hearing, nor was he represented. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D508/94

2. a) Between May 1992 and November 30, 1992, the Solicitor misappropriated the sum of \$30,078.68, more or less, belonging to his clients Messrs. Emedi;
- b) Between May and July, 1994, the Solicitor misappropriated or, in the alternative, misapplied the sum of \$29,433 belonging to his client Daphne Williams;
- c) In or about November 1992, the Solicitor breached Rule 7 of the Rules of Professional Conduct by borrowing the sum of \$30,000 from his client Michael J. Patterson;
- d) The Solicitor failed to maintain proper books, records and accounts in accordance with Sections 14 and 15 of Regulation 708 made under the *Law Society Act*;
- e) The Solicitor practised law while under suspension from the Law Society of Upper Canada by acting for Emily Allen et al. on a civil litigation matter and by acting for Daphne Williams on the sale of 37 Chiefswood Square, Scarborough;
- f) The Solicitor has failed to reply to the Law Society regarding a complaint by Karen Kikkelen despite letters dated June 28 and August 17, 1994 and telephone messages left on August 5, August 11, and August 15, 1994.

Complaint D351/95

2. a) He failed to file within six months of the termination of his fiscal year ending January 31, 1995, a certificate in the form prescribed by the Rules and a report completed by a public accountant and signed by the member in the form prescribed by the Rules thereby contravening Section 16(2) of Regulation 708 made pursuant to the *Law Society Act*.

RECOMMENDATION AS TO PENALTY

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The Committee recommends that David Roy Snider be disbarred.

REASONS FOR RECOMMENDATION

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The Law Society of Upper Canada has given notice to the Solicitor at his last known address. The Solicitor did not appear before us.

The penalty is disbarment. Two separate and substantial counts of misappropriation of funds from clients, totalling \$60,000, have been made out. In addition, Mr. Snider has been found guilty of other serious misconduct, including improperly borrowing money from a client (and not repaying it), practising while under suspension, failing to reply to the Law Society of Upper Canada, failing to maintain proper books, records and accounts.

The Solicitor concluded his career by terminating his practice without complying with Law Society requirements and his whereabouts are not known.

David Roy Snider was called to the Bar on April 8, 1987.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of September, 1996

Jane Harvey, Chair

SUPPLEMENTARY REASONS FOR DECISION  
IN THE MATTER OF DAVID ROY SNIDER

All particulars of professional misconduct outlined in the complaints were proved and no contrary evidence was introduced. The Solicitor did not appear at either day of hearing despite notice sent to his last known address. I shall refer to each paragraph of both complaints as follows:

Complaint D508/94

- (a) Kres Vladimir and Moses Emedi appeared and gave evidence of the Emedi family's use of the Solicitor as a lawyer. The Solicitor held monies of the family in his trust account, from which he was to make payments to a third party. Cheques paid out by the Solicitor to the third party bounced. The Solicitor may have applied some portion of the \$30,078.68 discrepancy to other work which was to have been done for the family in connection with the Croatian Credit Union but which the family assert was not performed.

- (b) Daphne Williams appeared and gave evidence of her attempts to recover her proceeds of a sale of real estate from the Solicitor. The Law Society also became involved in the attempt to recover Mrs. William's money as a result of a complaint by Mrs. Williams. Criminal charges of theft and criminal breach of trust were laid against the Solicitor. The amount of \$29,433 remains outstanding.
- (c) Mr. Patterson did not appear but an affidavit sworn by Mr. Patterson was put in evidence as Exhibit II. His affidavit asserts that the Solicitor borrowed \$30,000 from him in 1992 without advising him to obtain Independent Legal Advice and he did not obtain Independent Legal Advice. Mr. Patterson was an unemployed construction worker at the time who had never previously loaned monies to anyone.

The Solicitor represented to Mr. Patterson that if the Solicitor did not repay the debt, that Errors and Omissions Insurance would. The Solicitor also gave Mr. Patterson an interest cheque that was returned NSF. The Solicitor never repaid the loan. Mr. Patterson advised the Law Society, retained a law firm, obtained judgment against the Solicitor and tried to enforce a Writ against the Solicitor but has received nothing.

- (d) May Ann Lord of the Law Society of Upper Canada gave evidence that she performed an audit on the Solicitor's practice in June 1994 based on complaints from clients which revealed inadequacies and shortfalls which were not corrected.
- (e) Diane Evans provided affidavit evidence and documentation proving that the Solicitor acted for Emily Allen et. al. while under suspension.
- (f) The Law Society of Upper Canada provided evidence of the Solicitor's failure to respond to the complaint of Karen Nikhelen, a former client of the Solicitor.

#### Complaint D351/95

- (a) The Law Society of Upper Canada provided evidence that the Solicitor failed to file his year end filing with the Law Society for the year ended January 31, 1995.

The Solicitor's conduct constituted a breach of far too many of the Law Society of Upper Canada's rules ranging from failure to file his annual filing to one of the more serious, misappropriation. His disinclination to appear before a committee for a hearing of the complaints alleged against him shows his utter disregard of the Law Society rules and is an apt conclusion to his career as a lawyer in Ontario. The Solicitor's conduct clearly constitutes professional misconduct warranting disbarment.

ALL OF WHICH is respectfully submitted

DATED this 2nd day of September, 1997

Jane Harvey, Chair

Mr. Stuart advised that the solicitor had been served according to the Act.

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

Carried

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

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

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

Carried

Re: John Lionel McCAULEY - Ottawa

The Secretary placed the matter before Convocation.

Messrs. Scott, Wilson, Swaye and Chahbar withdrew for this matter.

Mr. Stuart 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 23rd October, 1997, together with an Affidavit of Service sworn 27th October, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 20th October, 1997 (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

Nancy L. Backhouse, Chair  
Gerald A. Swaye, Q.C.  
Abdul A. Chahbar

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

Glenn Stuart  
for the Society

JOHN LIONEL MCCAULEY  
of the City  
of Ottawa  
a barrister and solicitor

Not Represented  
for the Society

Heard: September 3, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

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On July 25, 1996 Complaint D211/96 was issued, and on November 21, 1996 Complaint D262/96 was issued against John Lionel McCauley alleging that he was guilty of professional misconduct.

The matter was heard in public on September 3, 1997 before this Committee composed of Nancy L. Backhouse, Chair, Abdul A. Chahbar and Gerald A. Swaye, Q.C. The Solicitor attended the hearing and represented himself. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D211/96

2. a) The Solicitor failed to serve his client, George Cooney, by
  - i) failing to make monthly maintenance payments to Mr. Cooney's retirement residence (the Glebe Centre), on his behalf, or to ensure that alternative arrangements were made to protect Mr. Cooney's position in the retirement residence; and,
  - ii) failing to respond to numerous enquiries from the Glebe Centre regarding the status of payments on Mr. Cooney's behalf; and,
- b) He failed to serve his clients Melvyn and Carol Grandame and the Toronto-Dominion Bank regarding the purchase and financing of a property at 17 Bluff's Road, Newcastle, Ontario by
  - i) failing to register the lease and Toronto-Dominion mortgage on title in a timely fashion;
  - ii) failing to report to the Toronto-Dominion Bank in a timely fashion following the closing of the transaction despite letters dated June 14, 1992, August 14, 1992, September 14, 1992, October 13, 1992, December 4, 1992, January 5, 1993, February 9, 1993 and May 14, 1993 from the bank; and
  - iii) failing to report to Mr. and Mrs. Grandame in a timely fashion following the completion of the transaction despite their requests to do so.

Complaint D262/96

2. a) He failed to reply to the Law Society regarding a complaint by R. Paul McTaggart despite letters dated March 27, and June 19, 1996 and telephone messages left on June 6, June 13, and August 28, 1996;
- b) He failed to reply to the Law Society regarding a complaint by Kenneth Killeen despite a letter dated March 7, 1996 and telephone messages left on April 26, May 15 and August 28, 1996;
- c) He failed to serve his client, Kenneth Killeen, in a conscientious, diligent and efficient manner in that he:
  - i) failed to complete the winding up of the estate for which his client is Executor;
  - ii) failed to respond to reasonable requests from his client for information with respect to the status of the estate;
- d) He failed to reply to the Law Society regarding a complaint by Dorothy Villeneuve despite letters dated July 18, and August 23, 1996 and telephone messages left on August 13, and August 21, 1996;
- e) He failed to reply to communications from fellow solicitor, Thomas Curran, requesting information about the estate of Douglas Killeen; and
- f) He failed to reply to communications from a fellow solicitor, R. Paul McTaggart, with respect to a joint venture.

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 D211/96 and D262/96 and is prepared to proceed with a hearing of this matter on September 3-4, 1997.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D211/96 and D262/96, as well as this Agreed Statement of Facts, and admits the particulars, except particular 2(a) of Complaint D211/96, and the facts contained therein. The Solicitor further admits that the said particulars, except particular 2(a) of Complaint D211/96, supported by the facts hereinafter stated, constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on April 12, 1976 and at all relevant times was an associate with the firm of MacLaren Corlett, or its predecessor firm McMaster Meighen.

Complaint D211/96

Particular 2(a) the Solicitor failed to serve his client, George Cooney, by

- (i) failing to make monthly maintenance payments to Mr. Cooney's retirement residence (the Glebe Centre), on his behalf, or to ensure that alternative arrangements were made to protect Mr. Cooney's position in the retirement residence; and
- (ii) failing to respond to numerous enquiries from the Glebe Centre regarding the status of payments on Mr. Cooney's behalf.

5. In or about 1989, Mr. George Cooney, an elderly gentleman, took up residence at the Glebe Centre, a senior's residence located at 950 Bank Street in Ottawa.

6. In or about July, 1990, Mr. Cooney retained the Solicitor and, on July 4, 1990, executed a general power of attorney, without restrictions, in favour of the Solicitor. A copy of this power of attorney is attached hereto as Exhibit 1 to this Agreed Statement of Facts. By letter dated July 5, 1990, the Solicitor confirmed the execution of a general unrestricted power of attorney by Mr. Cooney. A copy of this letter is attached hereto as Exhibit 2 to this Agreed Statement of Facts.

7. From the date of his admission until September 1990, Mr. Cooney dealt directly with his maintenance payments to the Glebe Centre. In or about September 1990, Mr. Cooney, because of failing eyesight, no longer wished to handle his own financial matters and advised the Glebe Centre that the maintenance payments would be taken care of by the Solicitor, who held his power of attorney. Thereafter, the Glebe Centre invoiced the Solicitor on behalf of Mr. Cooney. The Solicitor made the maintenance payments to Glebe Centre on behalf of Mr. Cooney for the period of September 19, 1990 to April, 1992, inclusive, as follows:

Date	Amount of Cheque	Details
January 22, 1991	7,565.22	Cheque from Cooney's personal account to the Glebe Centre
March 8, 1991	3,100.00	Cheque from Cooney's personal account to Solicitor's trust account
March 8, 1991	2,917.75	Cheque from Solicitor's trust account to the Glebe Centre
July 17, 1991	6,493.00	Cheque from Cooney's personal account to the Glebe Centre
August 21, 1991	1,950.00	Cheque from Cooney's personal account to Solicitor's trust account
August 21, 1991	1,650.00	Cheque from Solicitor's trust account to the Glebe Centre
October 18, 1991	3,447.00	Cheque from Cooney's personal account to Solicitor's trust account
October 10, 1991	3,247.00	Cheque from Solicitor's trust account to the Glebe Centre
October 31, 1991	1,863.92	Cheque from Cooney's personal account to Solicitor's trust account
October 31, 1991	1,597.00	Cheque from Solicitor's trust account to the Glebe Centre
April 3, 1992	8,174.00	Cheque from Cooney's personal account to the Glebe Centre

These transfers are supported by the bank records of George Cooney, attached hereto as Exhibit 3 to this Agreed Statement of Facts and by the Solicitor's trust ledger, attached hereto as Exhibit 4 to this Agreed Statement of Facts. The payments are also confirmed by correspondence from the Solicitor to the Glebe Centre, copies of which are attached hereto as Exhibit 5 to this Agreed Statement of Facts.

8. After April 19, 1992, the Glebe Centre continued to invoice the Solicitor for the care of George Cooney. The Solicitor made no further payments to the Glebe Centre on behalf of his client. The Solicitor did not contact George Cooney to receive further instructions with respect to the payments.

9. During the period of April 1992 to June 1993, inclusive, the Glebe Centre made numerous efforts to contact the Solicitor. The Solicitor did not respond to those attempts to contact him.

10. In June, 1993, Susan LaConte, the administrator of the Glebe Centre, lodged a complaint with respect to the Solicitor's conduct with the Society. A copy of this complaint is attached hereto as Exhibit 6 to this Agreed Statement of Facts.

11. Because of his ill health, Mr. Cooney was not approached directly by the Glebe Centre with respect to the difficulties concerning the payment of his maintenance fees. Eventually, the Glebe Centre itself obtained a power of attorney for Mr. Cooney and the maintenance fees were paid. Mr. Cooney died in December, 1994.

12. When he was spoken to by an investigator from the Society, the Solicitor acknowledged that he had not responded to the Glebe Centre or paid maintenance fees for Mr. Cooney after April, 1992. He stated that the Power of Attorney did not oblige him to respond to the Glebe Centre. He further stated that as the Glebe Centre was not his client, he was under no obligation to respond to it.

13. The Solicitor further stated that he did not make payments subsequent to April, 1992 as there were insufficient funds in Mr. Cooney's account. A perusal of Mr. Cooney's bank records (Exhibit 3) indicates this statement is incorrect.

14. The Solicitor also indicated that Mr. Cooney did not provide him with instructions to make further payments, although he acknowledged that Mr. Cooney was very old and may not have been in a position to give him instructions. The Solicitor did not attempt to contact Mr. Cooney to receive those instructions.

Particular 2(b) He failed to serve his clients Melvyn and Carol Grandame and the Toronto-Dominion Bank regarding the purchase and financing of a property at 17 Bluff's Road, Newcastle, Ontario by

- (i) failing to register the lease and Toronto-Dominion mortgage on title in a timely fashion;
- (ii) failing to report to the Toronto-Dominion Bank in a timely fashion following the closing of the transaction despite letters dated June 14, 1992, August 14, 1992, September 14, 1992, October 13, 1992, December 4, 1992, January 5, 1993, February 9, 1993 and May 14, 1993 from the bank; and
- (iii) failing to report to Mr. and Mrs. Grandame in a timely fashion following the completion of the transaction despite their requests to do so.

15. In or about 1990, the Solicitor was retained by Melvyn and Carol Grandame with respect to their purchase of a property located in Newcastle, Ontario. This transaction consisted of the purchase of a residence on leased land; the transaction closed on April 27, 1990. The Grandames obtained a mortgage from the Toronto Dominion Bank in the amount of \$85,000.00 and the Solicitor was retained by the Toronto Dominion Bank to act on its behalf with respect to that mortgage.

16. The Solicitor failed to register the mortgage and the lease on title and failed to report to either the Grandames or the Toronto Dominion Bank.

17. The Solicitor states that this file was misplaced when his firm moved offices on June 1, 1990. The Solicitor further states that this matter was corrected as soon as all of the necessary information was available to him. The Law Society does not accept this characterization of the events, based on the following chronology.

18. By letter dated July 14, 1992, a copy of which is attached hereto as Exhibit 7 to this Agreed Statement of Facts, the Toronto Dominion Bank wrote to the Solicitor requiring *inter alia* his final report and a copy of the registered mortgage. The Solicitor did not respond to this letter.

19. By letter dated August 14, 1992, a copy of which is attached hereto as Exhibit 8 to this Agreed Statement of Facts, the Toronto Dominion Bank again wrote to the Solicitor with a similar request. The Solicitor did not respond to this letter.

20. By letter dated September 14, 1992, a copy of which is attached hereto as Exhibit 9 to this Agreed Statement of Facts, the Toronto Dominion Bank again wrote to the Solicitor making a similar request. The Solicitor did not respond to this letter.
21. By letter dated October 13, 1992, a copy of which is attached hereto as Exhibit 10 to this Agreed Statement of Facts, the Toronto Dominion Bank yet again wrote to the Solicitor making a similar request. The Solicitor did not provide the required report or documents to the Toronto Dominion Bank.
22. By letter dated December 4, 1992, a copy of which is attached hereto as Exhibit 11 to this Agreed Statement of Facts, the Toronto Dominion Bank wrote to the Solicitor enquiring as to the status of the mortgage file. The Solicitor did not respond to this letter.
23. By letter dated January 5, 1993, a copy of which is attached hereto as Exhibit 12 to this Agreed Statement of Facts, the Toronto Dominion Bank again wrote to the Solicitor, requesting a reply to its earlier correspondence. The Solicitor did not respond to this letter.
24. By letter dated February 9, 1993, a copy of which is attached hereto as Exhibit 13 to this Agreed Statement of Facts, the Toronto Dominion Bank once again wrote to the Solicitor requiring his final report and documents. The Solicitor did not respond to this letter.
25. By facsimile transmission dated March 1, 1993, a copy of which is attached hereto as Exhibit 14 to this Agreed Statement of Facts, the Toronto Dominion Bank again requested the Solicitor provide his report and documents. The Solicitor did not respond to this facsimile request.
26. By facsimile transmission dated March 5, 1993, a copy of which is attached hereto as Exhibit 15 to this Agreed Statement of Facts, the Toronto Dominion Bank again requested of the Solicitor his report and documents.
27. By letter dated March 5, 1993, a copy of which is attached hereto as Exhibit 16 to this Agreed Statement of Facts, the Solicitor responded to the Toronto Dominion Bank, indicating he was unable to provide his final report as the mortgage had not yet been registered. He further indicated that he could not register the mortgage without an original lease, which he was in the process of obtaining. He stated that he would complete the file and report thereon by the end of that month.
28. By facsimile transmission dated March 12, 1993, and retransmitted on March 24, 1993 and March 25, 1993, a copy of which is attached hereto as Exhibit 17 to this Agreed Statement of Facts, the Toronto Dominion Bank requested the Solicitor provide the status of the mortgage.
29. By facsimile transmission dated March 31, 1993 and retransmitted April 2, 1993, a copy of which is attached hereto as Exhibit 18 to this Agreed Statement of Facts, the Toronto Dominion Bank enquired of the Solicitor as to whether the mortgage had been registered.
30. By facsimile transmission dated April 29, 1993 and retransmitted May 3, 1993 and May 10, 1993, a copy of which is attached hereto as Exhibit 19 to this Agreed Statement of Facts, the Toronto Dominion Bank required the Solicitor to provide the status of the file. The Solicitor did not respond to this facsimile.
31. By letter dated May 14, 1993, a copy of which is attached hereto as Exhibit 20 to this Agreed Statement of Facts, the Toronto Dominion Bank wrote to the Solicitor requiring a response to its earlier correspondence. The Solicitor did not respond to this letter.
32. By letter dated May 21, 1993, a copy of which is attached hereto as Exhibit 21 to this Agreed Statement of Facts, the Toronto Dominion Bank complained to the Law Society concerning the conduct of the Solicitor.

33. During or about the latter part of 1992 and the early part of 1993, Melvyn Grandame made a number of attempts to contact the Solicitor. The Solicitor did not respond to these attempts. The Solicitor did not report to the Grandames concerning the real estate transaction.

34. During August, 1993, the Solicitor did contact Melvyn Grandame and request that the original lease be forwarded to him. Mr. Grandame complied with that request immediately.

35. On August 19, 1993, the Solicitor registered the lease and mortgage in this matter. A copy of the registered documents is attached hereto as Exhibit 22 to this Agreed Statement of Facts. The Solicitor did not report to the Toronto Dominion Bank at this time, although he did inform the bank of the registration.

36. By letter dated September 22, 1993, a copy of which is attached hereto as Exhibit 23 to this Agreed Statement of Facts, the Toronto Dominion Bank wrote to the Solicitor, requesting his final report and copies of the registered documents. The Solicitor did not respond to this letter.

37. By letter dated November 4, 1993, a copy of which is attached hereto as Exhibit 24 to this Agreed Statement of Facts, the Toronto Dominion Bank again wrote to the Solicitor, requiring his final report and the registered documents.

38. By letter dated November 9, 1993, the Solicitor did report to the Toronto Dominion Bank and provide them with the required documentation. This reporting is confirmed by a letter from the Solicitor to the Society dated November 16, 1993, a copy of which is attached hereto as Exhibit 25 to this Agreed Statement of Facts and by a letter from the Toronto Dominion Bank to the Society dated November 16, 1993, a copy of which is attached hereto as Exhibit 26 to this Agreed Statement of Facts.

39. The Solicitor only billed Mr. Grandame for the disbursements for the file, and, to the Solicitor's knowledge, Mr. Grandame suffered no damage as a result of the Solicitor's delay.

#### Complaint 262/96

Particular 2(a) He failed to reply to the Law Society regarding a complaint by R. Paul McTaggart despite letters dated March 27 and June 19, 1996 and telephone messages left on June 6, June 13 and August 28, 1996; and

2(f) He failed to reply to communications from a fellow solicitor, R. Paul McTaggart, with respect to a joint venture.

40. In 1995 the Solicitor was representing a group of investors with respect to a joint venture. Another solicitor, R. Paul McTaggart, was representing another group of investors with respect to the same joint venture. A difficulty developed with the financing of the joint venture. Mr. McTaggart, on behalf of his clients, made arrangements for a mortgage to be taken on the property by Maritime Life. These arrangements necessitated the execution of Releases by a number of the Solicitor's clients.

41. On or about February 13, 1995, an Agreement was reached between all parties that the Releases would be so executed. Thereafter, Mr. McTaggart wrote to the Solicitor on a number of occasions in an effort to have him obtain and forward the Releases to him. By letter dated April 6, 1995, a copy of which is attached hereto as Exhibit 27, Mr. McTaggart wrote to the Solicitor requesting the Releases and detailing his previous attempts to contact the Solicitor. The attempts so detailed totalled twenty-one. The Solicitor did not respond to any of those attempts.

42. By letter dated April 12, 1995, Mr. McTaggart again wrote to the Solicitor. He received no response. By letter dated April 19, 1995, copy of which is attached hereto as Exhibit 28, Mr. McTaggart again wrote to the Solicitor requiring him to treat the matter as urgent. This correspondence was sent by facsimile transmission. The Solicitor did not respond.

43. By letter dated April 20, 1995, a copy of which is attached hereto as Exhibit 29, also sent by facsimile transmission, Mr. McTaggart wrote to the Solicitor requiring the provision of the discharged documents and a response. The Solicitor did not respond.

44. By letter dated May 11, 1995, a copy of which is attached hereto as Exhibit 30, Mr. McTaggart again wrote to the Solicitor requiring the provision of the documents and a response from the Solicitor. Mr. McTaggart also indicated that, should the Solicitor not provide at least an explanation by May 15, 1995, Mr. McTaggart intended to report the matter to the Law Society of Upper Canada. The solicitor did not respond.

45. By letter dated May 15, 1995, a copy of which is attached hereto as Exhibit 31, Mr. McTaggart complained to the Law Society concerning the conduct of the Solicitor.

46. On May 23, 1995, a staff member of the Law Society telephoned the Solicitor concerning the complaint received from Mr. McTaggart. The Solicitor admitted not responding to the letters from Mr. McTaggart. He further indicated that his clients had a difficulty with the manner in which Mr. McTaggart had dealt with the joint venture and that they had specifically instructed him to make the matter as difficult as possible for Mr. McTaggart. A copy of the telephone message and transcription is attached hereto as Exhibit 32.

47. By letter dated May 25, 1995, a copy of which is attached hereto as Exhibit 33, the Law Society wrote to the Solicitor, enclosing the complaint of Mr. McTaggart and requested his response.

48. By letter dated June 8, 1995, a copy of which is attached hereto as Exhibit 34. Mr. McTaggart wrote to the Solicitor requiring the Solicitor to provide certain documentation and to respond. The Solicitor did not respond to this correspondence.

49. By letter dated June 19, 1995, a copy of which is attached hereto as Exhibit 35, the Solicitor responded to the Law Society. In that letter the Solicitor advised that he had advised his clients to take a hard line and not negotiate with Mr. McTaggart. He further accused Mr. McTaggart of using bullying tactics and derisive language with respect to the Solicitor's clients. Finally, he indicated that thirteen of the necessary Releases had been obtained and the remainder were expected by the deadline.

50. By letters dated July 6, 1995, August 1, 1995, September 5, 1995 and September 26, 1995, Mr. McTaggart wrote to the Solicitor requesting that the file be finalized. The Solicitor did not do so.

51. By letter dated October 16, 1995, a copy of which is attached hereto as Exhibit 36, Mr. McTaggart again wrote to the Solicitor requiring that matters concerning the joint venture be completed. The Solicitor did not respond to this correspondence.

52. By letter dated November 7, 1995, a copy of which is attached hereto as Exhibit 37, the Law Society responded to the Solicitor's letter to the Society dated June 19, 1995 (Exhibit 35). The Law Society drew the Solicitor's attention to Rule 14, Commentary 5, and reminded him of his professional obligation to respond with reasonable promptness to all communications from other lawyers requiring an answer. The Law Society requested that the Solicitor provide a response or responses to Mr. McTaggart and provide copies of those responses to the Law Society. The Solicitor did not respond to this correspondence.

53. On February 13, 1996, a staff member of the Law Society telephoned the Solicitor and left a voice mail message indicating that his response was still outstanding and required him to call the Law Society as soon as possible. A copy of this message and the transcription thereof is attached hereto as Exhibit 38.

54. The same day, the Solicitor returned the telephone call and indicated that he would respond by Monday of the next week. A copy of the telephone message and transcription thereof is attached hereto as Exhibit 39.

55. By letter dated February 19, 1996, a copy of which is attached hereto as Exhibit 40, the Solicitor responded to the Law Society. The Solicitor addressed the issue of his non-communication with Mr. McTaggart as follows:

“It seems to me, that the issue is not whether I responded to each and every one of Mr. McTaggart’s letters, faxes or telephone calls, but whether my clients had been served, protected and are finally out of a real estate transaction which, if they had remained in, would have had them offering personal guarantees when none had been offered before.

It seems to me that I did my job and did it well and achieved the legitimate ends of my clients.”

56. On February 21, 1996, a staff member of the Law Society telephoned the Solicitor with respect to his response, and left a message for him to return her call. On February 22, 1996, the Solicitor returned the telephone call and left a message indicating he thought that all the Releases had been sent but would check, and that he would write on February 26, 1996. A copy of the telephone message and transcription thereof is attached hereto as Exhibit 41.

57. On March 6, 1996, a staff member of the Law Society telephoned the Solicitor and reminded him that he had not yet forwarded his detailed response. The Solicitor promised to forward same the next day. A copy of the telephone message and transcription thereof is attached hereto as Exhibit 42.

58. By letter dated March 8, 1996, a copy of which is attached hereto as Exhibit 43, the Solicitor wrote to the Society, acknowledging that “there is work to be completed by my office”. He further indicated that he hoped to be in a position to provide the outstanding items to Mr. McTaggart by the end of the week of March 19, 1996.

59. By letter dated March 27, 1996, copy of which is attached hereto as Exhibit 44, the Law Society wrote to the Solicitor, indicating as follows:

During a telephone conversation with the Complainant on March 13, 1996, it is apparent that a dispute in facts exists as between you and him. This situation raises the issue of credibility and the Law Society is simply not in a position to effectively mediate a dispute of this nature. Accordingly, I would respectfully request that you prepare a list of outstanding items which you require Mr. McTaggart to provide, and, by copy of this letter, request that he do likewise. With a view to reaching a timely resolve, please provide this information, together with a status report of the legal matter at hand, in writing, within two weeks from the date of this letter.

The Solicitor did not respond to this letter.

60. By letter dated April 11, 1996, a copy of which is attached hereto as Exhibit 45, Mr. McTaggart wrote to the Solicitor setting out matters as had been requested by the Society in its correspondence of March 27, 1996. Mr. McTaggart also required the Solicitor to advise him as to his closing agenda. The Solicitor did not respond to this correspondence.

61. By letter dated May 16, 1996, a copy of which is attached hereto as Exhibit 46, Mr. McTaggart again wrote to the Solicitor requesting a response to his previous correspondence. The Solicitor did not respond.

62. On June 6, 1996, a staff member of the Law Society telephoned the Solicitor and left a message indicating he had not yet responded to the Law Society’s letter of March 27, 1996. The Solicitor did not return this telephone call. On June 13, 1996, a staff member of the Law Society again telephoned the Solicitor and left a message requesting that he return the telephone call. A copy of the telephone messages and transcriptions thereof is attached hereto as Exhibit 47. The Solicitor did not respond.

63. By letter dated June 19, 1996, which was delivered by registered mail, the Law Society again wrote to the Solicitor requiring a response to its letter of March 27, 1996 and its telephone messages of June 6 and June 13, 1996. This letter was signed for and delivered on June 24, 1996. A copy of the letter and the acknowledgement of receipt card is attached hereto as Exhibit 48. The Solicitor did not respond.

64. The Solicitor states that he was frustrated that his clients had invested in a venture promoted by Mr. McTaggart and his spouse and that all of his clients had considerable sums of money in the venture, and was now being called upon to answer to Mr. McTaggart and the Law Society.

65. To date the Solicitor has not responded to Mr. McTaggart or to the Law Society.

Particular 2 (b) He failed to reply to the Law Society regarding a complaint by Kenneth Killeen despite a letter dated March 7, 1996 and telephone messages left on April 26, May 15 and August 28, 1996;

2 (c) He failed to serve his client, Kenneth Killeen, in a conscientious, diligent and efficient manner in that he:

- i) failed to complete the winding up of the estate for which his client is Executor;
- ii) failed to respond to reasonable requests from his client for information with respect to the status of the estate.

66. In 1992 the Solicitor was retained by Kenneth Killeen, the Executor of the estate of Douglas Killeen, who died on March 5, 1992, to assist him with the distribution and winding up of the estate.

67. Besides Kenneth Killeen, the beneficiaries of the estate were Dorothy Villeneuve and Audrey Lawrie.

68. In August 1994, the Solicitor sent Kenneth Killeen a payment schedule, indicating payments made to the beneficiaries of July 1994. A copy of the schedule is attached hereto as Exhibit 49.

69. That schedule indicates that payments of \$2,500.00 each were made to the three beneficiaries on July 19, 1994. In fact, Kenneth Killeen received a cheque for \$3,500.00 and the payments to Dorothy Villeneuve and Audrey Lawrie were not made.

70. In October of 1994, Kenneth Killeen received a cheque for interest on Canada Savings Bonds held by the deceased, which he forwarded to the Solicitor. He also instructed the Solicitor to cash in the Canada Savings Bonds, which had a face value of \$3,000.00.

71. Despite those instructions, in October 1995, Kenneth Killeen received a further interest cheque on the Canada Savings Bonds. As a result, on October 24, 1995, his wife, Anita, telephoned the Solicitor and spoke with him. At that time the Solicitor informed her that he thought the file was closed and he would have to get back to her.

72. Thereafter, Mrs. Killeen called the Solicitor on a number of occasions and left messages for him to return her calls. The Solicitor did not return any of those calls.

73. By letter dated November 25, 1995, a copy of which is attached hereto as Exhibit 50, Anita Killeen wrote to the Solicitor on behalf of Kenneth Killeen, requiring him to make a final distribution of the estate, and provide to her a copy of the Revenue Canada Release and the estate bank account passbook. The Solicitor did not respond.

74. By letter dated February 5, 1996, a copy of which is attached hereto as Exhibit 51, Kenneth Killeen wrote to the Law Society complaining about the Solicitor's actions.

75. By letter dated March 7, 1996, a copy of which is attached hereto as Exhibit 52, the Law Society wrote to the Solicitor, enclosing Kenneth Killeen's letter and requesting the Solicitor's comments thereon. In particular, the Society asked for an explanation for his failure to respond to his client, a copy of any accounting or reporting that had been prepared with respect to the estate, and information on the status of the estate. The Solicitor did not respond.

76. On April 25, 1996, a staff member of the Law Society telephoned the Solicitor with respect to the March 7, 1996 letter, and left a voice mail message asking the Solicitor to call and advise when his response might be expected. On April 26, 1996, at 7:40 a.m. the Solicitor returned the telephone call and left a message that he would fax his response by Monday, April 29, 1996. A copy of the telephone transaction record is attached hereto as Exhibit 53. The Solicitor did not forward a response.

77. On May 15, 1996, a staff member of the Law Society telephoned the Solicitor and left a message on his voice mail advising that she required a date by which he would be responding to the Law Society's letter of March 7, 1996. A copy of the telephone transaction record is attached hereto as Exhibit 54. The Solicitor did not return the telephone call.

78. By letter dated May 23, 1996, delivered by registered mail, the Law Society again wrote the Solicitor requiring his response. That letter was signed for and delivered on May 28, 1996. A copy of the letter and the acknowledgement of receipt card is attached hereto as Exhibit 55. The Solicitor did not respond.

79. On May 22, 1996, Kenneth Killeen attended at the Canada Trust branch holding the estate account of Douglas Killeen. At that time he discovered the account was dormant, re-activated the account and received a new passbook and cheque book. The same day he called Revenue Canada for a statement of account and was informed that there was an interest penalty from the assessment date of March 1993. On May 29, 1996, he sent a cheque to Revenue Canada for the total balance owing including interest. He also provided Revenue Canada with necessary documentation and applied for a Clearance Certificate. After that payment, the balance in the estate account was \$7,390.88. This amount did not include the \$3,000.00 in Canada Savings Bonds being held by the Solicitor nor the interest cheque signed over to the Solicitor for interest on those bonds in October 1994. Mr. Killeen's efforts are detailed in a letter from him to the Law Society dated May 30, 1996, a copy of which is attached hereto as Exhibit 56.

80. On August 28, 1996, a staff member of the Law Society telephoned the Solicitor and left a message for him advising that the matter would be referred to Discipline should he not respond. The staff member asked that the Solicitor call and advise when he would be responding. A copy of the telephone transaction message is attached hereto as Exhibit 57. The Solicitor did not respond.

81. The Solicitor states that no fees were charged to Mr. Killeen for any work completed on his behalf by the Solicitor.

82. To date the Solicitor has not responded to the Law Society, nor has he completed the winding up of the estate of Douglas Killeen or responded to the Executor, Kenneth Killeen.

Particular 2 (d) He failed to reply to the Law Society regarding a complaint by Dorothy Villeneuve despite letters dated July 18, and August 23, 1996 and telephone messages left on August 13, and August 21, 1996;

2 (e) He failed to reply to communications from a fellow solicitor, Thomas Curran, requesting information about the estate of Douglas Killeen.

83. As a result of the difficulties experienced in obtaining a distribution of the estate of Douglas Killeen, one of the beneficiaries, Mrs. Dorothy Villeneuve, retained counsel, Thomas W. Curran.

84. By letter dated March 21, 1996, a copy of which is attached hereto as Exhibit 58, Mr. Curran wrote to the Solicitor requesting that he provide information with respect to the status of the estate of Douglas Killeen. The Solicitor did not respond.

85. Thereafter, Mr. Curran telephoned the Solicitor and left a message for him to return his call. The Solicitor did not return the telephone call. On April 16, 1996, Mr. Curran wrote the Solicitor, insisting that the Solicitor respond to him with respect to the status of the estate. This letter was delivered by facsimile transmission. A copy of the letter is attached hereto as Exhibit 59. The Solicitor did not respond.

86. Mr. Curran telephoned the Solicitor's office again, and received no response. By letter dated May 16, 1996, a copy of which is attached hereto as Exhibit 60, Mr. Curran again wrote to the Solicitor requiring he respond. This letter was delivered by facsimile transmission and by regular mail. The Solicitor did not respond.

87. By letter dated July 4, 1996, a copy of which is attached hereto as Exhibit 61, Dorothy Villeneuve wrote to the Law Society complaining about the behaviour of the Solicitor.

88. By letter dated July 18, 1996, a copy of which is attached hereto as Exhibit 62, the Law Society wrote to the Solicitor, enclosing the complaint of Dorothy Villeneuve and requesting he respond to the complaint. The Solicitor did not respond.

89. On August 13, 1996, a staff member of the Law Society telephoned the Solicitor and left a message on his voice mail requesting he return her call as soon as possible and advise her when his reply to the Society's letter of July 18, 1996 might be expected. The Solicitor did not return that telephone call. On August 21, 1996, a staff member of the Law Society again telephoned the Solicitor and left a message for him to return her call as soon as possible. The Solicitor did not return that telephone call. A copy of the telephone transactions and transcriptions thereof is attached hereto as Exhibit 63.

90. By letter dated August 23, 1996 and delivered by registered mail, the Law Society wrote to the Solicitor requiring his immediate response. A copy of this letter is attached hereto as Exhibit 64. The Solicitor did not respond.

91. On August 28, 1996, a staff member of the Law Society telephoned the Solicitor and left a message for him, advising him that the matter would be referred to Discipline should he not respond. The staff member asked that he return her telephone call and advise when he would be responding. A copy of this telephone transaction is attached hereto as Exhibit 65. The Solicitor did not return the telephone call.

92. By letter dated September 9, 1996, a copy of which is attached hereto as Exhibit 66, Mr. Curran wrote to the Society confirming that the Solicitor had not responded to any of his correspondence or telephone calls.

93. To date the Solicitor has not responded to the Law Society or to Thomas Curran.

#### V. DISCIPLINE HISTORY

94. The Solicitor was found guilty of professional misconduct on August 23, 1990 for falsely advising clients and failing to notify the Errors and Omissions Department of his possible negligence. He received a reprimand in Committee.

95. The Solicitor was found guilty of professional misconduct on December 13, 1994 for failing to reply to the Law Society and for failing to serve a client by failing to keep the client reasonably informed, failing to answer reasonable requests for information and failing to make a prompt and complete interim report. He received a reprimand in Committee and was ordered to pay costs in the amount of \$750.00, which have been paid.

95. The Solicitor was found guilty of professional misconduct on November 28, 1995 for failing to reply to the Law Society. He received a reprimand in Committee and was ordered to pay costs in the amount of \$400.00, which have been paid.

DATED at Toronto this 3rd day of June, 1997."

Re: Particular 2(a) D211/96

The Solicitor did not admit Particular 2(a) of D211/96 or that the facts set out therein constituted professional misconduct. In the Committee's view, the facts admitted in paragraphs 5 to 14 of the Agreed Statement of Facts are sufficient upon which to found the allegations in Particular 2(a). The Solicitor admitted he was retained by George Cooney and that Mr. Cooney executed a power of attorney in the Solicitor's favour so that the Solicitor could pay Mr. Cooney's bills. The Solicitor put the nursing home in which Mr. Cooney resided on notice that the Power of Attorney had been signed in his favour.

Mr. Cooney was elderly, blind, sick and without family. Inexplicably, in April 1992, the Solicitor stopped making the payments to Mr. Cooney's nursing home. He attempted to defend this by saying that it had been the client's pattern to drop in from time to time and many of the payments to the nursing home were made by the client writing a cheque at the Solicitor's office. The nursing home made numerous attempts to contact the Solicitor, to which the Solicitor did not respond. He did not contact Mr. Cooney to receive further instructions. He advised the Committee that he believed he served Mr. Cooney well.

#### Reasons for Finding of Professional Misconduct

In our view, the aforesaid facts constitute a failure to serve. We find that the Solicitor is guilty of professional misconduct as set out in particular 2(a). The Solicitor has admitted professional misconduct with respect to the balance of the particulars and there will be a finding in accordance with the admissions and in regard to particular 2(a) of Complaint D211/96 as set out above.

#### RECOMMENDATION AS TO PENALTY

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The Committee recommends that John Lionel McCauley be suspended for a period of one month, that he pay Law Society costs in the amount of \$1500 and that on his return to practice he participate in the Practice Review Program.

#### REASONS FOR RECOMMENDATION

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The misconduct in these complaints involved three failures to serve clients, three failures to reply to the Law Society and two failures to reply to fellow solicitors in regard to client matters.

With respect to the failure to serve his client in the winding up of the Killeen estate, the estate was not wound up some five years after Mr. Killeen had passed away. With respect to the failures to reply to fellow solicitors and the Law Society, no replies had been received at the time this matter reached hearing.

Taking these complaints with the prior discipline history of three reprimands in Committee, two of which were for similar kinds of misconduct, the Committee is extremely concerned that the Solicitor has not appreciated the seriousness of the situation. There is a persistent pattern of the Solicitor disregarding his obligations to his clients and to the Law Society. Reprimands through the disciplinary process have been unsuccessful in getting the Solicitor's attention. We are not satisfied that the Solicitor has made any changes in his practice or faced up to his problems.

In the Solicitor's favour, he did cooperate with the Law Society and enter into an Agreed Statement of Facts. His failure, however, to admit particular 2(a) of Complaint D211/96 causes us concern, not as a failure to admit but rather as a failure on his part to appreciate the nature of his misconduct.

The Solicitor advised us of personal difficulties he has undergone, which included personal bankruptcy. The Committee is very sympathetic to the problems he has had to face. However, the protection of the public must be paramount. The Solicitor has damaged not only his own reputation but the reputation of the legal profession. The profession must be aware that this type of conduct will not be countenanced by the Law Society. The Committee is of the view that a lesser penalty than a suspension will not be a sufficient specific deterrent to this Solicitor, bearing in mind that three reprimands have not had the desired effect.

The Committee recommends that after the Solicitor completes his suspension, he participate in practice review in an effort to set up procedures in his office to avoid repetition of the conduct which is the subject of this complaint.

John Lionel McCauley was called to the Bar on April 12, 1976.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of October, 1997

Nancy L. Backhouse, Chair

There were no submissions.

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

Carried

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month, pay the Society's costs in the amount of \$1,500 and upon return to practice he participate in the Practice Review Program.

Counsel for Society made submissions in support of a higher penalty of a 6 month suspension.

Counsel, the reporter and the public withdrew.

It was moved by Ms. Ross, seconded by Mr. Topp that the solicitor be suspended for 6 months to commence at the end of any administrative suspension and continue indefinitely until the solicitor responds to the Society and to pay costs and enroll in the Practice Review Program upon his return to practice.

Carried

It was moved by Mr. Gottlieb, seconded by Ms. Puccini that the recommended penalty be adopted.

Not Put

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

Not Put

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period 6 months to commence at the end of any administrative suspension and the suspension continue indefinitely until the solicitor responds to the Society and that he pay costs in the amount of \$1,500 and enroll in the Practice Review Program upon his return to practice.

The Bruce Allan CLARK matter was adjourned.

CONVOCATION ROSE AT 5:40 P.M.

Confirmed in Convocation this 27 day of February, 1998

*Harvey T. Stoshko*

Treasurer