

22nd May, 1997

MINUTES OF DISCIPLINE CONVOCATION

Thursday, 22nd May, 1997
8:45 a.m.

PRESENT:

The Treasurer (E. Susan Elliott), Adams, Angeles, Arnup, Bobesich, Carey, Carter, Cole, Crowe, Curtis Eberts, Gottlieb, MacKenzie Manes, Marrocco, Millar, O'Connor, Puccini, Ross, Stomp, Swaye, Thom, Wilson and Wright.

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IN PUBLIC

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The reporter was sworn.

REPORT OF THE DIRECTOR OF BAR ADMISSIONS

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The Director of Bar Admissions begs leave to report:

B.
ADMINISTRATION

B.1. CALL TO THE BAR AND CERTIFICATE OF FITNESS

B.1.1. (a) Bar Admission Course

B.1.2. The following candidates having successfully completed the Bar Admission Course now have filed the necessary documents and paid the required fee and apply to be called to the Bar and to be granted a Certificate of Fitness at Special Convocation on Thursday, May 22nd, 1997:

Husna Fatima Alikhan	38th BAC
Sofia Michelle Ansari	37th BAC
Rohan George Bansie	38th BAC
Gregory John Bergman	38th BAC
Margarett Rose Best	38th BAC
Gidron MacDonald O'Carrol Cadogan	38th BAC
Bruce Alan Chapple	38th BAC
Geoffrey Brian Davidson	37th BAC
Anthony Attila de Fazekas	38th BAC
Jean Jacques Victor Nicolas Desgranges	38th BAC
Jasteena Dhillon	38th BAC
Nelusha Ediriweera	38th BAC
Shizuye Faulkner	38th BAC
Patrick Howard Floyd	38th BAC
Maggy Gayed	38th BAC

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Bruce Anthony Gilpin	38th BAC
Christine Elizabeth Ida Gravel	38th BAC
Sharmaine Gail Hall	37th BAC
Deborah Anne Harrison	38th BAC
Toby Johann Hoffmann	38th BAC
Oswald Paul David James	38th BAC
Leslie Ann Kaufman	38th BAC
Stephane Joseph Oscar Gratien Roger Lalonde	38th BAC
Maureen Elizabeth Lennon	38th BAC
Rochelle Sonja Lyons	38th BAC
Patricia Gail Kavanagh Macrae	38th BAC
Winston Gauntlett Mattis	38th BAC
Andrew de Lotbiniere McDougall	37th BAC
Kaori Miyake	38th BAC
Yasmeena Mohamed	38th BAC
Mohammed Mortala Muslim Sarko	38th BAC
Laura Elizabeth Oliver	38th BAC
Louis Nathaniel Rajnauth	31st BAC
Lisa Edna Reiten	38th BAC
Joy Masuda Lissa Ruth Saleh	38th BAC
Kim Tigre Sfalcin	38th BAC
Dodie Sobretudo	38th BAC
Leonard Stigler	37th BAC
Lana Marie Strain	38th BAC
Mitchell Jeffrey Worsoff	38th BAC

B.1.3. Transfer from another Province - Section 4

B.1.4. The following candidates having completed successfully the Transfer Examination or Phase Three of the Bar Admission Course, filed the necessary documents and paid the required fee now apply for call to the Bar and to be granted a Certificate of Fitness at Special Convocation on Thursday, May 22nd, 1997:

Edward Duncan Bridge	Province of Quebec
Karen Marie Sargeant	Province of British Columbia

C.
INFORMATION

C.1. READMISSION FOLLOWING RESIGNATION AT OWN REQUEST

C.1.1. The following former member has applied for readmission and has met all the requirements in that regard:

Kevin Ian Munro	<u>Called:</u> March 31st, 1990
	<u>Resigned:</u> June 24th, 1994

ALL OF WHICH is respectfully submitted

DATED this the 22nd day of May, 1997

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It was moved by Ms. Ross, seconded by Mr. Crowe that the Report of the Director of Bar Admissions be adopted.

Carried

THE REPORT WAS ADOPTED

CALL TO THE BAR

The following candidates were presented to the Treasurer and Convocation and were called to the Bar by the Treasurer and the degree of Barrister-at-Law was conferred upon each of them.

Husna Fatima Alikhan	38th Bar Admission Course
Sofia Michelle Ansari	37th Bar Admission Course
Rohan George Bansie	38th Bar Admission Course
Gregory John Bergman	38th Bar Admission Course
Margarett Rose Best	38th Bar Admission Course
Gidron MacDonald O'Carrol Cadogan	38th Bar Admission Course
Bruce Alan Chapple	38th Bar Admission Course
Geoffrey Brian Davidson	37th Bar Admission Course
Anthony Attila de Fazekas	38th Bar Admission Course
Jean Jacques Victor Nicolas Desgranges	38th Bar Admission Course
Jasteena Dhillon	38th Bar Admission Course
Nelusha Ediriweera	38th Bar Admission Course
Shizuye Faulkner	38th Bar Admission Course
Patrick Howard Floyd	38th Bar Admission Course
Maggy Gayed	38th Bar Admission Course
Bruce Anthony Gilpin	38th Bar Admission Course
Christine Elizabeth Ida Gravel	38th Bar Admission Course
Sharmaine Gail Hall	37th Bar Admission Course
Deborah Anne Harrison	38th Bar Admission Course
Toby Johann Hoffmann	38th Bar Admission Course
Leslie Ann Kaufman	38th Bar Admission Course
Stephane Joseph Oscar Gratien Roger Lalonde	38th Bar Admission Course
Maureen Elizabeth Lennon	38th Bar Admission Course
Rochelle Sonja Lyons	38th Bar Admission Course
Patricia Gail Kavanagh Macrae	38th Bar Admission Course
Winston Gauntlett Mattis	38th Bar Admission Course
Andrew de Lotbiniere McDougall	37th Bar Admission Course
Kaori Miyake	38th Bar Admission Course
Yasmeena Mohamed	38th Bar Admission Course
Mohammed Mortala Muslim Sarko	38th Bar Admission Course
Laura Elizabeth Oliver	38th Bar Admission Course
Louis Nathaniel Rajnauth	31st Bar Admission Course
Lisa Edna Reiten	38th Bar Admission Course
Joy Masuda Lissa Ruth Saleh	38th Bar Admission Course
Kim Tigre Sfalcin	38th Bar Admission Course
Dodie Sobretudo	38th Bar Admission Course
Leonard Stigler	37th Bar Admission Course
Lana Marie Strain	38th Bar Admission Course
Mitchell Jeffrey Worsoff	38th Bar Admission Course
Edward Duncan Bridge	Special, Transfer, Province of Quebec
Karen Marie Sargeant	Special, Transfer, Province of British Columbia

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DISCIPLINE COMMITTEE

Ms. Lesley Cameron, Senior Counsel-Discipline introduced Mr. Scott Fenton who acted as Duty Counsel.

Re: John William EVANS - Lindsay

The Secretary placed the matter before Convocation.

Ms. O'Connor, and Messrs. Adams, Gottlieb and Carey withdrew for this matter.

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

Convocation had before it the Report of the Discipline Committee dated 27th February, 1997, together with an Affidavit of Service sworn 19th March, 1997 by Ron Hopple that he had effected service on the solicitor by registered mail on 6th March, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 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

Jane Harvey, Chair
W. Michael Adams
Shirley O'Connor

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

Glenn Stuart
for the Society

JOHN WILLIAM EVANS
of the Town
of Lindsay
a barrister and solicitor

Steven Skurka
for the solicitor

Heard: December 11, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 15, 1996 Complaint D392/95 was issued against John William Evans alleging that he was guilty of professional misconduct. This Complaint was withdrawn and replaced with Complaint D392a/95 issued on August 13, 1996.

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The matter was heard in public on December 11, 1996 before this Committee composed of Jane Harvey, Chair, W. Michael Adams and Shirley O'Connor. The Solicitor attended the hearing and was represented by Steven Skurka. Glenn Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D392a/95

2. a) in the circumstances of a mortgage transaction in or about December 1988 between Mission Mill Holdings Inc., a company which he controlled, as mortgagor, and the Solicitor, in trust for his clients Hugh Grant, Hillary Owen, and J.J. Graham, as mortgagee,
 - (i) the Solicitor directly or indirectly borrowed the sum of \$170,133.12 from his investor clients, and failed to ensure that those clients received independent legal advice before they invested in this transaction, contrary to the provisions of Rule 7 of the Rules of Professional Conduct; and,
 - ii) the Solicitor failed to disclose that the borrower, Mission Mill Holdings Inc., had been dissolved prior to the renewal of the mortgage loan in December 1989 and, therefore, was a non-entity and not the legal owner of the property.
- b) in the circumstance of a mortgage transaction in or about July 1989 between 824916 Ontario Limited, a company which he controlled, as mortgagor, and the Solicitor, in trust for his clients Hillary Owen, Ruth Evans, and 529828 Ontario Limited, as mortgagee, the Solicitor directly or indirectly borrowed the sum of \$29,070.89 from his investor clients, and failed to ensure that those clients received independent legal advice before they invested in this transaction, contrary to the provisions of Rule 7 of the Rules of Professional Conduct;
- c) in the circumstance of a mortgage transaction in or about February 1990 between Sandra Weaver, as mortgagor, and the Solicitor, in trust for his clients Georgina Williams, Paul Ware, Mission Mill Holdings Inc., and himself as mortgagee,
 - (i) the Solicitor acted in a conflict of interest by representing both the mortgagor and the mortgagees and failed to advise his client Georgina Williams of the nature of his conflict and to either obtain her informed consent to his continuing to act or ensure that she obtained independent legal advice before she entered this transaction, contrary to the provisions of Rule 5 of the Rules of Professional Conduct; and,
 - (ii) the Solicitor failed to ensure that the loan to Sandra Weaver was adequately secured by the mortgage provided by her;

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- d) in relation to the mortgage described in particular (c), the Solicitor failed to disclose the following relevant information to his investor client, Georgina Williams, in contravention of Rule 23(3) of the Rules of Professional Conduct:
 - (i) the Solicitor had both a direct interest as an investor in the mortgage and a direct or indirect interest in the name of Mission Mill Holdings Inc., a company which he controlled and which invested in this mortgage;
 - (ii) the borrower was unemployed at the time of Mrs. William's investment;
 - (iii) the purpose of the mortgage was to repay funds that had been stolen by the mortgagor, Sandra Weaver; and,
 - (iv) the Solicitor personally paid the interest payments to Mrs. Williams on behalf of Sandra Weaver for a period of 3 months after the mortgagor had defaulted on the mortgage;
- e) in the circumstance of a mortgage transaction in or about February 1987 between Henry Bryce Playfoot, as mortgagor, and the Solicitor, in trust for his clients C. Green, M. Barry, and himself, as mortgagee,
 - (i) the Solicitor acted in a conflict of interest by representing both mortgagors and mortgagees without advising any party to the transaction in writing of the nature of his conflict and either obtaining their informed written consent to his continuing to act or ensuring they obtained independent legal advice, contrary to the provisions of Rule 5 of the Rules of Professional Conduct;
 - (ii) the Solicitor failed to register a discharge of an existing mortgage on Mr. Playfoot's property for over six years after he was required to do so;
- f) in the circumstances of the mortgage transaction identified in particular 2(e), the Solicitor invested trust funds which at the time belonged to his client Lea Ann Rea without first obtaining Ms. Rea's informed consent and authority to do so, and without creating any documentation to accurately evidence this investment;
- (g) the Solicitor issued a cheque from his trust account payable to "cash" in contravention of subsection 14(10) of Regulation 708 pursuant to the *Law Society Act*;
- (h) the Solicitor completed an audit questionnaire and delivered to the Law Society Form 2 Certificates dated November 30, 1989, June 25, 1991, December 2, 1992, and November 22, 1993, which falsely stated that the Solicitor had not been indebted to a client, either directly or indirectly, when he had directly or indirectly been indebted to clients with respect to the mortgages described in particulars (a) and (b); and,

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- (i) the Solicitor delivered to the Law Society form 2 Certificates dated December 2, 1992, and November 22, 1993, which falsely stated that he had not directly or indirectly participated in a syndicated mortgage investment, when he had directly or indirectly participated in the syndicated mortgage investments described in particulars (b) and (c).

Evidence

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D392a/95 and is prepared to proceed with a hearing of this matter on August 13-14, 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 D392a/95 and this agreed statement of facts with his counsel, Steven Skurka, and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the amended complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

Background

4. The Solicitor was called to the Bar on March 22, 1974, and is 50 years old. He is a sole practitioner with a general practice.
5. Since the company's incorporation, the Solicitor has been the president and director of Mission Mill Holdings Inc. ("Mission Mill"). At all relevant times, he was a shareholder and the controlling mind of Mission Mill. A copy of the registered corporate documentation for Mission Mill is contained at Tab 1 of the Document Book.
6. Since the company's incorporation, the Solicitor has been the sole officer and director of 824916 Ontario Limited ("824916"). At all relevant times, he was the sole shareholder and the controlling mind of 824916. A copy of the registered corporate documentation for 824916 is contained at Tab 2 of the Document Book.
7. 529828 Ontario Limited was incorporated by Jane Kirby Donohue in December 1982 (Document Book, Tab 3). Articles of Amendment, dated December 30, 1985, identify the Solicitor as the "Manager" of 529828 (Document Book, Tab 4). The company was dissolved on August 14, 1989, pursuant to a Notice of Dissolution under the *Corporations Tax Act* which was sent to the Solicitor (Document Book, Tab 5).

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8. Ruth Evans was the Solicitor's mother. She died in 1988, but the Solicitor was executor of her estate and had unlimited discretion to invest her estate funds. The Last Will and Testament of Ruth Evans is contained at Tab 6 of the Document Book.

9. The Solicitor did not maintain a formal ledger or record for the mortgage investments he held on behalf of clients up to 1992; the details of these mortgages were kept in a handwritten notebook by Susan Wood, the Solicitor's assistant. In 1992, the Solicitor's records were computerized, and formal ledgers introduced, and proper books, records and accounts were kept.

Particular 2(a) in the circumstances of a mortgage transaction in or about December 1988 between Mission Mill Holdings Inc., a company which he controlled, as mortgagor, and the Solicitor, in trust for his clients Hugh Grant, Hillary Owen, and J.J. Graham, as mortgagee,

- (i) the Solicitor directly or indirectly borrowed the sum of \$170,133.12 from his investor clients, and failed to ensure that those clients received independent legal advice before they invested in this transaction, contrary to the provisions of Rule 7 of the Rules of Professional Conduct; and,
- (ii) the Solicitor failed to disclose that the borrower, Mission Mill Holdings Inc., had been dissolved prior to the renewal of the mortgage loan in December 1989 and, therefore, was a non-entity and not the legal owner of the property

10. On December 2, 1988, the property known municipally as 11 Sussex Street, Lindsay ("11 Sussex St."), was purchased by Mission Mill from Landis Seed Canada Ltd. for \$205,000 (Document Book, Tab 7). On the same date, the Solicitor registered a mortgage in the amount of \$170,133.12, against this property in favour of John William Evans, in trust (Document Book, Tab 8). The Solicitor acted for both the borrower and the nominal lender on this transaction, as well as the investors in the mortgage.

11. The Solicitor held interests in this syndicated mortgage in trust for the following clients of his law practice:

Hugh Grant ("Grant")	\$100,000.00
Hillary Owen ("Owen")	\$ 30,133.12
J. J. Graham ("Graham")	\$ 40,000.00.

These interests were evidenced by the Declarations of Trust (Document Book, Tab 9) in favour of each investor, which were signed by the Solicitor and kept in the Solicitor's file for this mortgage.

12. The Solicitor would testify that he orally advised Grant and Graham that he had an interest in Mission Mill. The Law Society accepts that it could not offer any evidence to contradict the Solicitor's expected evidence in this regard. Although it is disputed whether the Solicitor advised Owen orally that the Solicitor had an interest in Mission Mill, the mortgage sent to Owen (Document Book, Tab 8) reflects that the Solicitor had signing authority for the company.

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13. The Solicitor also prepared Forms 4 (Investment Authority for Mortgages or Other Charges on Real Property Held in Trust) and 5 (Report on Investment for Mortgages or Other Charges on Real Property Held in Trust) (Document Book, Tab 10), dated December 1988, for each investor in this mortgage. The Solicitor did not complete the section of each of the Form 4's which addressed whether the Solicitor had a direct or indirect interest in the borrower. Grant did not sign his Form 4.

14. By letters dated December 5, 1988, the Solicitor reported to each of his investor clients on this mortgage (Document Book, Tab 11). The Solicitor did not explicitly disclose in writing at that time, or subsequently, the fact that he controlled Mission Mill.

15. At no time did the Solicitor advise his investor clients to obtain independent legal advice. The Solicitor failed to ensure that his investor clients obtained independent legal advice on this transaction.

16. In December 1989, the Solicitor extended the mortgage on 11 Sussex St. for another year. The Solicitor's letter, dated December 7, 1989, to Hillary Owen confirming this client's oral authorization for the extension of the mortgage is contained at Tab 12 of the Document Book.

17. The Solicitor did not disclose to the investors either before, at the time of or after the extension of this mortgage in December 1989 that the borrower, Mission Mill, had been dissolved on July 10, 1989, for failure to pay its corporate taxes (Document Book, Tab 1). As a consequence of the dissolution of Mission Mill, 11 Sussex St. was the property of the Province of Ontario, not of Mission Mill, at the time of the extension of the mortgage.

18. Grant's interest in the mortgage on 11 Sussex St. was assigned to the Estate of Ruth Evans on August 5, 1990. Neither the introduction of Mrs. Evans' estate to this mortgage nor the Solicitor's relationship with the estate were disclosed to the other two investors.

19. The mortgage on 11 Sussex St. is ongoing and in good standing, and all financial obligations to the investors have been honoured since January 1989. None of the investors have complained to the Law Society regarding this matter.

Particular 2(b) in the circumstance of a mortgage transaction in or about July 1989 between 824916 Ontario Limited, a company which he controlled, as mortgagor, and the Solicitor, in trust for his clients Hillary Owen, Ruth Evans, and 529828 Ontario Limited, as mortgagee, the Solicitor directly or indirectly borrowed the sum of \$29,070.89 from his investor clients, and failed to ensure that those clients received independent legal advice before they invested in this transaction, contrary to the provisions of Rule 7 of the Rules of Professional Conduct

20. On June 30, 1989, the property known municipally as 96 Russell Street, Lindsay ("96 Russell St."), was purchased by 824916 from Suzanne Millington for \$182,500.00 (Document Book, Tab 13). On the same day, a mortgage, in the amount of \$138,750, was registered against the property in favour of National Trust Company (Document Book, Tab 14). The mortgage was guaranteed by the Solicitor.

21. On October 30, 1989, the Solicitor registered a mortgage, in the amount of \$42,826.73, against the property in favour of John William Evans, in trust (Document Book, Tab 15). However, the funds secured by this mortgage had been advanced through the Solicitor in July 1989. The Solicitor acted for both the borrower and the nominal lender on this transaction, as well as the investors in the mortgage.

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22. The Solicitor prepared Forms 4 (Investment Authority for Mortgages or Other Charges on Real Property Held in Trust) and 5 (Report on Investment for Mortgages or Other Charges on Real Property Held in Trust) (Document Book, Tab 16), dated July 4, 1989, for each investor in this mortgage.

23. The Solicitor held interests in this syndicated mortgage in trust for the following clients of his law practice:

Owen	\$ 20,058.51
Ruth Evans	\$ 9,012.38
529828	\$ 13,012.38.

These interests were evidenced by the Forms 4 and 5 (Document Book, Tab 16) which were kept in the Solicitor's file for this mortgage.

24. The Solicitor signed the Form 4's on behalf of 529828 and the estate of Ruth Evans; Owen signed on his behalf. In the Form 4's, the Solicitor advised the investors, specifically Owen, that the Solicitor's interest with respect to the borrower, 824916, or as an investor was "nil". This statement was false both with respect to the Solicitor's interest in the borrower and the Solicitor's interest in 529828.

25. The Solicitor did not disclose on the Form 4's that the property was mortgaged to over 98% of its purchase price and estimated value. The Solicitor did not obtain an independent appraisal for this property. The Solicitor would testify that he believed that there was viable security in the property as a commercial downtown location.

26. Although it is disputed whether the Solicitor advised Owen orally that the Solicitor had an interest in 824916, the mortgage sent to Owen (Document Book, Tabs 15 and 17) reflects that the Solicitor had signing authority for the company.

27. By letters dated July 5, 1989, (Document Book, Tab 17), the Solicitor reported to each of the investors, including 529828 and the Estate of Ruth Evans (at his office address). The letter to Owen does not disclose the Solicitor's interest in the borrower, 824916, or his relationship with 529828 or the Estate of Ruth Evans. The letter also does not disclose the involvement of these latter entities in the mortgage.

28. After the dissolution of 529828 on August 14, 1989, the interest cheques payable to it under this mortgage were deposited directly to the Solicitor's personal account.

29. At no time did the Solicitor advise his investor clients to obtain independent legal advice. The Solicitor failed to ensure that his investor clients obtained independent legal advice on this transaction.

30. The mortgage is ongoing and in good standing at the current time, and all financial obligations to the investors have been honoured since July 1989. None of the investors have complained to the Law Society regarding this matter.

Particular 2(c) in the circumstance of a mortgage transaction in or about February 1990 between Sandra Weaver, as mortgagor, and the Solicitor, in trust for his clients Georgina Williams, Paul Ware, Mission Mill Holdings Inc., and himself, as mortgagee,

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- (i) the Solicitor acted in a conflict of interest by representing both the mortgagor and the mortgagees and failed to advise his client Georgina Williams of the nature of his conflict and to either obtain her informed consent to his continuing to act or ensure that she obtained independent legal advice before she entered this transaction, contrary to the provisions of Rule 5 of the Rules of Professional Conduct; and,
- (ii) the Solicitor failed to ensure that the loan to Sandra Weaver was adequately secured by the mortgage provided by her;

Particular 2(d) in relation to the mortgage described in particular (c), the Solicitor failed to disclose the following relevant information to his investor client, Georgina Williams, in contravention of Rule 23(3) of the Rules of Professional Conduct:

- (i) the Solicitor had both a direct interest as an investor in the mortgage and a direct or indirect interest in the name of Mission Mill Holdings Inc., a company which he controlled and which invested in this mortgage;
- (ii) the borrower was unemployed at the time of Mrs. Williams' investment;
- (iii) the purpose of the mortgage was to repay funds that had been stolen by the mortgagor, Sandra Weaver; and
- (iv) the Solicitor personally paid the interest payments to Mrs. Williams on behalf of Sandra Weaver for a period of 3 months after the mortgagor had defaulted on the mortgage

31. On February 7, 1990, the Solicitor registered a \$50,000 mortgage in favour of himself, in trust, against a property owned by Sandra Weaver (nee Ware) ("Weaver") (Document Book, Tab 18). The mortgage was guaranteed by Paul Ware ("Ware"). A promissory note for \$50,000 also secured the loan (Document Book, Tab 19). The Solicitor acted for both the borrower and the lender on this transaction, as well as the investors in the mortgage. The Solicitor's reporting letter to Weaver is at Tab 20 of the Document Book.

32. According to the Declarations of Trust located in the Solicitor's file for this mortgage (Document Book, Tabs 21, 22, 23 and 24), the Solicitor held interests in this syndicated mortgage in trust for the following clients of his law practice:

Paul Ware	\$10,000.00
Georgina Williams ("Williams")	\$19,000.00
Mission Mill	\$12,000.00
J.W. Evans, General	\$ 4,000.00

Only \$45,000 was advanced under this mortgage.

33. The Solicitor did not advise Williams that he was acting for the mortgagor, the mortgagee, and the investors in this transaction, and he failed to either obtain her consent to his acting in this position of conflict or ensure that she obtained independent legal advice. The Solicitor did not disclose to Williams at any time, either orally or in writing, his \$4,000 direct interest or his indirect \$12,000 interest in this mortgage. Williams had provided her funds to the Solicitor to invest at his discretion.

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34. The Solicitor prepared undated Forms 4 and 5 (Document Book, Tabs 25 and 26) for Williams with respect to this mortgage. The Form 4 does not indicate that the Solicitor has an interest in the mortgage.

35. The estimated value of the property which is disclosed on the Form 4 prepared on behalf of Williams (Document Book, Tab 25) is \$50,000, being 100% of the face value of the mortgage. There is no stated basis for this value, and no material to support this estimate of value was located in the Solicitor's file; the Solicitor did not obtain an independent appraisal before advancing funds on this mortgage. The Solicitor did not disclose to Williams the basis for the estimated value stated in the Form 4.

36. Weaver was a former employee of the Solicitor. During the course of her employment, she had been a nominal officer and director of Mission Mill prior to its dissolution. The Solicitor was aware that Weaver was unemployed and that the purpose of the mortgage was to enable Weaver to repay funds that had been stolen by her at the time.

37. The Solicitor states that, notwithstanding the fact of Weaver's unemployment, he relied on the security of the property, including the fact that two severance applications were being processed on the property, and the strength of Ware's guarantee and his status as an investor. The Solicitor states that, to his direct knowledge, Ware was a successful businessman at the time. The Solicitor did not obtain any documented support of Ware's financial position. Ware made an assignment into bankruptcy on September 28, 1993.

38. Mission Mill had been dissolved on July 10, 1989, approximately seven months before the funds were advanced and had no legal capacity to invest funds in this mortgage. The effect of the dissolution of Mission Mill was that the Solicitor, who was the principal of the company, held an undisclosed direct investment in the mortgage. The Law Society does not take the position that Mission Mill was introduced to this mortgage for the purpose of concealing the Solicitor's investment upon the company's dissolution.

39. The Solicitor did not disclose to the borrower or the other investors that Mission Mill was a dissolved corporation at the time of this investment.

40. By letter dated February 12, 1990, the Solicitor reported to Williams on this transaction (Document Book, Tab 27). The Solicitor's reporting letter does not address the Solicitor's conflict of interest or the Solicitor's involvement in the mortgage.

41. Shortly after this mortgage was registered, Weaver was charged with stealing funds from a lawyer (not the Solicitor) for whom she had worked. The Solicitor was Weaver's counsel of record for a brief period of time prior to the registration of the mortgage. The Solicitor did not disclose his relationship with Weaver or the fact that Weaver had been charged to Williams. Williams learned of the charges against Weaver from reading a local newspaper.

42. To the Solicitor's knowledge, the purpose of this mortgage was to obtain the funds to repay the money which Weaver had stolen. The Solicitor did not advise Williams of this fact. The Solicitor would testify that he had no interest in obtaining the mortgage for Weaver. It was an effort to help a former employee to make restitution, which she would otherwise be unable to make, to avoid criminal charges and a prison sentence.

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43. On May 17, 1990, Williams attended at the Solicitor's office to enquire about the mortgage payments that were to have commenced on March 5, 1990, but had not been made. Williams received from the Solicitor's assistant a cheque in the amount of \$840.99, being the amount of three months interest, which was drawn on the Solicitor's general account (Document Book, Tab 28). This payment was made from the Solicitor's personal funds, as Weaver had not made any payments up to that time. The Solicitor did not advise Williams that he, not Weaver, was making this payment. The Solicitor included this amount among his disbursements, approximately half of which were reimbursed to him from the proceeds of the sale of a portion of the lot subsequently (Document Book, Tab 29).

44. Weaver only made two payments on account of interest on this mortgage to the Solicitor, one on May 31, 1990, and one on June 8, 1990. Both cheques were returned NSF. These payments are reflected in the summary prepared by the Solicitor at Tab 30 of the Document Book. In a handwritten letter which accompanied the cheques (Document Book, Tab 31), Weaver indicated to the Solicitor that she was unable to pay any more, but she would transfer the property to the Solicitor if required.

45. In a letter, dated January 23, 1994, the Solicitor advised Williams' new counsel that the mortgage had gone into arrears in June 1990 (Document Book, Tab 32). He did not disclose that he had made the payments prior to that time and that Weaver had not made payments from the beginning of the mortgage.

46. By letter dated July 6, 1990 (Document Book, Tab 33), the Solicitor confirmed to Weaver that the mortgage was five months in arrears and that the Solicitor's investor clients were considering power of sale proceedings. The Solicitor advised that Weaver had to arrange alternative financing by July 13, 1990, or the Solicitor would have to list the property for sale. The Solicitor asked Weaver to execute a deed conveying the property to him, which she did, and advised her that he would hold the deed in trust until July 13, 1990 (Document Book, Tab 34). Although Weaver returned the executed deed, the deed was not registered on July 13, 1990.

47. In response to an inquiry from the client, the Solicitor wrote to Williams on September 17, 1990, to confirm that the mortgage was in arrears and had not been repaid when due on August 5, 1990 (Document Book, Tab 35). He indicated to Williams that she had to wait until the property was sold to recover her funds.

48. On April 11, 1991, the deed which Weaver signed in July 1990 was registered (Document Book, Tab 34). This effected the transfer of the property by quitclaim rather than by way of power of sale. The deed transferred the property to the Solicitor, personally, the words "in trust" having been deleted by the Solicitor from the registered copy prior to registration. The Solicitor acted at all times, however, as though the property was held in trust.

49. On April 12, 1991, the Solicitor advised Weaver that he had registered the quitclaim deed (Document Book, Tab 36). He had previously had given Ware, as guarantor, notice of his intention to register the deed (Document Book, Tab 37).

50. On April 12, 1994, at the request of Williams' new counsel, the Solicitor signed a Statutory Declaration to indicate that the property which had been subject to the quitclaim deed, and the lots severed from that property, were held by the Solicitor in trust for the investors in the mortgage. An unsigned copy of the Statutory Declaration is at Tab 38 of the Document Book.

51. The property was severed on November 12, 1992. On June 28, 1994, part of the property was sold for \$16,000. Williams received \$6,026.92 from the proceeds. As indicated on the Amended Statement of Adjustments prepared by the Solicitor for the sale, the Solicitor was also paid \$2,500.00 towards his disbursements from the proceeds (Document Book, Tab 29). The remaining property, in which Williams maintains an interest, has not yet been sold.

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Particular 2(e) in the circumstance of a mortgage transaction in or about February 1987 between Henry Bryce Playfoot, as mortgagor, and the Solicitor, in trust for his clients C. Green, M. Barry, and himself, as mortgagee,

- (i) the Solicitor acted in a conflict of interest by representing both mortgagors and mortgagees without advising any party to the transaction in writing of the nature of his conflict and either obtaining their informed written consent to his continuing to act or ensuring they obtained independent legal advice, contrary to the provisions of Rule 5 of the Rules of Professional Conduct;
- (ii) the Solicitor failed to register a discharge of an existing mortgage on Mr. Playfoot's property for over six years after he was required to do so

52. On February 3, 1987, the Solicitor registered a mortgage, in the amount of \$17,991.41, in favour of himself, in trust, against a property owned by Henry Bryce Playfoot ("Playfoot") (Document Book, Tab 39). The Solicitor acted for both the borrower and the lender on this transaction, as well as the investors in the mortgage.

53. In his reporting letter, dated February 23, 1987, to Playfoot, the Solicitor reported that the mortgage was a first mortgage, the funds having been used to pay out the existing mortgage (Document Book, Tab 40). In fact, as reflected by the land register (Document Book, Tab 41), the property was a second mortgage at the time as the prior first mortgage (Document Book, Tab 42) was not discharged. A discharge of this mortgage was registered on March 26, 1993 (Document Book, Tab 43) at the time of the sale of the property by Playfoot.

54. According to the Declaration of Trust located in the Solicitor's file for this mortgage (Document Book, Tab 44) and the Solicitor's manual ledger, the Solicitor held interests in this syndicated mortgage in trust for the following clients of his law practice:

C. Green ("Green")	\$11,000.00
Mervin Barry ("Barry")	\$ 3,000.00
J.W. Evans	\$ 3,991.41

55. The Solicitor would testify that he orally advised Barry and Green that he was acting for the mortgagor, the mortgagee, and the investors in this transaction. The Law Society accepts that it could not offer any evidence to contradict the Solicitor's expected evidence in this regard. However, the Solicitor failed to confirm this advice in writing and, further, failed to either obtain their informed written consent to his acting in this position of conflict or ensure that they obtained independent legal advice.

56. By letters dated February 3, 1987, the Solicitor reported to Green and Barry on this mortgage (Document Book, Tab 45). By letter dated February 3, 1989, the Solicitor reported to himself on this mortgage (Document Book, Tab 45). The letters confirmed that this was a second mortgage. There is no indication in the letters to Barry and Green that the Solicitor was an investor in this mortgage.

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57. On March 15, 1987, Form 4's were purportedly executed by Green, Barry, and the Solicitor with respect to this mortgage (Document Book, Tabs 46, 47 and 48). The Form 4 for Green (Tab 46, Document Book) indicated that the mortgage was a second mortgage and that the Solicitor had advised this client that the Solicitor did not have any direct or indirect interest in the borrower or as an investor in this investment. No estimate of the value of the property was included on the Form 4. The Form 4 for Green was signed "G. Green per JWE/SW".

58. The Form 4 which was purportedly executed by Barry (Tab 47, Document Book) states that the Solicitor had a "nil" interest in the mortgage as either borrower or lender. No estimate of the value of the property was included on the Form 4.

59. The Form 4 which was purportedly executed by the Solicitor (Tab 48, Document Book) expressly states that the Solicitor had advised this client, that is, himself, that he did have a direct or indirect interest in the borrower or as an investor in this investment. No details of this interest are identified on the Form 4.

60. The Solicitor's mortgage ledger indicated that the interests held by Green and Barry were assigned to Graham on August 1, 1989. However, the reporting letter to Graham which was located in the file was dated February 3, 1987 (Document Book, Tab 49). This date was incorrect as Graham did not acquire an interest until August 1989. A Form 4 was purportedly executed by Graham on February 1, 1990 (Document Book, Tab 50). The Form 4 incorrectly states that this was a first mortgage; however, as indicated previously, the mortgage was a second mortgage at the time. The Solicitor's reporting letter to Graham identified the mortgage as a second mortgage.

61. The Form 4 purportedly signed by Graham does not indicate whether or not the Solicitor had advised this client that he did not have any direct or indirect interest in the borrower or as an investor in this investment. Graham believes that he was not otherwise advised by the Solicitor of the Solicitor's interest in the transaction, although he does not recall many details of the information initially provided by the Solicitor when he commenced his interest in the mortgage. He had some money to invest and gave it to the Solicitor to invest at his discretion.

62. On March 21, 1990, the Solicitor registered a new mortgage, in the amount of \$22,000, in favour of himself, in trust, against the property owned by Playfoot (Document Book, Tab 51). The face value of this mortgage represented the principal of the existing mortgage plus legal fees and accrued interest. On the same day, the previous mortgage in favour of the Solicitor, in trust, was discharged.

63. By letter dated March 26, 1990 (Document Book, Tab 52), the Solicitor reported to Graham on the mortgage extension and confirmed that Graham's interest in the new mortgage was \$14,370.69. This amount represented Graham's interest in the previous mortgage plus the accrued interest arrears which had not been paid. Although it was not disclosed to Graham, the remaining portion of the mortgage was held by the Solicitor, as indicated in the memorandum, dated January 23, 1991, from Susan Wood, the Solicitor's assistant, to the Solicitor, which is located at Tab 53 of the Document Book.

64. The mortgage was paid out in full on March 26, 1993. Graham was repaid his investment by a cheque, dated March 29, 1993, in the amount of \$14,213.24, from the Solicitor's trust account (Document Book, Tab 54). No complaint has been made to the Law Society regarding the matters identified in particular 2(e).

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Particular 2(f) in the circumstances of the mortgage transaction identified in particular 2(e), the Solicitor invested trust funds which at the time belonged to his client Lee Ann Rea without first obtaining Ms. Rea's informed consent and authority to do so, and without creating and documentation to accurately evidence this investment

65. On August 4, 1982, Lee Anne Rea ("Rea") retained the Solicitor to act on her behalf in a divorce proceeding. The matrimonial matter was completed in or about November 1987. The matrimonial home was sold in the course of the divorce proceedings. The proceeds were paid at the time of the sale to the Solicitor, in trust, of which the vast majority was distributed to Rea at that time.

66. The Solicitor did not report on the sale of the matrimonial home until March 1993, after Rea had insisted that the Solicitor report to her. At or about the same time, Rea received from the Solicitor a "Statement of Trust Investment Funds" (Document Book, Tab 55) which indicated that the Solicitor no longer held any funds on her behalf and that the trust funds had been applied on account of fees charged in billings dated August 2, 1989 (Document Book, Tab 56) and October 29, 1990 (Document Book, Tab 57). Rea did not receive either of these fee billings until March 29, 1993. Although these accounts are itemized, the Solicitor did not keep time dockets for this work. The Law Society does not take issue with the accuracy of these accounts.

67. As indicated in the Statement of Trust Investment Funds (Document Book, Tab 55), the sum of \$3,991.41, from the funds which the Solicitor held in trust for Rea, had been invested in a private mortgage. Although not stated in the material provided to Rea nor evidenced by any material in the Solicitor's file for Rea, these funds constituted the investment which had been made in the Solicitor's name in the mortgage from Playfoot. In effect, Rea's funds were used to pay the Solicitor's legal fees on the Playfoot mortgage.

68. The Solicitor failed to advise Rea that her interest in the Playfoot mortgage had been transferred to him in satisfaction of his account for fees. Rea first learned of this transfer in March 1993 when the Solicitor provided her with the Statement of Trust Investment Funds. Rea also first learned at that time that her funds had been invested previously in the Playfoot mortgage, although she had been advised that they had been invested at the time the proceeds of the matrimonial home were distributed.

69. The notations by the Solicitor's assistant, Susan Wood, in the bank book for the interest-bearing trust account in which the Solicitor held Rea's funds, Royal Bank Account # 8417925, (Document Book, Tab 58), also confirm that Rea's funds were invested in the Playfoot mortgage on February 2, 1987. Monthly blended payments under the mortgage were deposited to this trust account until August 2, 1989, after which time no further payments were made under the mortgage to Rea's credit.

70. In a letter, dated August 9, 1993, to Stanley Zuly, Rea's new counsel, (Document Book, Tab 59) the Solicitor stated that he had discussed the investment of Rea's funds with her and advised her that the funds were being held in part in an interest bearing account and "a charge". While the Solicitor had generally discussed the investment of Rea's funds with Rea, he had not discussed with her the investment of Rea's funds in the private mortgage with Playfoot, nor had Rea signed any documentation relating to this investment.

71. As indicated in paragraphs 54 and 59 of this Agreed Statement of Facts, the Solicitor prepared and signed both a Declaration of Trust, dated May 1989 (Document Book, Tab 44), and a Form 4, dated March 15, 1987, (Document Book, Tab 48) which indicated that the Solicitor was an investor in the Playfoot mortgage.

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72. Although the transfer is not documented, the Solicitor transferred the value of the mortgage to himself on or about August 2, 1989, allegedly in satisfaction of the Solicitor's account of the same date (Document Book, Tab 56). The account was in the amount of \$2,894.13; the mortgage had a value at August 2, 1989, of approximately \$3,350 at the time. Rea was not advised that Rea's interest in the mortgage had been transferred to the Solicitor until March 1993.

73. The balance of the funds held on behalf of Rea in the interest bearing trust account, totalling \$4,340.72, were ultimately transferred to the Solicitor on October 29, 1990, in partial satisfaction of the Solicitor's account of the same date (Document Book, Tab 57). Rea was not advised that these funds had been transferred to the Solicitor until March 1993.

Particular 2(g) the Solicitor issued a cheque from his trust account payable to "cash" in contravention of subsection 14 (10) of Regulation 708 pursuant to the *Law Society Act*

74. The Solicitor issued a cheque, dated November 19, 1993, in the amount of \$2,000, from his trust account which was payable to cash (Document Book, Tab 60). The trust cheque was cashed by the Solicitor's assistant the same day. As confirmed subsequently by the Direction, dated April 12, 1996 (Document Book, Tab 61), the cash was withdrawn from the Solicitor's trust account at the request of a client, Barbara Gee, in connection with a mortgage transaction.

Particular 2(h) the Solicitor completed an audit questionnaire and delivered to the Law Society Form 2 Certificates dated November 30, 1989, June 25, 1991, December 2, 1992, and November 22, 1993, which falsely stated that the Solicitor had not been indebted to a client, either directly or indirectly, when he had directly or indirectly been indebted to clients with respect to the mortgages described in particulars (a) and (b)

75. In the course of completing the audit questionnaire with the Law Society auditor on December 2, 1994, the Solicitor stated that he had not directly or indirectly borrowed money or otherwise become indebted to a client or former client. This statement was false to the extent that, at the time, the Solicitor had outstanding mortgage loans, totalling approximately \$200,000, from clients through both Mission Mill and 824916.

76. The Solicitor's annual Form 2 filings in each of 1988, 1989, 1991, 1992, and 1993, contained the following statement which the Solicitor certified to be true:

I HAVE NOT been indebted for borrowed money either directly or indirectly to a client or to a person or corporation who at the time of borrowing was or had been my client or a client of a firm of which I was then a member.

77. In each year in which the Solicitor made these Form 2 filings, the statement identified in paragraph was false. In 1988, the Solicitor had borrowed funds from his clients through Mission Mill. In 1989, 1991, 1992, and 1993, the Solicitor had borrowed funds from his clients through both Mission Mill and 824916.

Particular 2(i) the Solicitor delivered to the Law Society Form 2 Certificates dated December 2, 1992, and November 22, 1993, which falsely stated that he had not directly or indirectly participated in a syndicated mortgage investment, when he had directly or indirectly participated in the syndicated mortgage investments described in particulars (b) and (c)

78. The Solicitor's annual Form 2 filings for the years ending May 31, 1992, and May 31, 1993, which were received by the Law Society on December 2, 1992, and November 22, 1993, respectively (Document Book, Tab 18), contained the following statement which the Solicitor certified to be true:

I HAVE NOT either directly, or indirectly through a corporation in which I, or a related person has an interest, participated in a joint venture, syndicated mortgage investment, partnership or other form of business enterprise with a client or former client.

79. In each year in which the Solicitor made these Form 2 filings, the statement identified in the preceding paragraph was false. During the fiscal years covered by these filings, the Solicitor held an indirect interest, in the amount of \$13,012.38, in the syndicated mortgage from 824916 through 529828, and both a direct interest, in the amount of \$4,000.00, and an indirect interest, in the amount of \$12,000.00, in the name Mission Mill, in the syndicated mortgage from Weaver.

V. PRIOR DISCIPLINE

80. The Solicitor was found guilty of professional misconduct on January 17, 1995, for failure to reply to correspondence from the Law Society with respect to a complaint by Rea and failure to comply with an Undertaking to the Law Society to answer all correspondence from the Law Society within two weeks. He was reprimanded in Committee and ordered to pay costs of \$500.00.

DATED at Toronto this 13th day of August, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that John William Evans be suspended for a period of four (4) months on the following conditions:

1. The Solicitor will not act for non-institutional mortgagees until allowed to do so by the Secretary of the Law Society;
2. The Solicitor will be supervised for one year by Drew Gunsolus;
3. The Solicitor will give his undertaking not to make investments for clients of his legal practice;
4. Existing client investors of the Solicitor's will be notified by the Solicitor in writing within thirty (30) days that they should obtain independent legal advice regarding mortgages that they hold on 11 Sussex Street, Lindsay and 96 Russell Street, Lindsay.
5. The Solicitor will pay costs of \$5,000 over a period of 12 months from his reinstatement;
6. The Solicitor will pay Mrs. Williams \$5,000 prior to this matter reaching Convocation.

REASONS FOR RECOMMENDATION

The facts constituting professional misconduct include:

1. The Solicitor's company bought 11 Sussex Street, Lindsay, with financing by client investors.
2. The Solicitor's company bought 96 Russell Street, Lindsay with financing by client investors. In both cases, the Solicitor breached the rule against borrowing from clients either absolutely or if permissible without independent legal advice. Further there was no full written disclosure given to clients.

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3. The Solicitor obtained a mortgage from the client for the benefit of an unemployed friend without adequate disclosure - if disclosure had been made the client likely would not have invested.
4. The Solicitor obtained a mortgage for his client, Mrs. Rea and failed to advise the client of her investment in that specific mortgage.
5. The Solicitor cashed a trust cheque to cash.
6. The Solicitor filed incorrect Form 2s with the Law Society.

In summary the Solicitor borrowed \$200,000 from clients in two transactions contrary to Rule 7, "Borrowing from Clients". He also preferred his own interest over that of his clients in another transaction. He failed to advise his client properly in another mortgage transaction. He filed incorrect Law Society of Upper Canada documents and breached the Rule against making trust cheques payable to cash.

It is fortunate that his clients did not lose money as a result of his breach of our rules, designed to avoid conflict between lawyers and their clients. We are encouraged that his practice of investing clients' money has ended.

Based on a review of comparable cases we have determined that suspension for four (4) months is appropriate. The Solicitor has made restitution (although 2 of his client borrowings remain as outstanding mortgages). He has one prior discipline matter related to the investigation of facts in this matter. The Solicitor and the Law Society agreed to the following conditions:

The Solicitor will not act for non-institutional mortgagees until allowed to do so by the Secretary of the Law Society;
The Solicitor will be supervised for one year by Drew Gunsolus;
The Solicitor will give his undertaking not to make investments for clients of his legal practice;
Existing client investors of the Solicitor's will be notified by the Solicitor in writing within thirty (30) days that they should obtain independent legal advice regarding mortgages that they hold on 11 Sussex Street, Lindsay and 96 Russell Street, Lindsay;
The Solicitor will pay costs of \$5,000 over 12 months from his reinstatement;
The Solicitor will pay Mrs. Williams \$5,000 prior to this matter reaching Convocation.

John William Evans was called to the Bar on March 22, 1974.

ALL OF WHICH is respectfully submitted

DATED this 27th day of February, 1997

Jane Harvey, Chair

Mr. Stuart asked that the Report be amended as follows:

- on page 16 of the Report, paragraph 56 - the following words should be added to the last sentence - "was a second mortgage. There is no indication in the letters to Barry and Green that the solicitor....."

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There were no submissions. The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 4 months on the conditions set out in the Report relating to his practice, giving an undertaking not to make investments for clients, pay costs and make restitution to a client.

Both counsel made submissions in support of the recommended penalty and advised that the conditions were being met.

It was moved by Mr. MacKenzie, seconded by Ms. Puccini that the solicitor be suspended for a period of 4 months commencing June 1st, 1997.

Carried

Re: Robert Noel BATES - Burlington

The Secretary placed the matter before Convocation.

Messrs. Crowe, Wright, Carter, Swaye and MacKenzie, Ms. Curtis and Ms. Eberts withdrew for this matter.

Mr. Stuart 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 12th December, 1996, together with an Affidavit of Service sworn 9th January, 1997 by Louis Katholos that he had effected service on the solicitor by registered mail on 16th December, 1996 (marked Exhibit 1), together with the Report of the Discipline Committee dated 27th February, 1997 together with an Affidavit of Service sworn 5th March, 1997 by Ron Hopple that he had effected service on the solicitor by registered mail on 4th March, 1997 (marked Exhibit 2). Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them was waived.

The Report of the Discipline Committee dated December 12th, 1996 is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Harriet E. Sachs, Chair
Marshall Crowe
Abdul Ali Chahbar

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

ROBERT NOEL BATES
of the City
of Burlington
a barrister and solicitor

Neil Perrier
for the Society

Frederick Forsyth
for the solicitor

Heard: November 11, 12, 13, 14 &
15, 1996

22nd May, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 28, 1995, Complaint D179/95 was issued against Robert Noel Bates (the "Solicitor") alleging that he was guilty of professional misconduct. The matter was heard in public on November 11, 12, 13, 14 and 15, 1996, before this Committee composed of Harriet Sachs, Chair; Marshall Crowe and Abdul Ali Chahbar. Mr. Bates was present at the hearing and was represented by F. Forsyth. N. Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D179\95

- 2(a) He misappropriated funds in the amount of \$90,000.00, more or less, when on or about May 24, 1993, he drew \$90,000.00 on a Letter of Credit to be used for the payment of fees incurred by his client, John Grant, in a litigation matter, for a purpose other than for which he was entitled to draw them; and
- 2(c) On or about March 2nd, 1994, he misappropriated funds in the sum of \$44,150.05, more or less, by drawing on a Letter of Credit ostensibly for the purposes of paying the accounts of agent solicitors who had performed services for his client, John Grant.

The allegations of professional misconduct identified in paragraphs 2(b) and 2(d) of Complaint D179\95 were withdrawn.

REASONS FOR DECISION

I. SOLICITOR'S BACKGROUND

1. The Solicitor is 56 years of age and was called to the Bar in March of 1968. Since approximately 1974 or 1975, he has practised law in Burlington, Ontario. His practice is exclusively a litigation practice. He has, in the past, been certified as both a civil and criminal litigation specialist.

II. FACTS GIVING RISE TO THE COMPLAINT

2. On February 23, 1988, John Grant ("Grant") entered into two agreements of purchase and sale (each of which was conditional on the other being completed) to purchase land in the Town of Milton for \$3,050,000.00 from a company known as Tiercel Digital Limited ("Tiercel"). Both agreements were conditional upon certain construction liens being cleared by the vendor.

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3. The transaction was originally scheduled to close in May of 1988. The closing was extended until October of 1988. In October, prior to the date scheduled for closing, Grant's lawyer was advised by Tiercel that it could not clear title and that the deal was at an end. Grant tendered on October 17, 1988.

4. In the late fall of 1988, Grant retained the Solicitor to sue Tiercel for specific performance. The action was commenced on May 10, 1989.

5. On May 17, 1989, Tiercel entered into an agreement with Peter Civiero ("Civiero") to sell him the same parcels of land for \$13,900,000.00. The Civiero deal was conditional upon the Grant lawsuit being resolved in favour of Tiercel and upon the transaction being able to close no later than December of 1994.

6. The trial in the *Grant vs. Tiercel* action was conducted before Mr. Justice Carnwath and concluded on February 19, 1993. Mr. Justice Carnwath reserved his decision and indicated at the end of the trial that his Judgment would be released within two months.

7. In the meantime, the price of land had dropped significantly. Consequently, Civiero was interested in being released from its deal with Tiercel. Needless to say, Tiercel was most anxious that the deal with Civiero close.

8. After the trial, and before the Judgment was released, discussions ensued between the Solicitor and counsel for both Tiercel (Stephen Goudge) and Civiero (Barry Lipson). As a result of these discussions, an agreement was reached between Grant and Civiero whereby if Grant lost his action he would appeal. In return, Grant's legal fees and costs exposure would be covered by Civiero.

9. As part of this agreement, two irrevocable Letters of Credit were opened by Civiero in April of 1993 -- one for \$90,000.00 and one for \$160,000.00. Both were payable to the Solicitor. The professional misconduct complained of concerns what the Solicitor did with the monies drawn down by him on these Letters of Credit. This conduct, and the Solicitor's defence in respect of same, is further detailed below.

10. On April 22, 1993, Mr. Justice Carnwath released his Judgment and found in favour of Tiercel. Grant appealed and Frank Newbould was retained to act on the appeal. The appeal was argued in March of 1994 and a decision was rendered at the end of June 1994. The Ontario Court of Appeal dismissed the appeal. No further proceedings were taken in the action.

III. THE LETTERS OF CREDIT

11. On March 18, 1993, the Solicitor wrote Civiero's lawyer, Barry Lipson, confirming their agreement. The relevant portions of that letter are as follows:

"3. That your client will provide an irrevocable Letter of Credit expiring March 17th, 1995, in the sum of \$250,000.00 in favour of R. Noel Bates to ensure that legal costs and disbursements which have been or may be incurred by Mr. Grant, including any costs assessed against him in the action are secured.

4. The Letter of Credit cannot be drawn until May 24th, 1993 and at that time only to the extent of \$90,000.00." (*emphasis added*)

12. On March 25, 1993, Lipson wrote back to the Solicitor approving the terms set forth in the Solicitor's letter to him of March 18, 1993.

13. On April 6, 1993, Civiero opened two irrevocable Letters of Credit. Neither was apparently forwarded to the Solicitor until later in April.

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14. One Letter of Credit was for \$90,000.00. Its purpose, according to the Letter of Credit itself, was

"to secure the financial obligations of Peter Civiero pursuant to legal costs when due by Peter Civiero under litigation matters in the case of *Grant vs Tiercel*."

It was payable to the Solicitor and only needed a certificate signed by the Solicitor for the payment to be made. It could not be drawn down before May 24, 1993 or after April 15, 1994 unless renewed.

15. The other Letter of Credit was for \$160,000.00. Its terms were the same as the Letter of Credit for \$90,000.00 except that:

- (a) any draws against it required two certificates -- one from the Solicitor and the other from Lipson's firm, Shibley, Righton; and
- (b) no mention is made of the May 24, 1993 date.

16. On April 14, 1993, the Solicitor wrote to Lipson confirming that the Letter of Credit was subject to the terms set out in the correspondence between them dated March 18 and March 25, 1993 (which correspondence is detailed above) and further confirming one other term, i.e. that any funds drawn down on the Letter of Credit were to be returned if Grant was successful in his claim for specific performance and then was either unwilling or unable to complete the transaction.

IV. THE MISAPPROPRIATION OF \$90,000.00 -- PARTICULAR 2(a) OF THE COMPLAINT

17. On May 24, 1993, the Solicitor drew down on the Letter of Credit for \$90,000.00. According to his testimony, he did not tell Mr. Grant or any of his advisors this fact. From the documentary evidence filed it would appear that it was not until July of 1994 that Newbould (Grant's appeal lawyer) learned from Lipson (Civiero's lawyer) that the Solicitor had drawn down on the \$90,000.00 Letter of Credit.

18. This Committee heard testimony from Grant, Grant's corporate lawyer (John Howard), Grant's accountant (Bruce Buckley) and Civiero's lawyer (Barry Lipson). All were involved in discussions leading up to the putting in place of the Letters of Credit. All testified that the purpose of the \$90,000.00 Letter of Credit was to reimburse Grant for the trial costs he had paid to the Solicitor. This evidence was confirmed by Frank Newbould who testified that this is what the Solicitor told him in November of 1993 when he met with the Solicitor and Howard to discuss the appeal. It was agreed that as of March 18, 1993, the total trial costs billed and paid by Grant to the Solicitor were \$127,739.00.

19. Instead of paying Grant the \$90,000.00 drawn down on the Letter of Credit, the Solicitor took the money and used it to discharge a debt which he had personally guaranteed for a corporation called Lawline Ontario Incorporated ("Lawline").

20. The Solicitor was the sole officer, director and majority shareholder of Lawline. Grant had invested \$55,000.00 in Lawline in 1989 and had loaned Lawline another \$50,000.00 in 1991. As of the date of the hearing before us, Grant had realized nothing on his investment and had not been repaid his loan.

21. According to the Solicitor, in March of 1993, Lawline lost a major contract. The financial statements filed for Lawline report a deficit of \$382,797.00 as of April 30, 1993. According to the Solicitor, Lawline had a bank loan for \$75,000.00 and a line of credit incurred of \$15,000.00 to \$20,000.00. By April of 1993 the bank was calling. The Solicitor admitted that the \$90,000.00 he drew down from the Letter of Credit enabled him to pay down all of the debt he had personally guaranteed for Lawline.

V. THE SOLICITOR'S DEFENCE TO THE \$90,000.00 MISAPPROPRIATION

22. The Solicitor testified that during his first conversation with Lipson, Lipson indicated that he was interested in obtaining an "insurance policy" for his client, Civiero. The Solicitor told Lipson that he was also negotiating with Tiercel's lawyer, Stephen Goudge.

23. According to the Solicitor, he spoke to Lipson on March 17, 1993 and told him that he was going to be meeting with his client the following day and needed a concrete proposal from Civiero to take to Grant. The Solicitor advised Lipson that it would cost between \$150,000.00 and \$160,000.00 to appeal all the way to the Supreme Court of Canada and that he already had instructions from Grant to do so if necessary. Lipson replied by proposing that Civiero get Grant \$250,000.00 -- \$160,000.00 to finance the appeal and the balance to be applied towards fees incurred.

24. According to the Solicitor, the letter of March 18, 1993 did not represent the actual terms as finally negotiated. Rather, it was a draft proposal that he could then take to his client for confirmation. At the same time, he was going to be presenting Grant with a proposal, albeit a less concrete one, from Tiercel.

25. According to the Solicitor, he met with Grant, Buckley (Grant's accountant) and Howard (Grant's corporate lawyer) on March 18, 1993 to discuss both proposals. At that meeting the Solicitor expressed concern about champerty and maintenance. At the conclusion of the meeting, according to the Solicitor, the following consensus was reached:

- (1) That the Solicitor was to pursue the Civiero proposal and not the Tiercel proposal;
- (2) That the Solicitor was to definitely make sure that Civiero paid Grant's appeal costs;
- (3) That the Solicitor was to try and get Grant some reimbursement for his trial costs; and
- (4) That the Solicitor was to use his judgment and not risk entering into a champertous agreement or a maintenance agreement. He was to "take the high road", which apparently meant that if the Solicitor felt that the trial costs should not be included as part of the agreement with Civiero, they should not be. The Solicitor was free to decide, apparently without further consultation with Grant or his advisors.

26. Grant, Buckley and Howard all agreed that there was such a meeting with the Solicitor some time in March of 1993. Where their testimony differs from the Solicitor's is that they:

- (1) all stated that the March 18, 1993 letter did not represent a draft proposal for discussion purposes, but rather incorporated the terms as discussed and agreed to by them at the meeting;
- (2) as indicated in the March 18, 1993 letter, Grant was to be reimbursed for his trial costs;
- (3) champerty and maintenance was discussed and dismissed as a concern by the Solicitor.

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27. The Solicitor states that after the March 18, 1993 meeting, he took a serious look at the law of champerty and maintenance. As a result of this exercise he apparently concluded that since his client was prepared to appeal and could afford to pay for the appeal whether or not Civiero assisted with the costs of same, the agreement with Civiero with respect to the appeal costs would not constitute champerty or maintenance. However, to allow Civiero to reimburse Grant for his trial costs would cause the agreement to become a "maintenance" agreement.

28. As a result, sometime after March 25, 1993 (the date of the letter from Lipson confirming their deal), the Solicitor states he called Lipson and told Lipson that they could not deal with the issue of trial costs because of problems with maintenance.

29. The Solicitor testified that on April 2, 1993, he received the proposed wording for the Letter of Credit. That proposed wording made reference to the March 18, 1993 letter, which clearly did make reference to reimbursement for trial costs. Therefore, according to the Solicitor, he called Lipson again on April 13, 1993 and told Lipson that he wanted "appeal fees only, that's it".

30. After that, the Solicitor testified that he was expecting to receive a Letter of Credit for \$160,000.00. Within 24 hours of Mr. Justice Carnwath's decision being released the Solicitor received a telephone call to go to the office of a land development company in which Civiero had a large interest. An envelope was waiting for him there. In the envelope were two Letters of Credit -- one for \$90,000.00 and one for \$160,000.00. This was the first time the Solicitor had seen these Letters of Credit.

31. The Solicitor testified that when he saw the Letters of Credit, and particularly the one for \$90,000.00, he realized what Lipson had meant when he said he wanted an "insurance policy". He knew that the \$90,000.00 was not to be paid over to Grant because if Grant "accepted it it would be doing the very thing that I had said he shouldn't do". He knew that the money had been paid to ensure that the bargain had been struck. It was a payment by Civiero (or Lipson, presumably on behalf of Civiero) to the Solicitor by way of "bonus" or "premium" to make sure that the Solicitor "kept things going".

32. The Solicitor testified that his reaction upon realizing this was anger -- "He bought an insurance policy. He was trying to buy me and I wasn't having it". Then he reconsidered. He decided that he would take the money and "use it so that it would benefit Mr. Grant and collaterally me", i.e. he would use it to discharge Lawline's bank debt.

33. The Solicitor admitted that he never contacted Lipson or Grant to confirm that the \$90,000.00 was meant for the Solicitor and not for Grant. The Solicitor admitted that he did not recommend that Grant obtain independent legal advice with respect to the Solicitor's conclusion that only he (the Solicitor) could take the money and not Grant. He also admitted that he had no reason to believe that Grant knew what had happened to the \$90,000.00. Finally, he admitted that he did not write to either Grant or Lipson to confirm that Grant was not going to be receiving any compensation for his trial costs.

VI. THE COMMITTEE'S CONCLUSIONS RE THE \$90,000.00 MISAPPROPRIATION

34. The Committee did not find either the Solicitor or the Solicitor's defence credible.

35. The Solicitor's defence was not supported by the testimony of the other parties involved in the transaction or the documents filed evidencing the transaction.

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36. The Solicitor's defence made no sense. Why would an agreement to finance Grant's appeal costs not be champerty or maintenance because the client was prepared to appeal and could afford to appeal, and an agreement to reimburse Grant for trial costs constitute champerty or maintenance when Grant had already gone to trial and incurred and paid those costs?

37. Why would the Solicitor write a letter to Lipson on April 14, 1993 confirming that the Letters of Credit were subject to the terms set out in the correspondence of March 18 and March 25, 1993 when the day before (according to the Solicitor) he had called Lipson to tell him that the draft terms he had seen for the Letter of Credit were a problem because they made reference to the letter of March 18, 1993?

38. It is simply not credible that Lipson, on Civiero's behalf, would be interested in paying the Solicitor a "bonus" or a "premium". The "insurance" purchased for this payment would appear to have about as much value to Civiero as the "benefit" received by Grant when the Solicitor discharged his personal guarantees by paying down the Lawline debt.

39. Finally, it is not credible that the Solicitor, while purporting to be so concerned that his client be insulated from any allegations of champerty or maintenance would not take steps to confirm in writing that his client had not received any payment from Civiero for his trial costs -- especially when all of the documents would appear to indicate exactly the opposite.

40. This Committee had no difficulty whatsoever in concluding beyond a reasonable doubt that the Solicitor did commit the professional misconduct particularized in paragraph 2(a) of the Complaint.

VII. THE \$44,150.05 MISAPPROPRIATION -- PARAGRAPH 2(c) OF THE COMPLAINT

The facts giving rise to this aspect of the Complaint are not in dispute. Essentially, legal bills were rendered to the Solicitor by lawyers retained with respect to Grant's appeal against Tiercel. These bills totalled \$44,150.05 and comprised of the following:

Weir & Foulds (Paul Perell) - \$3,063.88 (Account dated June 11, 1993)

Borden & Elliot (Frank Newbould) - \$34,706.12 (Account dated February 18, 1994)

Shibley Righton (Clifford Cole) - \$6,380.05 (Account dated June 4, 1994)

TOTAL \$44,150.05

42. The Solicitor, after receiving the necessary certification from Lipson, drew down on the \$160,000.00 Letter of Credit to the extent necessary to pay these accounts. However, instead of depositing the monies into his trust account and remitting the necessary cheques to the lawyers concerned, the Solicitor deposited the monies into his general account and used them to run his practice. To date the lawyers concerned have not been paid by him. Mr. Newbould, however, has been paid by Grant.

43. At this point, it is worth noting that Newbould commenced an action on behalf of Grant against the Solicitor to recover both the \$90,000.00 dealt with in the first aspect of the Complaint and the \$34,706.12 paid by Grant to Newbould for his February 1994 account. In April of 1995, the Solicitor lodged a proposal with a Trustee under the *Bankruptcy and Insolvency Act*. Grant has received a total of \$11,000.00 from that Trustee.

VIII. THE SOLICITOR'S DEFENCE TO THE \$44,150.05 MISAPPROPRIATION

44. The Solicitor admits that he drew down on the \$160,000.00 Letter of Credit to pay the Newbould, Cole and Perell accounts. He states that because of Section 14(6) of *Regulation 708* of the *Law Society Act*, R.S.O. 1990, c. L.8, he felt he was prohibited from depositing these monies into his trust account and had to deposit them into his general account. He then states that having deposited the monies into his general account he did not get around to paying the lawyers concerned. Instead, the money was used to run his practice. By the time he was ready to pay the lawyers concerned his general account was essentially seized by Revenue Canada.

IX. THE COMMITTEE'S CONCLUSIONS RE THE \$44,150.05 MISAPPROPRIATION

45. The relevant portions of Section 14(6) of *Regulation 708* of the *Law Society Act* read as follows:

"(6) Money shall not be paid into a trust account,

(a)...

(b) that is received by the member on account of fees for which a billing has been delivered or for services already performed for which a billing is delivered forthwith thereafter or is received to reimburse the member for disbursements made or expenses incurred on behalf of a client."

46. The Committee cannot see how this Regulation can be used to justify the Solicitor's position that he was prohibited from depositing into his trust account the monies drawn down by him on the Letter of Credit.

47. In the Committee's opinion, section 14(6)(b) provides that it is only when the lawyer concerned has delivered a bill or is going to deliver a bill forthwith for services performed that the monies are not to be deposited into a trust account. The Solicitor seemed to feel that having received (but not paid) bills with respect to Grant's appeal from other lawyers he had "incurred an expense" within the meaning of Section 14(6)(b). It is this Committee's view that an expense is "incurred" within the meaning of Section 14(6)(b) once it has actually been paid and not before.

48. The purpose of the relevant Sections of *Regulation 708* are to provide protection for monies received by a lawyer from or on behalf of a client which that lawyer cannot make a claim to. As soon as client monies are paid into a lawyer's general account they are put at risk. They can be seized (as the Solicitor claims happened in this case) by that lawyer's creditors. While the Committee was not impressed with the Solicitor's honesty, we were with his intelligence. We do not believe that the Solicitor deposited the monies which are the subject of this aspect of the Complaint into his general account because he believed *Regulation 708* prohibited him from doing otherwise.

49. Even if this were the case, it does not explain why the Solicitor did not immediately use the money for the purposes for which he knew it was intended. Instead he used it for his own purposes. We find beyond any reasonable doubt that in doing so the Solicitor misappropriated the funds which are the subject of this aspect of the Complaint against him.

RECOMMENDATION AS TO PENALTY

50. The Committee recommends that Robert Noel Bates be disbarred.

REASONS FOR RECOMMENDATION

51. The Solicitor does have a prior discipline record. In 1984 the Solicitor received a reprimand in Convocation after a finding that he had suppressed information which ought to have been disclosed to opposing counsel and to the court. The Solicitor disputed the Society's characterization of that finding. However, this Committee's recommendation as to penalty arises solely from the facts of the Complaint before us.

52. The general rule is that solicitors who are guilty of misappropriation should be disbarred unless there are exceptional circumstances which would dictate otherwise (re *Spencer Black*, Report and Decision of the Discipline Committee, August 16, 1993, at page 14).

53. Exceptional circumstances have been found to exist in situations where the Solicitor calls character evidence, psychiatric or medical evidence and has made restitution. None of these factors is present in this case.

54. We note that the Solicitor was offered an adjournment by the Society to call evidence with respect to the issue of penalty. Counsel for the Solicitor indicated that the only evidence that the Solicitor could call on this issue would be character evidence and that in his judgment (which we agree with) that evidence would be of little assistance. As noted by Gavin MacKenzie in his book Lawyers and Ethics, at page 26-45:

"In cases involving fraud or theft, in spite of evidence of prior good character and financial or other pressures, lawyers are almost certain to be disbarred."

55. Given the Solicitor's conduct, this Committee is of the view that disbarment is the only appropriate penalty.

Robert Noel Bates was called to the Bar on March 1968.

ALL OF WHICH is respectfully submitted

Dated this 12th day of December, 1996

Harriet Sachs, Chair

The Report of the Discipline Committee dated February 27th, 1997 is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Mary A. Eberts, Chair
W. Michael Adams
Bradley H. Wright

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

Glenn Stuart
for the Society

22nd May, 1997

ROBERT NOEL BATES
of the City
of Burlington

Not Represented
for the solicitor

a barrister and solicitor

Heard: February 11 and 14, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 15, 1994 complaint D339/94 was issued against Robert Noel Bates ("the Solicitor") alleging that he was guilty of professional misconduct. Complaint D376/95 alleging professional misconduct against the Solicitor was issued November 30, 1995. Complaint D97/96 alleging professional misconduct against the Solicitor was issued March 29, 1996.

This Committee composed of Mary Eberts, Chair; Michael Adams and Bradley Wright convened on February 11 and 14, 1997 to hear these complaints. At the outset of the hearing, F. Forsyth, counsel for the Solicitor, who was not present in person, requested an adjournment. The request was denied. Acting upon instructions from the Solicitor obtained by telephone, Mr. Forsyth advised the Committee that the Solicitor would not be attending the hearing, and also withdrew as counsel. The taking of evidence on complaints D376/95 and D97/96 proceeded in the absence of the Solicitor and his counsel. G. Stuart appeared on behalf of the Law Society.

DECISION

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

Complaint D376/95

2. a) he failed to file with the Society 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*.

Complaint D97/96

2. a) He misappropriated funds in the sum of \$11,454.00 received from his client to be paid to a third party in settlement of a judgment insofar as he has misapplied those funds towards his fees;
- c) he sent a misleading letter to a client dated July 27, 1993, which confirmed that he would hold the \$11,454.00 in trust when the solicitor had already disbursed the funds by that date;
- d)(i) he misappropriated the sum of \$25,255.00 from a client, Mrs. Jenkins, when he charged her disbursements for a co-counsel at an inflated rate and for more hours than were actually provided;
- d)(ii) he rendered a misleading statement of account for legal services;

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- d)(iii) he acted in a conflict of interest when he caused a mortgage to be registered on title to his client's property as collateral for legal fees without ensuring that the client obtained independent legal advice;
- e)(i) he improperly borrowed the sum of \$50,000.00 from a client;
- f) he misappropriated the sum of \$70,000.00 from his trust account on or about June 18, 1993; and
- g) in September, 1993, he misled a client, Mr. Main, by representing that he had invested a client's trust monies in the sum of \$70,000.00 in a mortgage, when in fact he had misappropriated the monies from his trust account.

The allegations of professional misconduct identified in complaint D239/94 were withdrawn. In view of the Committee's decision on particular 2(a) of Complaint D97/96, it did not make a decision on particular 2(b), although it considered that the evidence would warrant such a finding in the alternative to particular 2(a). Particular 2(b) of complaint D97/96 identifies the following misconduct: 2(b) in the alternative, he misapplied funds in the sum of \$11,454.00 received from this client to be paid to a third party in settlement of a judgment insofar as he has misapplied these funds towards his fees.

The Reasons for these decisions are set out below. Before addressing those, however, the Committee will outline its reasons for refusing the adjournment requested on behalf of the Solicitor.

THE ADJOURNMENT MOTION

1. F.L. Forsyth, counsel to Mr. Bates, appeared at the outset of the hearing on February 11, 1997, and two procedural matters were dealt with at that time. The first, a disclosure issue which had been put over to the Discipline Committee by a single Benchers on February 4, 1997, was disposed of by the Committee with oral reasons, a written version of which was to be provided at a later date. The second matter was Mr. Forsyth's request for an adjournment of the proceedings.
2. The main reason advanced for the adjournment was the ill health of the member, and counsel tendered in support of the request a letter from Dr. Benjamin C. Carruthers of Burlington, the Solicitor's personal physician. Because he was doing surgery that day, Dr. Carruthers was not available for cross-examination on the letter, which was dated February 10, 1997 and had been received by the Society late the previous day. The Committee was also advised that Dr. Carruthers was leaving the next day for a ten-day vacation in Arizona. The Society objected to its admission.
3. The Committee decided that the letter was admissible into evidence, but concluded that it did not support the request for an adjournment.
4. The full text of the letter is set out here:

This letter will confirm that Mr. Bates is currently under my care and has been my patient for more than 10 years. I have been seeing Mr. Bates on a regular basis since just prior to the November 11, 1996 Law Society hearings and have been monitoring his physical and mental health carefully since then.

On Thursday, February 6, 1997, Mr. Bates came to see me as a result of worsening depression. Mr. Bates and I discussed whether hospitalization was appropriate. For the moment, I do not think it is necessary.

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I have instructed Mr. Bates to take a complete break from his practice for the next three to four weeks due to illness. Mr. Bates had developed a significant affective mood disorder, (situation-bound reactive depression) of quite a serious nature. In addition he also is suffering from stress-related anxiety attacks, insomnia, inability to concentrate, internal tremulousness and palpitations. I do not think he should be practising for the next three weeks, at least, and I certainly do not think that he is medically able to stand the stress of the hearing before the Law Society scheduled for this week. I am aware of the procedural matters that occurred during January in respect of the hearing. I am completely satisfied that Mr. Bates' condition and my instructions are in no way related to an attempt to avoid the hearing for any ulterior purpose.

I also do not believe he is medically unfit to practise, but he would not benefit himself or his clients in the next month by doing so. Mr. Bates has advised me he has arranged for two other lawyers to monitor his practice during this break.

5. The Committee notes that the conditions said to be affecting Mr. Bates, namely reactive depression and stress-related anxiety attacks and other symptoms could be undergone by many caught up in the judicial process, whether as parties, complainants or witnesses. Nothing in this letter identifies the particular concerns that would be highlighted if Mr. Bates were to participate in the hearing, beyond the general statement that he is not "medically able to stand the stress of the hearing".

6. Further, the Committee finds Dr. Carruthers' observations on Mr. Bates' ability to practise problematic. While advising that he has instructed Mr. Bates to take a complete break from his practice for the next three to four weeks due to illness, and stating "I do not think that he should be practising for the next three weeks, at least", Dr. Carruthers also observes, "I also do not believe he is medically unfit to practise". To this contradiction, he adds another. Although Mr. Bates is not "medically unfit to practise" in the doctor's view, he adds, "... but he would not benefit himself or his clients in the next month by doing so".

7. Mr. Stuart informed the Committee that Mr. Perrier, Discipline Counsel for the Society, had sent to Mr. Forsyth on February 3, 1997 a letter responding to Mr. Forsyth's query to him whether the Society would proceed on February 11, in the absence of Mr. Bates. Mr. Perrier advised Mr. Forsyth that if the Solicitor did not attend, the Society would seek to proceed in his absence, and would seek that he be disbarred, and be found ungovernable. Mr. Forsyth stated to the Committee that he had not interpreted these comments to deal with a non-attendance due to medical reasons, only the "unilateral decision" of the Solicitor not to appear.

8. The Committee had before it a letter sent by Mr. Perrier to Mr. Forsyth dated February 7, 1996. In that letter, he confirmed Mr. Forsyth's communication of that morning that Mr. Bates had instructed Mr. Forsyth to seek an adjournment of the proceedings for "medical reasons", which the Society would strongly oppose.

9. In that letter, Mr. Perrier sets out a detailed procedural history in chart form of these complaints, and complaint D179/95 (heard November 11-15, 1996). The chart is reproduced here:

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DATE	COMPLAINT	CHRONOLOGY
19/04/95 (1st proceed date)	D339/94 (15/12/94)	Adjournment: Solicitor retained counsel, Loretta Zubas, just prior to proceed date
10/05/95	D339/94	Adjournment: Solicitor's counsel had conflict in her schedule
27/06/95	D339/94	Adjournment: Law Society's only request for an adjournment due to issuance of D179/95
18/09/95 (set date)	D339/94; D179/95 (28/06/95)	Date set on consent with new counsel, Brian Greenspan, to 10/01/96; Note: Complainant/client of Bates, John Grant, had been referred to Greenspan on an appeal; Greenspan, who never actually met Grant, takes the position that Bates did not inform him that he had previously acted for Grant
30/11/95	D376/95	D376/95 issued and scheduled to proceed with other complaints on consent on 10/01/96
14/12/95	D339/94; D179/95; D376/95	Adjournment: All complaints adjourned at request of Mr. Bates because he had a trial scheduled for that date. Hearing dates of 25-27/03/96 set peremptory to Solicitor
03/96	D339/94; D179/95; D376/95	Greenspan informs Bates that Perrier is engaged to an associate in Greenspan's office, no issue of apprehension of bias raised at that time by Bates

15/03/95	D339/94; D179/95; D376/95	Adjournment: Issue of potential conflict re: Mr. Grant, discovered by Perrier and brought to attention of Greenspan; Greenspan asks to be removed as counsel and requests further adjournment;
29/03/96	D97/96	D97/96 issued. Greenspan had already been provided counsel brief earlier that month
11/04/96	D339/94; D179/95; D376/95; D97/96	All complaints scheduled to proceed peremptory to the Solicitor, on consent of new counsel, Forsyth, to 03-5/07/96
20/06/96	D339/94; D179/95; D376/95; D97/96	Society informed for the first time that Bates would be moving to have Perrier removed as counsel for the Society on the basis of a "apprehension of bias" due to his relationship (engagement) with associate at Greenspan, Humphrey, despite the fact that Bates knew of relationship prior to the scheduled March proceed dates
05/07/96	D339/94; D179/95; D376/95; D97/96	Adjournment: Hearing dates adjourned due to motion to remove Perrier. Motion subsequently dismissed. Hearing dates scheduled for 11-15/11/96
11/11/96	D339/94; D179/95; D376/95; D97/96	Solicitor brings motion for adjournment on the basis of late disclosure; Motion is dismissed and Complaint D179/95 is heard;

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15/11/96	D339/94; D376/95; D97/96	Adjournment: The remaining Complaints adjourned due to lack of time; Hearing schedule for 10-14/02/97 on consent, peremptory to the Solicitor
17/01/97	D339/94; D376/95; D97/96	Bates makes first time request for numerous documents re: D97/96
20/01/97	D339/94; D376/95; D97/96	Bates brings adjournment motion based on new request for documents; Adjournment motion denied
04/02/97	D339/94; D376/95; D97/96	Bates brings another adjournment motion based on new request for documents; Adjournment motion denied
07/07/97	D339/94; D376/95; D97/96	Society informed that Bates intends to bring further motion for adjournment, this time for medical reasons.

10. It is evident from this history that the Solicitor has a track record of setting dates on consent, or having them set peremptory to the Solicitor (sometimes on consent), and then moving late in the process to have them adjourned.

11. For example, on April 11, 1996, Mr. Bates' new counsel Mr. Forsyth agreed that all complaints would proceed peremptory to the Solicitor on July 3-5, 1996. Subsequently, in June, 1996, the Solicitor brought a motion to disqualify Mr. Perrier as counsel on the basis of apprehension of bias, based on facts which had been known to him since March of 1996 and not previously raised. That motion having been dismissed, new dates were set for November 11-15, 1996. At that time, the Solicitor brought an unsuccessful motion for adjournment on the basis of late disclosure; one complaint was heard (D179/95) but the remainder had to be adjourned for lack of time. The hearing of these complaints was scheduled for February 10-14, 1997, on consent, peremptory to the Solicitor.

12. Prior to the February hearing dates, the Solicitor brought two unsuccessful adjournment motions based on new requests for documents, on January 20 and February 4, 1997.

13. Based on the inadequate medical evidence tendered, and the history of procedural stratagems employed to forestall the hearing of these complaints, the Committee refused the request for the adjournment. Mr. Forsyth spoke with his client by telephone.

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14. Mr. Forsyth advised the Committee that Mr. Bates would not attend the hearing, electing not to act "in contravention of his doctor's advice". The Law Society argued that the Committee could proceed in the absence of Mr. Bates, because Mr. Forsyth could conduct competent cross-examinations. There is no procedural bar to proceeding in this way. However, Mr. Bates instructed Mr. Forsyth not to take part in the hearing if the Committee chose to proceed in his absence. Mr. Forsyth also advised the Committee that Mr. Bates had offered to withdraw from practice by way of an undertaking not to practice, assuming the hearing of the complaints could be adjourned. No written offer or undertaking was placed before the Committee. This arrangement was opposed by the Society, given the lengthy history of the Solicitor's treatment of the discipline process, and the fact that this was merely an oral undertaking relayed through counsel. The Committee was advised that the previous week, negotiations between the Solicitor and the Society about such an undertaking had broken down.

15. Both counsel made submissions on the case law governing the issue whether the Committee could proceed in Mr. Bates' absence. Given that he had had notice of the hearing of February 11, and had been advised through counsel of the Society's position should he not attend, both in the week prior to the hearing and at the hearing itself prior to Mr. Forsyth's telephone call with him, the Committee held that it could proceed in his absence.

16. The Committee also decided that in the circumstances it would not grant an adjournment on the basis of an oral offer through counsel of an undertaking not to practise received so very late in the process following upon Mr. Bates' consistent refusals to give such an undertaking.

17. On February 13, the Solicitor directed to the Committee Chair a written communication confirming that he would not attend the hearing and that he had instructed counsel not to take part, in spite of his desire to represent evidence to the panel. He also advised that on February 13 he had seen a heart specialist who "confirmed Dr. Carruthers' opinion and instructions". The name of the specialist was not provided. A copy of his report was not submitted, and he was not made available for cross-examination. Both in the original tender of Dr. Carruthers' letter, at the last minute and without making the doctor available for cross-examination, and in this later attempt to give the Committee medical information himself by means of a letter with sparse detail, it seems to the Committee that the Solicitor has fallen short of what is expected of someone who seeks to rely on a medical reason for adjourning proceedings. Mr. Bates, a very experienced litigator, surely would know the quality of evidence required to support such a request.

REASONS FOR DECISION

I. SOLICITOR'S BACKGROUND

18. The Solicitor was born in 1940 and called to the Bar in March of 1968. Since 1974 or 1975 he has practised law in Burlington, Ontario. He has been a sole practitioner since April 29, 1991. He practises litigation, and has been certified as a specialist in Civil Litigation and Criminal Law.

II. COMPLAINT 376/95

19. Zelia F. Melo, a reviewer/examiner in the Forms Services Department of the Society, testified that the last Annual Filing received from the member was in respect of the year ending January 31, 1994. This filing was due in July, 1994 and it was received (Forms 2 and 3) on April 20, 1995.

20. The next member filing due was in respect of the year ended January 31, 1995. It was due on July 31, 1995.

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21. The first Notice of Default in Annual Filing with respect to the 1995 filing was sent August 16, 1995, by regular mail, to the last address on record for the member. No response was received.

22. A Second Notice of Default in Annual Filing was sent by registered mail on September 18, 1995, to the last address on record for the member. The Acknowledgement of Receipt of a Registered Item was returned to the Society on September 22, 1995.

23. Society employees then telephoned the member in October, 1995. He advised in a telephone call on October 10 with Ms. Heidi Buckley that he would file by the end of October, 1995. On October 10, 1995, he advised Ms. Helen Pascari of the Society by letter that he would have all the filings completed by the end of October, 1995.

24. The required filings in respect of the year ended January 31, 1995 had not been received by the time of the hearing.

25. Mr. Bates was given ample opportunity to comply with his obligation and has not done so. The Committee finds that this particular of professional misconduct has been made out.

III. COMPLAINT D97/96

A. Particulars 2(a) - 2(c): "Environs"

26. Environs Landscape Contracting Co. Ltd., of Milton Ontario was founded by Robert E. Everest, and its office manager is Patrick Arnott, both of whom testified before the Committee.

27. Mr. Everest contacted Noel Bates to represent Environs after receiving a demand letter dated September 23, 1991 with respect to the alleged wrongful dismissal of former employee Diane Jones. A statement of claim was served on behalf of Ms. Jones in February, 1992, and the member attended on the discovery of Ms. Jones in June, 1992.

28. In a reporting letter to Robert Everest in June, 1992, the member estimated that if the company were unsuccessful in defending the action, it would face the prospect of having to pay four months' notice, plus costs, plus his legal fees, concluding that "the worst case scenario" is that the company would be exposed to \$12,000 plus prejudgment interest plus lost time, for a total risk in losing the case of \$15,000.00. With this letter, he enclosed a "sample" invoice for services up to June 15, 1992, of \$2,086.50, being comprised of \$1,900 in fees, and \$50.00 in disbursements, plus GST. Mr. Arnott testified that the company did not pay this invoice, because they did not regard it as a "hard" invoice, only a sample.

29. Mr. Everest also requested the member to act for Environs with respect to a former employee called Morancynski, who was alleged to have taken a computer program belonging to Environs and used it to compete with the company. In September, 1992 Environs provided the member, at his request, with a retainer cheque for this matter in the amount of \$5,000.00. Mr. Arnott testified that they were advised that these funds would be held in trust.

30. Diane Jones' wrongful dismissal action went to trial in May of 1993, resulting in judgment against Environs in the amount of \$9,945.00, and prejudgment interest of \$1,509.00 (totalling \$11,454.00), plus costs.

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31. The member sent Mr. Everest a reporting letter dated June 14, 1993 about this judgment, enclosing a "draft" account in the amount of \$9,362.50 in fees, plus disbursements of \$324.88 and GST. Mr. Everest instructed Mr. Arnott not to pay the draft invoice, as it was higher than the earlier estimate of fees, and he wanted to review all invoices and outstanding matters with Mr. Bates. By letter dated July 13, 1993, Environs received from Mr. Bates what Mr. Arnott described as a "hard" account (the first that was not a sample or a draft) in the amount of \$9,362.50 in fees plus \$324.88 in disbursements, and GST.

32. Mr. Bates also told Mr. Everest orally that it was imperative that he receive almost immediately from him a cheque to cover the judgment, which had to be paid promptly. Mr. Everest instructed Mr. Arnott to prepare the cheque, made out to "Noel Bates in Trust". The cheque, dated July 19, 1993, was for \$11,454.00, and Mr. Bates came to the Environs office in person to pick it up. Mr. Everest testified that at that time he knew that these funds were being put in a trust account to pay the amount of the judgment against the company when it was appropriate to do so.

33. William Simpson, an Examiner with the Law Society, gave evidence concerning the member's trust records relating to Environs. A deposit to the credit of Environs in the amount of \$11,454.00 was made to the member's trust account on July 19, 1993; a deposit slip signed by the member and a trust account ledger card were in evidence before the Committee. The ledger card reflects a credit of \$11,454.00 to Environs Landscape, as of July 19, 1993.

34. Also on July 19, 1993, the ledger card records that by cheque 531, the sum of \$10,000.00 was paid to "J. Finlay in trust", and by cheque 532, the sum of \$1,454.00 was paid to "RNB".

35. Cheque No. 531 on R. Noel Bates Trust Account dated July 19, 1993 was signed by R.N. Bates and made out to "John Finlay in trust". Mr. Simpson testified that during the course of his investigation, the member advised him that the cheque to John Finlay in trust represented monies due to Mr. Bates used to pay a personal matter. Cheque No. 532 on R. Noel Bates Trust Account dated July 23, 1993 was signed by R.N. Bates and made out to "R.N. Bates - General" in the amount of \$2,545.00, not the \$1,454.00 shown on the ledge card. Mr. Simpson explained that \$1,000.00 of this amount was the fees of another client being transferred at the same time, which are not the subject matter of a complaint.

36. After the transfers out of trust effected by cheques 531 and 532, the \$11,454.00 deposited on July 19 was depleted. However, Mr. Bates sent Mr. Everest a letter dated July 27, 1993 on the Jones file acknowledging receipt of the cheque for \$11,454.00 from the Environs office, and advising "these funds will be held in trust by me until such time as a letter from U.I.C. is delivered and thereafter I will remit to them [the plaintiff], less the deductions which I will make to Revenue Canada on your behalf". This letter was signed by his secretary on Mr. Bates' behalf.

37. Mr. Everest replied to this July 27, 1993 letter by fax memo of August 4, wherein he stated: "Please be advised that I expect to receive credit on my account for interest earned on any payments to you held "in trust". This would include the funds mentioned in the above noted letter [of July 27] as well as the \$5,000.00 remitted to you regarding Bob Morancynski".

38. Mr. Bates advised Mr. Simpson during the latter's investigation that he believed that this fax memo gave him authority to apply the trust funds to his accounts for fees and disbursements.

39. However, Mr. Bates sent Mr. Everest two letters by fax, on August 18, 1993. The first, in material part, states "You are correct that the funds remitted on the Moracynski file will be credited to the account with respect to the Jones matter as will be the funds which I picked up from you". The second stated, in material part, "From the funds we received we will be paying Revenue Canada directly and reimbursing U.I.C.".

40. Mr. Everest testified that on the basis of the two letters of August 18, he understood that Mr. Bates would pay the judgment. He remained under the impression that the judgment had been paid until February 1994.

41. In February 1994, Mr. Everest was served with papers to appear in court in connection with proceedings brought by Diane Jones to enforce the judgment in her favour, and he learned at that time that Mr. Bates had never paid over the funds left with him in trust for that purpose. Environs had to provide a sum of \$17,708.36 in February 1994 to satisfy the judgment, plus costs, interest and enforcement costs.

42. Environs' corporate solicitor, William Sinclair, dealt with Mr. Bates on behalf of the company when it was learned that proceedings to enforce the Jones judgment were underway. Mr. Everest testified that Mr. Sinclair advised him that the member had told him that the \$11,454.00 had been applied to Mr. Bates' account. In a letter to Mr. Sinclair dated March 17, 1994, Mr. Bates noted that "the reason the money was taken from the trust account was on your client's specific instructions which were confirmed in writing with your client". Before the Committee, Mr. Everest denied that he had ever authorized the member to apply to his accounts monies held in trust on behalf of Environs. Mr. Arnott testified that he had never instructed Mr. Bates to pay the Jones account from trust funds. The August 4, 1993 fax memo from Mr. Everest, discussed above, was identified by Mr. Bates to Mr. Simpson as the source of this purported instruction from Mr. Everest to apply trust funds to Mr. Bates' accounts. The Committee is of the view that the August 4 fax memo cannot possibly bear the construction put forward by the member. It is simply a direction about what is to happen to interest earned on the funds held in trust.

43. Environs has not been reimbursed by the member for the original \$11,454.00 provided to satisfy the Jones judgment, nor for any part of the sum provided to Ms. Jones in 1994.

44. In March 1994, there were some discussions between Mr. Sinclair and Mr. Bates about the return of the \$11,454.00 to Environs. At this time, as reflected in the member's letter to Mr. Sinclair of March 17, 1994, Mr. Bates raised the issue of his unpaid fees, on the Jones, Ireland and "Machensky" files. At that time, and at the time of the hearing before the Committee, Mr. Bates had not reported to the client about any work done on the Marancynski matter, and had rendered no account. Nor had he returned the \$5,000.00 retainer obtained on that file from Environs. Mr. Simpson's investigation of the Member turned up an account to Environs from the member on the "Ireland" and "Merchanskey" matters, dated July 21, 1993, in the amount of \$2,347.86. Mr. Everest, shown this account at the hearing, denied ever receiving it. Mr. Arnott's files disclosed no copy of a prior "outstanding account" referred to in the July 21, 1993 document.

45. On the basis of the oral and documentary evidence of Mr. Simpson, Mr. Everest and Mr. Arnott, it would appear that Mr. Bates misappropriated to his own purposes the amount of \$11,454.00 provided to him in trust on July 18, 1993 to satisfy the Jones judgment, later trying to raise some colour of right to those funds by claiming (quite unconvincingly) an authorization from the client to apply them to his accounts. There was no authorization to do anything with these funds except use them to satisfy the Jones judgment, which was not done. Accordingly, the Committee finds that the particulars of professional misconduct in para. 2(a) have been made out. In the alternative, these facts would support the particulars in 2(b).

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46. Indeed, it is clear that these funds had been misappropriated by the member by July 19 (July 23 at the latest), before he sent to the client the letter of July 27, 1993 undertaking to keep them in trust and apply them to the Jones judgment. Given the evidence that the member's own signature appears on the cheques moving the money from the trust account before July 27, the Committee does not believe that the July 27 letter can be explained away as inadvertence or simple error. Accordingly, the Committee finds that the particulars of misconduct in para. 2(c) have been made out.

B. Particulars 2(d)(i)-(iii): "Jenkins"

47. Mrs. Jean Jenkins immigrated to Canada in 1948, married in 1955, and stayed at home while her two children were young, returning to work as a hairdresser in 1976. Her husband Trevor Thomas Jenkins was a lithographer, who died tragically on May 5, 1986 in a fire of electrical origin in the couple's home. Mrs. Jenkins has not remarried. Her means are modest: her income last year was \$9,200.00.

48. She retained Noel Bates to represent her at the inquest called into her husband's death. Following the inquest, Mr. Bates recommended that she begin a lawsuit against Burlington Hydro with respect to the death of her husband, and she retained him to do that.

49. The Jenkins' home was insured by State Farm Fire and Casualty Company and Mrs. Jenkins received \$114,221.00 in insurance proceeds as a result of the fire. She testified that she used part of those proceeds to buy a residential property known municipally as 1312 Bunnell Drive in Burlington. An abstract of title provided by William Simpson indicates that the purchase price paid by Mrs. Jenkins for this property was \$106,500.00, of which \$74,500 was provided by means of a first mortgage to Royal Trust Corporation of Canada. Date of purchase was January 21, 1987. Mrs. Jenkins testified that she rented the property, hoping thereby to generate income to pay off the mortgage. She also owned a personal residence, in Brantford, which does not figure in the events giving rise to the complaint of professional misconduct.

50. When Mr. Bates talked to Mrs. Jenkins about beginning the lawsuit, she inquired about the cost of doing so. She testified that he told her that if she got nothing from the suit, he would not either.

51. State Farm arranged to enter the lawsuit with a subrogated claim in or about June 1990. In a letter to State Farm on June 18, 1990, Mr. Bates advised that his "target hourly rate" was \$210, that he expected Mrs. Jenkins' damage claim to be assessed in the \$125,000 - \$150,000 range, and that he proposed that the costs of the action be pro-rated between Mrs. Jenkins and State Farm in the proportions of their recovery. Mrs. Jenkins testified that he advised her that State Farm had a right to enter the lawsuit, and that they would share in the costs.

52. In a March 23, 1992 letter to State Farm, which Mrs. Jenkins recalls seeing, Mr. Bates estimated that the trial would be between six days and two weeks long, and the total legal bill from that time on would be \$20,000 - \$25,000 including disbursements. He advised State Farm that Mrs. Jenkins' proportion of those fees would likely be two-thirds, and that she would have some additional fees and disbursements solely referable to her claim.

53. Shortly before trial, Mrs. Jenkins states, Mr. Bates advised that his fee would be \$60,000.00. She got the impression from what he said that this would be the total and State Farm would pay half.

54. Mr. Bates sent State Farm a letter dated March 3, 1993, a copy of which Mrs. Jenkins remembers receiving. He estimated in that letter that trial costs from that point on for himself and his junior would be \$60,000 plus \$20,000 disbursements.

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55. The trial began March 22, 1993. It proceeded for sixteen or seventeen days, in Mrs. Jenkins' recollection. The plaintiff was unsuccessful, and in February 1994 an order of costs was obtained by which she was ordered to pay costs to Burlington Hydro. The defendant was ordered to pay the costs of the third party which would be recoverable against the plaintiff.

56. Mrs. Jenkins provided Mr. Bates with a cheque for \$5,000.00 dated April 22, 1993.

57. At that time, she had not yet received a bill from him, but she testified he had asked her orally for \$15,000.00.

58. Mrs. Jenkins testified that she knew she owed Mr. Bates money for the trial, and he suggested that she give him a mortgage. She replied "well, that will be another lawyer I have to pay". He said, no, that he had the mortgage "right here". The face value of the mortgage was \$75,000.00 and Mr. Bates told her that the fee would not exceed that.

59. The mortgage from Mrs. Jenkins to Mr. Bates for \$75,000.00 on 1312 Bunnell Drive was entered as an exhibit at the hearing. In the block on the form headed "Document prepared by:", there is typed in "Bridle & Bridle, Barristers & Solicitors, 3310 South Service Road, Burlington, Ontario".

60. Mrs. Jenkins said of this mortgage: "I didn't have a lawyer but I figured it would be OK because he had it done by someone else". She never spoke to anyone from Bridle & Bridle about this mortgage.

61. Mr. Bates took the position in his correspondence with R. Paul McCormick of the Law Society, dated April 27, 1994, that there had been no need for Mrs. Jenkins to have independent legal advice before signing this mortgage. At the hearing, the Law Society tendered in evidence an extract from the LSUC "Advisor" October 1993, Vol. 1, No. 3, which contained the information in a prominent article that "Independent legal advice essential when fees secured by client mortgage".

62. Mr. Bates also advised Mr. McCormick in the letter of April 27, 1994 that he only ever rendered one account to Mrs. Jenkins, and that account "showed the accumulated time of \$95,000.00 and acknowledged within the account ... that pursuant to the agreement under which the mortgage was taken, I would only seek fees of \$75,000.00.

63. Mr. Bates' account dated September 7, 1993 was addressed to both Mrs. Jenkins and State Farm. It was for the period from July 19, 1990 to September 1, 1993. This account does not bear any notation whatever reflecting the agreement between Mr. Bates and Mrs. Jenkins that he would seek from her fees of only \$75,000.00.

64. The account shows "Court Time" from Noel Bates of 180 hours at \$240.00 (\$43,200) plus preparation time for Noel Bates of 270 hours at \$210 an hour (\$56,700.00). "Court Time" for the lawyer Mr. Bates had retained to assist him on contact with this matter, Milena Protich, was shown as 170 hours at \$175 (\$29,750.00) and preparation time for her was shown as 180 hours at \$150 (\$27,000.00).

65. Overall, the account showed total fees and disbursements to be divided between Mrs. Jenkins and State Farm at \$170,727.51, with the share of each at \$85,363.75. Additional fees and disbursements from Mrs. Jenkins were given as \$13,839.66. The total shown as attributable to Jean Jenkins was \$99,213.14, less the \$5,000.00 paid on account, for a total owing by Mrs. Jenkins of \$94,213.41.

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66. Milena Protich gave evidence at the hearing. She was called to the bar in 1986, having articulated at Weir & Faulds. She practised at Weir & Faulds until September 1990, then opened a sole practice in Cambridge, Ontario doing civil litigation and administrative law. She first met Mr. Bates in 1989 or 1990, at an environmental hearing. Thereafter, he contracted with her to provide agency services in a long trial. By agreement, she was to bill Mr. Bates at the rate of \$150 per hour, plus disbursements. She would bill for travel by charging half her hourly rate (\$75) for travel time, but with no travel disbursements. She sent her account to Mr. Bates in accordance with these arrangements and it was paid. During this trial, she said she developed respect of Mr. Bates' trial acumen and advocacy skills, learned from him, and became friends with him. She did other agency work for him after that.

67. Mr. Bates retained her, she said, on the same fee arrangement as before in the fall of 1992, to work on the Jenkins matter. She assisted Mr. Bates with pre-trial motions and other interlocutory matters, at trial, and thereafter with respect to costs matters.

68. Ms. Protich sent Mr. Bates three accounts, dated December 2, 1992, May 7, 1993 and January 14, 1994, all of which were entered as exhibits at the hearing.

69. The December 2, 1992 account was for \$4,450.00 in fees. The May 7, 1993 account was for \$25,230.00 in fees, and the January 14, 1994 account was for \$1,815.00 in fees. The total fees billed by Ms. Protich to Mr. Bates were \$31,495.00.

70. She further testified that she had calculated from her time records the actual number of hours encompassed by the accounts rendered to Mr. Bates. On the December 2, 1992 account, she billed for 29.66 hours (although 32.7 were docketed by that time); on the May 7, 1993 account, she billed for 168.2 hours (167 hours had been docketed for the period since the first bill, but the extra 1.2 hours was in respect of some, but not all, of the time from the previous period); on the January 14, 1994 account, she billed for the rest of her time, 12.1 hours. The total time for all the accounts was 209.96 hours.

71. To contrast:	Hours	Fees
Billed by Bates to Jenkins:	350	\$56,750.00
Billed by Protich to Bates	209.96	<u>\$31,495.00</u>
		<u>\$25,255.00</u>

72. Ms. Protich saw a copy of the September 7, 1993 account rendered by Mr. Bates to Mrs. Jenkins and State Farm in September 1993; Mr. Bates' new secretary sent her a copy of it when Mr. Bates was away. When she first got the bill, she didn't examine it closely. Then Ms. Jenkins phoned her at home, upset about the account, and asked her if she had billed her \$60,000.00. Ms. Protich thereupon phoned Mr. Bates. Mr. Bates told her not to talk to "his client". Mr. Bates told her that he had charged the amounts for her fees, because her hourly rate was "too low" and she had underestimated her preparation time.

73. Although she did not phone Mrs. Jenkins back, Ms. Protich testified of the account that "it felt wrong". She spoke to two other practitioners about the situation, who were astonished at the nerve of what had been done, but told her they did not think she had any obligations in the situation. She took no steps at that time. Later, Mr. Bates told her that there had been an assessment of fees, and that they had been reduced. She felt that the issue had been dealt with through the assessment.

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74. Mr. Bates paid Ms. Protich only \$16,800.00 of the \$31,495.00 she had actually billed him. In the first week of trial, which began March 22, 1993, Mr. Bates gave her \$5,000.00. In October 1994, she received \$10,000.00. In the early spring of 1995, Mr. Bates made a proposal under the *Bankruptcy Act*. After proving the balance of her account and interest in the bankruptcy she received \$1,800.00 from the trustee.

75. Ms. Protich appeared to the Committee to be a sincere and responsible witness, who made every effort to be fair towards Mr. Bates. At her own initiative, she gave additional evidence after Mrs. Jenkins' testimony, to offer her recollections of a meeting between Mr. Bates and Mrs. Jenkins, spoken of by Mrs. Jenkins, which she also had attended. In so doing, she noted that Mr. Bates had appropriately put a settlement offer to Mrs. Jenkins.

76. With respect to Ms. Protich's fees on the September 7, 1993 account, Mrs. Jenkins stated that she knew she was paying for Ms. Protich's services "through" Mr. Bates, but did not think that Ms. Protich had charged her that amount of money. Mr. Bates never gave her an explanation of the account, or the number of hours. She testified that she had never agreed to pay Mr. Bates a premium.

77. Following receipt of the account, Mrs. Jenkins retained other counsel to advise her with respect to Mr. Bates. She was for a time uncertain whether to permit him to continue representing her with respect to costs submissions. She told him she would have his costs assessed, but did not proceed with this step (in contrast to what Mr. Bates told Ms. Protich).

78. On March 7, 1994, Mrs. Jenkins signed a Release in favour of Noel Bates with respect to his representation of her in her action against Burlington Hydro. She was represented at that time by Mr. Amey. On March 31, 1994, she signed a transfer of the property at 1312 Bunnell Drive to "Noel Bates in Trust", a copy of which was entered as an exhibit at the hearing. Mrs. Jenkins testified of this step, "he got the house". She also gave evidence that after she signed it over, Mr. Bates did not keep up payments. When it was sold, she got nothing. Mr. Amey arranged for Burlington Hydro to close its file without pursuing its award of costs against Mrs. Jenkins.

79. An abstract of title to this property was entered into evidence by William Simpson. It does not show any registration of the transfer from Mrs. Jenkins to Mr. Bates. It does show a transfer from Jean Jenkins to Mark and Lindsay Beemer on July 25, 1994, for the sum of \$146,000.00, a little less than the face amount of the two mortgages on the property.

80. Ms. Protich's testimony adds to the mystery surrounding Mr. Bates' course of dealings with 1312 Bunnell Road. By July 1994, Ms. Protich had been trying for some time to receive payment from Mr. Bates for her outstanding accounts, and had been met with excuse after excuse. At this time, he told her that he had arranged to sell the property he held in trust for his and her accounts, and the sale was to close July 25, 1994, at which time funds would be deposited to her account "off the top" of the proceeds of sale.

81. Ms. Protich was about to leave on a holiday with her family. She was counting on these funds to finance the holiday, and asked Mr. Bates to let her know before she left if there was any question about payment. He reassured her that the funds would be there as promised. From her holiday destination, she phoned her bank on July 25 to check on the funds. There had been no deposit. Mr. Bates' office advised that he was on holiday. His secretary told her that the bank had refused to accept the funds from the closing. When she phoned the law firm handling the sale, she found she was unknown to them. A secretary there advised her that Mr. Bates did not own the house, it was owned by Mrs. Jenkins. She received no funds from Mr. Bates in 1994 until the \$10,000 paid her in October.

82. Mr. Simpson testified based on his review of the abstract of title on 1312 Bunnell, and his investigation, that Mr. Bates had not ever taken title to the property.

83. Mr. Simpson discussed with Mr. Bates the September 7, 1993 account and the mortgage on 1312 Bunnell. Mr. Bates advised him that only \$50,000.00 of the amount shown on the account as owing by State Farm was paid. Mr. Bates also told Mr. Simpson that Mrs. Jenkins had not received independent legal advice on the mortgage transaction, because Mr. Bates did not believe it was necessary. Mr. Bates confirmed to Mr. Simpson that he had never taken title to the property.

84. Turning to particular 2(d)(i) of complaint D97/96, determining whether and to what extent misappropriation has occurred with respect to Mr. Bates' billings for Ms. Protich's services involves at first blush a numerical or accounting problem, rather than any difficulty in assessing the propriety of the Solicitors' conduct.

85. It seems clear from the evidence of Ms. Protich that the Solicitor billed considerably more for her services than she billed him: his bill was for \$56,750.00, hers for \$31,495.00, a difference of \$25,255.00. He almost doubled her account. The extent of the discrepancy in both hours and money, and Ms. Protich's evidence about Mr. Bates' explanation for the sum billed, leaves the Committee in no doubt that it was a deliberate step on his part, and neither an oversight nor a simple act of "rounding up".

86. However, counsel for the Law Society posed this question in his final argument: can there be misappropriation where a Solicitor attempts to take additional amounts but is not successful? The issue arises because Mr. Bates did not recover from either State Farm or Mrs. Jenkins the full amount he billed. From State Farm, he obtained \$50,000.00 of \$70,363.75. From Mrs. Jenkins, he obtained \$75,000.00 (the second mortgage proceeds) of the \$94,213.41 he sought.

87. To begin with, we observe that we are not here in the situation where the Solicitor tried to overcharge but did not get paid at all, so that, at best, his bare intention is in question. In fact, Mr. Bates realized a respectable recovery on his account, especially for a case where his clients had no success. He recovered \$125,000.00 of a total account of \$164,587.16.

88. In his argument, counsel for the Law Society did not address whether it is of significance that Ms. Protich's fees are dealt with in the part of the account referable to both clients, and not that part solely attributable to Mrs. Jenkins, whereas the complaint deals only with Mrs. Jenkins and is based on the difference between the whole of what Mr. Bates billed, and was billed, for Ms. Protich's services. For purposes of the complaint, the whole of the alleged mischief has been assigned to Mrs. Jenkins' part of the account, rather than pro-rated between State Farm and Mrs. Jenkins. To be fair, the Committee did not raise this with counsel during the course of hearing or argument, but it having arisen during our own thinking on this case, we should now address it.

89. This issue, like the one of only partial "success" in overcharging, seems to the Committee to be dealt with by the Law Society's submission that we should not become too deeply involved in "clever accounting", trying to determine whether the overcharge is properly allocable to the part of the fees not paid, or to the part which was paid, and in what proportions. In our view, the Society should not have to satisfy an obligation to trace the application of funds received from a client or clients, pursuant to an account which inflates

disbursements, before it can show that misappropriation has occurred. This is particularly so in a case like the present one where the Solicitor has never provided the Society's Examiner with access to his general account statements. Mr. Simpson testified that he asked Mr. Bates for his general account statements, whenever he attended at Mr. Bates' office to do his audits (April, July, August and September, 1994). Mr. Bates never directly refused to provide his general records, he just used various excuses about them not being available.

90. Here, it is permissible for the Society to attribute to Mrs. Jenkins' account the full amount of the discrepancy between what Mr. Bates billed, and was billed, for Ms. Protich's services. The corollary to that, which is met here, is that having done so, the Society could not also base an allegation of professional misconduct on any comparable charges to State Farm. Similarly, it is enough here that the Society has established that Mrs. Jenkins paid Mr. Bates an amount more than adequate to cover the \$56,750.00 he billed for Ms. Protich's services. In this case, tracing the actual application of those funds might, arguably, result in a finding that he had misappropriated more than the \$25,255.00 difference between what he was billed and what he billed. This is because he only paid Ms. Protich \$16,800 (about half) of the \$31,495.00 that she billed him.

91. Under commentary 6 of Rule 13 of the Rules of Professional Conduct, it is the lawyer's professional duty to meet financial obligations incurred, assumed or undertaken on behalf of clients. Given Mrs. Jenkins' evidence that she understood that Ms. Protich was being paid "through" Mr. Bates, it is reasonable to conclude that the obligation to Ms. Protich might be considered such a debit. This circumstance provides another reason for considering that the overcharge for these fees is "inside" the sum paid by Mrs. Jenkins and not "outside" it: if the \$56,750.00 had been the actual amount charged by Ms. Protich, there is an argument that Mr. Bates should have paid it before, for example, taking his own fees from the funds provided by Mrs. Jenkins.

92. The Committee is, accordingly, satisfied that the Society has made out the particulars of misconduct in paragraph 2(d)(i).

93. Given the evidence of Ms. Protich about the hours she worked and what she billed Mr. Bates, and the details reflected in the account of September 7, 1993 for her work, the Committee has also concluded that the Solicitor rendered a misleading statement of account for legal services as stipulated in particulars 2(d)(ii).

94. The evidence, as well as Mr. Bates' own letter to the Law Society of April 27, 1994, leaves no doubt that Mr. Bates arranged for a mortgage on Mrs. Jenkins' property, which was registered, as security for his legal fees, and that Mrs. Jenkins did not have legal advice when she granted that mortgage. The Committee is of the view that this is contrary to Rule 5, particularly commentary 7, and that it constitutes professional misconduct, as particularized in paragraph 2(d)(iii) of Complaint D97/96.

C. Particular 2(e)(i): "Prins"

95. In support of this particular, the Society tendered the Affidavit of Gary David Rich, sworn February 13, 1997. Mr. Rich had been scheduled to give oral evidence at the hearing, and his "will say" statement and file had accordingly been disclosed to the member. In substituting the affidavit for this oral evidence, counsel for the Society relied upon subsection 33(9) of the *Law Society Act*, which provides that an affidavit of any person is admissible as proof, in the absence of evidence to the contrary, of the statements made therein.

96. The Committee accepted the affidavit, except for the hearsay statements made in it.

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97. Mr. Rich is a barrister and solicitor in sole practice in Burlington. Gerry and Cornelia Prins have been his clients for a number of years. In September 1993, they retained him to advise with respect to a loan made to Mr. Bates.

98. Cornelia Prins directed RBC Dominion Securities on July 15, 1993 to release a cheque for \$50,000.00 to Mr. Bates. Mr. Bates provided a promissory note to her, dated July 15, 1993, promising to repay her \$50,000.00 on or before July 22, 1993. The promissory note, in handwriting which Mr. Simpson identified as Mr. Bates', stated that the attached mortgage [the mortgage of \$75,000.00 to Mr. Bates from Jean Jenkins] was assigned to Cornelia Prins as collateral security. Mr. Rich subsequently performed a title search of the property and learned that no formal assignment of the mortgage had been registered by the Solicitor.

99. Mr. Rich was not consulted by Gerry or Cornelia Prins at the time of the advance on July 15, 1993, and did not provide independent legal advice to them.

100. The Prinses instructed Mr. Rich to obtain repayment of the loan, which had been due in July, and in the meantime to get better security for it. Mr. Rich arranged with Mr. Bates to provide a formal assignment of the Jenkins mortgage, and this was registered on September 15, 1993.

101. The loan plus costs and interest (\$51,200.50) was repaid by Jill Bates, Noel Bates' wife, on September 24, 1993, by means of payment into Mr. Rich's trust account.

102. The funds were released to Cornelia Prins on October 5, 1993, upon the provision by her of an assignment to Jill Bates of the Jenkins mortgage. The assignment was not registered by Mr. Rich. He gave it to Mr. Bates at his request so that he could register it himself.

103. The details of this loan to Mr. Bates are relatively straightforward, but the Committee had to consider the nature of the relationship between Mr. Bates and Cornelia and Gerry Prins.

104. Mr. Bates told William Simpson on May 10, 1995 that he had been acting for Mr. Prins. Mr. and Mrs. Prins were in his office one day and indicated to him that he did not look too well. Mr. Bates told them he had financial problems, and they offered him a loan of \$50,000.00. When he offered them security, they said they didn't need any.

105. Mr. Bates told Mr. Rich that he was retained only by Gerry Prins at the time of the loan from Cornelia Prins. He also admitted, however, that previously he had acted for both Gerry and Cornelia Prins.

106. Mr. Rich stated that at all times when he acted for the Prinses, the couple treated their funds as belonging to both of them, even when particular funds were held in the name of one spouse or another. His firm's client ledger for the Prinses was opened in the name of only Gerry Prins. However, funds in the name of both Cornelia and Jerry Prins, including the funds repaid by Mr. Bates, were recorded on this ledger on the basis of the Prinses' instructions to him.

107. Rule 7 provides that the lawyer must not borrow money from a client, with two exceptions not relevant to the Prinses' circumstances. Paragraph 3 of Rule 7 states that whether a person lending money to a lawyer is to be considered a client within this principle is to be determined having regard to all the circumstances. If the circumstances are such that the lender might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan, then the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

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108. The evidence of Mr. Rich and Mr. Simpson brings Cornelia Prins herself within the ambit of the principle in paragraph 3 of Rule 7. As a former client, married to a present client, acting as part of a lending couple in a meeting in her husband's lawyer's office, Cornelia Prins was entitled to look to Mr. Bates for guidance or advice in respect of the loan. As a present client, Mr. Prins is protected by the prohibition against borrowing from clients, and Mr. Rich's evidence suggests that it is eminently likely that Mr. Prins had an interest in the funds advanced, given the way the couple organized their financial dealings. This is reinforced by Mr. Bates' account of the circumstances in which the loan was made. The Committee finds that the misconduct alleged in particular 2(e)(i) has been established.

D. Particulars 2(f), (g): "Main"

109. Roy Main has an Honours degree in Business Administration from Windsor and a Masters degree in Public Administration from Queens. He has been the City Administrator in St. Thomas Ontario since 1993. He first met Mr. Bates in 1977. Mr. Main was employed by the Town of Milton and Mr. Bates was the Solicitor for the Halton Region. Mr. Main came to admire his abilities.

110. Mr. Main engaged Mr. Bates in November 1991 in connection with his dismissal by the Town of Milton. His action began in 1992, and a settlement for \$70,000.00 was reached in May 1993. Mr. Main executed a Release in favour of the Town in May.

111. He instructed Mr. Bates that from the settlement funds, he was to pay Revenue Canada, pay back U.I.C., pay funds into his RRSP mutual fund, and pay out the balance in cash to him, less Mr. Bates' fees. The cash balance remaining to Mr. Main after these payments would be \$9,606.00.

112. Mr. Bates trust ledger card for Mr. Main shows receipt of \$70,000.00 from David Harris (solicitor for the Town) on June 18, 1993.

113. Mr. Main testified that he was unaware until the end of August that these settlement funds had been received. In the summer of 1993, his financial situation was grim and he contracted Mr. Bates weekly to ask about the settlement funds. He was given excuses about why the funds hadn't been received.

114. Just prior to the long weekend at the end of August, Mr. Main insisted on having his funds, and only then did Mr. Bates tell him that he had received the settlement funds in June, and invested the funds in an unsecured second mortgage. Mr. Main had not authorized such an investment. No documents reflecting that investment were shown to Mr. Main at that time.

115. Mr. Bates told Mr. Main that he would pay him back plus interest on his investment by cashing some bonds and certificates left with him by another client, who had authorized him to cash them and pay Mr. Main.

116. By September 20, 1993 when he started work in St. Thomas, Mr. Main had still received no money, but had received a number of excuses, from Mr. Bates.

117. Finally, on November 2, 1993, he received a cheque from Mr. Bates for \$9,606.00, delivered by Bates in a meeting in his car 40 km. east of London. This cheque was NSF, even though Mr. Main had told Mr. Bates "I need this cheque to be valid because I'm going to cash it". Mr. Main had to arrange bridge financing with his bank to cover a support cheque he had written to his former spouse.

118. Mr. Bates came to Mr. Main's office in St. Thomas on November 18 with a cheque for \$9,606.00, which was honoured, and enabled Mr. Main to correct his funds. At that time, he asked Mr. Main to sign a "Form 4" authorizing him to make the investment on his behalf. Mr. Main refused.

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119. On that occasion, Mr. Main sought correction of a reporting letter which he had received from Mr. Bates in November 1993 (although it was dated August 31, 1993). The original letter had stated that on July 8, the settlement funds were invested in a mortgage account bearing interest at eight per cent in trust for him, and that he had approved of that investment. In November, Mr. Bates made a handwritten amendment so that the letter would read that on July 8, his funds were "to be placed in an interest bearing trust". Mr. Bates refused to remove the sentence indicating that Mr. Main had agreed with that investment. Mr. Main disagreed, but could not resolve the issue with Mr. Bates at that time.

120. Mr. Bates provided Mr. Main with an account dated November 19, 1993, showing fees in the amount of \$5,430.00. The trust statement accompanying that account shows:

RECEIVED

Harris & Partners, June 18	\$70,000.00	
Proceeds of Mortgage, November 22	\$71,430.00	
		\$141,430.00

PAID

R.N. Bates Mortgage	\$70,000.00	
(Jenkins), June 19		
Altimira Investment, November 22	36,000.00	
UIC, November 22	12,444.00	
Revenue Canada, November 22	7,950.00	
Roy Main, November 22	9,606.00	
Noel Bates Account	5,430.00	
		\$141,430.00

BALANCE HELD IN TRUST \$0

All of the payments indicated were made on or about November 22.

121. Mr. Simpson produced the client ledger card kept by Mr. Bates for Mr. Main. It indicates receipt on June 18 of \$70,000.00 from David Harris, and payment out on June 18 by cheque 530 to "RNB in Trust (Placed in Mtg)" the sum of \$70,000.00. Cheque No. 530 was also produced by Mr. Simpson: it is made out to "Noel Bates General".

122. Because Mr. Bates did not produce general account records, it was not possible for Mr. Simpson to trace what actually happened to the \$70,000.00 after cheque 530. However, his evidence contradicted Mr. Bates' statement to Mr. Main that the funds had been invested in a mortgage.

123. Mr. Simpson testified that Mr. Bates told him that Mr. Main had purchased the Jenkins mortgage from him. He said he had prepared this assignment but never registered it.

124. However, the money left the Main trust account on June 18, 1993, and the Jenkins mortgage was not executed until July 9, 1993. The promissory note of July 15 then purported to assign that mortgage to Cornelia Prins. The actual assignment to Prins was registered on September 15, 1993. Although the assignment of the Jenkins mortgage from Cornelia Prins to Jill Bates was given by Prins on October 5, 1993, according to Mr. Rich, it was not registered by Mr. Bates until July 25, 1994, the day the property was sold. At no time does the title abstract show any registered interest of Roy Main in this mortgage, and there is no instrument on the record before this Committee which discloses any unregistered interest.

125. Mr. Main's trust ledger card does not reflect payment in of any identifiable Jenkins mortgage proceeds. A payment into trust of \$45,000.00 on November 16 is identified only as "Wellington", as are payments of \$8,500.00 on November 23, \$7,930.00 on November 25, and \$10,000.00 on November 17. These total \$71,430.00, the same amount identified on the trust statement of November 19 as "Proceeds of Mortgage November 22". Mr. Bates never provided to Mr. Simpson a requested explanation of these amounts.

126. From the trust records and the evidence of Mr. Simpson, the Committee finds that it is clear that on or about June 18, 1993, Mr. Bates misappropriated \$70,000.00 from his trust account, namely the \$70,000.00 in settlement funds meant for Mr. Main. The particulars of professional misconduct in paragraph 2(f) are established.

127. The Committee also finds that in September 1993 when he told Mr. Main that these funds had been invested in a mortgage, he was misleading him. There was no such investment. The monies had been misappropriated June 18, 1993. The professional misconduct described in paragraph 2(g) is established.

RECOMMENDATION AS TO PENALTY

128. The Committee recommends that Robert Noel Bates be disbarred.

REASONS FOR RECOMMENDATION

129. The findings of professional misconduct in this case involve misappropriation of trust funds (Environs; Main), misappropriation of funds by means of seriously inflating an account (Jenkins), misleading a client (Environs, Jenkins, Main), borrowing from a client (Prins) and conflict of interest in securing legal fees with a mortgage from a client who did not have legal advice (Jenkins), as well as failing to file annual returns. The material acts relating to all these clients took place in a relatively short period of time in the summer and early fall of 1993. Cumulatively, they present a chilling pattern of deception and calculated self-interest.

130. The general rule is that solicitors who deliberately misappropriate funds should be disbarred save in exceptional circumstances. In this case, where there is not just misappropriation, but other professional misconduct, the Committee sees no reason to depart from the general rule.

131. There are no mitigating circumstances here. While restitution can sometimes be a factor, the circumstances of the restitution made to Mr. Main themselves pose questions about the source of the funds, to which the Solicitor has not provided an answer. With respect to Environs, Mr. Bates took the position in a letter to the Law Society on April 29, 1994 that he had "accounted for the funds provided" to him by Environs, and had not improperly used any trust funds. He contended that Environs had been billed more than \$17,000.00, an allegation not borne out by the evidence before the Committee, and had "paid on account" only \$5,000.00. Far from indicating any desire to set things right with Environs, this attitude reveals regrettable persistence in wrongful conduct. In the case of Mrs. Jenkins, Mr. Bates agreed to settle his \$94,000.00 account for \$75,000.00, but this gesture of reasonableness did not even cover the excess he had charged for the fees of Ms. Protich. Again, we see problematic conduct instead of an approach to restoring client funds.

132. There are several aggravating factors in this case. The Solicitor deliberately, and with some complexity of execution, ignored client instructions in misappropriating the trust funds of Mr. Main and Environs. In each of these cases, the misappropriations put clients at risk of breaching obligations to others: Environs the court order in favour of Ms. Jones, and Mr. Main his support obligations to his spouse and payments to Revenue Canada and UIC. Mr. Bates knew of these obligations. His actions caused considerable financial problems to some clients whom he knew were in difficult financial circumstances, like Mr. Main and Mrs. Jenkins. He knew Mr. Main was badly in need of his settlement funds during his period of unemployment, yet did not even tell him they had been received. When he did finally tender a partial payment, it was with an NSF cheque, despite his knowledge that Mr. Main had incurred obligations for which he needed the funds. Similarly, he left a junior colleague, Ms. Protich, in the lurch about her fees, despite her known reliance on his reassurances that they would be paid, and despite the fact that he billed his client for roughly three times what he actually paid Ms. Protich. These examples only highlight the want of regard or conscience in his treatment of his professional obligations.

133. Another aggravating factor here is Mr. Bates' stature at the Bar, and the trust he had engendered in those he deceived. Certified as a specialist in both civil litigation and criminal law, he was seen by Ms. Protich as an excellent advocate. Mr. Main had come to appreciate his skill and judgment while he held a senior counsel position with Halton Region, and even after what happened still valued him as a worthy person and offered friendship and support. Mrs. Jenkins, whom he had seen through the inquest into her husband's tragic death, obviously trusted him to guide her through the ensuing civil litigation. It is particularly regrettable when a senior and respected barrister uses that position, and the trust of clients and colleagues alike, to conceal predatory conduct.

134. Mr. Bates did not provide his general account records to the Society's Examiner Mr. Simpson in spite of several requests. Questions posed by Mr. Simpson remained unanswered. Mr. Bates tried to get Mr. Main to sign a "Form 4" to be submitted to the Society saying he had authorized the (non-existent) mortgage investment. He refused to take part in the hearing of the complaints, having first used procedural delays to forestall accountability as long as possible. Mr. Bates' attitude towards the Society and the discipline process is certainly an aggravating factor, even though it can hardly be said that any more such factors are needed.

135. The Society asked that the Committee find that the Solicitor warrants disbarment because of ungovernability, as well as because of professional misconduct. We did not do so at this point, in part because the final outcome in the Report and Decision in Complaint D179/95 had not yet been considered by Convocation, and so the full procedural story of that Complaint and of the ones before this Committee has not yet been told. Since it is in the Solicitor's treatment of the discipline procedure, not just in his response to the investigation, that the elements of his alleged ungovernability may be emerging, we considered that it is as yet premature to make this finding. If necessary, it may be open to Convocation to return to this question when it considers the Report and Decision in these several complaints, at which time there may be an even more complete history of the Solicitor's attitude toward the Society. This holding is not to be construed as a finding that the solicitor is not ungovernable, but merely as an indication that this Committee feels that matter may be more ripe for adjudication at a later point, if indeed it is necessary to reach it at all.

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136. The Solicitor has a prior discipline record. In 1984, he was reprimanded in committee after a finding that he had suppressed information which ought to have been disclosed to opposing counsel and to the court. In December 1996 the Discipline Committee recommended that he be disbarred for misappropriation, but that recommendation has yet to be considered by Convocation.

Robert Noel Bates was called to the Bar in March 1968.

ALL OF WHICH is respectfully submitted

Dated this 27th day of February, 1997

Mary Eberts, Chair

Mr. Stuart reviewed the history of this matter to date and advised that the solicitor would not be attending Convocation.

The following materials were filed as Exhibits:

Exhibit 3 - Affidavit of Yvette Soulliere sworn April 4th, 1997
Exhibit 4 - Affidavit of Yvette Soulliere sworn May 1st, 1997
Exhibit 5 - Affidavit of Michelle Brodie sworn April 24th, 1997
Exhibit 6 - Letter from Noel Bates to Glenn Stuart delivered by fax
Exhibit 7 - Letter from Noel Bates to The Law Society of Upper Canada dated March 31st, 1997 delivered by fax

Exhibit 8 - Notice of Disagreement on behalf of the solicitor dated January 10th, 1997

There were questions from the Bench.

It was moved by Ms. Ross, seconded by Mr. Wilson that the Reports dated December 12th, 1996 and February 27th, 1997 be adopted.

Carried

The following corrections were made to the Report:

- Report dated February 27th - page 5, paragraph 8, second line - the date February 7, 1996 should be "1997";
- Report dated February 27th - page 20, paragraph 66 - law firm of Weir & Faulds referred to should be Weir & "Foulds";
- Report dated February 27th - page 26, paragraph 91, fifth line - last word in sentence should be "debt" not debit.

The recommended penalty in both Reports was that the solicitor be disbarred.

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

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

Carried

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Re: Norman Franklin WILLIAMS - Hamilton

The Secretary placed the matter before Convocation.

Messrs. Adams and MacKenzie and Ms. Eberts withdrew for this matter.

Ms. Lesley Cameron 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 10th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 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

Elvio L. DelZotto, Q.C., Chair
W. Michael Adams
Mary A. Eberts

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

Lesley Cameron
for the Society

NORMAN FRANKLIN WILLIAMS
of the City
of Hamilton
a barrister and solicitor

Brian Greenspan
for the solicitor

Heard: January 29, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 30, 1995 Complaint D439/94 was issued against Norman Franklin Williams alleging that he was guilty of professional misconduct. The Complaint was withdrawn and replaced by Complaint D439a/94 issued on January 28, 1997.

The matter was heard in public on January 29, 1997 before this Committee composed of Elvio L. DelZotto, Q.C., Chair, W. Michael Adams and Mary Eberts. The Solicitor attended the hearing and was represented by Brian Greenspan. Lesley Cameron appeared on behalf of the Law Society.

DECISION

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

Complaint D439a/94

2. a) In connection with the Solicitor's representation of his client, Tony Froude, in the defence of criminal charges he failed to serve the client in a conscientious, diligent and efficient fashion and demonstrated discourtesy to the court by:
 - i) accepting the brief when he had a conflicting previous court commitment on the date scheduled for trial; and
 - ii) failing to bring a timely motion for an adjournment.
- b) He failed to serve his clients, Peter and Barbara Clarke, in a conscientious, diligent and efficient fashion in connection with his representation of them in respect of the expropriation of a portion of their property by the Government of Ontario by:
 - i) failing to take the steps required by the Ministry of Transportation and Communications to obtain payment for the property expropriated with the result that the Ministry paid the monies into court; and
 - ii) failing to take the necessary steps to have the monies paid out of court in a timely manner.
- c) In connection with his representation of his client Stuart MacCuaig on the appeal of MacCuaig's criminal conviction:
 - i) he failed to serve the client in a conscientious, diligent and efficient fashion by:
 - 1) failing to commence an appeal of the client's conviction within the appeal period, notwithstanding the client's instructions to do so and the Solicitor's agreement to do so;
 - 2) writing to the client after the appeal period had expired, recanting his offer to conduct the appeal free of charge; and
 - 3) failing to respond to the client's inquiries for information about the status of his appeal in numerous telephone calls to the Solicitor's office between January 30, 1990 and January 21, 1991 and letters to the Solicitor from the client dated October 29, 1990 and December 5, 1990;
 - ii) he failed to advise the client of the status of the appeal and specifically that he had not commenced an appeal; and
 - iii) he swore an affidavit in support of a motion to extend the time to appeal, which was not filed, which was false and misleading.
- d) He failed to serve his client Leonard and Carol Baldwin and Royal Trust in a conscientious, diligent and efficient fashion, in connection with the 1989 refinancing of their property at 237 Charing Cross Street, Brantford, Ontario, by:

- i) registering a mortgage which was to be a first mortgage without registering discharges of three prior encumbrances and subsequently failing to obtain registered discharges of the three prior encumbrances in a timely manner;
- ii) incorrectly advising his clients Leonard and Carol Baldwin that two of the encumbrances were discharged when they were still outstanding; and
- iii) incorrectly reporting to his client, Royal Trust that its mortgage was first in priority.

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 D439a/94 and is prepared to proceed with a hearing of this matter on January 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 D439a/94 and this agreed statement of facts with his counsel, Brian Greenspan, and admits the particulars of Complaint D439a/94. The Solicitor also admits that the particulars alleged in the complaint supported by the facts as set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 26, 1971 and is a sole practitioner in the City of Hamilton.

2(a) In connection with the Solicitor's representation of his client, Tony Froude, in the defence of criminal charges, he failed to serve the client in a conscientious, diligent and efficient fashion and demonstrated discourtesy to the court by:

- 1) accepting the brief when he had a conflicting previous court commitment on the date scheduled for trial; and
- 2) failing to bring a timely motion for an adjournment.

5. Tony Froude ("Froude") was charged with two sexual assaults, forcible confinement, weapons offences, possession under and theft under. He was initially represented by Paul D. Farquharson ("Farquharson") of Oshawa. Farquharson had attended two pre-trial conferences and had participated in the scheduling of a trial date of March 26, 1992.

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6. Froude first contacted the Solicitor on February 24, 1992. At Tab 1 of the Document Book is a copy of an account submitted by the Solicitor to the Ontario Legal Aid Plan (the "Account" and the "Plan" respectively) indicating a 15 minute telephone call between the Solicitor and Froude on this date.

7. Froude advised the Solicitor in the course of the telephone call on February 24, 1992 that the trial date was March 26, 1992. The Solicitor states that although he did not turn his mind to it during the telephone conversation, he was not available for this trial date.

8. On March 6, 1992, the Solicitor had three short telephone conversations with Froude, as indicated by the Account.

9. By facsimile transmission on Friday, March 6, 1992, at 5.01 p.m., a copy of which is at Tab 2 of the Document Book, Farquharson wrote to the Solicitor indicating that Froude had advised him that he wished to replace Farquharson and asking the Solicitor to confirm that he would be acting for Froude.

10. By facsimile transmission dated March 8, 1992, at 2.05 p.m., a copy of which is at Tab 3 of the Document Book, the Solicitor responded indicating that March 26, 1992 was not a date convenient for the Solicitor to attend at trial and that he would discuss the matter with Froude and get back to Farquharson.

11. By facsimile transmission on Wednesday, March 18, 1992, at 5.20 p.m., a copy of which is at Tab 4 of the Document Book, Farquharson forwarded to the Solicitor copies of correspondence from the Crown Attorney dated Monday March 9 and Tuesday March 10, 1992.

12. On March 21, 1992, the Solicitor met with Froude for one hour, as indicated by the Account. At this meeting, the Solicitor agreed to represent Froude. By facsimile transmission on March 22, 1992 at 2:08 p.m., a copy of which is at Tab 5 of the Document Book, the Solicitor wrote to the Crown, advising that:

"I expect to be representing Mr. Froude. The firm of Ripson, Epsey is no longer representing him. I am waiting for legal aid.

The March 26 date is not an agreeable date for this counsel. My office will be calling the trial co-ordinator to try and set up a new date convenient to me."

13. On Tuesday, March 24, 1992, the Solicitor had a telephone conversation with the Assistant Crown, Nevina Crisante, advising her that he would be seeking an adjournment on Thursday, March 26, 1992. Ms. Crisante told him that the crown would oppose the adjournment request and that a motion should be brought on proper notice if an adjournment was being sought.

14. The Solicitor states that he spoke on March 24, 1992 to Bruce Affleck or someone in Bruce Affleck's office to ask that someone in the Affleck office bring a motion for an adjournment. The Solicitor states that he was advised on Wednesday, March 25, 1992, that no one from Mr. Affleck's office was available to bring such a motion on his behalf.

15. On Thursday, March 26, 1992, the Solicitor travelled from his home in Hamilton to attend in Oshawa before Stone J. of the Ontario Court (Provincial Division)(Criminal Division). The Solicitor advised the court that he had a conflict and requested an adjournment. At Tab 6(a) of the Document Book is a transcript of the proceedings concerning Froude on that date. It is apparent from the transcript that there were twelve witnesses under subpoena for the Froude trial and that the entire day had been set aside by the court.

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16. It appears from pages 33 and 34 of the transcript that in the result, the matter was adjourned to a pre-trial on April 10, 1992 with a target trial date of April 24, 1992.

17. By letter dated June 18, 1992, a copy of which is at Tab 6 of the Document Book, His Honour Sidney B. Linden, Chief Judge of the Ontario Court of Justice (Provincial Division) complained to the Law Society about the conduct of the Solicitor, enclosing a copy of a letter from Stone J. and the transcript.

18. By letter dated August 19, 1992, the Society forwarded the Solicitor a copy of the letter of complaint and requested his comments. The Solicitor provided a reply to the Law Society dated October 29, 1992, a copy of which is at Tab 7 of the Document Book.

2(b) He failed to serve his clients, Peter and Barbara Clarke, in a conscientious, diligent and efficient fashion in connection with his representation of them in respect of the expropriation of a portion of their property by the Government of Ontario by:

i) failing to take the steps required by the Ministry of Transportation and Communications to obtain payment for the property expropriated with the result that the Ministry paid the monies into court; and

ii) failing to take the necessary steps to have the monies paid out of court in a timely manner.

19. The Solicitor was retained by Peter and Barbara Clarke to assist them with an expropriation by the Ministry of Transportation and Communications (the "Ministry") of a small piece of land owned by the Clarkes on a property municipally known as 198 Beach Boulevard, Hamilton. The Solicitor had previously acted for Peter Clarke over the course of several years in relation to various criminal matters. At the time of his retention on this matter, Howard Miller ("Miller"), a lawyer whom the Solicitor states was familiar with expropriations, shared office space with the Solicitor and became involved in the file. Miller left private practice in June of 1987 and the file remained with the Solicitor.

20. By letter dated November 8, 1985, a copy of which is at Tab 8 of the Document Book, the Ministry wrote to the Solicitor advising that the Clarkes had entered into a Property Purchase Agreement dated October 5, 1985, which was accepted by the Ministry on November 7, 1985. The letter enclosed a deed and requested its execution and requisitioned a discharge of the mortgage on the property being purchased, the removal of a writ of execution and other details. The letter also advised that the Ministry required the executed deed and partial discharge prior to closing on December 11, 1985 and indicated that in the event the necessary documents were received shortly, the Ministry would be able to complete the Property Purchase Agreement and have the expropriation procedures withdrawn.

21. By letter dated January 9, 1986, a copy of which is at Tab 9 of the Document Book, the Ministry again wrote to the Solicitor referencing its letter of November 8, 1985 and phone calls and requesting the executed deed. The letter indicates that unless the required documents are received by February 6, 1989, the Ministry would have no alternative but to register the expropriation plan on title because of an early construction date.

22. By letter dated January 9, 1986, a copy of which is at Tab 10 of the Document Book, Miller wrote to the Bank of Nova Scotia requesting the required documents.

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23. By letter dated February 5, 1986, a copy of which is at Tab 11 of the Document Book, the Bank of Nova Scotia responded, indicating that as they understood the Clarkes did not wish to make the necessary payment on the mortgage, the matter was being dropped.

24. A document entitled "Agreement As to Compensation and Possession for Land Required by the Ministry of Transportation and Communications" executed by Peter and Barbara Clarke on May 15, 1987 (the "Expropriation Agreement") indicates that the property in question was ultimately expropriated. A copy of the Expropriation Agreement is at Tab 12 of the Document Book.

25. By letter dated June 5, 1987, a copy of which is at Tab 13 of the Document Book, Miller corresponded with the Ministry concerning the expropriation.

26. By letter dated September 22, 1987, a copy of which is at Tab 14 of the Document Book, the Solicitor forwarded the executed Expropriation Agreement and requested that it be held in escrow pending receipt of funds.

27. By letter dated October 26, 1987, a copy of which is at Tab 15 of the Document Book, the Solicitor followed up with the Ministry concerning payment.

28. By letter dated October 26, 1987, a copy of which is at Tab 16 of the Document Book, the Ministry wrote to the Solicitor indicating that before payment could be made pursuant to the Expropriation Agreement, it was necessary that the Solicitor notify the mortgagee in order that the mortgagee might either release or claim part of the compensation for the expropriation. The Ministry enclosed a release form in duplicate for execution and requested the return of the original at the Solicitor's earliest convenience, together with mortgage statements for any mortgagee wishing to claim part of the compensation.

29. By letter dated December 1, 1987, a copy of which is at Tab 17 of the Document Book, the Solicitor wrote to the Ministry requesting the address of the mortgagee, Central Covenants Limited.

30. By letter dated December 8, 1987, a copy of which is at Tab 18 of the Document Book, the Ministry provided the requested information to the Solicitor.

31. By memo dated May 16, 1988 from the Solicitor to "Joan", "Re Barbara and Peter Clarke - Expropriation", a copy of which is at Tab 19 of the Document Book, the Solicitor asked an employed Solicitor named Joan MacDonald to take over conduct of the matter, advising that the Clarkes were "becoming quite vocal because the concluding piece of information has not been accomplished because I really don't know what the hell I'm doing".

32. By letter dated August 17, 1988, a copy of which is at Tab 20 of the Document Book, the Ministry advised the Solicitor that as it had not received the releases required to complete the transaction, it would be paying the compensation set out in the Expropriation Agreement into court.

33. By letter dated September 8, 1988, a copy of which is at Tab 21 of the Document Book, the Solicitor responded requesting that the monies not be paid into court.

34. On September 19, 1988, the Ministry forwarded its cheque for payment into court. A Notice of Payment into Court dated September 26, 1988, a copy of which is at Tab 22 of the Document Book, indicates that \$6,220.69 was paid into court on or about that date.

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35. The memo dated May 16, 1988 from the Solicitor to Joan, a copy of which is at Tab 19 of the Document Book, bears handwritten notes dated December 20, 1988 indicating that the Ministry advised that the money had been paid into court and that the Ministry "couldn't hold money any longer - no one returned calls or letters."

36. By memo dated October 4, 1989, a copy of which is at Tab 23 of the Document Book, the Solicitor asked his employed solicitor, Mary Elizabeth Kneeland ("Kneeland"), to determine the amount of monies held in court and the current interest rate.

37. By letter dated December 1, 1989, the Ministry of the Attorney General responded to a letter from Kneeland, enclosing a certificate of funds standing in court, a copy of which is at Tab 24 of the Document Book.

38. By memorandum dated December 20, 1989, a copy of which is at Tab 25 of the Document Book, the Solicitor asked "Sarah", a secretary in his office, to determine how much money had been paid into court.

39. Between September of 1988 and the spring of 1990, the Solicitor took no action to have the monies paid out of court.

40. At some point after being retained by the Clarkes to deal with the expropriation issues, the Solicitor was retained by Peter Clarke to represent him in matrimonial proceedings against Barbara Clarke. The Solicitor states that between the spring of 1990 and the summer of 1991, the payment into court formed part of the ongoing matrimonial negotiations, and he did not understand that there was any urgency to having the money paid out.

41. As of the summer of 1991, it was clear to the Solicitor that the money had to be paid out of court.

42. On August 31, 1992, the Solicitor obtained an Order of Leach J., ordering the payment of \$6,220.69 plus accrued interest out of court to counsel for Mrs. Clarke in the matrimonial proceedings. A copy of the Order is at Tab 26 of the Document Book.

2(c) In connection with his representation of his client Stuart MacCuaig on the appeal of MacCuaig's criminal conviction:

i) he failed to serve the client in a conscientious, diligent and efficient fashion by:

- 1) failing to commence an appeal of the client's conviction within the appeal period, notwithstanding the client's instructions to do so and the Solicitor's agreement to do so;
- 2) writing to the client after the appeal period had expired, recanting his offer to conduct the appeal free of charge; and
- 3) failing to respond to the client's inquiries for information about the status of his appeal in numerous telephone calls to the Solicitor's office between January 30, 1990 and January 21, 1991 and letters to the Solicitor from the client dated October 29, 1990 and December 5, 1990;

ii) he failed to advise the client of the status of the appeal and specifically that he had not commenced an appeal; and

iii) he swore an affidavit in support of a motion to extend the time to appeal, which was not filed, which was false and misleading.

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43. On January 11, 1990, the Solicitor represented Stuart MacCuaig ("MacCuaig") on a charge of sexual assault. Following a guilty plea, MacCuaig was convicted and fined \$300. The Solicitor's statement of account dated January 11, 1990 is at Tab 27 of the Document Book.

44. MacCuaig and the Solicitor were surprised that a conditional discharge was not granted and the Solicitor offered to appeal the matter for MacCuaig free of charge, which offer was accepted by MacCuaig.

45. On January 30, 1990, MacCuaig called the Solicitor's office to inquire whether an appeal had been filed. At Tab 28 of the Document Book is the Williams & Johnson client ledger for MacCuaig which references this telephone call.

46. The appeal period is thirty days and it expired on February 10, 1990.

47. By letter dated February 19, 1990, a copy of which is at Tab 29 of the Document Book, the Solicitor wrote to MacCuaig confirming that he would be appealing the matter of sentence. The letter also confirms that the Solicitor had indicated that he would not be charging a fee other than the transcript cost. The letter goes on to state that on reflection, the Solicitor felt he must charge \$250 plus the transcript costs and that the \$250 would be payable at the time the appeal was heard. The letter also stated "We will keep you advised".

48. By memorandum dated April 27, 1990 to his employed solicitor, George Johnson ("Johnson"), the Solicitor asked Johnson to "Please do this immediately" in reference to the Stuart MacCuaig appeal. A copy of this memorandum is at Tab 30 of the Document Book.

49. MacCuaig called the Solicitor on Saturday, August 11, 1990 to ask when the appeal would be heard. The Solicitor asked him to call back on the following Monday and ask for Lois who would be able to tell him the date. When MacCuaig called Lois on Monday, August 13, 1990, she indicated that she had to check with Johnson and would call him back, but did not.

50. Between August 13 and October 9, 1990, MacCuaig made numerous telephone calls to the Solicitor's office in an attempt to obtain the details of his appeal. These attempts are set out in his letter of complaint to the Law Society dated January 21, 1991, a copy of which is at Tab 31 of the Document Book.

51. MacCuaig also wrote to the Solicitor on October 29, 1990 and December 5, 1990 and received no reply to either letter, copies of which are at Tab 32 and 33 of the Document Book.

52. When the Audit Department attended at the Solicitor's office, it discovered the following three versions of draft court documents for the contemplated appeal, none of which were ever filed or served:

- i) at Tab 34 of the Document Book are a notice of motion, draft affidavit of the Solicitor, draft consent and draft notice of appeal, all dated April 30, 1990;
- ii) at Tab 35 of the Document Book are a draft notice of appeal dated August 22, 1990 and an affidavit sworn by the Solicitor on August 22, 1990; and

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- iii) at Tab 36 of the Document Book are a notice of motion dated December 7, 1990 and an affidavit of the Solicitor which was signed by the Solicitor but not sworn. This affidavit is identical in content to the affidavit sworn August 22, 1990.

Johnson drafted this material, based upon information provided by the Solicitor and the file.

53. The affidavit sworn by the Solicitor was false and misleading in that:

- i) paragraph 3 of the affidavit deposes that on February 16, 1990 the client decided that he wanted to appeal and contacted the Solicitor. In fact the decision was made and instructions given to the Solicitor on January 11, 1990;
- ii) paragraph 4 of the affidavit deposes that the matter was not appealed within thirty days "because of a problem with the retainer". No request for a retainer was made to the client until after the expiry of the thirty-day appeal period and in any event, the letter provides that it is payable at the time the appeal is heard;
- iii) paragraph 5 of the affidavit deposes that the court documents had been dictated prior to the expiry of the appeal period, but had simply not been typed due to staff problems. This is untrue, as shown by the memorandum dated April 27, 1990 from the Solicitor to Johnson, found at Tab 30 of the Document Book;
- iv) paragraph 6 of the affidavit deposes that Johnson provided the court materials to the Solicitor three months earlier and the Solicitor inadvertently did not obtain a motion date. This allegation is contained in both the August and December versions of the affidavit and is not accurate.

2(d) He failed to serve his clients Leonard and Carol Baldwin and Royal Trust in a conscientious, diligent and efficient fashion, in connection with the 1989 refinancing of their property at 237 Charing Cross Street, Brantford, Ontario by:

- i) registering a mortgage which was to be a first mortgage without registering discharges of three prior encumbrances and subsequently failing to obtain registered discharges of the three prior encumbrances in a timely manner;
- ii) incorrectly advising his clients Leonard and Carol Baldwin that two of the encumbrances were discharged when they were still outstanding; and
- iii) incorrectly reporting to his client, Royal Trust that its mortgage was first in priority.

54. The Solicitor states that on August 28, 1989, he was retained to act for Leonard and Carol Baldwin who were refinancing their property known municipally as 237 Charing Cross Street, Brantford (the "Property").

55. At the date of their proposed refinancing there were three encumbrances against the Brantford Property as follows:

- i) Canada Trust in the sum of \$38,800;
- ii) Income Trust Corporation in the sum of \$2,059 or \$3,478 (amount was disputed); and
- iii) Avco Financial Services in the sum of approximately \$19,500.

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56. The Solicitor acted for both the Baldwins as mortgagors and Royal Trust, the mortgagee, on the refinancing. At Tab 37 of the Document Book is a copy of instructions to the Solicitor from Royal Trust dated August 28, 1989. The instructions indicate that Royal Trust would be loaning \$58,000 to Leonard and Carol Baldwin in exchange for a first mortgage on the property. Enclosed with the instructions was a copy of Royal Trust's commitment letter to the Baldwins.

57. The closing was delayed by a dispute between the Baldwins and Income Trust as to the amount owing. In the result, Kneeland, a solicitor employed by the Solicitor, obtained an order dated November 1, 1989 requiring the removal of Income Trust's encumbrance on payment of \$2,059.10 a copy of which is at Tab 38 of the Document Book.

58. On November 24, 1989, Royal Trust forwarded a mortgage advance to the Solicitor. A mortgage from Carol Baldwin to Royal Trust was registered on November 27, 1989 for \$58,000. A copy of the mortgage is at Tab 39 of the Document Book.

59. The Solicitor states that by November 27, 1989, the three prior encumbrances of Canada Trust, Income Trust and Avco Financial Services had been paid.

60. By letter dated December 12, 1989, a copy of which is at Tab 40 of the Document Book, the Solicitor reported to Leonard and Carol Baldwin. The reporting letter indicates that a discharge of the existing mortgage in favour of Canada Trust would be registered as soon as it was executed and returned to the Solicitor's office. The reporting letter also provided that:

there were several reasons for the delay in closing details of which are listed below:

2. An Execution (No. 8516-87) registered in the Sheriff's Office of Brantford against the property by Income Trust Corporation had to be lifted.
3. A lodgment of title registered against the property by AVCO Finance Company had to be lifted.

61. By letter dated June 27, 1990, a copy of which is at Tab 41 of the Document Book, the Solicitor reported to Royal Trust enclosing a Solicitor's Final Report on Title which provides that "you have a good and valid first mortgage/charge".

62. A discharge of the Canada Trust mortgage was signed on April 11, 1991 and forwarded to the Solicitor by letter dated April 12, 1991, a copy of which is at Tab 42 of the Document Book. The Solicitor registered this discharge July 3, 1991 (Tab 43 of the Document Book), almost three months after receiving it and nineteen months after closing the transaction.

63. A discharge of the Income Trust execution was executed on September 12 and 13, 1990 and forwarded to the Solicitor by letter dated September 12, 1990, a copy of which is at Tab 44 of the Document Book. The Solicitor registered this discharge January 21, 1991, four months after he received it and fourteen months after closing the transaction.

64. Avco signed the discharge of the lodgment of title on April 9, 1990. The Solicitor registered it on April 19, 1991 (Tab 45 of the Document Book), approximately seventeen months after the transaction closed. There was no document in the Solicitor's file to indicate when he received the executed discharge from Avco.

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65. The statements made in the reporting letters to Leonard and Carol Baldwin were incorrect in that neither the execution registered by Income Trust nor the lodgment of title registered by Avco had been discharged.

66. The statements made in the reporting letter to Royal Trust were incorrect in that at the time its mortgage was registered, the three prior encumbrances had not been discharged.

V. JOINT SUBMISSION - PENALTY

67. Counsel for the Solicitor and for the Society will jointly submit that the appropriate penalty is a reprimand in Convocation with costs of \$5,000 payable by the Solicitor over ten months.

VI. DISCIPLINE HISTORY

68. Th Solicitor does not have a discipline history.

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

RECOMMENDATION AS TO PENALTY

The Committee recommends that Norman Franklin Williams be reprimanded in Convocation and pay costs of \$5,000 over ten months.

REASONS FOR RECOMMENDATION

The Solicitor was called to the Bar in March of 1971, he had an unblemished record until the four matters came before this Committee.

Prior to this hearing the Solicitor had completed the Practice Review Program.

Three of the matters complained of indicated that the Solicitor was not well enough organized to address rather routine follow up on files for which he was responsible. It is clear from the agreed statement of facts that some of the Solicitor's problems arise out of passing files to employees or others and not following up on those files. His failure to serve his clients conscientiously, diligently and efficiently did not result in any serious loss to his clients.

In the matter of Stuart MacCuaig his actions were more reprehensible in that he agreed to an appeal of a minor conviction to be done without charge. He then failed to file the appeal on time and after the fact told his client that he would need a fee. He failed to tell his client that the time had passed to file the appeal. He had in his file an affidavit signed by him which was false. The affidavit had not been filed.

The penalty agreed to in the joint submission has been adopted by the Committee as reasonable.

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Norman Franklin Williams was called to the Bar on March 26, 1991.

ALL OF WHICH is respectfully submitted

DATED this 10th day of April, 1997

Elvio L. DelZotto, Q.C., Chair

The following corrections be made to the Report:

- page 15, paragraph 60, third line, last word should be "registered" not "registerd";
- page 16, paragraph 63, second line - the word "leter" should be "letter";
- page 16, paragraph 68, first word should be "The" not "Th";
- page 17, last sentence on page - date should be "1971" not 1991.

The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and pay costs in the amount of \$5,000 over ten months.

Both counsel made submissions in support of the joint submissions made before the Discipline Committee that the solicitor be reprimanded in Convocation.

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

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

The Wilson/Stomp motion to adopt the recommended penalty was voted on and carried.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be reprimanded and pay costs.

The Treasurer administered the reprimand.

Re: William Gerald PUNNETT - Guelph

The Secretary placed the matter before Convocation.

Ms. Christina Budweth appeared on behalf of the Society and Mr. Peter Madorin appeared on behalf of the solicitor who was present.

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Convocation had before it the Report of the Discipline Committee dated 17th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 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

Paul Copeland

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

Christina Budweth
for the Society

WILLIAM GERALD PUNNETT
of the City
of Guelph
a barrister and solicitor

Peter Madorin
for the solicitor

Heard: February 4, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 2, 1992 Complaint D169/92 was issued against William Gerald Punnett alleging that he was guilty of professional misconduct.

The matter was heard in public on February 4, 1997 before Paul Copeland sitting as a single bencher. The Solicitor attended the hearing and was represented by Peter Madorin. Christina Budweth appeared on behalf of the Law Society.

DECISION

At the hearing particulars 3 - 13, 25, 26 and 28-41 of the Complaint were withdrawn. The following particulars of professional misconduct were found to have been established:

Complaint D169/92

Catherine Gardiner

14. The Solicitor misled Halton Region regarding the terms of an Order-in-Council dated August 20, 1981 and subsequently attempted to rely on what he believed to be an error made by a clerk in the employ of Halton Region, which error was based on the Solicitor's misrepresentation aforesaid (March, 1986);
15. He transferred one lot of the Appleby Line property from Catherine Gardiner to himself:

- i) knowing that the transfer was void under the Planning Act because the lot had not been properly severed; and
 - ii) for an improper purpose, specifically, to deprive one John Teklenburg of the right to purchase the property in anticipation that he would exercise an option to purchase (July, 1986);
16. He swore a false Land Transfer Tax Act Affidavit which improperly stated that there was, or was to be, consideration of \$42,000 in respect of the transaction, when in fact no consideration passed and none was intended to pass (July 1986);
17. He entered into an Agreement of Purchase and Sale for the lot transferred into his name with a third party named Hammond, knowing that the lot was not properly severed and that he could not legally transfer title (November, 1986);
18. He applied for a building permit on the said lot, knowingly relying on Halton's error and failing to disclose prior unsuccessful attempts to obtain a legal severance (December, 1986);
19. When the building permit was refused, he brought a mandamus application to compel the issuance of a building permit to which he knew he was not entitled (February, 1987);
20. In an attempt to obtain a judicial "validation" of the transfer, he:
- i) created a sham sale of the property to his friend and client, Eugene Wasylciw; and,
 - ii) misled a fellow solicitor, Donald McKinnon, that the transaction was legitimate (April, 1987);
21. He attempted to mislead the court by bringing a Vendor's and Purchaser's Application in District Court in Guelph based on this sham sale, failing to disclose the prior unsuccessful efforts to "legitimize" the transaction (April, 1987);
22. He attempted to mislead the court and his fellow solicitor, Harman Faber, in the course of a Vendor's and Purchaser's Application brought by Faber on behalf of his client, John Teklenburg, in the Supreme Court at Milton as follows:
- i) by maintaining his position regarding the validity of the conveyance to himself, which position he knew to be invalid; and,
 - ii) by failing to disclose to the court and to Mr. Faber the prior unsuccessful attempts to obtain a judicial legitimation for the transfer, including failing to disclose the April, 1987 motion in Guelph (October, 1987);
23. He attempted to secure a \$10,000 payment to himself in exchange for the transfer of the lot from himself to Teklenburg, although he knew that he had no legal right to convey the lot (August, 1987);
- 24 a) In the course of the Society's investigation into the matter described in (16) above, the Solicitor provided an explanation of the matter referred to in paragraph 16 different from that which he provided when giving sworn evidence in the lawsuit commenced against him and Catherine Gardiner by Teklenburg, thereby misleading either the Law Society or the court;

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- b) the Solicitor filed false Forms 2, filed in the years, 1988 - 1991, inclusive, in which he failed to disclose that he held the property in trust for Catherine Gardiner;
 - c) in the alternative to (b), gave false evidence on his examination for discovery in the Teklenburg action regarding whether he was holding the property in trust for Catherine Gardiner or holding it partly in trust for her and partly as security for his fees;
27. The Solicitor breached his undertaking given to fellow solicitor, Paul Lafleur, to hold \$15,000 in trust pending completion of the Society's investigation, by failing to continue to hold such monies in trust.

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 D169/92 and is prepared to proceed with a hearing of this matter on February 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 Complaint D169/92 with his counsel, Peter Madorin, and admits the particulars set out hereinafter. The parties acknowledge that certain particulars will be withdrawn by the Society at the commencement of the hearing. The Solicitor admits that the admitted particulars together with the facts as hereinafter set out constitute professional misconduct.

IV. FACTS

Particulars 14 The Solicitor misled Halton Region regarding the terms of an Order-in-Council dated August 20, 1981 and subsequently attempted to rely on what he believed to be an error made by a clerk in the employ of Halton Region, which error was based on the Solicitor's misrepresentation aforesaid (March, 1986);

Particulars 15 He transferred one lot of the Appleby Line property from Catherine Gardiner to himself:

- i) knowing that the transfer was void under the Planning Act because the lot had not been properly severed; and
- ii) for an improper purpose, specifically, to deprive one John Teklenburg of the right to purchase the property in anticipation that he would exercise an option to purchase (July, 1986);

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Particular 16 He swore a false Land Transfer Tax Act Affidavit which improperly stated that there was, or was to be, consideration of \$42,000 in respect of the transaction, when in fact no consideration passed and none was intended to pass (July, 1986);

Particular 17 He entered into an Agreement of Purchase and Sale for the lot transferred into his name with a third party named Hammond, knowing that the lot was not properly severed and that he could not legally transfer title (November, 1986).

4. In 1980, Ms. Gardiner, approximately 78 years of age at the date of the investigation, retained the Solicitor to act on her behalf with respect to Applications for two severances from a parcel of property in Burlington, which portions she proposed to sell. The abstract of title can be found at Tab 1 of the Law Society's Document Book.

5. Both severances were opposed by the City and the Region, and her Applications were dismissed on May 27, 1980. Both Applications were also denied on a subsequent appeal to the Ontario Municipal Board. Although the severance request was denied, the Solicitor attempted to obtain a change in zoning for the property. This also was unsuccessful.

6. Ms. Gardiner then appealed the dismissals to the Provincial Cabinet and was granted one severance from the southwest portion of her lot on August 20, 1981. The Solicitor did not represent Ms. Gardiner at the Cabinet level of this application. The petition resulted in an Order in Council being issued dated August 20, 1981, which specifically approved the conveyance of one lot (only) having frontage of 49.073 metres. The Order in Council was attached to a Deed and the lot was conveyed to a third party in August, 1982. The Order in Council is found at Tab 6 of the Law Society's Document Book.

7. Between October, 1983 and July, 1985, Ms. Gardiner again applied for a severance of a further lot on her Property (the "Second Lot"). The severance was again denied. Ms. Gardiner appealed the decision and her appeal was dismissed, exhausting all avenues of appeal.

8. In 1986, Ms. Gardiner again retained the Solicitor to act on her behalf in regard to the sale of lands (the remaining 5 acres) she owned in Burlington which she had purchased in 1965 (the "Property") and the severance of the Second Lot referred to in paragraph 44 above.

9. In March 1986, the Solicitor sent a letter Tab 7 to the Regional Municipality of Halton in which he described Cabinet's Order in Council as follows:

She was given one lot per year...

His letter further stated:

We would appreciate your initiating the necessary steps required to release this second lot in accordance with the Order in Council.

The Solicitor enclosed a copy of the Order in Council, but did not detail in his letter the prior unsuccessful attempts to sever the Second Lot.

10. On March 24, 1986, Ms. Kobli, Secretary/Treasurer of the Halton Region Land Division Committee, advised the Solicitor on the procedural steps to be taken for releasing a lot based on an Order in Council (Tab 8).

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11. The Solicitor informed the Society that he interpreted the letter to be a consent from Halton to the release of Ms. Gardiner's Second Lot. He also subsequently informed the Society on August 20, 1990, and the Errors & Omissions Adjuster on September 22, 1988, that he thought that Halton may have made a mistake in authorizing the severance of the Second Lot and that he intended to rely on that mistake to advance his client's case. The Solicitor has also admitted that the letter from the Region did not identify the exact dimensions of the lot that is the subject matter of the letter.

12. In May, 1986, Ms. Gardiner leased the entire remaining parcel (5 acres) to a Mr. John Teklenburg. The lease contained an option to purchase (Tab 9). The option to purchase was drafted such that in the event that the Second Lot was not severed before the exercise of the option to purchase, then the lot was to be included in the other four acres of lands subject to the option to purchase.

13. Ostensibly, in reliance on Ms. Kobli's March 24, 1986 letter, (Tab 8), the Solicitor transferred the second lot into his own name (Tab 10), on July 18, 1986. The Solicitor swore a Land Transfer Tax Act Affidavit deposing that the consideration for the transfer was the sum of \$42,000. This is a false Affidavit. The Solicitor has admitted to the Law Society that no consideration passed between Ms. Gardiner and himself.

14. On December 6, 1990, the Solicitor advised in a letter to Mr. Brian Law, a solicitor retained by the Errors & Omissions Insurance Fund that:

The land was put in my name so that it would appear to be sold.

15. The Solicitor admits that in purporting to transfer the parcel he, on behalf of Ms. Gardiner, intended to deprive Mr. Teklenburg of the right to exercise his option to purchase the entire five acres as specified under the lease. He did so intending to rely on what is admittedly a mistake on the part of Ms. Kobli and in all the circumstances doing so committed an act of professional misconduct.

Particular 18 He applied for a building permit on the said lot, knowingly relying on Halton's error and failing to disclose prior unsuccessful attempts to obtain a legal severance (December, 1986);

Particular 19 When the building permit was refused, he brought a mandamus application to compel the issuance of a building permit to which he knew he was not entitled (February, 1987).

16. On November 4, 1986, the Solicitor signed an Agreement of Purchase and Sale to sell the Second Lot, now in his own name, to Mr. and Mrs. Hammond. The Hammonds' solicitor requisitioned proof that the Second Lot was properly severed and that the Order in Council applied. The Solicitor was unable to provide such proof and eventually entered into a Release of Claims with the Hammonds in November, 1987.

17. Between November, 1986 and November, 1987, a number of events in regard to the proposed sale took place which the Solicitor admits constitute professional misconduct.

18. On December 9, 1986, notwithstanding the refusal by the Ontario Municipal Board to allow the severance of the Second Lot, the Solicitor applied to the Municipality for a building permit on the said lot. On January 15, 1987 Halton refused the building permit application (Tab 14).

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19. On February 25, 1987, the Solicitor brought a Mandamus Application to compel issuance of a building certificate (Tab 16).

20. The Solicitor relied, inter alia, on the Order in Council and the letter of Ms. Kobli of Halton Region as the grounds for his Mandamus Application.

21. The City of Burlington defended the application and in support of its position entered into evidence Affidavits of Douglas Brown, Paula Kobli, and Peter Langdon (Tabs 17, 18 and 19).

22. In the Affidavit of Ms. Kobli, included in the defence record, she states that

At the time of forwarding the letter...I was unaware of the Registry Office status of the property identified within the Order in Council as 'the conveyance having the frontage of 49.073 metres'.... My letter was intended to confirm information as to the process of implementing an Order in Council and not for the purpose of ascertaining the legal status of...(second lot).

23. Found at Tab 20, is a schematic diagram of the Gardiner property with the various applications for the proposed severed lots shown in different types of shading.

24. A portion of the Respondent's Record containing all documents relevant to the application is found under Tab 21 of the Law Society's Document Book.

25. The Solicitor eventually consented to the dismissal of the applications with costs to the City of Burlington

Particular 20. In an attempt to obtain a judicial "validation" of the transfer, he:

- i) created a sham sale of the property to his friend and client, Eugene Wasylciw; and,
- ii) misled a fellow solicitor, Donald McKinnon, that the transaction was legitimate (April, 1987);

Particular 21. He attempted to mislead the court by bringing a Vendor's and Purchaser's Application in District Court in Guelph based on this sham sale, failing to disclose the prior unsuccessful efforts to "legitimize" the transaction (April, 1987);

Particular 22. He attempted to mislead the court and his fellow solicitor, Harman Faber, in the course of a Vendor's and Purchaser's Application brought by Faber on behalf of his client, John Teklenburg, in the Supreme Court at Milton as follows:

- i) by maintaining his position regarding the validity of the conveyance to himself, which position he knew to be invalid; and,
- ii) by failing to disclose to the court and to Mr. Faber the prior unsuccessful attempts to obtain a judicial legitimation for the transfer, including failing to disclose the April, 1987 motion in Guelph (October, 1987);

Particular 23. He attempted to secure a \$10,000 payment to himself in exchange for the transfer of the lot from himself to Teklenburg, although he knew that he had no legal right to convey the lot (August, 1987).

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26. In continuing to seek some form of approval of the transfer of the Second Lot the Solicitor took advantage of a friend and longtime client, Eugene Wasylciw, and a fellow solicitor, Donald McKinnon.

27. In April, 1987, the Solicitor fabricated a sale of the lot to Mr. Wasylciw and asked Mr. McKinnon to "represent" Mr. Wasylciw. The Solicitor admitted to the Society that there was never any intention that Mr. Wasylciw was to purchase the Second Lot. The "sale" provided the framework for the Solicitor to bring a Vendor and Purchaser Application and thereby attempt to obtain a judicial endorsement of the validity of the purported severance occasioned by the transfer of the Second Lot from Ms. Gardiner to the Solicitor.

28. By letter dated April 23, 1987 (Exhibit 62), Mr. McKinnon requisitioned proof of the validity of the transfer. The Solicitor stated in a letter of April 24, 1987 (Exhibit 63) that:

As far as (sic) the severance is concerned you will notice that there is a deposit registered on title with a certified copy of the order of the Cabinet. This order severs the land and it is under that order that I am acting. I am enclosing a copy of that order for your perusal. It is my position that this order effectively severs the land.

By letter dated April 27, 1987, Mr. McKinnon refused to accept that explanation (Exhibit 64).

29. On April 30, 1987, the Solicitor commenced a Vendor's and Purchaser's Application and brought a motion at the District Court in Guelph for an Order providing that the Order in Council had effectively severed the Second Lot (Exhibit 65). The motion was dismissed by Judge Higgins on that date.

30. Mr. Teklenburg entered into an Agreement of Purchase and Sale on June 26, 1987 (subsequently amended on July 6, 1987) with a third party to sell the two lots at a price of \$237,500.

31. In furtherance of this transaction, on July 16, 1987, Mr. Teklenburg gave notice of his intention to exercise the option to purchase Mr. Gardiner's property at a sum of \$211,500.

32. On August 13, 1987, the Solicitor wrote Mr. Teklenburg's solicitor, Harman Faber, advising him that (Exhibit 66):

Mrs. Gardiner is only in position to convey 4 acres of the property as 1 lot has been sold to me. The position of Mrs. Gardiner is that the lot was sold and the title has passed.

33. Mr. Faber, on behalf of Mr. Teklenberg, commenced an application under the Vendor's and Purchaser's Act. A copy of the Applicant's Record is found under Tab 27 of the Law Society's Document Book. The Solicitor's responding material did not disclose the dismissal of his own vendor's and purchaser's motion on April 30, 1987. Mr. Faber was not aware of the previous motion.

34. Judge Quinlan determined that the instrument conveying the lot from Ms. Gardiner to the Solicitor was not a valid conveyance.

35. In November, 1987, subsequent to the hearing of the application, the Solicitor contacted Mr. Faber and offered to sign over the one acre parcel upon payment to himself of \$10,000 although he knew he had no right to convey that lot. The Solicitor's offer is confirmed in a letter dated November 9, 1987 from Mr. Faber to the Solicitor and further addressed by the Solicitor in a letter dated November 21, 1987 from himself to Mr. Mr. Faber, found collectively under Tab 28 of the Law Society's Document Book.

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36. In the meantime, the Solicitor was corresponding with Mr. Hewitson the Chief Building Official of the City of Burlington regarding his decision to reject the application for building permit dating to January of 1987. That effort is evidenced by a letter found at Tab 29 of the Law Society's Document Book.

37. The City of Burlington distributed a deposit on title to Mrs Gardiner's property on November 25, 1987, a copy of which is found under Tab 30.

38. The Solicitor continued to participate in Mrs. Gardiner's efforts to sever the property as is evidenced by her Application for Consent found under Tab 31 of the Law Society's Document Book.

39. The Gardiner property was eventually sold. A deed of transfer was registered on September 30, 1988 (Tab 32). The purchasers were represented by Paul A. Lafleur. The Solicitor's conduct in respect of Mr. Lafleur is set out in Particular 27.

Particular 27 The Solicitor breached his undertaking given to fellow solicitor, Paul LaFleur, to hold \$15,000 in trust pending completion of the Society's investigation, by failing to continue to hold such monies in trust.

40. On September 29, 1988, a fellow solicitor, Mr. Paul LaFleur, wrote to the Solicitor enclosing the funds to discharge the \$34,000 mortgage and confirming the Solicitor's Undertaking to hold his share of the monies in trust pending the completion of the Law Society's investigation. The Solicitor confirmed this agreement by letter dated September 29, 1988. A copy of both letters dated September 29, 1988 are attached collectively as Tab 33. The Solicitor deposited his \$15,000 share of the funds in a Guaranteed Investment Certificate ("GIC") on October 24, 1988.

41. When the GIC matured on December 23, 1988, the Solicitor did not reinvest the money, but cashed the certificate in breach of his Undertaking to Mr. LaFleur. The Solicitor informed the Law Society that he:

cashd the Guaranteed Investment Certificate when no Statement of Claim was issued against (him).

42. When the Solicitor cashed the GIC on December 23, 1988, the Law Society had not completed its investigation and Mr. LaFleur had not relieved the Solicitor of his Undertaking. The Solicitor was thereby in breach of his Undertaking to Mr. LaFleur.

Particular 24(a) In the course of the Society's investigation into the matter described in paragraph 13 above, the Solicitor provided an explanation of the matter referred to in paragraph 13 different from that which he provided when giving sworn evidence in the lawsuit commenced against him and Catherine Gardiner by Teklenburg, thereby misleading either the Law Society or the court;

(b) The Solicitor filed false Forms 2, filed in the years 1988 to 1991, inclusive, in which he failed to disclose that he held the property in trust for Catherine Gardiner;

(c) In the alternative to (b), gave false evidence on his examination for discovery in the Teklenburg action regarding whether he was holding the property in trust for Catherine Gardiner or holding it partly in trust for her and partly as security for his fees.

22nd May, 1997

43. The Solicitor swore a Land Transfer Tax Affidavit in support of the July 1986 transfer of one lot from Ms. Gardiner to himself in which he deposed that consideration of \$42,000.00 had passed on the transfer. The Solicitor was asked by the Society whether consideration had actually passed. During a meeting of August 20, 1990, the Solicitor advised Howard Maker and Margot Devlin of the Law Society that the transfer was in part to secure outstanding fees and in part to be held in trust. He could not provide a breakdown of what amount of fees might be owing to him at that time.

44. The Solicitor told the Law Society's errors and omissions adjuster on September 22, 1988, that no money was paid, but rather the transfer was in part to secure legal fees owing to him and the balance to be held in trust for Ms. Gardiner. In the Solicitor's statement of defence in the litigation dated October 18, 1990, he takes the position no consideration was given and that all times he was merely acting as a trustee.

45. During the year 1988, the Solicitor filed Forms 2 which failed to disclose that he held property in trust for Catherine Gardiner.

V. DISCIPLINE HISTORY

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

DATED at Toronto this 4th day of February, 1997."

RECOMMENDATION AS TO PENALTY

The Committee recommends that William Gerald Punnett be suspended for a period of twelve months and pay Law Society costs in the amount of \$7,500.

REASONS FOR RECOMMENDATION

I originally dealt with this matter at a pre-hearing conference with Mr. Madorin and Ms. Budweth. At that time there was no agreed statement of facts, and it did not look all that likely that one was going to be agreed upon.

As a result of the pre-hearing conference, it became likely that there was going to be an agreed statement of facts, and I was asked whether I would sit as a single benchman dealing with this matter. An agreed statement of facts has been prepared and Mr. Punnett has acknowledged that he is guilty of professional misconduct in regard to the matters set out in the agreed statement of facts.

What was put to me in addition to the agreed statement of facts at this hearing was a range of penalty. Both parties agreed that Mr. Punnett should be suspended. Both parties agreed that Mr. Punnett should pay costs in the amount of \$7,500 on terms that I will outline later. It was left to me to decide on the appropriate range of penalty.

The two discipline cases that were referred to by counsel before me were the Rovet matter and the Hainsworth matter, and I am familiar with both of those decisions. I wrote the decision in Hainsworth, and the Hainsworth decision makes mention of the Rovet matter, and I was present at Convocation for the first day that the Rovet matter was there.

22nd May, 1997

In the Rovet matter, ultimately Mr. Rovet was suspended for twelve months in regard to basically two very serious allegations, although they are described as three separate particulars in the Complaint. Convocation ultimately suspended Mr. Rovet for twelve months.

There are two dissents in the Rovet decision, one of the dissents is that of Mr. Strosberg and Mr. Epstein in which they thought the six months recommended by the committee would be sufficient, and there is a dissent by Ms. Lax in which she felt that the penalty was not sufficient. She, in fact, had voted to disbar Mr. Rovet and had also moved a motion that Mr. Rovet be suspended for three years.

Subsequently in the Hainsworth decision, there is some comment on the Rovet decision and a decision, in fact, by Convocation, assuming I am correct, that Convocation in Hainsworth adopted the reasons of the committee in full, that Rovet was wrongly decided, that the penalty imposed in Rovet was not sufficiently severe.

I am prepared to concede in this case that the allegations against Mr. Punnett are not as serious as the allegations against Mr. Rovet. Mr. Rovet engaged in some serious behaviour, and I don't want to make it appear as though what Mr. Punnett did was not serious, but I think Mr. Rovet's behaviour was more serious in that he assisted in the fabrication of backdating employment agreements in order to mislead the Canada Labour Relations Board in an attempt to avoid a union organizing campaign; and as well, Mr. Rovet was taking money from the firm by way of charging personal expenses, either without the knowledge of his clients or without the knowledge of his partners and in effect, he was putting the money in his pocket.

As I say, the Hainsworth decision indicates Rovet is too light a penalty and I, having written that decision, agree with it. It is for that reason that I think the higher end of the range that has been suggested to me is appropriate in this case.

I bear in mind the experience of counsel before me, and this is not with disrespect to Mr. Madorin, but if Ms. Budweth as a very experienced discipline counsel is suggesting to me that a range of twelve months is appropriate and one that would meet the ends of justice, I am not inclined to go above the range that she is suggesting.

I think it is important that whether it be single benchers or benchers sitting in a committee, wherever possible, to go along with the joint submissions that are placed before them in the way of penalty. It both makes, I think, for an orderly process, and I think assists in the resolution of matters that generally speaking counsel who place a joint submission before a committee will be assured that it usually will be followed.

So I take Ms. Budweth's submissions on the matter with extreme seriousness. I note that Mr. Madorin has joined, although not quite at the same range of penalty as Ms. Budweth has, and it is for that reason that I am prepared to recommend to Convocation that having regard to the seriousness of these matters and having regard to the fact that it was resolved on a fairly short hearing before me, that the twelve month suspension would be appropriate in the circumstances of this case.

22nd May, 1997

I note that at the hearing before me, the only material that was filed by Mr. Punnett was a C.V. I am quite prepared to assume that the reason more complicated and more significant material was not filed was because of the agreed range of penalty, and I am quite prepared to make this decision based on the fact that if it were necessary, Mr. Punnett could have gotten appropriate supporting material as to his character and background. So I am not at all holding that against him and recognize the desire of having these matters resolved in as expeditious a fashion as possible.

Now, there have been some submissions made to me in regard to the issue of costs and I have no difficulty, since it is a total joint submission on that issue, that costs in the amount of \$7,500 be assessed in this particular case or be awarded to the Society in this particular case.

As I understand it, Mr. Punnett has agreed that when this matter comes before Convocation, he will have a cheque available in the amount of \$1,500 as a first payment on the costs, that he will provide a further cheque to the Society in the amount of \$2,000 before he resumes his practice at the end of the period of suspension, and that he will pay to the Society the sum of \$500 per month thereafter until the costs have been paid in full.

I understand as well that the parties hope that this matter will be dealt with by Convocation at the April Discipline Convocation. It is, I understand, the parties' hope that Mr. Punnett will have his affairs in order so that the suspension might commence on the 1st of May 1997.

Speaking for myself, if there is some brief additional period that Mr. Punnett needs even if the matter is dealt with in Convocation as of at the end of April, if he needs some brief additional period of time, I certainly would have no objection to that being made available to him.

There has been a significant savings of time before a discipline panel. Counsel for the Law Society indicated that the matter would have taken in excess of a full week of hearing time. I had indicated to Mr. Madorin at the pre-hearing that while none of us want to say that we will increase the penalty if you have a hearing, it is certainly a factor in mitigation of penalty, the degree of cooperation that the solicitor has shown and in this case, also the acknowledgment that the conduct was professional misconduct. So that it assists the benchers when people find that it is a situation where they can come upon an agreed statement of facts and can avoid the necessity of calling viva voce evidence.

William Gerald Punnett was called to the Bar on March 21, 1969.

ALL OF WHICH is respectfully submitted

DATED this 17th day of April, 1997

Paul Copeland

There were no submissions. The finding was confirmed and the Report was adopted.

The Benchers had before them copies of four character letters which were mailed to them prior to Convocation.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 12 months and pay the Society's costs in the amount of \$7,500.

22nd May, 1997

Both counsel made submissions in support of the recommended penalty.

There were questions from the Bench.

It was moved by Mr. Cole, seconded by Ms. Ross that the recommended penalty be adopted, the suspension to commence June 1st, 1997.

Carried

Re: Irving GOODMAN - Toronto

The Secretary placed the matter before Convocation.

Messrs. Adams, MacKenzie and Cole and Ms. Eberts withdrew for this matter.

Ms. Jane Ratchford appeared on behalf of the Society and Mr. David Goodman appeared for the solicitor who was present.

Convocation had before the Report of the Discipline Committee dated 10th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 2nd May, 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

Elvio L. DelZotto, Q.C., Chair
W. Michael Adams
Mary A. Eberts

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

Jane Ratchford
for the Society

IRVING GOODMAN
of the City
of Toronto
a barrister and solicitor

David Goodman
for the solicitor

Heard: January 29, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On March 12, 1996 Complaint D80/96 was issued against Irving Goodman ("the Solicitor") alleging that he was guilty of professional misconduct. Complaint D120/96 alleging professional misconduct against the Solicitor was issued April 18, 1996. This Complaint was withdrawn and replaced by Complaint D120a/96 issued on January 27, 1997.

The matter was heard in public on January 29, 1997 before this Committee composed of Elvio L. DelZotto, Q.C., W. Michael Adams and Mary Eberts. The Solicitor attended the hearing and was represented by David Goodman. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D80/96

2. a) He acted in conflict of interest in 5 lending transactions in which he acted for the lender and one Charles Baker and where in each transaction, he was aware that Baker used the aliases Thomas Fournaros and/or Carlos Panadera, as borrower, and the name Charles Baker, as guarantor. The five lending transactions were:
 - i) Loan of approximately \$176,984.17 made on or about August 3, 1990, secured by an assignment of mortgage against a property at 196 Van Horne Street, Sudbury and a property at 214 Shaughnessy Street, Sudbury in which the Borrower was identified as Thomas Fournaros and the guarantor as Charles Baker;
 - ii) Loan of approximately \$56,700.00 made on or about October 30, 1990, secured by an assignment of mortgage against five different properties located in the City of Peterborough, the Township of Verulam, the Township of Cavan, the Village of Stirling and the Township of Harcourt, in which the Borrower was identified as Thomas Fournaros and the guarantor as Charles Baker;
 - iii) Loan of approximately \$172,000.00 made on or about November 19, 1991, secured by an assignment of mortgage against R.R. #4, Marmora, Ontario, in which the Borrower was identified as Thomas Fournaros and the guarantor as Charles Baker;
 - iv) Loan of approximately \$260,018.00 made on or about February 10, 1992, secured by an assignment of mortgage against four properties located in the Township of Harvey, the Township of Emily and two in the City of Peterborough, in which the Borrower was identified as Thomas Fournaros and the guarantor as Charles Baker;

22nd May, 1997

- v) Loan of approximately \$42,000.00 made on or about June 17, 1992, secured by an assignment of mortgage against seven properties located in the City of Peterborough (2), the Township of Lindsay, the Township of Belmont (3) and the Township of Otonabee, in which the Borrower was identified as Thomas Fournaros and the guarantor as Charles Baker.
- b) By acting for both the lender and borrower/guarantor in each of the transactions described in particular a), the Solicitor breached his fiduciary duty to his lender client by not disclosing that the guarantor of each transaction was one and the same person as the borrower.
- c) He failed to immediately withdraw his services from both his clients when it became clear that the Solicitor's employment by the clients in the first transaction described in particular a) would cause the Solicitor to breach his respective obligations to each of his clients.

Complaint D120a/96

- 2. a) On or about October 26, 1990, on the basis of instructions received from a third party, he purported to represent Michael Evans and Sharon Evans by issuing or causing to be issued in the Ontario Court (General Division), Peterborough, a mortgage enforcement proceeding with respect to mortgages held by the Evans on properties known municipally as 25 Lansdowne Street, West, Peterborough, 539 Reid Street and 255 Reid Street, Peterborough, without first confirming with them the authority of the third party, and without confirming to the Evans the commencement and the disposition of the proceedings;
- b) He failed to take steps to enforce a default judgment obtained in the mortgage enforcement proceedings, on the basis of instructions received from a third party, without confirming the authority of the third party with Mr. and Mrs. Evans.

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 D80/96 and D120a/96 and is prepared to proceed with a hearing of this matter on January 28 and 29, 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.

22nd May, 1997

III. ADMISSIONS

3. The Solicitor has reviewed Complaints D80/96 and D120a/96 with his counsel, David Goodman, and admits the facts set out herein. The Solicitor admits that the particulars of these Complaints, together with the facts hereinafter stated, constitute professional misconduct.

IV. BACKGROUND

4. The Solicitor was called to the Bar on June 25, 1959. He is a sole practitioner in the City of Toronto.

V. FACTS

Complaint D80/96:

Particular 2(a): He acted in conflict of interest in five lending transactions in which he acted for the lender and one Charles Baker and where in each transaction, he was aware that Baker used the aliases Thomas Fournaros and/or Carlos Panadera, as borrower, and the name Charles Baker, as guarantor. The five lending transactions were:

- i) Loan of approximately \$176,984.17 made on or about August 3, 1990, secured by an assignment of mortgage against a property at 196 Van Horne Street, Sudbury, and a property at 214 Shaughnessy Street, Sudbury, in which the Borrower was identified as Thomas Fournaros and the Guarantor as Charles Baker;
- ii) Loan of approximately \$56,700.00 made on or about October 30, 1990, secured by an assignment of mortgage against five different properties located in the City of Peterborough, the Township of Verulam, the Township of Caven, the Village of Stirling and the Township of Harcourt, in which the Borrower was identified as Thomas Fournaros and the Guarantor as Charles Baker;
- iii) Loan of approximately \$172,000.00 made on or about November 19, 1991, secured by an assignment of mortgage against R.R.#4, Marmora, Ontario, in which the Borrower was identified as Thomas Fournaros and the Guarantor as Charles Baker;
- iv) Loan of approximately \$260,018.00 made on or about February 10, 1992, secured by an assignment of mortgage against four properties located in the Township of Harvey, the Township of Emily and two in the City of Peterborough, in which the Borrower was identified as Thomas Fournaros and the Guarantor as Charles Baker; and
- v) Loan of approximately \$42,000.00 made on or about June 17, 1992, secured by an assignment of mortgage against seven properties located in the City of Peterborough (2), the Township of Lindsay, the Township of Belmont (3), and the Township of Otonabee, in which the Borrower was identified as Thomas Fournaros and the Guarantor as Charles Baker.

22nd May, 1997

Particular 2(b): By acting for both the lender and borrower/guarantor in each of the transactions described in particular (a), the Solicitor breached his fiduciary duty to his lender client by not disclosing that the guarantor of each transaction was one and the same person as the borrower.

Particular 2(c): He failed to immediately withdraw his services from both his clients when it became clear that he Solicitor's employment by the clients in the first transaction described in particular (a) would cause the Solicitor to breach his respective obligations to each of his clients.

5. Both David Gannicott and Charles Baker were clients of the Solicitor during the material time to this Complaint. The Solicitor introduced them to one another in the mid 1980s. A business relationship then developed whereby David Gannicott, members of his family or one of his companies, would loan sums of money secured by mortgage assignments that had been arranged and guaranteed by Charles Baker. Mr. Gannicott required and obtained the guarantee of Mr. Baker in each of the following investments where the Solicitor performed the required legal work:

Date	Lenders/Assignees	Amount of David Gannicott's and related parties Investment	Mortgagee /Assignor	Guarantor
August 3, 1990	Kathleen Joy Gannicott, Claire Joy Gannicott, Gannicott Holdings Inc.	\$176,984.17	Thomas Fournaros	Charles Baker
October 30, 1990	same as above	\$256,700.00	Thomas Fournaros	Charles Baker
November 19, 1991	Gannicott Holdings Inc., David James Gannicott, Stephanie Mary Gannicott, 596376 Ontario Limited	\$172,000.00	Thomas Fournaros	Charles Baker
February 10, 1992	Gannicott Holdings Inc., Kathleen Joy Gannicott, 596376 Ontario Limited	\$260,018.00	Thomas Fournaros	Charles Baker
June 17, 1992	Claire Joy Gannicott, Stephanie Mary Gannicott	\$ 42,000.00	Thomas Fournaros , Carlos Panadera, Luke Lee	Charles Baker

22nd May, 1997

6. The August 3, 1990 transaction pertains to particular 2(a)(i) of Complaint D80/96. A copy of Instrument #100430, being an Assignment of Mortgages as Security, is found at Tab 1 of the Book of Documents. A copy of the Solicitor's reporting letter to his lender/assignee clients Gannicott Holdings Inc., Kathleen Joy Gannicott, Claire Joy Gannicott and Stephanie Mary Gannicott dated August 10, 1990 is found at Tab 2 of the Book of Documents.

7. The October 30, 1990 transaction pertains to particular 2(a)(ii) of Complaint D80/96. A copy of Instrument #174373, being an Assignment of Mortgages as Security, is found at Tab 3 of the Book of Documents.

8. The November 19, 1991 transaction pertains to particular 2(a)(iii) of Complaint D80/96. A copy of Instrument # 166150, being an Assignment of Mortgage as Security, is found at Tab 4 of the Book of Documents.

9. The February 10, 1992 transaction pertains to particular 2(a)(iv) of Complaint D80/96. A copy of Instrument #559702, being an Assignment of Mortgages as Security, is found at Tab 5 of the Book of Documents. A copy of the Solicitor's reporting letter to his lender/assignee clients, Gannicott Holdings Inc., Kathleen Joy Gannicott and 596376 Ontario Limited dated February 17, 1992 is found at Tab 6 of the Book of Documents.

10. The June 17, 1992 transaction pertains to particular 2(a)(v) of Complaint D80/96. A copy of Instrument #565779, being an Assignment of Mortgages and Interests in Mortgages as Security, is found at Tab 7 of the Book of Documents. A copy of the Solicitor's reporting letter to his lender/assignee clients, Claire Joy Gannicott and Stephanie Mary Gannicott dated June 23, 1992 is found at Tab 8 of the Book of Documents.

11. In the late autumn of 1992, Mr. Gannicott met with the Solicitor regarding the status of the secured loans that he had made to Fournaros, guaranteed by Baker. For the first time, the Solicitor advised Mr. Gannicott that Thomas Fournaros and Carlos Panadera were the aliases of Charles Baker and that the Solicitor had known since the early 1980's that Baker would, from time to time, use these aliases in his real estate transactions.

12. Mr. Gannicott subsequently retained new counsel, Harvin Pitch, to address matters related to Mr. Gannicott's dealings with Charles Baker and the Solicitor. On February 2, 1993, Mr. Pitch wrote to the Law Society and complained about the Solicitor's representation of Mr. Gannicott in the circumstances.

13. A copy of Mr. Pitch's letter dated February 2, 1993, with enclosures, is found at Tab 9 of the Book of Documents. The enclosures consist of two letters from the Solicitor to the lenders dated May 24, 1990 and August 10, 1990, respectively. The May 24, 1990 letter states: "Mr. Baker wants to transfer some of these loans from 546598 Ontario Limited to private individuals such as Thomas Fournaros, Luke Lee, etc." The letter of August 10, 1990 states: "As security I enclose an Assignment of Mortgages as security from Thomas Fournaros with the Guarantee of Charles Baker." The Solicitor wrote these letters with full knowledge that Thomas Fournaros was Mr. Baker.

14. The Solicitor admits that he knew that his client, Charles Baker, was one and the same person as Thomas Fournaros and Carlos Panadera and that he was in possession of this knowledge when he acted for Mr. Gannicott and Baker/Fournaros in the transactions referred to above. He admits that he did not disclose this fact to Mr. Gannicott until the late autumn of 1992. The Solicitor advises that he had been instructed by Baker not to disclose to anyone that Baker used these aliases. Notwithstanding the Solicitor's knowledge and the instructions of Mr. Baker, the Solicitor continued to act for both the lenders/assignees and Charles Baker in these transactions.

22nd May, 1997

Complaint D120a/96

Particular 2(a): On or about October 26, 1990, on the basis of instructions received from a third party, he purported to represent Michael Evans and Sharon Evans by issuing or causing to be issued in the Ontario Court (General Division), Peterborough, a mortgage enforcement proceeding with respect to mortgages held by the Evans on properties known municipally as 25 Lansdowne Street West, Peterborough, 539 Reid Street and 255 Reid Street, Peterborough, without first confirming with them the authority of the third party, and without confirming to the Evans the commencement and the disposition of the proceeding;

Particular 2(b): He failed to take steps to enforce a default judgment obtained in the mortgage enforcement proceedings, on the basis of instructions received from a third party, without confirming the authority of the third party with Mr. and Mrs. Evans.

V. FACTS

15. In April, 1990 Sharon and Michael Evans, (the "Evans"), reached an agreement with Charles Baker to invest in mortgages arranged by Baker. Mr. and Mrs. Evans mortgaged their home in the amount of \$180,000.00 to raise investment capital. At the suggestion of Baker, the Evans retained the Solicitor to prepare the legal documents related to this mortgage. This mortgage is not the subject matter of the Complaint.

16. The Evans then invested \$160,000.00 in several mortgages arranged by Baker. \$90,000.00 of the \$160,000.00 was invested in two mortgages which were eventually discharged without incident.

17. The remaining \$70,000.00 was invested in two mortgages given by Gary and Jane Hetherington to 564598 Ontario Ltd. on properties known municipally as 25 Lansdowne Street West and 539 Reid Street and 255 Reid Street, Peterborough (Tabs 10 and 11 of the Book of Documents). The numbered company then assigned the mortgages to Thomas Fournaros (an alias of Charles Baker), (Tabs 12 and 13 of the Book of Documents). Thomas Fournaros then assigned the mortgages to the Evans (Tabs 14 and 15 of the Book of Documents). The mortgages all had a due date of October 25, 1990. The Lansdowne mortgage was a fifth mortgage; the Reid Street mortgages were second mortgages on each property. The Solicitor did not prepare the legal documents related to the placement of the mortgages or the subsequent assignments of the mortgages referred to herein.

18. The Evans did not know the Hetheringtons. All of the Hetheringtons' mortgage payments, some 36 payments of \$887.72 totaling \$31,957.92, were received by the Evans from Baker or his associates. The last payment received by the Evans occurred on October 25, 1992; two years after the mortgages matured on October 25, 1990.

19. On October 26, 1990, the day after the mortgages matured, the Solicitor commenced in the Ontario Court (General Division), Peterborough, a civil action seeking, *inter alia*, payment of monies owing under the mortgages of 25 Lansdowne Street and 539/255 Reid Street, Peterborough. The Solicitor named Michael Evans and Sharon Evans as plaintiffs and Gary Orville Hetherington and Jane Hetherington as defendants. A copy of the Statement of Claim is found at Tab 16 of the Book of Documents.

22nd May, 1997

20. The Solicitor commenced the civil action on the instructions of Charles Baker on the basis of information from Baker that the mortgage was in default and that he had been authorized by the Evans to pursue mortgage remedies. The Solicitor did not, at that time or at any time thereafter, speak to the Evans or correspond directly with them to confirm whether they had given such authority to Mr. Baker nor did he seek written authorization by the Evans from Mr. Baker. The Evans would state that they had no knowledge that this action had been commenced or that judgment had been obtained (referred to in paragraph 22 below) until after well after the fact of both.

21. On November 26, 1990, the Solicitor filed with the Local Registrar of the Ontario Court (General Division), Peterborough, (the "Local Registrar"), a Requisition for Default Judgment wherein he identified himself as the Solicitor for the plaintiffs, Michael Evans and Sharon Evans. A copy of the Requisition for Default Judgment is found at Tab 17 of the Book of Documents.

22. On November 26, 1990, the Solicitor obtained from the Local Registrar default judgment in favour of Michael Evans and Sharon Evans in the amount of \$71,335.56 plus costs and post judgment interest. A copy of the Judgment is found at Tab 18 of the Book of Documents.

23. On November 27, 1990, the Solicitor filed with the Local Registrar a Requisition for Writ of Seizure and Sale wherein he identified himself as the Solicitor for the plaintiffs, Michael Evans and Sharon Evans. The Requisition asks, *inter alia*, that monies recovered pursuant to the requested Writ of Seizure and Sale be paid to Michael Evans and Sharon Evans. A copy of the Requisition for Writ of Seizure and Sale is found at Tab 19 of the Book of Documents.

24. On March 25, 1991, the Sheriff of the County of Peterborough advised the Solicitor that the Writ of Execution had been received and filed in the Sheriff's Office and Land Titles Office on March 22, 1991. A copy of the Receipt of Execution is found at Tab 20 of the Book of Documents.

25. The Solicitor did not advise the Evans that the Writ of Execution had been received and filed in the Sheriff's Office and the Land Titles Office.

26. The Solicitor took no further steps to enforce the Judgment of November 26, 1990, upon instructions from Charles Baker. The Solicitor did not speak to the Evans or correspond directly with them to confirm whether they had given such authority to Mr. Baker nor did the Solicitor seek written authorization from Mr. Baker.

DISCIPLINE HISTORY

27. The Solicitor does not have a discipline history.

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

RECOMMENDATION AS TO PENALTY

The Committee recommends that Irving Goodman be given permission to resign.

REASONS FOR RECOMMENDATION

The Solicitor was called to the Bar on June 25, 1959. He has no discipline history.

The Solicitor was in serious conflict in that he acted on both sides of mortgage transactions and knowingly failed to disclose upon his client's instructions, that his borrower client and the guarantor were one and the same. The borrower used aliases as the borrower and his own name as the guarantor.

The Solicitor received no personal benefit from these transactions.

The recommendation for permission to resign was a joint submission.

ALL OF WHICH is respectfully submitted

DATED this 10th day of April, 1997

Elvio L. DelZotto, Q.C. Chair

There were no submissions. The finding was confirmed and the Report was adopted.

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

Both counsel made submissions in support of the recommended penalty.

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

Carried

Convocation took a brief recess at 10:25 a.m. and resumed at 10:45 a.m.

Re: Bruno Mario TONEGUZZI -Nepean

The Secretary placed the matter before Convocation.

Messrs. Marrocco, Wright and Manes, Ms. Curtis and Ms. O'Connor withdrew for this matter.

Ms. Rhonda Cohen appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 17th January, 1997 together with an Affidavit of Service sworn 5th February, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 29th January, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 1997 (marked Exhibit 2), together with the Report of the Discipline Committee dated 23rd April, 1997 (marked Exhibit 3), together with a letter sent by fax from the solicitor to Ms. Rhonda Cohen dated 15th May, 1997 (marked Exhibit 4). Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them was waived.

22nd May, 1997

The Report of the Discipline Committee dated January 17th, 1997 is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Bradley Wright, Chair
Abraham Feinstein
Shirley O'Connor

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

Neil Perrier
for the Society

BRUNO MARIO TONEGUZZI
of the City
of Nepean
a barrister and solicitor

James M. O'Grady, Q.C.
for the solicitor

Heard: December 4, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

IN THE MATTER OF BRUNO MARIO TONEGUZZI
Complaint D113/96

REPORT

1. On August 12, 1996, Complaint D113/96 was issued against Bruno Mario Toneguzzi ("Member") alleging that he was guilty of professional misconduct. The Complaint was amended at the Hearing on the consent of the parties.

2. The matter was heard in Ottawa in public on December 4, 1996 before this Committee comprising Bradley Wright, Chair, Abraham Feinstein and Shirley O'Connor. The Member attended the Hearing and was represented by James M. O'Grady Q.C. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

- 2(a) The Member failed to act in a conscientious, diligent and efficient manner by failing to fulfill two undertakings each dated September 26, 1990, to each of Daniel and Christine Lamoureux and their solicitors, Dust Bater Beament Green ("Dust Bater"), and the Corporation of the Township of Cumberland and its solicitors.
 - 2(b) The Member failed to reply to the Law Society in respect of the investigation of a complaint by a fellow solicitor, Gerald Dust.
 - 2(c) The Member failed to reply to the Law Society in respect of the investigation of a complaint by a fellow solicitor, Keith MacKaren.
 - 2(d) The Member failed to serve his client, Luciano Sperotto, in a conscientious, diligent and efficient manner in that the Member failed to consult properly with his client as to the processing of, or to keep his client properly advised as to the disposition of, a claim for lien filed by him on the client's behalf in or about April 1992.
 - 2(e) The Member failed to reply to the Law Society in respect of the investigation of a complaint by a client, Luciano Sperotto.
4. The Committee heard from the Member and two character witnesses, and found all three credible.
5. The Member was called to the bar in March 1977. On September 28, 1990, he began an administrative suspension for failing to pay a late filing fee, which suspension he did not bring to an end until April 22, 1991. On December 1, 1992, he was suspended for one month for failing to up-date his annual filings and for having practised while under the first suspension. As the period of the suspension for practising while suspended was so short (1/8th the norm), the Committee concluded, in the absence of evidence to the contrary, that the instances of practising while suspended must have been minor. Although he could have returned to practice on January 1, 1993, he chose to remain suspended until March 1, 1995.
6. Thus, the Member practised from his call to the bar in 1977 until September 28, 1990, was suspended until April 22, 1991, practised until December 1, 1992, was suspended until March 1, 1995, and has been practising since.

Particular 2(a) (failing to fulfill undertakings)

7. To close a real estate deal on September 26, 1990, the Member undertook to the Lamoureux and the Township to register a Transfer of Easement to the Lamoureux. The Member believed at the time that it would be a simple matter of preparing the Transfer, attending to its execution, and registering it. However, from September 1990 until mid-1995, he failed to complete the matter despite proddings from Dust Bater. Ultimately, Dust Bater completed the work.
8. Two problems the Member faced, though self-inflicted, in fulfilling the undertakings were his suspensions as he could not fulfill his lawyer's undertaking while suspended. Thus, the failure to fulfill may be described as a failure to transfer the file to an active solicitor for completion during the period of the first suspension, followed by a failure to fulfill after the first suspension ended and before the second one began.

9. By January 1992, the Member realized that, because the easement was to be transferred to individuals and not to a public utility or municipality, the Transfer could not be registered without first obtaining Planning Act consent - still a simple process but one involving a three-month delay and additional costs.

10. As was pointed out by Mr. O'Grady, it is not the case that the Member did nothing toward fulfilling the undertakings. By October 1990, he had fulfilled the first part, namely, registering the Reference Plan. The Member later became stymied in trying to fulfill the second part by the Planning Act. He asked the Township to accept a transfer of the easement and re-transfer it to the Lamoureux, presumably on the basis that such a manoeuvre would not circumvent the spirit of the Planning Act. The Township refused. He hired a consultant at a personal cost of \$1,000.00 to process the severance application. By July 1992, he had, in fact, obtained severance approval and could have circulated the Transfer for execution - a process so routine as to be virtually automatic. Why he failed to do so is a mystery, and the severance approval lapsed in 1994. Thus, through a combination of procrastination, suspension, unexpected hurdles, refusal of cooperation from the Township, and more procrastination, 1995 arrived without the Member having fulfilled the second half of his undertakings.

11. The Lamoureux claimed to have suffered damages as a result of the failure to fulfill the undertakings in a timely manner, but the property did sell twice during the period, albeit in reliance on the undertakings of a member of the bar to register the easement. Any losses in real estate value and legal fees to Dust Bater appear to have been small and compensable within the Member's deductible. Taken in isolation, this instance of misconduct would likely not have warranted more than a reprimand in Committee.

Particular 2(d) (failure to consult with client)

12. On or about April 16, 1992, Luciano Sperotto retained the Member to pursue a construction lien claim for about \$5,000.00 against a tenant in a mall. The Member registered the lien against the tenant and the mall owner. The owner paid the claim and costs into court and brought a motion to vacate arguing that the claimant had no claim against it. The Member agreed with that contention and, without consulting his client, consented to the order in exchange for \$500.00 (a nuisance payment by the owner). The claim against the tenant remained alive; and apparently still is. The client appears to have retained new counsel for this purpose.

13. If the Member's assessment that there was no claim against the owner is wrong, and if the tenant fails to pay, then it is a matter for the insurer (in this case the Member's deductible), and not a matter for discipline. If the Member's assessment is correct or if the tenant pays, there will have been no harm to the client. Only the failure to consult is a matter for discipline here. While the Member is guilty of misconduct for having failed to consult, the misconduct, on its own, would likely not have warranted more than a reprimand in Committee.

Particulars (b), (c) and (e) failures to reply

14. For the failures to reply, the Member deserves a period of suspension especially as he has been penalized for similar misconduct in the past. Particulars (b) and (e) of the complaint relate to Particulars (a) and (d) respectively. Particular (c) relates to a matter the substance of which, at the urging of both counsel, was not before us.

15. For the misconduct before us, the Committee recommends that the Member be suspended for one month provided he has filed a medical report satisfactory to the Secretary or a Committee appointed by Convocation indicating that the Member is fit to practise law, failing which he be suspended indefinitely until such a report has been deemed satisfactory, and that he be directed to enter the Practice Review Program. There is no recommendation as to costs.

REASONS FOR RECOMMENDATION

16. In normal circumstances (i.e., no discipline history), the Member's failure to fulfill the undertakings to transfer the easement and failure to consult Mr. Sperotto prior to consenting to the order likely would have warranted a reprimand in Committee. In normal circumstances, the Member's failures to fulfill undertakings and to consult, and to reply to the Society in respect of these two complaints, likely would have warranted a reprimand in Convocation.

17. However, in this case, there is a discipline history, and a third outstanding failure to reply. We must decide the effect of the discipline history on the determination of the penalty to recommend for this current misconduct.

18. As a general proposition, penalties may reflect discipline history. This is especially so where the fresh misconduct is similar to the misconduct previously penalized. If a member fails to heed the message of prior penalties and persists in similar misconduct, it is proper that subsequent penalties may escalate for recurrences. Where the fresh misconduct involves quite unrelated matters, the proposition may have less application. The proposition may also have less application when there are significant mitigating factors present either at the time of the previous penalty or at the time of the fresh penalty assessment. In this case, the Committee feels that there are applicable mitigating circumstances.

19. At the relevant times, the Member practised mostly in association with Lorenzo DeFranco, a lawyer who had been disbarred, readmitted and disbarred again. It appears that Mr. DeFranco was a lawyer of little competence or integrity. The Member testified that he felt some loyalty to Mr. DeFranco as they had been friends since grade school and he had been importuned by various friends to lend Mr. DeFranco a helping hand. From the testimony of the Member and of the witness, Richard Mount, a lawyer who practises across the street from the Member, practising with Mr. DeFranco for about half-a-decade would appear to have been difficult and trying. Among the many other problems, Mr. DeFranco lived in the office, sleeping therefor months on end, and was unable to contribute sensibly to the overhead, casting the burden onto the Member.

20. By the uncontradicted evidence of the two character witnesses, the Member is an ethical, decent, honest, loyal, hardworking, and conscientious person. Such people are often the last to recognize the damage being done to them and the stresses being inflicted upon them by those with unfortunate deficiencies in those qualities.

21. One of the character witnesses is a friend and client of the Member who has had numerous solicitor-client dealings with the Member. The other witness is a well-respected, experienced lawyer who has had many professional dealings with the Member over the years. Both were at a loss to understand, other than owing to stress, why the Member was so often late with his annual filings, and why he was so often delinquent in replying to the Law Society.

22. Both the Law Society and the Member believe that there may be a psychological reason for the chronic procrastination. The Member readily agreed with Mr. Perrier's request for a medical report.

22nd May, 1997

23. The Committee feels that the public would be protected and the interests of both the Society and the Member well-served by a shorter suspension than would otherwise be called for and by a requirement of a satisfactory medical report. The Committee's recommendation of a one-month suspension (with conditions) is light for a member previously reprimanded for similar failures to reply and for a member previously suspended. The leniency is justified primarily by an appreciation of the heavy stresses the Member must have been under while practising with Mr. DeFranco, and secondarily by the fact that the Member's previous suspension appeared to have been, with no evidence presented otherwise, for relatively minor breaches of the prohibition against practising while suspended. We have subsumed the other misconduct (failures to fulfill and to consult) within our recommended penalty of a one-month suspension with conditions on the basis that these other particulars would not of themselves have warranted a suspension.

24. Put another way, we have declined the opportunity to escalate the period of suspension owing to the mitigating circumstances. Instead, we have imposed the same period of suspension as before and added conditions. However, should the Member ever be found guilty of further misconduct arising after Mr. DeFranco departed the firm, whether client - or regulation-oriented, such misconduct may run a serious risk of being regarded as evidence, not of unfortunate confluence of circumstance deserving of leniency, but of incorrigibility.

Bradley H. Wright, Chair
January 17, 1997

The Report of the Discipline Committee dated April 23rd, 1997 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

Rhonda Cohen
for the Society

BRUNO MARIO TONEGUZZI
of the City
of Nepean
a barrister and solicitor

Not Represented
for the solicitor

Heard: April 8, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 16, 1996 Complaint D261/96 was issued against Bruno Mario Toneguzzi alleging that he was guilty of professional misconduct.

The matter was heard in public on April 8, 1997 before this Committee composed of Ronald D. Manes, Chair, Bradley H. Wright and Thomas E. Cole. The Solicitor participated by telephone conference and represented himself. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D261/96

2. a) He failed to fulfill an undertaking given on April 15, 1987, to obtain an order from the Court releasing an administration bond issued in respect of the Estate of John Thomas Howard;
- b) He failed to fulfill an undertaking given on March 2, 1988, to obtain an order from the Court releasing an administration bond issued in respect of the Estate of Giovannina Rigutto; and
- c) He failed to reply to the Law Society regarding a complaint by Bert Van Vlaanderen despite letters dated March 27 and June 10, 1996 and telephone messages left on May 15 and May 31, 1996.

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 D261/96 and is prepared to proceed with a hearing of this matter on April 8 and 9, 1997, in Toronto, Ontario.

II. IN PUBLIC/IN CAMERA

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

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D261/96 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 25, 1977. He is a sole practitioner.

Particular 2

- (a) He failed to fulfil an undertaking given on April 15, 1987, to obtain an order from the Court releasing an administration bond issued in respect of the Estate of John Thomas Howard;

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- (b) He failed to fulfil an undertaking given on March 2, 1988, to obtain an order from the Court releasing an administration bond issued in respect of the Estate of Giovannina Rigutto; and
- (c) He failed to reply to the Law Society regarding a complaint by Bert Van Vlaanderen despite letters dated March 27 and June 10, 1996 and telephone messages left on May 15 and May 31, 1996.

5. The Complainant, Mr. Bert Van Vlaanderen, is an insurance broker with Van Vlaanderen Insurance Brokerage & Associates Co. Ltd, in Ottawa, Ontario.

6. The Solicitor requested from Mr. Van Vlaanderen an administration bond in respect of each of the Estates of John Thomas Howard and Giovannina Rigutto. Both bonds were delivered to the Solicitor.

7. By letter dated April 15, 1987, the Solicitor undertook to Mr. Van Vlaanderen to obtain a release of the bond regarding the Estate of Mr. Howard within one year of the date of his letter and, if not, to pay outstanding premiums until a release is obtained from the Court (Document Book, Tab 1).

8. By letter dated March 2, 1988, the Solicitor undertook to Mr. Van Vlaanderen to obtain a release of the bond regarding the Estate of Mr. Rigutto as soon as possible after the Estate is wound up (Document Book, Tab 2).

9. On or about February 22, 1988, the Solicitor advised Mr. Van Vlaanderen that the bond in respect of Mr. Howard's Estate was no longer necessary and undertook to obtain the release (Document Book, Tab 3).

10. By letter dated August 25, 1993, Mr. Van Vlaanderen advised Mrs. Howard (Mr. Howard's widow) that the bond in respect of her husband's Estate had been renewed as of April 23, 1993 with an annual premium of \$120.00. Mr. Van Vlaanderen further advised that he had not been able to collect the premium through the Solicitor, and requested that Mrs. Howard make the payment (Document Book, Tabs 4 & 6).

11. By letter dated August 25, 1993, Mr. Van Vlaanderen advised Mrs. Rigutto (Mr. Rigutto's widow) that the bond in respect of her husband's Estate had been renewed as of March 10, 1993, with an annual premium of \$360.00. Mr. Van Vlaanderen further advised that he had not been able to collect the premium through the Solicitor, and requested that Mrs. Rigutto make the payment (Document Book, Tabs 5 & 7).

12. By letter dated September 22, 1995, Mr. Van Vlaanderen requested that the Solicitor secure a release for each of the bonds in question. Mr. Van Vlaanderen further stated:

"We have discussed this matter for a long time, if the releases are not yet available we will insist on receiving payment in the amount of \$518.40.

In case this is not solved by October 1, 1995, we will inquire with the Canadian Law Society if they can be of assistance in getting these releases for us."

(Document Book, Tab 8)

The Solicitor did not respond.

13. Mr. Van Vlaanderen complained to the Law Society by letter dated November 1, 1995 (Document Book, Tab 9):

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"Mr. Toneguzzi has requested from our office two Administration Bonds.

Marjorie Judith Howard issued April 1987

Giovannina Rigutto issued March 1988

Both estates are settled but so far we have not received the required court releases. Up to last year we have been paid for the renewal premiums. This year we are not getting any cooperation or payment of the premiums. Before not too long there will be additional renewals and so on.

All we want is that Mr. Toneguzzi goes to court and obtain the releases and of course pay us the outstanding amount of \$518.40.

Please notice the copies of our documentation."

14. By letter dated January 24, 1996, to the Solicitor, the Law Society enclosed a copy of Mr. Van Vlaanderen's complaint and asked the Solicitor to respond in writing within period of two weeks. The Solicitor was reminded of his obligation under Rule 13, Commentary 3 of the Rules of Professional Conduct to reply promptly to communications from the Law Society (Document Book, Tab 10). The Solicitor did not respond.

15. The Law Society contacted the Solicitor's office on March 1, 1996, to remind the Solicitor that his reply was outstanding and expected by the Law Society (Document Book, Tab 13). The Solicitor did not respond.

16. The Law Society contacted the Solicitor's office on March 6, 1996. The Solicitor was not available and a message was left asking the Solicitor to return the call the following day (Document Book, Tab 13). The Solicitor did not reply.

17. The Law Society finally reached the Solicitor by telephone on March 11, 1996. At that time, he undertook to give priority to obtaining the necessary court orders within the following two weeks. The Solicitor confirmed his undertaking by letter dated March 12, 1996 (Document Book, Tabs 13 & 14).

18. The Law Society followed-up with the Solicitor by letter dated March 27, 1996 (Document Book, Tab 15):

"I acknowledge receipt ...of your response to the Law Society dated March 12, 1996,.....

Having reviewed the contents of my file, I note that you did not speak to the issues raised ... concerning the payout of \$518.40.[p]lease provide to me a written status report, in connection with this matter, together with your comments ... within thirty days from this letter ..."

The Solicitor did not respond.

19. On each of May 15 and 31, 1996, the Law Society attempted to follow-up with the Solicitor by telephone. Messages were left (Document Book, Tab 16). The Solicitor did not respond.

20. A registered letter was sent to the Solicitor dated June 10, 1996. The letter summarized the Law Society's attempts to contact the Solicitor, reminded him of his obligation to reply under Rule 13 of the Rules of Professional Conduct and further advised that if his response was not received within seven days of the date of the letter, the matter would be referred to the Chair of the Discipline Committee for further instructions. The Registered letter was signed for on June 17, 1996 (Document Book, Tab 17). The Solicitor did not respond.

21. The within complaint was sworn on December 16, 1996.

22. As at today's date, the Solicitor has neither replied to the Law Society's investigation, nor fulfilled his undertakings regarding the administration bonds.

23. Also as at today's date, as a result of the Solicitor's misconduct, Mr. Van Vlaanderen's company is out of pocket the aggregate sum of at least \$1,136.80.

V. DISCIPLINE HISTORY

1990 In or about April 1990, the Solicitor was Reprimanded in Committee for failing to reply to communications from the Law Society and failing to file his Forms 2 and 3 within six months of his fiscal years ending April 30, 1988 and April 30, 1989.

1992 Commencing December 1, 1992, the Solicitor was ordered suspended for a period of one month and thereafter indefinitely until his filings for the years 1988, 1989, 1990 and 1991 were completed and he paid costs to the Law Society fixed in the amount of \$350. The suspension concluded on March 1, 1995. The Solicitor's suspension was based upon a finding of professional misconduct in that he:

- a) practised law while under suspension during the period September 28, 1990 to April 22, 1991;
- b) failed to comply with a verbal undertaking given to a Discipline Committee on April 11, 1990, to file his Forms 2/3 for his fiscal years ending April 30, 1988 and April 30, 1989 by June 1, 1990; and
- c) failed to file Forms 2/3 for his fiscal years ending April 30, 1990 and April 30, 1991.

1993 In or about March 1993, the Solicitor was Reprimanded in Committee and ordered to pay costs in the amount of \$300 for failing to reply to the Law Society in respect of the investigation of a complaint.

1996 In or about December, 1996, a Discipline Committee found the Solicitor to have committed professional misconduct in that he failed to fulfill two undertakings in relation to a real estate transaction, failed to serve a client in an unrelated matter and failed to reply to communications from the Law Society in respect of the investigation of three discrete complaints. The Discipline Committee will recommend to Convocation that the Solicitor be suspended from the practice of law for a fixed period of one month, and thereafter until such time as the Solicitor can demonstrate that he is fit to return to the practice of law. This matter has not yet reached Convocation."

Executed by the Solicitor at Ottawa on January 31, 1997 and by Law Society Counsel at Toronto on April 7, 1997.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Bruno Mario Toneguzzi be suspended for a period of one month consecutive to the suspension recommended with respect to Complaint D113/96, and to continue indefinitely on the following terms:

- 1. that the Solicitor proceed to obtain the release of the administration bonds;
- 2. that the Solicitor pay the outstanding administration bond premiums, which at the present time appear to amount to \$1,655.20, and which may increase by the time the proceeding has been completed;

3. that the Solicitor obtain a medical report, satisfactory to the Secretary of the Law Society or a Committee appointed by Convocation, indicating that the member is fit to practise law;
4. that the Solicitor be directed to attend the Practice Review program.

REASONS FOR RECOMMENDATION

The Solicitor has been practising law since 1977. Since that time he has, by his own admission, built a checkered discipline history which is accurately set out in the Agreed Statement of Facts.

The Solicitor was reprimanded in Committee in 1990 for failing to reply and failing to file his Form 2 and 3 for the period ending April 1988 to April 1989. He did not file for 1988, 1989, 1990 and 1991, and was in 1992 suspended for a period of one month and indefinitely thereafter until his filings were completed.

Notwithstanding the Solicitor's suspension, he practised law under suspension during the period of September 28, 1990 to April 22, 1991. He failed to comply with verbal undertakings in that period of time with respect to filing his Form 2 and 3. In 1993 the Solicitor was reprimanded in Committee and ordered to pay costs in the amount of \$300 for failing to reply to the Law Society with respect to the investigation of a complaint, and in 1996, in Complaint D113/96 which is to be heard by Convocation in May of this year, the Solicitor failed to fulfil two undertakings with respect to real estate transactions, failed to serve a client in an unrelated matter and failed to reply to communications from the Law Society in respect of the investigation of three discrete complaints.

The recommendation of that discipline committee was essentially that the Solicitor be suspended from the practice of law for a fixed period of one month and thereafter until he can demonstrate that he is fit to return to the practice of law.

We know through all of this there has been no allegation of dishonesty, nor is there any evidence of any dishonesty whatsoever. In the last Complaint, D113/96, the Committee in reasons delivered by Mr. Wright, stated in paragraph 24 of his reasons on page seven, as follows:

"Put another way, we have declined the opportunity to escalate the period of suspension owing to the mitigating circumstances. Instead, we have imposed the same period of suspension as before and added conditions. However, should the Member ever be found guilty of further misconduct arising after Mr. De Franco departed the firm, whether client - or regulation - oriented, such misconduct may run a serious risk of being regarded as evidence, not of unfortunate confluence of circumstance deserving of leniency, but of incorrigibility."

Although the circumstances of this complaint arose during the currency of the situation obtaining in D113/96 (i.e., the presence of Mr. DeFranco in the firm and his effect on the solicitor), Mr. DeFranco has been gone from the firm for quite some time; yet, the solicitor has continued to fail to rectify his failures to comply with his undertaking to the Society, to serve his client with respect to the administration bond, and to respond to the Society.

Although these circumstances do not, as of yet, give rise to a finding of incorrigibility and we make no such finding, we do note that unless the medical evidence is compelling, the situation is declining to the extent that there is some sense in the Committee that the Solicitor is bordering on incorrigibility. Having said that, we noted that the Solicitor's discipline history was not so

22nd May, 1997

serious as to provoke the Society's counsel into seeking disbarment on the basis of ungovernability. We believe that this is so because of the positive aspects of the solicitor's career in law, the nature of the previous misconduct, and his character as represented in the decision of the Committee in D113/96. Had it not been for these mitigating factors, we believe that the penalty sought by the Society would have been more severe, and our inclination may well have been the same.

Bruno Mario Toneguzzi was called to the Bar on March 25, 1977.

ALL OF WHICH is respectfully submitted

DATED this 23rd day of April, 1997

Ronald D. Manes, Chair

There were no submissions. The findings were confirmed and the Reports were adopted.

The recommended penalty in the Report of the Discipline Committee dated January 17th, 1997 was that the solicitor be suspended for a period of one month provided that he has filed a medical report satisfactory to the Secretary or a Committee appointed by Convocation indicating that the solicitor is fit to practise law, failing which he be suspended indefinitely until the condition has been met and further that the solicitor enter the Practice Review Program.

The recommended penalty of the Report of the Discipline Committee dated April 23rd, 1997 was that the solicitor be suspended for a period of 1 month to continue indefinitely on the terms set out in the Report regarding the administration bonds, obtaining a medical report and attending the Practice Review Program.

Counsel for the Society and the solicitor made submissions in support of the 2 month suspension.

The solicitor requested that the suspension commence June 1st in order to wind down his practice.

It was moved by Ms. Stomp, seconded by Mr. Wilson that the recommended penalty of a 2 month suspension be adopted.

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

It was moved by Ms. Ross, seconded by Ms. Stomp that on page 5 of the January 17th, 1997 Report that paragraph 16 be deleted and the first word "However" in paragraph 17 be deleted.

Carried

The Stomp/Wilson motion was voted on and carried the suspension to commence June 1st, 1997.

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the recommended penalty be adopted and that the suspension commence June 1st, 1997. In addition the January 17th, 1997 Report was amended by deleting paragraph 16 on page 5 and deleting the first word "However" at the beginning of paragraph 17.

22nd May, 1997

The following corrections were also made:

At page 1 of the April 23rd Report the first word Oon be changed to "on";

The following words "...if and when the solicitor returns to practice" be added to the end of number 4 on page 8 of the April Report.

Re: Arnold EPSTEIN - Etobicoke

The Secretary placed the matter before Convocation.

Mr. MacKenzie withdrew for this matter.

Ms. Ratchford appeared for the Society and Mr. Scott Fenton, Duty Counsel appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 12th September, 1996, together with an Affidavit of Service sworn 25th September, 1996 by Ron Hoppie that he had effected service on the solicitor by registered mail at the 16 Four Seasons Place address on 23rd September, 1996 (marked Exhibit 1), together with the Report and Affidavit of Service sworn 23rd October, 1996 by Louis Katholos that he had effected service on the solicitor by registered mail at the 1862 Bathurst Street address on 8th October, 1996 (marked Exhibit 2), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 1997 (marked Exhibit 3). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Jane Harvey, Chair
Nora Angeles
Gavin MacKenzie

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

Jane Ratchford
for the Society

ARNOLD EPSTEIN
of the City
of Etobicoke
a barrister and solicitor

Mark Sandler
for the solicitor

Heard: April 3, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On February 24, 1995, Complaint D510/94 was issued. That Complaint was withdrawn and replaced with D510a/94, issued on April 3, 1996, against Arnold Epstein alleging that he was guilty of professional misconduct.

22nd May, 1997

The matter was heard in public on April 3, 1996, before this Committee composed of Jane Harvey, Chair, Nora Angeles and Gavin MacKenzie. The Solicitor attended the hearing represented by Mark Sandler. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D510a/94

I Sale of 372 Gilmore Rd., Fort Erie and the GTR Tavern

2. (a) In respect of a mortgage registered in July, 1989 in favour of his clients George and Irene Camilleri, the Solicitor acted in conflict of interest by:

- (i) taking a \$100,000 interest in the mortgage upon its sale without disclosure to the clients; and
- (ii) subsequently selling pieces of his \$100,000 interest in the mortgage to his investor clients without disclosing to them that they were purchasing his interest in the mortgage;

II The Rowbotham Mortgages - R.R. #4, Creemore, and 100 George St., Creemore, Ont.

(a) In respect of mortgage loan advances made in December, 1989 and February, 1990 secured against R.R. #4, Creemore, the Solicitor acted in conflict of interest which had the effect of preferring his personal interests to those of his clients, as follows:

- (i) notwithstanding the fact that the second mortgage which the Solicitor had funded personally was already in default, and the prior first mortgage was already under Power of Sale, the Solicitor sold his interest in the mortgage to his investor clients William and Margaret Woodgate, Alexander MacDonald and Sol Hoffert, without disclosure to the clients of the full circumstances of their investment or the fact that they were purchasing the Solicitor's interest in the mortgage;
- (ii) by failing to advise them of the mortgagor's March, 1990 default on the mortgage, until June 1990.

(b) The Solicitor failed to disclose to the clients his receipt of an arranging fee for setting up the mortgage.

(c) In respect of mortgage loan advances made in April and June, 1990, secured against 100 George St., Creemore, the Solicitor acted in a conflict of interest which had the effect of preferring his personal interests to those of his clients, as follows:

- (i) notwithstanding the fact of the mortgagor's default as disclosed in paragraph 2(a), the Solicitor sold his interest in this mortgage which he had funded personally to his clients Joe Caparelli and Gail Weber, without disclosure to the clients of the full circumstances of their investment or the fact that they were purchasing the Solicitor's interest in the mortgage;

22nd May, 1997

- (ii) notwithstanding the default of the mortgagor as described in paragraph 2(a), the Solicitor invested funds under his control belonging to his clients William and Margaret Woodgate in the June 1990 mortgage advance, without disclosure to the clients of all of the full circumstances of the investment;
- (d) The Solicitor failed to serve his mortgagee client Canada Trust in a conscientious, diligent and efficient manner. The Solicitor reported to his client that it had obtained a good and valid first mortgage on the property, when in fact the mortgage stood in third position by virtue of the fact that the Solicitor failed to register discharges of two prior mortgages.

III 6247 Guelph Line, Burlington, Ontario

- (e) In respect of a mortgage loan advance made in April, 1988, the Solicitor:
 - (i) between October, 1989 and June, 1990, the Solicitor failed to advise his client of:
 - the mortgagor's October, 1989 default;
 - the fact that the mortgagor was the subject of a very large Judgment in favour of Revenue Canada; and
 - the fact that the Solicitor, as mortgagee of a subsequent mortgage on the same property, had commenced a Power of Sale proceeding.
 - (f) In respect of a mortgage loan advance made in February, 1989, the Solicitor acted in conflict of interest which had the effect of preferring his personal interests to those of his clients, as follows:
 - (i) the Solicitor sold his interest in this mortgage which he had originally funded to his investor clients Domenic Gagliardi and Iris Peretz:
 - without disclosing to the clients that they were purchasing his interest in the mortgage; and
 - without disclosing to the clients that he received a finder's fee for arranging the mortgage.
 - (ii) by failing to advise them of the mortgagor's October, 1989 mortgage default until July, 1990.

IV Alvanzo and Eunice Honeyghan - 28 Minnacote Ave., Scarborough and 59 Mansewood Gardens, Scarborough

- (g) In respect of a mortgage loan advanced in April, 1990, the Solicitor:
 - (i) failed to protect the interests of his investor clients William and Margaret Woodgate, by advancing funds belonging to the clients without having taken reasonable steps to ensure that they received adequate security for the loan; and
 - (ii) failed to advise of the mortgagors' June 1990 mortgage default and of the Power of Sale proceedings commenced by prior mortgagees on each property; and
 - (iii) failed to disclose to the client his receipt of an arranging fee in connection with the transaction.
- (h) In respect of a mortgage loan advance made in June, 1990, the Solicitor failed to protect the interests of his investor client Gail Weber by advancing funds belonging to the client without having taken reasonable steps to ensure that she received adequate security for her loan.

22nd May, 1997

V 15 Wembley Rd., Toronto

- (i) In respect of a mortgage loan advance made in October, 1988, the Solicitor failed to serve his client Jerome S. Ublansky, in trust, in a conscientious, diligent and efficient manner, as follows:
 - (i) although the Solicitor received the advance in October, 1988, he failed to register the mortgage security until July 4, 1990, by which time the Solicitor had pledged the property as security for two other loans, whose mortgages had already been registered on title; and
 - (ii) the Solicitor failed to deliver a reporting letter in a timely manner (not until April, 1991).

EVIDENCE

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D510a/94 and is prepared to proceed with a hearing of this matter on April 3, 1995.

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 D510a/94, as amended and this agreed statement of facts with his counsel, Mark Sandler, and admits that the facts and particulars referred to herein constitute professional misconduct.

IV. FACTS

4. The Solicitor is 59 years of age. He was called to the Bar in 1966 and practised in Toronto until December, 1995 as a sole practitioner.

5. At the material time, the Solicitor also syndicated or arranged mortgages, though he has not done so for several years. A.E. Investments, the Solicitor's company, operated from the same premises as the Solicitor's law practice. It had a line of credit with the Canadian Imperial Bank of Commerce. This line of credit was utilized to enable A.E. Investments to make short-term, initial advances on mortgages which the solicitor syndicated, that is, the initial funds were replaced by funds from the Solicitor's clients, as they became available. Except as noted in the Agreed Statement of Facts herein, advances by A.E. Investments were not intended to be the Solicitor's investments *per se*, but rather interim financing, pending the availability of syndicated funds.

Particular 2, I(a) Sale of 372 Gilmore Road, Fort Erie and the GTR Tavern

6. This transaction involved the syndication by the Solicitor of a vendor takeback mortgage for a property at 372 Gilmore Road in Fort Erie ("the Gilmore Property"). A business operated as the GTR Tavern was located on the property. The property was owned and the business operated by the Solicitor's clients, George and Irene Camilleri ("the Camilleris").

7. In March 1989, the Camilleris sold the Gilmore Property through a series of transactions that resulted in the Camilleris' numbered company, 543366 Ontario Limited ("543366") selling to an unrelated numbered company, 808028 Ontario Inc. The Solicitor acted for the Camilleris and 543366 on the sale. The actual Transfer of the Gilmore Property indicates the Transfer was made by the Camilleris to another numbered company, 841335 Ontario Limited that was related to the purchasing company, 808028 Ontario Inc.

8. The purchase price for the Gilmore Property was \$625,000.00, payable as follows: (Tab 1, Document Book)

Deposit	\$ 10,000
Vendor takeback mortgage (the "VTB")	500,000
Cash payable on closing	<u>115,000</u>
	\$ 625,000

9. The VTB was agreed upon at an interest rate of 12%. The mortgagor was 841335 Ontario Limited. (Tab 2, Document Book). The Camilleris needed to sell the VTB to repay outstanding mortgages and/or other liabilities and had been unsuccessful in obtaining a purchaser for the VTB. The Camilleris asked the Solicitor to find a purchaser for the VTB. The Camilleris had already signed the Agreement of Purchase and Sale for the Gilmore property, contemplating that they could arrange the sale of the VTB without difficulty. In those circumstances, the Solicitor agreed to acquire the VTB, which was registered in the name of the Solicitor, in trust, at a discount. The Solicitor was of course responsible for obtaining participants for the mortgage loan. The Solicitor was also responsible for payment of the "spread" to the participants (that is, the difference between the 12% interest rate payable on the VTB and the interest rate provided to the participants).

10. According to the Solicitor's report to the Camilleris dated July 28, 1989, the sale of the property was completed on May 26, 1989. The Transfer to the purchaser and the VTB were registered on July 5, 1989. (Tab 3, Document Book)

11. As reflected in paragraph 9, the Camilleris instructed the Solicitor to sell the VTB. However, the Camilleris were to retain a \$50,000.00 interest in the VTB that was to be repaid in two equal installments, without interest, on November 26, 1989 and May 26, 1990.

12. According to the Solicitor's letter to the Law Society dated January 21, 1990 (Tab 4, Document Book), the balance of \$450,000.00 of the VTB was sold by the Solicitor for \$350,000.00 as follows:

\$300,000	to J.S. Ublansky, in trust
\$ 50,000	to Charles and Ellie MacAlister

The Ublansky participation was at a rate of 15%. The MacAlister participation was at a rate of 13%.

13. The funds in the amount of \$350,000.00 were used by the Camilleris to pay off existing indebtedness, including an existing first mortgage on the Gilmore Property to the Royal Bank of Canada and other pre-existing debts and/or mortgages, including a \$50,000 participation by the MacAlisters (who as noted above, re-invested through the VTB participation). The Royal Bank of Canada first mortgage was discharged on June 22, 1989. The Camilleris were aware that they were only receiving \$350,000 (either paid to them or advanced on their behalf) and retaining a further \$50,000 for their total interest in the VTB.

14. Accordingly, as reflected in the Solicitor's letter to the Law Society of January 21, 1990, the original beneficiaries of the VTB were as follows:

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J.S. Ublansky, in trust	\$300,000
Charles and Ellie MacAlister	50,000
George and Irene Camilleri	50,000
Arnold Epstein, in trust	<u>100,000</u>
Total	\$500,000

15. The Solicitor did not advance funds on this transaction. His participation in the VTB mortgage represented consideration for the sale of the VTB mortgage, its syndication and the obligation to pay the "spread" to the participants. Though the Camilleris were aware that the VTB was sold on the discounted basis noted above, the Solicitor did not specifically advise them as to his interest in the VTB.

16. The Solicitor then syndicated portions of the VTB to other of his investor clients. According to the Solicitor's letter to the Law Society of January 21, 1990, the beneficiaries of the VTB, as at January 21, 1990 were as follows:

Jerome S. Ublansky	\$225,000
Charles and Eleanor MacAlister	50,000
Arnold Epstein	3,000
Bessie Shapiro	20,000
Rose Epstein	20,000
Sue Ann Singer	40,000
Domenic and Immacolata Gagliardi	42,000
Elizabeth Gindli	<u>50,000</u>
Total	\$450,000

As previously indicated, the Ublansky participation was at a negotiated rate of 15%. All other participants agreed to a rate of 13%. The Solicitor, for obvious reasons, wanted to decrease the Ublansky participation in the VTB: hence, its reduction from \$300,000 to a lesser sum.

17. Some of the participants went to see the property. The Solicitor regarded it to be an excellent investment for the participants at a higher interest rate than the VTB itself. This is evidenced, in part, by the nature of the participants, who included friends and family of the Solicitor. For example, Bessie Shapiro was his wife's aunt and Rose Epstein was his mother.

18. The Solicitor acknowledged the interests of the mortgagees by Declaration of Trust dated January 11, 1990. (Tab 5, Document Book)

19. As appears from paragraph 16, when the VTB was syndicated, the Ublansky portion was reduced by \$75,000.00. The Solicitor's share was reduced by \$97,000, leaving the Solicitor with an interest of only \$3,000.00. Monies received from the new participants were paid to A.E. Investments and enabled the reduction of the Ublansky and Solicitor's participation in the VTB.

20. The Solicitor failed to advise Ms. Singer, Mrs. Epstein, Ms. Shapiro, or Mrs. Gindli ("his clients") that their participant funds were being used, in part, to reduce the Solicitor's interest in the VTB. He also failed to advise or discuss with his clients his potential conflict of interest in acting for both the borrowers and lenders in the transaction, as well as his initial interest in the VTB. (Tab 7, Document Book)

21. Regarding the repayment of the \$50,000.00 interest retained by the Camilleris in the VTB, the Solicitor's records indicate that \$25,000.00 was posted to the Solicitor's sub-ledger on or about May 30, 1990. Of this amount, \$20,000.00 was paid to the Camilleris and the balance of \$5,000.00 were the Solicitor's fees on the sale of the Gilmore property as agreed upon. As to the other \$25,000.00, on May 18, 1990, payment of \$25,000.00 was posted to the Solicitor's trust ledger and ultimately forwarded to the Camilleris.

22. The investors lost no monies on this investment. The Solicitor admits that his conduct, failed to adequately disclose to all of the parties involved the full circumstances of the transaction.

Particular 2, II(a) - Rowbotham - R.R. #4, Creemore

23. In December 1989, the Solicitor was retained by Gary Rowbotham to provide a new second mortgage loan on a property known as R.R. #4 in Creemore, Ontario (the "Creemore Property"). Mr. Rowbotham had acquired the Creemore Property in March 1989 for \$215,000.00. It was encumbered by an institutional first mortgage of \$150,000.00 and a private second mortgage of \$15,000.00.

24. On December 12, 1989, the Solicitor registered a mortgage in favour of "Arnold Epstein, Trustee" on title to the Creemore Property in the amount of \$41,000.00 at a rate of 16.5% (Tab 8, Document Book). Drawing upon its line of credit, A.E. Investments advanced these funds, as an interim holder of the loan, pending syndication. This mortgage was intended to replace the private second mortgage of \$15,000.00. The second mortgagee had been making payments on the first mortgage, which had been in default. After the mortgage in the amount of \$41,000.00 was agreed upon, the Solicitor was advised that the sum advanced in the amount of \$41,000.00 was insufficient to obtain a discharge of the second mortgage and pay off the balance of the expenses. Thus, for the time being, the Solicitor's mortgage stood third in priority.

25. On January 30, 1990, the first mortgagee had issued a Notice of Sale under its mortgage (Tab 12, Document Book). The Solicitor was served with a copy of the Notice of Sale documentation on or about January 30, 1990.

26. In February 1990 the Solicitor advanced the additional funds necessary to obtain a discharge of the original second mortgagee's interest. At that time, a further mortgage in the amount of \$45,000.00 ("the Mortgage") was registered, designed to secure the Solicitor's mortgage loan and replace the original second mortgage of \$41,000.00. The Mortgage was for a term of one year with interest at 16.5%, payable on the 12th day of each month. The Mortgage was originally registered as a third charge but ranked in second position after the discharge of the original second mortgage on May 30, 1990. (Tab 9, Document Book).

27. The Solicitor was aware of appraisals on the property, together with a contemplated Agreement of Purchase and Sale. Accordingly, at that time, the Solicitor was of the view that the property had a significantly higher value than the encumbrances on it. As well, Mr. McNamara, the mortgage broker, had made representations to him as to the income flow of Mr. Rowbotham, which the Solicitor believed. (Mr. McNamara was later convicted of various offences relating to dishonesty). In any event, the Solicitor was of the view that the contemplated sale of the property and its value would more than adequately protect the second mortgage.

28. As of March 13, 1990 the mortgagor defaulted in payments on the Mortgage.

29. As previously indicated, the Solicitor always contemplated that A.E. Investments would only hold the loan on an interim basis and the loan would be syndicated. On or about March 29, 1990, the Solicitor bought A.E. Investments' interest in the Mortgage with the following client funds that were in his control for use in secure income stream investments, as indicated by the Solicitor's trust ledger. (Tab 10, Document Book)

William and Margaret Woodgate	\$13,000
Alexander MacDonald	30,000
Sol Hoffert	<u>2,000</u>
Total	\$45,000

Mr. Hoffert was the Solicitor's father-in-law.

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30. The Solicitor failed to advise his clients of the full circumstances described in the paragraphs above, when they became the participants in the loan previously funded by A.E. Investments. Though the Solicitor brought his clients into the transaction because he regarded it to be an appropriate investment (and not to unburden himself of an investment), the Solicitor admits that the effect of the transaction was to create an undisclosed conflict of interest. Further, the Solicitor admits that, although he regarded the investments as sound in light of the appraisal and contemplated sale, he did fail to adequately advise his clients of the full circumstances of the investments.

31. The Solicitor executed a Declaration of Trust on April 9, 1990 evidencing the interests of the Woodgates, Alexander MacDonald and Sol Hoffert ("his clients") in the Mortgage (Tab 11, Document Book).

32. When the mortgagor continued in default under the Mortgage in April, May and June, 1990, the Solicitor made the interest payments on the Mortgage to his clients from his own funds, rather than advising them of the default.

33. By letter dated July 12, 1990, the Solicitor wrote to the Woodgates, advising them as follows:

"This is to advise you that default has been made in payment of the above Mortgage in which you have an interest went into default on March 13, 1990.

For some time I have been making mortgage payments to you at my own expense though I had no legal obligations to do so. I did so because I thought it would be only a temporary arrangement and I would be reimbursed when either the owner paid all of the arrears or when the property is sold.

Due to the state of our economy the values of property has been declining in value and I cannot afford to continue making mortgage payments.

The property has been listed for sale but so far no offer has been received.

I will of course continue legal proceedings and I will keep you informed of any developments."

(Tab 13, Document Book)

34. The Solicitor received legal fees of \$500.00 on this transaction, together with an arranging fee of \$3,000.00 (another \$3,000.00 was paid to Mr. McNamara, then an agent with Royal Mortgage Services Ltd., a mortgage brokerage firm). Though the Solicitor expected that the clients were aware that he was being compensated for arranging the syndicated loan, he failed in his obligation to disclose his fee arrangement to Mr. and Mrs. Woodgate who were unaware of this fee. (Tab 14, Document Book)

35. In November 1990, the Creemore Property was sold under Power of Sale by the first mortgagee for \$160,000.00. The Solicitor's clients lost their entire investments.

100 George Street, Creemore

36. This transaction involved a property at 100 George Street, Creemore (the "George Property") also owned by Mr. Rowbotham. As at April 5, 1990, it was encumbered by a first mortgage to the Collingwood Community Credit Union of \$95,000.00 and a construction lien of \$42,619.00.

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37. On April 5, 1990, the Solicitor acted for Mr. Rowbotham in registering a mortgage on the George Property in favour of Arnold Epstein, Trustee for \$18,000.00 ("the Mortgage") (Tab 15, Document Book). At the time the Solicitor made this mortgage loan, he was aware of the difficulties on the Creemore Property, earlier outlined, though expected that they would be rectified.

38. On April 30, the funds represented by the Mortgage were advanced by A.E. Investments. On May 1, 1990, the Solicitor transferred \$10,000.00 from an investor client, Joseph Caparelli to this ledger. On May 28, 1990 the Solicitor transferred the \$10,000.00 to A.E. Investments, in repayment of the \$10,000.00 advanced by A.E. Investments. A.E. Investments retained an \$8,000.00 interest in the Mortgage (Tab 16, Document Book).

39. Mr. Caparelli was the caretaker at the Solicitor's former office. The Solicitor believed that Mr. Caparelli owned another investment property unrelated to the Solicitor. However, the Solicitor admits that Mr. Caparelli was an investor client who relied upon the Solicitor's advice concerning this investment. Having regard to the interest rate, the nature of the property and all of the circumstances, the Solicitor regarded the investment as low risk.

40. The Solicitor failed to advise Mr. Caparelli that his \$10,000.00 investment reduced A.E. Investment's participation in the Mortgage loan and failed to adequately advise Mr. Caparelli as to the risks associated with the investment.

41. At one point, the Solicitor was to act for Mr. Rowbotham and his girlfriend, Kellie Fawcett in relation to certain matrimonial proceedings. He did not act for them in that regard. On June 14, 1990, the Solicitor registered a Transfer of the George Property from Mr. Rowbotham to Ms. Fawcett (Tab 17, Document Book). The consideration for the Transfer was \$113,000.00, (the face amount of the two mortgages on title).

42. A mortgage in favour of Canada Trust was registered for \$123,000.00 on June 12, 1990. These funds were to be used to pay off the balance owing under the Collingwood Community Credit Union first mortgage. The actual amount advanced by Canada Trust was \$122,800.00. Mr. McNamara, the mortgage broker, had made representations (which were not true) to Canada Trust on similar terms to those representations made to the Solicitor.

43. On June 14, 1990 the Solicitor registered a further mortgage in favour of Arnold Epstein, Trustee in the amount of \$48,500.00 (the "Further Mortgage") (Tab 18, Document Book), that was also registered collaterally on the Creemore Property. The Further Mortgage was a third mortgage, but fourth in priority due to the construction lien on the George Property. It was a fourth mortgage on the Creemore Property.

44. The funds advanced by Mr. Caparelli for the Mortgage were absorbed into the Further Mortgage. The Solicitor advanced \$33,000 from the Woodgates' funds and \$2,000 from another client, Gail Weber. According to the Solicitor's records, the investors in the Further Mortgage were as follows:

Joe Caparelli	\$ 10,000
Arnold Epstein	3,500
Gail Weber	2,000
Mr. and Mrs. Woodgate	<u>33,000</u>
Total	\$48,500

45. No mortgage payments were received by Mr. Caparelli, or the Woodgates from Ms. Fawcett on the Further Mortgage. The Solicitor repaid Ms. Weber on this transaction and assumed her participation.

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46. The Solicitor failed to adequately advise his clients as to all of the circumstances of the investment and, to the extent to which their investment reduced his participation in the loan, a conflict of interest was created which was not disclosed to the clients.

47. In respect of the Canada Trust mortgage, the Solicitor undertook on closing to discharge the prior first and second mortgages and provide registration particulars. The Solicitor reported on June 12, 1990 to Canada Trust that it had a good and valid first mortgage (Tab 19, Document Book). Though the discharges had been arranged and agreed to, particularly with the first mortgagee, the Collingwood Community Credit Union, the documentation was not received and registered by June 12, 1990. Accordingly, the Solicitor erred in reporting in this fashion. The Solicitor registered the discharge of the prior second mortgage on January 21, 1991, and the discharge of the original first mortgage on June 5, 1991.

48. On June 7, 1991, the first mortgagee, Canada Trust, sold the property under Power of Sale for \$87,000.00. As a result, there was no recovery by the Solicitor's clients or the Solicitor of their investment in the Mortgage or the Further Mortgage.

6247 Guelph Line, Burlington, Ontario

49. This transaction involved the mortgaging of a property known as 6247 Guelph Line (the "Guelph Property"). Mr. Epstein had arranged an earlier mortgage for its owner, Mr. Duncan, on a Toronto property, which had been fully repaid. Unbeknownst to the Solicitor, Mr. Duncan had been arrested in California in February, 1988 on narcotic charges and apparently, the purpose of this mortgage transaction on the Guelph Property was to raise bail monies. An associate of Mr. Duncan, Malcolm Ford, contacted Larry McNamara, then an agent with Royal Mortgage Services Limited, who in turn contacted the Solicitor.

50. Mr. McNamara arranged a first mortgage on the Guelph Property with Montreal Trust in the amount of \$250,000.00 that was registered on April 8, 1988. The Solicitor understood that \$250,000.00 was the maximum amount that Montreal Trust would generally loan but that this amount did not represent any assessment of the value of the property. (Indeed, later paragraphs demonstrate that that is so).

51. The Solicitor registered a second mortgage (the "Second Mortgage") in favour of Arnold Epstein, Trustee, in the amount of \$115,000.00 on April 8, 1988. The Second Mortgage was to be for a term of six months, interest only, payable monthly. (Tab 20, Document Book) The Solicitor acted for both the mortgagors and the beneficial owners of the Second Mortgage. The mortgage funds were directed by the Duncans to be paid to Mr. Ford. It was always contemplated by the Solicitor that this loan would be syndicated rather than held as an investment by him.

52. The funds advanced by the Solicitor under the Second Mortgage belonged to another investor client, Peter Glinos. Prior to approaching Mr. Glinos about investing in the Property, the Solicitor attended the Property at least two times and was advised about it by Mr. McNamara. The Solicitor regarded it to be a beautiful property on approximately eight acres with significant recent renovations, including an indoor swimming pool. The Solicitor so described it to Mr. Glinos. Mr. Glinos and his wife provided \$115,000.00 to the Solicitor to be secured by the Second Mortgage. They were provided with a Declaration of Trust dated April 25, 1988. (Tab 23, Document Book)

53. An appraisal had been obtained by Montreal Trust for the first mortgage that valued the Guelph Property at \$550,000.00 as at the date of the first and Second Mortgage advances. Later, Royal Trust advised the Solicitor that the property was indeed worth \$650,000.00.

54. On May 3, 1988, the Solicitor registered a mortgage on the Guelph Property in favour of Malcolm Ford in the amount of \$100,000.00. This mortgage was discharged on February 3, 1989. The Solicitor understood that this represented a liability incurred to Mr. Ford, a business associate of Mr. Duncan. No funds were received or advanced on this mortgage by the Solicitor. (Tab 21, Document Book)

55. The Second Mortgage was renewed on October 7, 1988 for a further six months at an interest rate of 14 percent. It was renewed again on April 7, 1989, at a rate of 16 percent. The Solicitor was advised that the Duncans were out of the country. He was advised by Mr. Duncan by telephone that Mr. Duncan agreed to pay the higher rate for renewal.

56. On February 3, 1989, the Solicitor registered a third mortgage in favour of Arnold Epstein, Trustee in the amount of \$125,000.00 (the "Third Mortgage"). An arranging fee of \$6,000.00 was divided between the solicitor and Mr. McNamara or the mortgage brokerage firm for which he acted. The Solicitor received a direction to provide the proceeds of \$118,460.00 to the law firm of Gold and Fuerst. (Tab 22, Document Book)

57. Though the Solicitor expected that Mr. Glinos was aware that he was being compensated for arranging the syndicated loan, he failed in his obligation to disclose his fee arrangement to Mr. Glinos, who was unaware of the fee.

58. The Third Mortgage was originally funded by the Solicitor through A.E. Investments. Again, the Solicitor contemplated that A.E. Investments would hold this investment on an interim basis and that the loan would be syndicated. In late February 1989, the Solicitor sold his interest to other investor clients, Domenic Gagliardi (\$96,700.00) and Iris Peretz (\$28,300.00). A Declaration of Trust was executed by the Solicitor on March 2, 1989, in favour of these clients. (Tab 23, Document Book)

59. The Solicitor had known Mrs. Peretz for 40 years. She had been his client for 20 years. The Solicitor admits that Mrs. Peretz was not as sophisticated a client as others and relied upon his advice, though she had invested in many mortgages and real estate properties with success in the past. Though the Solicitor never contemplated holding this investment, he did fail to advise Mrs. Peretz that her participation reduced the Solicitor's interest. Further, though the Solicitor expected that Mrs. Peretz knew that he was being compensated for arranging this transaction, he did not specifically advise her as to his arranging fee of which she was unaware.

60. Mr. Gagliardi had been a client of the Solicitor for 25 years. Though Mr. Gagliardi had gone to see many other properties with the Solicitor before, he did not see the Guelph Property and relied on the Solicitor's representation that it was a sound investment. The Solicitor failed to advise Mr. Gagliardi in the same terms as reflected in the previous paragraph.

61. The Solicitor also registered a fourth mortgage in the amount of \$100,000.00 in favour of Malcolm Ford on February 3, 1989, having discharged the third mortgage for \$100,000.00 registered in favour of Mr. Ford on May 3, 1988. The Solicitor's understanding at the time was that this was security for a loan arrangement between Mr. Ford and Mr. Duncan and that Mr. Ford was content to have his mortgage interest subordinated. The Solicitor's reporting letter to Mr. Ford reflected that. No monies were received or advanced on this mortgage by the Solicitor. (Tab 24, Document Book)

62. The Solicitor did not advise or disclose to Mrs. Peretz, Mr. Gagliardi or Mr. Glinos ("his clients") that the fourth mortgage had been registered. However, it is significant that this mortgage was subsequent to their mortgage interests.

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63. On July 18, 1989, the Solicitor received a "Requirement to Provide Documents" from Revenue Canada concerning the Duncans, Fords and others. The Requirement was dated June 28, 1989. (Tab 25, Document Book). The Solicitor provided the information requested to Revenue Canada and did not advise his clients of this information. At the time, the mortgages were current and presented no difficulties.

64. The Duncans, as mortgagors, defaulted in their payments under the Third Mortgage for August and September, 1989. On September 22, 1989, the Solicitor issued a Notice of Sale on the Third Mortgage (Tab 26, Document Book) that required the Duncans to bring that mortgage into good standing by November 1, 1989. The Solicitor learned by doing a subsearch on the property that Revenue Canada had a judgment against Mr. Duncan in the amount of \$517,456.47. The Solicitor did not advise his clients of this information though he continued to pursue the remedies under the mortgage on behalf of the clients and advanced no further monies to or on behalf of the Mortgagors.

65. In early October, the Solicitor renewed the Second Mortgage for a further year at an interest rate of 16 percent. He regarded this to be in the client's interest, though again he failed to advise his clients of the circumstances and the reasons for his views.

66. The Duncans never executed the renewal agreement and defaulted in making the October interest payment under the renewed mortgage.

67. The Solicitor failed to advise Mr. Glinos that the Duncans had defaulted on the October 1989 payment under the renewed mortgage and that Revenue Canada had a judgment against Mr. Duncan.

68. The Duncans continued in default under the Second Mortgage from and after October, 1989. The Solicitor made the interest payments to Mr. Glinos until May 31, 1990. The first mortgagee commenced power of sale proceedings on November 29, 1989. On March 27, 1990, the Solicitor issued a Statement of Claim against the Duncans for their continued default under the Third Mortgage. On May 24, 1990, the Solicitor, in Trust, obtained judgment in the amount of \$141,273.97 against the Duncans and for possession of the Guelph Property, as a result of the Duncans' default under the third mortgage. The Solicitor did not advise Mr. Glinos of all of these circumstances until July, 1990. (Tab 28 and 29, Document Book).

69. By letter dated July 16, 1990, the Solicitor advised Mr. Glinos of the following facts:

- (i) the Second Mortgage had been in default since October 31, 1989;
- (ii) the Solicitor had been making payments under the Second Mortgage;
- (iii) while the property was listed for sale by Royal LePage and since an offer did not seem to be forthcoming, the Solicitor could not afford to continue making the mortgage payments so he stopped as of May 31, 1990;
- (iv) while making the mortgage payments, the Solicitor started legal proceedings against the owners by issuing a Notice of Sale under Mortgage on September 22, 1989 so that the property could be sold after November 1, 1989;
- (v) on March 27, 1990, the Solicitor issued a Statement of Claim and a Judgment was obtained on May 24, 1990 together with a writ of possession;
- (vi) on June 13, 1990, the Solicitor gave an exclusive listing for one day as he was told that someone was interested in making an offer. No offer materialized.

70. The Guelph Property was sold under Power of Sale by the first mortgagee in February 1991 for \$275,000.00. As a result, no monies were available under the Power of Sale for the Solicitor's clients. The Solicitor failed to fully advise his clients of all of the circumstances surrounding their investments. Though the Solicitor never contemplated that he would personally own this investment but rather that it would be syndicated to his clients, he did fail to advise his clients that their monies had replaced his participation in the loans.

71. Both Mr. Gagliardi and Mr. Glinos sued the Solicitor in connection with this transaction. The lawsuits were settled in 1994 by way of payment of \$90,000.00 to Mr. Gagliardi and approximately \$113,000.00 (\$94,000.00 for the claim and approximately \$18,000.00 for legal fees) to Mr. Glinos by the Lawyers' Professional Indemnity Company. Mrs. Peretz received the sum of \$40,000.00 from the Lawyers' Professional Indemnity Company in October of 1993.

28 Minnacote Avenue, Scarborough, Ontario and 59 Mansewood Gardens, Scarborough

72. Alvanzo and Eunice Honeyghan were the owners of the two above-noted properties referred to as the "Minnacote Property" and the "Mansewood Property". At the time of these events, they resided at the Mansewood property and were constructing a new house at the Minnacote Property.

73. The Honeyghans required financing for the construction of a house on the Minnacote Property. They contacted Larry McNamara who told them to contact the Solicitor.

74. The Honeyghans first met the Solicitor when they attended at his office to sign the mortgage documentation. The Solicitor explained the documents to them but failed to advise them to obtain independent legal advice or representation as the Solicitor was also acting for certain of the mortgagors/lenders.

75. On April 10, 1990, the Solicitor registered a mortgage in favour of Arnold Epstein, Trustee in the amount of \$86,000.00 on the title to the Minnacote Property, where it was a third mortgage (the "Minnacote Mortgage"). The Minnacote Mortgage was registered collaterally on the Mansewood Property, where it stood fourth. (Tab 30, Document Book)

76. Before the granting of these mortgages, the Solicitor reviewed appraisals of the two properties. The Minnacote Property was valued at \$310,000.00 and \$425,000.00 on completion. It was encumbered to the extent of \$345,000.00. This included a \$226,000.00 mortgage on the Minnacote Property, collaterally secured by a third mortgage on the Mansewood Property.

77. The Mansewood Property was valued at \$245,000.00 and was encumbered by a first, second and the collateral third mortgage for \$226,000.00 previously referred to. The total encumbrances on this property were \$185,750.00, excluding the \$226,000.00 collateral third mortgage.

78. At the time, the Solicitor had also seen a credit check on the Honeyghans dated March 30, 1990 which was positive and regarded this as an attractive investment, particularly with an interest return of 18%. As the Solicitor later noted in a letter dated August 29, 1991 to Gail Weber:

"...The value of these properties did not stand up. I am sure you will agree that almost without exception every single residential property in Ontario has gone down in value, many for as much as 30%....I know anyone would look at these mortgages and say "what a terrible investment this was" and with the results obtained it is hard to argue, except to be fair the mortgages had to be looked at as of the time the mortgage was started. ie. in a rising market, the prices of property is increasing almost daily and any investment in property looked good - quite different than the way things are today.."

22nd May, 1997

79. The funds under the Minnacote Mortgage were to be advanced in three stages. The initial advance was in the amount of \$39,000.00. A Declaration of Trust dated May 10, 1990, reflects that \$31,500.00 of the initial advance belonged to his clients, the Woodgates, and the balance of \$7,500.00 (representing the Solicitor's arranging fee) belonged to the Solicitor. (Tab 31, Document Book)

80. The \$39,000.00 advance brought the total encumbrances to \$569,750.00, approximately \$14,750 above the appraised values (absent completion) and approximately \$100,250.00 below the appraised values upon completion of the Minnacote Property.

81. The Honeyghans received \$21,435.00 from the \$39,000.00 advance. From that balance, an arranging fee of \$15,000.00 was paid; \$7,500.00 to Mr. McNamara's company and \$7,500.00 retained by the Solicitor. Though the Solicitor expected that the Woodgates knew that he was receiving consideration for arranging the transaction, he did not advise them of his specific arranging fee, of which they were unaware (Tab 32 & 33, Document Book).

82. On June 7, 1990, the Solicitor received a further \$20,000.00 from his client Gail Weber for investment. From these funds, he advanced another \$18,000.00 to the Honeyghans bringing the total advance to \$57,000.00 (Tab 34, Document Book). The Solicitor did not obtain appraisals on the two properties before making this advance.

83. After making this second advance, the Solicitor commissioned new appraisals of the two properties that disclosed that at the end of June 1990, the Minnacote Property had a value of \$325,000.00 as is and \$450,000.00 - \$475,000.00 upon completion in September 1990. The Mansewood Property was valued at \$212,500.00, totalling \$537,500.00. At that time, the total mortgage financing on the two Properties was \$587,750. The Solicitor refused to make a third advance. (Tab 35, Document Book)

84. The Honeyghans made only two mortgage payments, on May 9 and June 13, 1990 and then the Minnacote Mortgage went into default. Ms. Weber received no payments.

85. On September 24, 1990, the first mortgagee on the Minnacote Property, Prenor Trust, issued a Notice of Sale. The Solicitor was one of the parties served. (Tab 36, Document Book)

86. In August 1991, the Mansewood Property was sold under power of sale for \$190,000.00.

87. The Solicitor did not adequately outline the financial circumstances, as they arose, relating to the clients and failed to advise them of his potential conflict of interest in acting for both the borrowers and the lenders.

88. Ms. Weber and the Woodgates did not recover any of their mortgage monies.

15 Wembley Road, Toronto

89. This property (the "Property") was the Solicitor's personal residence, registered in the name of the Solicitor's wife.

90. At the material time, the Property was encumbered by two mortgages: a mortgage to the Canadian Imperial Bank of Commerce ("CIBC") of \$40,000.00, registered on October 3, 1985 and a mortgage of \$300,000.00 in favour of Guaranty Trust, registered on February 29, 1988. All parties, including the CIBC, treated the Guaranty Trust mortgage as prior in interest to the CIBC mortgage (see abstract - Tab 37, Document Book).

22nd May, 1997

91. In October 1988, the Solicitor arranged for a mortgage loan from a personal friend and solicitor, J.S. Ublansky (the "Ublansky mortgage"). Mr. Ublansky had provided a number of loans to the Solicitor in relation to various properties, including this one.

92. The Ublansky mortgage was to be a third mortgage of \$200,000.00 for two years with interest payable monthly. The Solicitor was to act for Mr. Ublansky in the preparation and registration of the mortgage. The terms of the mortgage were confirmed in a letter dated October 13, 1988 from Mr. Ublansky to the Solicitor (Tab 38, Document Book). The letter enclosed a trust cheque in the amount of \$149,769.86 representing the balance of the advance after certain deductions.

93. Both the Solicitor and his wife executed the mortgage documentation for the Ublansky mortgage on October 21, 1988. The funds under the mortgage were advanced and used by the Solicitor. However, the Solicitor failed to register the mortgage at that time.

94. On November 3, 1988, the Solicitor and his wife executed mortgage documentation in favour of the Canadian Imperial Bank of Commerce regarding a mortgage for \$185,000.00, collateral to a guarantee provided by the Solicitor on November 1, 1988. This mortgage was registered on November 29, 1988 and became a third mortgage (Tab 39, Document Book). Mr. Ublansky acted for the CIBC in relation to this mortgage.

95. On December 19, 1989, a further mortgage was registered by the CIBC for \$325,000.00, collateral to the Solicitor's guarantee (Tab 40, Document Book). Upon the registration of this mortgage, the mortgages for \$40,000.00 and \$185,000.00 were both to be discharged by CIBC's solicitors on this transaction, Strathy Archibald and Seagram. However, those mortgages were not discharged at that time (see mortgage instructions - Tab 41, Document Book).

96. In mid 1990, the non-registration of the Ublansky mortgage came to the Solicitor's attention. On July 4, 1990, the Solicitor registered the Ublansky mortgage (Tab 42, Document Book). When registered, it became a fifth mortgage.

97. The Solicitor did not deliver a reporting letter to Mr. Ublansky until April 22, 1991 (Tab 43, Document Book). In the letter, the Solicitor reported that the mortgage documentation had been signed in October 1988 and confirmed that interest payments had been made from November 1988 to December 1990 when they fell into arrears. The Solicitor stated that the delay in registration was through inadvertence on his part and advised that the CIBC mortgages of \$40,000.00 and \$185,000.00 were to have been discharged. The Solicitor contacted the CIBC and these mortgages were discharged.

98. As a result of the Solicitor's failure to register the Ublansky mortgage in a timely manner, it ranked in fifth priority when registered and not in third priority. It did not rank third in priority until April 1991 when the two CIBC encumbrances were discharged. For twenty months, the Ublansky advance of \$149,000.00 was not properly secured.

99. The Solicitor failed to serve his client, Mr. Ublansky in a conscientious, diligent and efficient manner in that he received a mortgage advance from him in October 1988, but failed to register the mortgage security until July 4, 1990 after the Solicitor had pledged the Property as security for two loans to the CIBC which mortgages had been registered on title.

V. GENERAL

100. In all cases, the Solicitor arranged and recommended the participation of his clients in mortgages where the Solicitor was also an investor without ensuring that his clients had competent independent legal advice and representation before making their investment.

101. The Solicitor failed to disclose in writing or at all, full and complete information relevant to their investment transactions to his clients and the priority of their mortgages which information was known to the Solicitor and which he should have known could be of concern to his clients.

102. The Solicitor failed to make adequate disclosure to his clients about his personal interest in the various mortgages (through A.E. Investments). He failed to fully advise his clients as to all the circumstances of the loans, including: that he acted for both the borrowers and lenders; the nature of the mortgage transactions; the risks involved; and the status of financing on the various properties at the time of his clients' investments. The Solicitor's failure to adequately advise his clients of this information prevented them from making informed decisions before investing, and in particular, whether the Solicitor was acting in a conflict of interest and what steps they could take to protect their interests.

VI. DISCIPLINE HISTORY

103. The Solicitor does not have a discipline history.

DATED at Toronto, this 3rd day of April, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Arnold Epstein be granted permission to resign.

REASONS FOR RECOMMENDATION

We agree with the joint submission. We find that Mr. Epstein failed to follow the rules of the Society regarding disclosure to clients and conflicts in at least six transactions. We are concerned with his failure to register the Ublansky mortgage on his own home in a timely fashion and his careless real estate practice.

We feel that the penalty jointly proposed by the Society and the Solicitor of ceasing to practising law is appropriate under the circumstances.

Arnold Epstein was called to the Bar on the 25th day of March, 1966.

ALL OF WHICH is respectfully submitted

DATED this 12th day of September, 1996

Jane Harvey, Chair

A correction was made to the Report as follows:

22nd May, 1997

- page 27, second paragraph under the heading of Reasons for Recommendation, the phrase "...ceasing to practising law..." should read "ceasing to practise law..."

There were no submissions. The finding was confirmed and the Report was adopted.

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

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

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

Carried

Re: Mark HENRY - Newmarket

The Secretary placed the matter before Convocation.

Ms. Curtis, Mr. Marrocco and Ms. Puccini withdrew for this matter.

Ms. Cohen appeared for the Society. The solicitor appeared on his own behalf.

Convocation had before it the Report of the Discipline Committee dated 17th April, 1997, together with an Affidavit of Service sworn 1st May, 1997 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 18th April, 1997 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 22nd May, 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

REPORT AND DECISION

Helene B. Puccini, Chair

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

Allan Maclure
for the Society

MARK HENRY
of the Town
of Newmarket
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 13, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 23, 1996, Complaint D3/96 was issued against Mark Henry alleging that he was guilty of professional misconduct.

The matter was heard in public on March 13, 1996 before Helene Puccini sitting as a single benchler. The Solicitor attended the hearing unrepresented by counsel. Allan Maclure appeared on behalf of the Law Society.

DECISION

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

Complaint D3/96

2. a) He failed to reply to the Law Society regarding a complaint by Dena Moyal despite various letters and telephone messages left for the Solicitor;
- b) He failed to reply with reasonable promptness to communications from another solicitor;
- c) He failed to provide reports to the Office of the Children's Lawyer (Office of the Official Guardian as it was then known) with respect to matters for which he had been retained to act; and
- d) He failed to release a file to the Office of the Children's Lawyer (office of the Official Guardian as it was then known) with respect to a matter for which he had been retained to act.

EVIDENCE

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D3/96 and is prepared to proceed with a hearing of this matter on March 13, 1996.

II. IN PUBLIC/IN CAMERA

2. The parties agreed that this matter should be heard in public pursuant to Section 9 of the Statutory Powers Procedure Act, save and except any evidence which identifies the family names of the Solicitor's child clients, which evidence should be received in camera.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D3/96 and this agreed statement of facts and admits the particulars contained therein. The Solicitor also admits that the facts alleged in the Complaint supported by the facts as hereinafter stated constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to Bar on April 6, 1983. He practices law as a sole practitioner. As a member of the Child Representation Panel of the Office of the Official Guardian (Office of the Children's Lawyer as it is now known), his practice included the representation of children in protection proceedings.

5. On September 22, 1994, Dena Moyal, senior Counsel of the Office of the Official Guardian wrote to the Solicitor requesting the status of thirteen child representation files that had been assigned to him. She requested the Solicitor's response within ten days of the date of her letter, failing which she would bring the matter to the attention of the Law Society. (Document Book, Tab 1)

6. On October 4, 1994, the Solicitor responded, in writing, to Ms. Moyal. He advised her, inter alia, that he would prepare and provide formal reports as soon as possible. (Document Book, Tab 2)

7. On October 14, 1994, Ms. Moyal wrote to the Solicitor. She requested, inter alia, that the Solicitor provide an immediate "update" regarding a specific child representation matter that was in trial, hereinafter referred to as the "B" file. She also asked that he forward all formal reporting letters as soon as possible. (Document Book, Tab 3)

8. On November 17, 1994, Ms. Moyal wrote to the Solicitor. She requested that he respond to her letter to him dated October 14, 1994, and indicated that failing a response, she would bring the matter to the attention of the Law Society. (Document Book, Tab 4)

9. On February 23, 1994 (sic), Ms. Moyal wrote to the Solicitor. She advised the Solicitor, inter alia, that she had not received his response to her letters of October 14, 1994 and November 17, 1994. She requested the Solicitor's response within five days of the date of her letter. (Document Book, Tab 5)

10. On April 3, 1995, Ms. Moyal wrote to the Solicitor. She advised the Solicitor, inter alia, that she was removing him as counsel for the child in the "B" matter and "any other cases assigned to him by the Office of the Official Guardian". She wrote:

Over the course of the last six months, I have attempted to contact you by way of correspondence and telephone calls, to no avail. You have responded by correspondence on one occasion only, that being October 4, 1994 in a very summary, unsatisfactory form.

My last call to you of March 15, 1995 which left the message as being urgent, has to date, not been responded to. Please forward your file on "B" to this office to my attention immediately.

She also advised the Solicitor that she was reporting the matter to the Law Society. (Document Book, Tab 6)

11. On April 4, 1995, Ms. Moyal wrote to the Law Society, enclosing a copy of her letter to the Solicitor dated April 3, 1995. (Document Book, Tab 7)

12. On April 19, 1995, Ms. Moyal wrote to the Solicitor. She expressed concern that the Solicitor had not returned the "B" file in accordance with her letter of April 3, 1995 and she urged the Solicitor to respond immediately. (Document Book, Tab 8)

22nd May, 1997

13. On April 27, 1995, the Law Society wrote to the Solicitor, requesting, inter alia, his comments regarding the complaint of Ms. Moyal dated April 4, 1995. The Solicitor was requested to respond, in writing, within two weeks of his receipt of the Law Society's letter or otherwise to telephone the Law Society if his written reply could not be provided within two weeks. (Document Book, Tab 9)

14. On May 2, 1995, the Law Society left a telephone message for the Solicitor requesting that he call. The Solicitor did not return the call. (Document Book, Tab 10)

15. On May 2, 1995, Ms. Moyal advised the Law Society, inter alia, that she had received no reporting letters or statements of account from the Solicitor. She requested the Law Society's assistance in retrieving a file from the Solicitor which had been reassigned to one of the Official Guardian's in-house counsel. (Document Book, Tab 11)

16. On May 3 and 4, 1995, the Law Society attempted to contact the Solicitor by telephone but was unable to reach him or leave a message. On May 19 and 24, 1995, the Law Society succeeded in leaving messages with the Solicitor's receptionist. (Document Book, Tab 12)

17. The Solicitor did not respond to the Law Society's messages left with his office on May 19 and 24, 1995.

18. On May 31, 1995, the Law Society wrote to the Solicitor advising him, inter alia, of his obligation to respond promptly to 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 for further instructions. This letter was sent by registered mail and was returned to the Law Society marked "unclaimed". (Document Book, Tab 13)

19. On August 25, 1995, Ms. Moyal advised the Law Society that she had received a file from the Solicitor on May 12, 1995. She also advised that the Solicitor had not communicated with her since his letter of October 4, 1994 and that he had not provided reports regarding the child representation matters that had been assigned to him. (Document Book, Tab 14)

20. As of March 12, 1996, the Solicitor had not provided Ms. Moyal with a reporting letters regarding the thirteen child representation matters which had been assigned to him, despite his receipt of correspondence and telephone messages from Ms. Moyal and her office.

21. As of March 12, 1996, the Solicitor has not replied to the Law Society's request for his response to the complaint of Ms. Moyal, despite his receipt of the Law Society's letter of April 27, 1995 and telephone messages of May 2, 19 and 24, 1995.

DISCIPLINE HISTORY

22. On January 10, 1991, the Solicitor was reprimanded in Committee with costs of \$500.00 for breach of undertaking to another Solicitor and for failure to reply to the Law Society with respect to a complaint made by another Solicitor.

23. On April 14, 1992, the Solicitor was reprimanded in Committee with costs of \$1,000.00 for failure to satisfy an order of the Committee to pay costs in the amount of \$500.00 and for failure to reply to the Law Society with respect to two complaints made against him.

DATED at Toronto this 13 day of March, 1996."

RECOMMENDATION AS TO PENALTY

It is recommended that Mark Henry be reprimanded in Convocation provided that he responds satisfactorily to the Official Guardian's Office; namely Dena Moyal, Senior Counsel, regarding her letter of September 22, 1994 and subsequent correspondence, failing which the Solicitor will be suspended for one month. Costs of \$500.

REASONS FOR RECOMMENDATION

The Solicitor has been found guilty of professional misconduct in that he failed to respond to his client, the office of the Children's Lawyer, and to report to them in a timely manner on thirteen files which had been assigned to him. At the time of the hearing all of the files had been re-assigned to other lawyers. Evidence was heard that the Solicitor had completed the work for the children in a timely and satisfactory manner and that there were no complaints about the quality of the work he had done. The only complaint was that he had not provided the required status reports.

The Solicitor accepted full responsibility for his behaviour and seemed to be truly contrite. He admitted that he seemed to have a problem with procrastination for certain tasks and that he was seeking counselling for this problem. The Solicitor expressed that he felt so badly about not yet having completed the reporting on these files that he was not submitting an account to the Official Guardian for his work on these files.

The Solicitor consented to the penalty and to paying costs of \$500. He promised to respond before this matter is heard in Convocation.

The penalty was thought to be necessary in this case in order to impress upon the Solicitor his duty under Rules 2 and 13 to reply and report promptly, and to compel his compliance with these Rules.

This is the Solicitor's third incidence of failure to comply.

Mark Henry was called to the Bar on the 6th day of April, 1983.

ALL OF WHICH is respectfully submitted

DATED this 17th day of April, 1997

Helene Puccini

There were no submissions. The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation provided he responds satisfactorily to the Official Guardian's Office failing which the solicitor be suspended for a period of 1 month and pay costs in the amount of \$500.

Ms. Cohen advised Convocation that the costs had been paid and the solicitor had responded satisfactorily to the Official Guardian's Office.

Both counsel and the solicitor made submissions in support of a reprimand in Convocation.

22nd May, 1997

It was moved by Mr. Crowe, seconded by Mr. Carey that the solicitor be reprimanded.

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

The Crowe/Carey motion 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 reprimanded.

The Treasurer administered the reprimand.

Re: David Samuel HOVLAND - Toronto

The Secretary placed the matter before Convocation.

Ms. Puccini withdrew for this matter.

Mr. Stuart 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 17th April, 1997, together with an Affidavit of Service sworn 1st May, 1997 by Yvette Soulliere that she had effected service on the solicitor by registered mail on 18th April, 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

Helene Puccini

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

Neil Perrier
for the Society

DAVID SAMUEL HOVLAND
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: April 10, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On January 8, 1996, Complaint D251/95 was issued against David Samuel Hovland alleging that he was guilty of professional misconduct.

22nd May, 1997

The matter was heard in public on April 10, 1996 before Helene Puccini at a single panel hearing. The Solicitor was present and was not represented by counsel. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D251/95

2. A) He has breached an Order of Convocation to suspend his practise of law for failure to pay a late filing fee by continuing to practise during the period of his suspension from March 25 to May 31, 1994.

EVIDENCE

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

"AGREED STATEMENT OF FACTS"

I. JURISDICTION AND SERVICE

1. The Solicitor admits service of Complaint D251/95 and is prepared to proceed with a hearing of this matter on April 10, 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 D251/95 and admits the particulars contained therein.

IV. FACTS

4. The Solicitor was called to the Bar on February 7, 1992 and practised as an associate with Sclodnick & Kavassalis. He has been administratively suspended since December 31, 1995, for non-payment of his annual fees.

5. On or about September 10, 1993, a Notice of Default in Annual Filing was sent to the Solicitor. A copy of this Notice is attached hereto as Exhibit 1.

6. The Solicitor did not make the required filing, and on or about October 19, 1993, a Second Notice in Default in Annual Filing was sent to the Solicitor. This Notice contained a warning that, should the filing not be received by November 10, 1993, a late filing fee would begin to accrue. This Notice was sent to the Solicitor by registered mail and the acknowledgement of receipt card indicates it was received on October 25, 1993. A copy of this Notice of acknowledgement of receipt are attached hereto as Exhibit 2.

22nd May, 1997

7. The Solicitor did not make the required filing and, on or about February 15, 1994, a Third Notice of Default in Annual Filing was sent to the Solicitor. This Notice contained a warning that, should the late filing fee not be received by the Law Society by March 24, 1994, the Solicitor would be suspended as of the next date. This Notice was also sent by registered mail and the acknowledgement of receipt card indicates it was received on February 18, 1994. A copy of this Notice and acknowledgement of receipt card are attached hereto as Exhibit 3.

8. The Solicitor did not pay the late filing fee and, on or about March 24, 1994, the Society wrote to the Solicitor, informing him that he was suspended as of March 25, 1994. This letter was sent by registered mail and, as indicated by the acknowledgement and receipt card, was received on March 29, 1994. A copy of this letter and acknowledgement of receipt card are attached hereto as Exhibit 4.

9. On May 31, 1994, the late filing fee and reinstatement fee were received by the Society from the Solicitor and the Solicitor was reinstated as of that date.

10. Thus, the Solicitor was suspended for the period of March 25, 1994 to May 31, 1994, inclusive.

11. During that period of time, the Solicitor continued to practise. On May 17, 1995, he was spoken to by a member of the Law Society's audit staff and filled out a questionnaire with respect to the suspension. A copy of this questionnaire is attached hereto as Exhibit 5.

12. During the period of suspension, the Solicitor's continued practising is evidenced by the following:

- a) The Solicitor's letter to the Ontario Legal Aid Plan dated April 12, 1994 and enclosed statement of account, a copy of which is attached hereto as Exhibit 6;
- b) The Solicitor's statement of account of April 9, 1994 on behalf of client, Rosa Henriques, a copy of which is attached hereto as Exhibit 7;
- c) The Solicitor's memorandum to a process server dated April 18, 1994, regarding his client Rosa Henriques, a copy of which is attached hereto as Exhibit 8;
- d) A Notice of Motion dated April 18, 1994 (including Petition for Divorce issued April 11, 1994), prepared by the Solicitor on behalf of his client, Rosa Henriques, a copy of which is attached hereto as Exhibit 9;
- e) The Solicitor's reporting letter to his client, Rosa Henriques, dated April 22, 1994, a copy of which is attached hereto as Exhibit 10;
- f) The Solicitor's letter to the Ontario Legal Aid Plan dated April 29, 1994 and enclosed statement of account, a copy of which is attached hereto as Exhibit 11;
- g) Requisition and Notice of Motion dated May 20, 1994 (including Affidavit of Petitioner sworn May 20, 1994), prepared by the Solicitor on behalf of his client, Rosa Henriques, a copy of which is attached here to as Exhibit 12;

22nd May, 1997

- h) The Solicitor's memorandum to a process server dated May 20, 1994, regarding the Solicitor's client, Rosa Henriques, a copy of which is attached hereto as Exhibit 13;
- j) The Solicitor's letter to his client, Alberto Olivares Debrini, dated April 22, 1994, a copy of which is attached hereto as Exhibit 15;
- k) An affidavit of Service dated April 22, 1994, and sworn by the Solicitor on behalf of his client, Alberto Olivares Debrini, a copy of which is attached hereto as Exhibit 16;
- l) The Solicitor's memorandum to a process server dated April 22, 1994 regarding the Solicitor's client, Alberto Olivares Debrini, a copy of which is attached hereto as Exhibit 17;
- m) The Solicitor's letter to the Ontario Legal Aid Plan dated April 29, 1994 and enclosed statement of account, a copy of which is attached hereto as Exhibit 18;
- n) The Solicitor's letter to the Ontario Legal Aid Plan dated May 24, 1994 and the enclosed statement of account, a copy of which is attached hereto as Exhibit 19;
- o) The Solicitor's letter to the Ontario Legal Aid Plan dated March 21, 1994, on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 20;
- p) An Order dated April 12, 1994, regarding the Solicitor's client, David Blodgett, a copy of which is attached hereto as Exhibit 21;
- q) The Solicitor's letter to the Registrar of the Ontario Court dated April 13, 1994 on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 22;
- r) The Solicitor's letter to the Family Support Plan dated April 13, 1994 on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 23;
- s) The Solicitor's letter to the Ontario Legal Aid Plan dated April 19, 1994 and enclosed statement of account, a copy of which is attached hereto as Exhibit 24;
- t) The Solicitor's letter to the Ontario Legal Aid Plan dated April 19, 1994, on behalf of his client, David Blodgett, a copy of which is attached here to as Exhibit 25;
- u) The Solicitor's letter to the Family Support Plan dated April 25, 1994 on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 26;
- v) The Solicitor's letter to Lesley Latimer dated April 27, 1994, a copy of which is attached hereto as Exhibit 27;
- w) The Solicitor's letter to his client, David Blodgett, dated April 27, 1994, a copy of which is attached hereto as Exhibit 28;
- x) The Solicitor's letter to the Family Support Plan dated April 27, 1994, on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 29;

22nd May, 1997

- y) Notice of Change/Amendment to Legal Aid Certificate dated April 28, 1994 on behalf of the Solicitor's client, David Blodgett, a copy of which is attached hereto as Exhibit 30;
- z) A letter to the Solicitor dated April 29, 1994 from Kozlowski & Company regarding the Solicitor's client, David Blodgett, a copy of which is attached hereto as Exhibit 31;
- aa) The Solicitor's letter to Kozlowski & Company dated May 11, 1994, on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 32;
- bb) The Solicitor's letter to the Ontario Legal Aid Plan dated May 17, 1994, and enclosed statement of account, a copy of which is attached hereto as Exhibit 33;
- cc) The Solicitor's notes of May 19, 1994 telephone conversation regarding his client, David Blodgett, a copy of which is attached hereto as Exhibit 34;
- dd) The Solicitor's letter to Kozlowski & Company dated May 24, 1994, on behalf of his client, David Blodgett, a copy of which is attached hereto as Exhibit 35;
- ee) A letter to the Solicitor dated May 26, 1994 from Kozlowski & Company regarding the Solicitor's client, David Blodgett, a copy of which is attached hereto as Exhibit 36;
- ff) The Solicitor's letter to the Ontario Court dated March 21, 1994, on behalf of his client, G.

RECOMMENDATION AS TO PENALTY

It is recommended that David Samuel Hovland be suspended for a period of two months and that he pay Law Society costs in the amount of \$500.

REASONS FOR RECOMMENDATION

The Law Society counsel requested a penalty of two months suspension with which I agree. This period of time is approximately equivalent to the amount of time the Solicitor practised while under suspension.

David Samuel Hovland was called to the Bar on February 7, 1992.

ALL OF WHICH is respectfully submitted

DATED this 17th day of April, 1997

Helene Puccini

There were no submissions. The finding was confirmed and the Report was adopted.

22nd May, 1997

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

Mr. Stuart made submissions in support of the recommended penalty but that it be amended by having the suspension commence at the conclusion of the administrative suspension.

It was moved by Ms. Ross, seconded by Mr. Cole that the solicitor be suspended for a period of 2 months commencing at the conclusion of the administrative suspension.

Counsel, the reporter and the public withdrew.

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

Counsel, the reporter and the public were recalled.

There were questions from the Bench.

Counsel, the reporter and the public withdrew.

The Adams/Wilson motion for a 3 month suspension was voted on and lost.

The Ross/Cole motion to adopt the recommended penalty as amended was voted and carried.

Counsel, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 2 months to commence at the conclusion of the administrative suspension and to pay the Society's costs of \$500.

Re: Gary Michael YAFFE - Toronto

Mr. Marrocco withdrew for this matter.

Mr. Stuart appeared on behalf of the Society. The solicitor was contacted by telephone.

The solicitor made submissions regarding his inability to attend in person to receive the reprimand due to the travel expenses involved and the time away from his practice.

Mr. Stuart made submissions regarding the applicability of the policy regarding reprimands.

It was moved by Ms. Stomp, seconded by Mr. Carey that because of the compelling reasons submitted by the solicitor that he be reprimanded by telephone.

Carried

The Treasurer administered the reprimand.

Re: Beverlie Ellen CAMINSKY - Ottawa

The Secretary placed the matter before Convocation.

Ms. Curtis withdrew for this matter.

22nd May, 1997

Ms. Elizabeth Cowie 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 18th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 18th April, 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

Philip Epstein, Q.C.

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

Elizabeth Cowie
for the Society

BEVERLIE ELLEN CAMINSKY
of the City
of Ottawa
a barrister and solicitor

Not Represented
for the solicitor

Heard: December 12, 1996 &
March 3, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On June 12, 1996 Complaint D170/96 was issued against Beverlie Ellen Caminsky alleging that she was guilty of professional misconduct.

The matter was heard in public on December 12, 1996 and March 3, 1997 before Philip Epstein, Q.C. sitting as a single bencher. The Solicitor attended the hearing on December 12, 1996 and represented herself. Elizabeth Cowie appeared on behalf of the Law Society. On March 3, 1997 the Solicitor did not attend, nor was she represented. Jane Ratchford appeared on behalf of the Law Society.

DECISION

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

Complaint D170/96

2. a) The Solicitor breached her Acknowledgement to the Law Society, dated August 17, 1995 by failing to provide all outstanding filings by October 9, 1995, despite letters dated October 31, 1995, and December 6, 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 D170/96 and is prepared to proceed with a hearing of this matter on December 12, 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 D170/96 and this agreed statement of facts 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 professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on February 5, 1993. She practised as a sole practitioner from August 1993 to October 1994. The Solicitor did not practise before or after these dates. She has been suspended since March 24, 1995, as a result of her failure to pay her late filing levy.

5. On January 10, 1995, Complaint D394/94 was sworn against the Solicitor alleging professional misconduct with respect to her failure to file her Forms 2 and 3 with the Law Society since her call to the Bar.

Particular 2(a) The Solicitor breached her Acknowledgement to the Law Society, dated August 17, 1995, by failing to provide all outstanding filings by October 9, 1995, despite letters dated October 31, 1995, and December 6, 1995

6. On August 21, 1995, Complaint D394/94 was heard by a Discipline Committee of the Law Society ("discipline hearing"). A transcript of the proceedings before the Discipline Committee are contained at Tab 1 of the Document Book.

7. Based on the Solicitor's admission and an Agreed Statement of Facts, the Committee made a finding of professional misconduct against the Solicitor with respect to Complaint D394/94.

8. At the time of the discipline hearing, the Solicitor had not made her required filings. The Solicitor, however, signed an Acknowledgement, dated August 17, 1995, (Document Book, Tab 2) wherein she agreed to make her future filings within six months of the termination of any fiscal year in which she practised. The Solicitor also undertook to make her outstanding filings no later than October 9, 1995.

9. On the basis of the Solicitor's Acknowledgement, the Law Society asked that the Solicitor be reprimanded in Committee (Document Book, Tab 1, p. 4). Counsel for the Law Society advised the Committee that, but for the Solicitor's Acknowledgement, the Law Society would be asking that the Solicitor be reprimanded in Convocation.

10. After hearing the submissions of counsel for the Law Society and the Solicitor, the Committee decided to reprimand the Solicitor in Committee.

22nd May, 1997

11. The Solicitor did not make the required filings with the Law Society by October 9, 1995.

12. By letter dated October 31, 1995 (Document Book, Tab 3), the Law Society confirmed to the Solicitor that her required filings had not been made as of that date and asked her to make the outstanding filings within two weeks. The Solicitor did not respond.

13. By registered letter dated December 6, 1995 (Document Book, Tab 4), the Law Society confirmed to the Solicitor that she had not responded to the letter of October 31, 1995, and advised her that if the filings were not received by December 15, 1995, the matter would be referred to the Discipline Committee. The letter was signed for on December 11, 1995. The Solicitor did not respond.

14. To date, the Solicitor has not provided the outstanding filings for the fiscal years ending February 5, 1994, February 5, 1995 or February 6, 1996, which she was required to provide by her Acknowledgement, dated August 17, 1995.

V. DISCIPLINE HISTORY

15. On August 21, 1995, the Solicitor was found guilty of professional misconduct with respect to her failure to file her Forms 2 and 3 since her call to the Bar and reprimanded in Committee.

DATED at Toronto this 12th day of December, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Beverlie Ellen Caminsky be suspended for a period of one month and from month to month thereafter until her filings are completed in a manner satisfactory to the Society.

REASONS FOR RECOMMENDATION

The Solicitor has been charged with professional misconduct and the grounds for that complaint are set out in the Agreed Statement of Facts which was filed as exhibit 2. The Solicitor admitted professional misconduct, and accordingly she is found guilty of professional misconduct.

On December 12, 1996, I adjourned the matter with respect to penalty, to proceed before me on March 3, 1997, peremptory to the Solicitor. I realized and appreciated at that time that the Solicitor had serious financial and other problems which were affecting her ability to cope with the filing requirements of the Society. I fully expected the Solicitor to appear on March 3rd, 1997 with the requisite filings fully completed. Instead, to my consternation, she left a telephone message on the day of hearing with the Society, indicating that she could not attend but that she was otherwise engaged in Ottawa, and she faxed a letter dated March 3rd, 1997 which was marked as exhibit 4. It indicated that the Form 2's were filed, but the Form 1 was not filed, and the Form 3 was not filed.

The Solicitor was aware of our discussion and my indications that the matter was peremptory to her, and she was given almost three months to complete the filings. What is astounding to me, is that on the very date for the hearing, the Solicitor not only did not appear, but did not complete the filings and simply sent a fax.

22nd May, 1997

I am very cognizant of the Solicitor's problems and I have no doubt that they are a factor in her inability to file. However, in light of the incomplete filings, in light of the Solicitor's non-attendance and in light of the fact that the matter was marked peremptory, I do not believe that I have any other alternative but to accede to the Society's request that Ms. Caminsky be suspended for one month and from month to month thereafter until her filings are completed in a manner satisfactory to the Society and I so recommend. Given Ms. Caminsky's financial circumstances, it is my belief that she has an inability to pay and I am not going to recommend any costs.

Beverlie Ellen Caminsky was called to the Bar on February 5, 1993.

ALL OF WHICH is respectfully submitted

DATED this 18th day of April, 1997

Philip Epstein, Q.C.

The following correction was made:

- first page, first line - the word "issued" should be "issued".

Ms. Cowie advised that the solicitor would not be attending.

The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month and from month to month thereafter until her filings are completed to the satisfaction of the Society.

Ms. Cowie advised that the filings had not been made and made submissions in support of the recommended penalty.

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

Carried

Re: Clayton James WALLACE - Hamilton

The Secretary placed the matter before Convocation.

Ms. Puccini withdrew for this matter.

Ms. Cohen 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 17th April, 1997, together with an Affidavit of Service sworn 21st April, 1997 by Ron Hoppe that he had effected service on the solicitor by registered mail on 18th April, 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:

22nd May, 1997

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Helene Puccini, Chair

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

Rhonda Cohen
for the Society

CLAYTON JAMES WALLACE
of the City
of Hamilton
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 13, 1996

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On November 6, 1995, Complaint D335/95 was issued against Clayton James Wallace alleging that he was guilty of professional misconduct.

The matter was heard in public on March 13, 1996 before Helene Puccini sitting as a single bencher. The Solicitor participated in the hearing by telephone conference and was unrepresented by counsel. Rhonda Cohen appeared on behalf of the Law Society.

DECISION

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

Complaint D335/95

2. a) He failed to file with the Society 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*.

Evidence

1. The Solicitor signed an Agreed Statement of Facts on March 13, 1996, admitting the particular and that it constituted professional misconduct.
2. The Solicitor was co-operative with the Society.
3. The Solicitor indicated that the reason he had not filed was financial.

The evidence disclosed that the Solicitor had not made the required filing by July 31, 1995, nor to date.

A finding of professional misconduct was therefore made.

22nd May, 1997

RECOMMENDATION AS TO PENALTY

It is recommended that Clayton James Wallace be reprimanded in Convocation if his filings are completed by the date of Convocation, failing which he be suspended for a period of one month and month to month thereafter until his filings are completed. No costs.

The Solicitor has no discipline history. He was called to the Bar on April 15, 1987.

ALL OF WHICH is respectfully submitted

DATED this 17th day of April, 1997

Helene Puccini

There were no submissions. The finding was confirmed and the Report was adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation if his filings are completed failing which he be suspended for a period of 1 month and month to month thereafter until his filings are completed.

Ms. Cohen advised that the solicitor had not completed his filings and made submissions in support of the 1 month suspension to commence at the conclusion of the administrative suspension.

It was moved by Ms. Ross, seconded by Mr. Wright that the solicitor be suspended for a period of 1 month to commence at the conclusion of any administrative and discipline suspensions.

Carried

Re: Stanley David GOLDBERG - Toronto

The Secretary placed the matter before Convocation.

Messrs. Millar, Wilson, Swaye and Cole and Ms. Curtis withdrew for this matter.

Ms. Georgette Gagnon 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 5th March, 1997, together with an Affidavit of Service sworn 19th March, 1997 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th March, 1997 (marked Exhibit 1), together with the Report of the Discipline Committee dated 18th April, 1997, together with the Affidavit of Service sworn 21st April, 1997 by Ron Hoppie that he had effected service on the solicitor on 18th April, 1997 (marked Exhibit 2). Copies of the Reports having been forwarded to the Benchers prior to Convocation, the reading of them was waived.

The Report of the Discipline Committee dated March 5th, 1997 is as follows:

22nd May, 1997

THE LAW SOCIETY OF UPPER CANADA

REPORT AND DECISION

Nancy L. Backhouse, Chair
Larry A. Banack
Gerald A. Swaye, Q.C.

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

Georgette Gagnon
for the Society

STANLEY DAVID GOLDBERG
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: March 26 & 27, 1996
October 17, 1996 and
January 24, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 22, 1995 Complaint D181/95 was issued; on October 23, 1995 Complaint D292/95 was issued; on January 10, 1996 Complaint D381/95 was issued; and on January 23, 1996 Complaint D35/96 was issued against Stanley David Goldberg alleging that he was guilty of professional misconduct.

The matter was heard in public by this Committee composed of Nancy Backhouse, Chair, Larry Banack, and Gerald A. Swaye, Q.C.

The hearing proceeded on March 26 and 27, 1996. The Solicitor did not attend. Ed Conway attended on his behalf although he advised the Committee that he had not been formally retained.

The Committee met on the following days:- April 26, 1996, the Solicitor was not in attendance and Mr. Conway attended but not on the record; May 24, 1996, the Solicitor attended and the matter was adjourned; June 13, 1996, the Solicitor attended and the matter was adjourned; October 17, 1996 the Solicitor attended and the matter proceeded; November 15, 1996, the Solicitor attended and the matter was adjourned; November 29, 1996, the Solicitor did not attend and the matter was adjourned; on January 24, 1997, the Solicitor did not attend and the matter proceeded in his absence.

Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D181/95

2. a) he failed to fulfil a financial obligation incurred in connection with his practice in favour of Legal Transcript Services in the amount of \$790.21 plus interest;

22nd May, 1997

- b) he failed to comply with his Undertaking to the Law Society dated May 31, 1991 to meet financial obligations incurred on behalf of clients by failing to fulfil a financial obligation to Legal Transcript Services;
- c) he failed to reply to the Law Society regarding a complaint by Katie Thomson despite letters dated October 28, 1994 and December 6, 1994 and telephone messages left on November 22, 1994 and December 1, 1994;
- d) he failed to provide an account of the proceeds from a real estate purchase and sale to his clients, Florinda and John Lettieri;
- e) he failed to reply to the Law Society regarding a complaint by John Lettieri despite letters dated September 14, 1994 and November 3, 1994 and telephone messages left on October 12, 1994 and October 24, 1994;
- f) he failed to comply with his Undertaking to the Law Society dated May 31, 1991 to reply promptly to communications from the Law Society by failing to reply to letters from the Law Society within one week of receipt of the correspondence and by failing to reply to telephone communications within three business days with respect to complaints by Katie Thomson and John Lettieri; and
- g) he failed to co-operate with the Law Society's attempts to conduct an audit pursuant to sections 9 and 18 of Regulation 708, by failing to produce his books and records as set out in section 15 of Regulation 708 despite the Society's:
 - i) visit on February 6, 1995;
 - ii) letters dated March 17, 1995, April 3, 1995 and April 26, 1995;
 - iii) telephone calls on February 6, 1995, February 9, 1995, February 14, 1995, February 16, 1995, February 17, 1995, February 20, 1995, February 22, 1995, March 10, 1995 and March 13, 1995.

Complaint D292/95

- 2. a) he failed to file with the Society 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.

Complaint D381/95

- 2. a) he failed to serve his clients, Ziad El-Amad and Nada El-Amad, in a conscientious, diligent and efficient manner, in that he:
 - i) failed to proceed in a timely manner with their actions commenced in the District Court of Ontario in 1989 and 1990;
 - ii) failed to properly advise the clients respecting their obligations to fulfil undertakings on an examination for discovery; and

22nd May, 1997

- iii) failed to advise the clients that their action commenced in 1989 was dismissed by motion in June 19, 1993 for failure to comply with undertakings.
- b) he failed to reply to the Law Society regarding a complaint by Ira E. Book despite letters dated June 21, 1995, August 2, 1995, August 29, 1995 and telephone communications on July 13, 14, 1995 and August 9, 11, 14, 1995;
- c) he charged fees of \$20, 781.06 after advising the client, Embassy Beach Hotel, that fees would be no greater than the sum of \$5,000.00;
- d) he removed the sum of \$16,719.67 from trust before delivering an account to the client, Embassy Beach Hotel; and
- e) he failed to comply with his undertaking to the Law Society dated May 31, 1991 to reply promptly to communications from the Law Society, by failing to reply to letters from the Law Society within one week of receipt of the correspondence and by failing to reply to telephone communication within three business days of receipt thereof with respect to the complaint of Ira E. Book.

Complaint D35/96

- 2. a) he failed to co-operate with the Law Society's representative who attempted to conduct an audit pursuant to section 18 of Regulation 708 when he failed to produce his books and records.

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 D181/95, D292/95, D381/95 & D35/96 and is prepared to proceed with a hearing of these matters on October 17, 1996.

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 D181/95, D292/95, D381/95 & D35/96 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 24, 1972. He has been suspended for non-payment of his Errors and Omissions levy since May 26, 1995.

Complaint D181/95

Particular 2a) He failed to fulfil a financial obligation incurred in connection with his practice in favour of Legal Transcript Services in the amount of \$790.21 plus interest.

5. The Solicitor retained Legal Transcript Services for an examination held on May 26, 1993. Legal Transcript Services prepared the transcripts and forwarded an invoice dated June 14, 1993 to the Solicitor in the amount of \$790.21. A copy of the invoice is contained at Tab 1, Volume I of the Document Book.

6. On October 13, 1994, Legal Transcript Services forwarded a reminder notice to the Solicitor which included the accrued interest. A copy of the reminder invoice is contained at Tab 2, Volume I of the Document Book. To date, the Solicitor has not paid the outstanding account.

7. By letter dated October 13, 1994 (Tab 3, Volume I, Document Book), Katie Thomson of Legal Transcript Services made a complaint to the Law Society regarding the Solicitor's failure to pay an outstanding account for services rendered.

Particular 2b) He failed to comply with his Undertaking to the Law Society dated May 31, 1991 to meet financial obligations incurred on behalf of clients by failing to fulfil a financial obligation to Legal Transcript Services.

8. By failing to pay the outstanding account owing to Legal Transcript Services for services rendered, the Solicitor failed to comply with his Undertaking to the Law Society, a copy of which is contained at Tab 4, Volume I of the Document Book.

Particular 2c) He failed to reply to the Law Society regarding a complaint by Katie Thomson.

9. By letter dated October 28, 1994 (Tab 5, Volume I, Document Book), the Law Society wrote to the Solicitor and enclosed a copy of Ms. Thomson's letter of complaint and requested his comments within two weeks. The Solicitor did not respond.

10. On November 22, 1994 and December 1, 1994, a Law Society employee called the Solicitor's office and each time left a message for him to return her call. The Solicitor did not return the calls. A copy of the handwritten notes of the telephone messages is contained at Tab 6, Volume I, of the Document Book.

11. By registered mail dated December 6, 1994 (Tab 7, Volume I, Document Book), the Solicitor was reminded of his professional obligation to respond promptly to communications from the Law Society. The Solicitor was further 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 delivered and signed for on December 9, 1994. The Solicitor did not respond.

12. To date, the Solicitor has not responded to the Law Society regarding the complaint by Katie Thomson of Legal Transcript Services.

Particular 2d) He failed to provide an account of the proceeds from a real estate purchase and sale to his clients, Florinda and John Lettieri.

22nd May, 1997

13. The Solicitor was retained by Mr. & Mrs. Lettieri to complete a purchase and sale transaction on their behalf. The Solicitor quoted fees of \$4,000.00 to be paid from the sale proceeds. As the closing date approached, the Solicitor asked Mr. Lettieri to provide him with \$500.00. On August 12, 1993, John Lettieri provided the Solicitor with a cheque in the sum of \$500.00 (Tab 8, Volume I, Document Book). The transactions closed on August 16, 1993.

14. By letters dated September 7, 1993 (Tabs 9 and 10, Volume I, Document Book), the Solicitor reported to his clients with respect to the sale of 356 Brownridge Drive, Thornhill and the purchase of 154 Castlehill Road, Maple.

15. Mr. & Mrs. Lettieri called the Solicitor several times between September 1993 and August 1994 to request a statement of account. Mr. Lettieri advised that the Solicitor agreed to provide the same but none was received. By facsimile dated July 25, 1994 (Tab 11, Volume I, Document Book), Mr. Lettieri provided the Solicitor with his accounting records showing that he and his wife were entitled to additional funds in the amount of approximately \$4,000.00. The Solicitor was requested to respond by July 28, 1994. The Solicitor did not respond.

16. By letter dated August 11, 1994 (Tab 12, Volume I, Document Book), Mr. Lettieri again advised the Solicitor that he and his wife were entitled to a return of monies. Mr. Lettieri reminded the Solicitor that they called the Solicitor's office over the past twelve months but the Solicitor did not return their calls. Mr. Lettieri advised that when he did speak with the Solicitor, he indicated that Mr. Lettieri would receive "something" from his office but Mr. Lettieri received nothing. Mr. Lettieri advised the Solicitor that if he did not receive all paperwork and a refund from the Solicitor by August 29, 1994, the matter would be referred to the Law Society.

17. By letter dated August 29, 1994 (Tab 13, Volume I, Document Book), Mr. Lettieri made a complaint to the Law Society.

18. On August 31, 1994, the Solicitor's secretary, Mary, called Mr. Lettieri to arrange an appointment. Mr. Lettieri advised that he had already written to the Law Society. The Solicitor's secretary then commented that an appointment was no longer necessary. A copy of Mr. Lettieri's handwritten notes of the telephone conversation with Mary are contained at Tab 14, Volume I of the Document Book.

19. The Solicitor has not provided a final accounting respecting the sale and purchase of real estate to the Lettieris.

Particular 2e) He failed to reply to the Law Society regarding a complaint by John Lettieri.

20. By letter dated September 14, 1994 (Tab 15, Volume I, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Lettieri's letter dated August 29, 1994 and requested his comments within two weeks. The Solicitor did not respond.

21. On October 12, 1994 and October 24, 1994, a Law Society employee called the Solicitor and left messages for him to return her calls. On October 24, 1995, the Solicitor called and advised the Law Society that he had delivered a response to the Law Society's reception in September. The Law Society did not receive this response. The Solicitor advised that he would bring a copy of his response to the Law Society on the following day. A copy of the handwritten notes of these telephone calls with the Solicitor is contained at Tab 16, Volume I of the Document Book.

22nd May, 1997

22. By registered mail dated November 3, 1994 (Tab 17, Volume I, Document Book), 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 Discipline Committee. The Law Society's letter was delivered and signed for on November 7, 1994. The Solicitor did not respond.

23. By letter dated February 3, 1995 (Tab 18, Volume I, Document Book), Mr. Lettieri wrote a further letter to the Law Society.

24. To date, the Solicitor has not responded to the Law Society regarding a complaint by John Lettieri.

Particular 2f) He failed to comply with his Undertaking to the Law Society dated May 31, 1991 to reply promptly to communications from the Law Society by failing to reply to letters from the Law Society within one week of receipt of the correspondence and by failing to reply to telephone communications within three business days with respect to complaints by Katie Thomson and John Lettieri.

25. By failing to reply to communications from the Law Society with respect to complaints made by Katie Thomson and John Lettieri, and by failing to meet the financial obligations of his law practice the Solicitor failed to comply with his Undertaking to the Law Society dated May 31, 1991, a copy of which is contained at Tab 3, Volume I of the Document Book.

Particular 2g) He failed to co-operate with the Law Society's attempts to conduct an audit pursuant to sections 9 and 18 of Regulation 708, by failing to produce his books and records as set out in section 15 of Regulation 708.

26. On February 6, 1995, Lorraine Campbell, an Examiner with the Audit and Investigation Department of the Law Society, attended at the Solicitor's office to commence an audit of the Solicitor's books and records. Ms. Campbell was advised by the receptionist that the Solicitor was out of the office. Ms. Campbell left her business card with the receptionist. The Solicitor called Ms. Campbell later that day and left a message asking her to return his call. Ms. Campbell returned the Solicitor's call who advised that his books and records were with his accountant. The Solicitor further advised that he would call his accountant that day and call Ms. Campbell the following day to schedule an appointment. Copies of the handwritten notes of these telephone communications with the Solicitor are contained at Tabs 19 and 20, Volume I of the Document Book.

27. On February 9, 1995, Ms. Campbell called the Solicitor and was advised by Mary, the Solicitor's secretary, that he was out of the office and that she would have him call Ms. Campbell upon his return. The Solicitor returned Ms. Campbell's call that day leaving a message on her voice mail. When Ms. Campbell returned his call later that day, she was advised that his number was no longer in service. The Solicitor called again advising Ms. Campbell that he was at his doctor's office and that he would call her the following day. Ms. Campbell advised the Solicitor that his number was out of service. The Solicitor indicated that he was aware of this and that he would take care of it. Copies of the handwritten notes of these telephone communications with the Solicitor are contained at Tabs 21, 22, 23 and 24, Volume I of the Document Book.

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28. On February 10, 1995, the Solicitor called Ms. Campbell and advised that he was taking his books to the accountant on the following Monday and that he would call her Monday afternoon to arrange an appointment. A copy of the handwritten notes of this telephone conversation with the Solicitor is contained at Tab 25, Volume I of the Document Book.

29. On February 14, 1995, the Solicitor called Ms. Campbell and left her a voice mail message advising that he would call her that afternoon. Ms. Campbell called the Solicitor that afternoon and was advised that he was not in the office. Ms. Campbell left a message asking the Solicitor to call her by 5:00 p.m. The Solicitor returned Ms. Campbell's call and advised that he was meeting with his accountant the following morning and that he would call her then. Copies of the handwritten notes of these telephone communications with the Solicitor are contained at Tabs 26, 27 and 28, Volume I of the Document Book.

30. On February 16, 1995, Ms. Campbell called the Solicitor and left a message asking him to return her call. On Friday, February 17, 1995, the Solicitor returned Ms. Campbell's call and left a message on her voice mail advising that his books and records would be ready the following Wednesday. He asked her to confirm on Monday, February 20, 1995, that she would be available the following Thursday to commence her audit. Ms. Campbell called the Solicitor and left a message with his receptionist that she would call him on Monday, February 20, 1995. Copies of the handwritten notes of these telephone communications with the Solicitor are contained at Tabs 29, 30 and 31, Volume I of the Document Book.

31. On February 20, 1995, Ms. Campbell called the Solicitor and left a message asking him to return her call to schedule an appointment. On February 21, 1995, the Solicitor called Ms. Campbell and advised that he would check with his accountant to see if the books were ready and that he would get back to her later that afternoon. A copy of the handwritten notes of these telephone communications with the Solicitor are contained at Tabs 32 and 33, Volume I of the Document Book.

32. On February 22, 1995, Ms. Campbell called the Solicitor and left a message with the receptionist asking him to return her call. A copy of the handwritten notes of this telephone message is contained at Tab 34, Volume I of the Document Book.

33. An appointment to meet with the Solicitor to review his books and records was scheduled for February 27, 1995. On that day, the Solicitor called Ms. Campbell to cancel their appointment and reschedule it for March 3, 1995. On March 2, 1995, the Solicitor called Ms. Campbell and cancelled the March 3, 1995 appointment and rescheduled to March 9, 1995. Copies of these handwritten notes of the telephone conversations with the Solicitor are contained at Tabs 35 and 36, Volume I of the Document Book.

34. The Solicitor cancelled the March 9, 1995 meeting. On March 10, 1995, Ms. Campbell called the Solicitor's office and left a message for him to return her call. A copy of the handwritten notes of this telephone message is contained at Tab 37, Volume I of the Document Book.

35. On March 13, 1995, Mary of the Solicitor's office left a message for Ms. Campbell advising that the Solicitor would not be in the office that day but would be contacting her the following day. Ms. Campbell called Mary advising her that she would be in the office the following day. Mary advised that she would have the Solicitor call her as soon as he gets in. A copy of these handwritten notes of the telephone communications with Mary is contained at Tab 38, Volume I of the Document Book.

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36. By ordinary and registered mail dated March 17, 1995 (Tab 39, Volume I, Document Book), the Solicitor was reminded that Ms. Campbell had been instructed to audit his books and records. The Solicitor was advised that if his books and records were not produced by April 3, 1995, the matter would be referred to the Discipline Committee. This letter was delivered and signed for on March 23, 1995.

37. By ordinary and registered mail dated April 3, 1995 (Tab 40, Volume I, Document Book), Ms. Campbell wrote to the Solicitor enclosing a copy of her letter dated March 17, 1995 and advised that if his books and records were not produced by April 13, 1995, the matter would be referred to the Discipline Committee. This letter was delivered and signed for on April 4, 1995.

38. On April 11, 1995, Ms. Campbell spoke to the Solicitor who advised that he would be contacting her that afternoon to arrange an appointment to review his books and records. A copy of the handwritten notes of the conversation with the Solicitor is contained at Tab 41, Volume I of the Document Book.

39. By facsimile dated April 13, 1995 (Tab 42, Volume I, Document Book), the Solicitor advised Ms. Campbell that he was not in a position to provide her with up-to-date books and records for the years 1994 and 1995, although he anticipated that the matter could be completed forthwith. The Solicitor further advised that he would contact Ms. Campbell the following week in order to complete the audit.

40. On April 19, 1995, the Solicitor attended at the Law Society and requested an adjournment of his discipline hearing. The Committee granted the adjournment on the condition that the Solicitor meet with the Law Society's auditors before April 30, 1995. A copy of the Discipline Committee's endorsement on April 19, 1995 is contained at Tab 43, Volume I of the Document Book.

41. By facsimile dated April 26, 1995 (Tab 44, Volume I, Document Book), the Solicitor was reminded that he was to produce his books and records to the Law Society's Audit and Investigation Department by April 30, 1995.

42. To date, the Solicitor has not produced his books and records to the Law Society.

Complaint D292/95

Particular 2a) He failed to file with the Society within six months of the termination of his fiscal year ending January 31, 1995.

43. The Solicitor's fiscal year end is January 31st. The Solicitor did not file his Form 2 or Form 3 within six months of the fiscal year ending January 31, 1995, as required by S.16(2) of Regulation 708 under the Law Society Act.

44. A Notice of Default in Annual Filing, dated August 16, 1995 was received by the Solicitor from the Law Society. A copy of the Notice is contained at Tab 45, Volume I of the Document Book.

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45. By registered mail, the Solicitor received a Second Notice of Default in Annual Filing dated September 18, 1995 from the Law Society. The Solicitor was advised that he had not taken the necessary steps to bring his filings up-to-date and that a fee of \$10.00 per day is applied on filings made after their due dates and on defaults in filings. The Solicitor was advised that once the fee amounted to \$1,500.00 and remained unpaid for four months, he was subject to suspension pursuant to Section 36 of the Law Society Act. The Solicitor was advised that the attracting and paying of a late filing fee did not relieve him from the obligation to make annual filings and that he might be brought before the Discipline Committee for failure to file. The Second Notice was delivered and signed for on September 21, 1995. A copy of the Second Notice and Acknowledgement of Receipt Card are contained at Tab 46, Volume I of the Document Book.

46. The late filing fee began to accrue on October 3, 1995.

47. On October 6, 1995 and October 10, 1995, a Law Society employee called the Solicitor and left messages for him to return her calls. The Solicitor did not return the calls. Copies of the handwritten notes of the telephone messages are contained at Tabs 47 and 48, Volume I of the Document Book.

48. The Solicitor has not provided the outstanding filing.

Complaint D381/95

Particular 2a) He failed to serve his clients, Ziad El-Amad and Nada El-Amad, in a conscientious, diligent and efficient manner.

49. The Solicitor was retained by Ziad and Nada El-Amad to represent them in civil proceedings arising out of two motor vehicle accidents which occurred on or about January 31, 1987 and October 31, 1989. The Solicitor issued statements of claim and both actions were defended. The claims of the El-Amads were for several hundred thousand dollars and compensation for services and permanent injuries and the inability to work. Copies of the pleadings in District Court Action No. 346733/89 (the "First Action") and District Court Action No. 394586/90 (the "Second Action") are contained at Tabs 1-5, Volume II of the Document Book. Examinations for Discovery in the First Action took place on December 17 and 19, 1990. At the examination of Mr. El-Amad, the Solicitor had given several undertakings contained at Tab 6, Volume II of the Document Book.

50. By letter dated March 27, 1991 (Tab 7, Volume II, Document Book), Michelle Nash, a Legal Assistant with the firm Smith, Lyons, requested that the Solicitor comply with the undertakings outstanding in the First Action.

51. The Solicitor provided responses to some of the undertakings. By letters dated September 10, 1991 and April 15, 1992 (Tabs 8 & 9, Volume II, Document Book), Ms. Nash asked the Solicitor to comply with the remaining undertakings immediately, failing which, a motion would be brought to compel answers. The Solicitor did not respond.

52. On September 23, 1992, the Solicitor was served with a Motion Record (Tab 10, Volume II, Document Book) returnable on November 13, 1992. On November 13, 1992, Master Peppiatt ordered that the First Action and the Second Action be tried together and that the outstanding undertakings be complied with within 10 days from the date of the Order. A copy of the Order dated November 13, 1992 is contained at Tab 11, Volume II of the Document Book. The Solicitor did not advise Mr. El-Amad of this motion and court order.

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53. After the motion, the Solicitor took the position that he had not consented to all the terms in the Order. By letter dated December 18, 1992 (Tab 12, Volume II, Document Book), the Solicitor advised Ms. Nash of his position that he would provide responses to the balance of the undertakings by mid January 1993.

54. By letters dated February 10 and April 1, 1993 (Tabs 13 & 14, Volume II, Document Book), Ms. Nash again asked the Solicitor to comply with the outstanding undertakings in the First Action. In Ms. Nash's letter of April 1, 1993, she advised the Solicitor that a motion would be made on April 13, 1993 to have the plaintiff's claim in the First Action struck as a result of non-compliance with the Order of Master Peppiatt dated November 13, 1992 for failure to answer the outstanding undertakings.

55. The Solicitor did not provide answers to the undertakings. The Defendants brought a motion on April 13, 1993. Master Cork ordered that all of the undertakings be completed by May 20, 1993. The Solicitor attended at the motion. A copy of Master Cork's Order is contained at Tab 15, Volume II of the Document Book. Further correspondence was exchanged and further litigation ensued.

56. On May 25, 1993, the defendants brought a motion without notice to dismiss the plaintiff's claim in the First Action. Master McBride made an order dismissing the plaintiff's action. A copy of the draft Order is contained at Tab 16, Volume II of the Document Book.

57. By letter dated May 20, 1993, which was received by Mr. Mew, solicitor for the defendants, on May 25, 1993 (Tab 17, Volume II, Document Book), the Solicitor provided answers to some of the undertakings. Given that the Solicitor's letter, although faxed to Mr. Mew on May 20, 1993, did not come to his attention until after he obtained the May 25, 1993 Order, Mr. Mew agreed to set aside the said Order, in spite of the fact that, the Solicitor had not complied with all the undertakings and had not brought a motion to extend the time to complete the undertakings.

58. On June 10, 1993, the Order of Master McBride dated May 25, 1993 was set aside. A copy of the Order dated June 10, 1993 is contained at Tab 18, Volume II of the Document Book. However, Mr. Mew obtained a further order that day dismissing the First Action because the Solicitor still had not completed the remaining undertakings. A copy of the Order dated June 10, 1993 dismissing the action is contained at Tab 19, Volume II of the Document Book.

59. The Solicitor was advised by letter dated June 22, 1993 (Tab 20, Volume II, Document Book), that the First Action had been dismissed.

60. The Solicitor never advised Mr. & Mrs. El-Amad that the First Action had been dismissed. The Solicitor took no steps to have the Order of June 10, 1993, dismissing the action, set aside or take any other steps to deal with the action.

61. Mr. El-Amad contacted the Solicitor to determine the status of the matters many times in 1993, 1994 and 1995. In April, 1995 Mr. El-Amad and the Solicitor met. Mr. El-Amad asked to see his file and the Solicitor could not provide it. As a result, the Solicitor's services were terminated on or about April 11, 1995. Mr. & Mrs. El-Amad then retained Ira E. Book to continue with the actions. On May 11, 1995, the Solicitor rendered his final account to Mr. El-Amad contained at Tab 21, Volume II of the Document Book.

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62. Mr. Book contacted the defendant's solicitor Mr. Mew as there was no material in the file after April, 1993 provided by the Solicitor. Mr. Book was advised by Mr. Mew on June 12, 1995 that the First Action had been dismissed two years earlier. The Second Action was still pending although no steps had been taken for some time and the action had not been listed for trial. Mr. Book advised the El-Amads of the dismissal of the First Action and the status of the second action. This was the first time that the El-Amads became aware that the First Action had been dismissed.

Particular 2b) He failed to reply to the Law Society regarding a complaint by Ira E. Book despite letters dated June 21, 1995, August 2, 1995, August 29, 1995 and telephone communications on July 13, 14, 1995 and August 9, 11, 14, 1995.

63. By letter dated June 12, 1995 (Tab 22, Volume II, Document Book), Ira E. Book made a complaint to the Law Society regarding the El-Amad matter.

64. By letter dated June 21, 1995 (Tab 23, Volume II, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Book's letter dated June 12, 1995 and requested his comments within two weeks. The Solicitor did not respond.

65. On July 13, 1995, the Law Society called the Solicitor and left a message for him to return the call. On July 14, 1995, the Solicitor returned the call and advised that he would respond by July 18, 1995. A copy of the handwritten notes of the telephone communications with the Solicitor are contained at Tab 24, Volume II of the Document Book.

66. On July 25, 1995, the Law Society called the Solicitor and left a message for him to return the call. The Solicitor returned the call and left two messages for the Law Society to return his calls. The Law Society returned the Solicitor's calls at which time he advised that he would respond by July 27, 1995. A copy of the handwritten notes of the telephone communications with the Solicitor are contained at Tab 25, Volume II of the Document Book.

67. By letter dated July 28, 1995 (Tab 26, Volume II, Document Book), the Solicitor advised the Law Society that he was unable to prepare his response without reviewing the file. The Solicitor further advised that he would be contacting Mr. Book for this purpose and that he would provide a report the following week.

68. By letter dated August 2, 1995 (Tab 27, Volume II, Document Book), the Law Society advised the Solicitor that a response would be expected on or before August 8, 1995. The Solicitor did not respond.

69. On August 9, 1995, the Law Society called the Solicitor and left a message for him to return the call. On August 11, 1995, the Law Society called the Solicitor who advised that he would complete his response that day. A copy of the handwritten notes of the telephone communications with the Solicitor are contained at Tab 28, Volume II of the Document Book.

70. On August 14, 1995, Mary from the Solicitor's office called the Law Society and left a message advising that the Solicitor would be out of the office until August 16, 1995 and that his response would be received that day. A copy of the handwritten notes of the telephone message is contained at Tab 29, Volume II of the Document Book.

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71. By registered mail dated August 29, 1995 (Tab 30, Volume II, Document Book), 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 delivered and signed for on August 31, 1995. The Solicitor did not respond.

72. To date, the Solicitor has not responded to the Law Society regarding a complaint by Ira E. Book.

Particular 2e) He failed to comply with his Undertaking to the Law Society dated May 31, 1991 to reply promptly to communications from the Law Society, by failing to reply to letters from the Law Society within one week of receipt of the correspondence and by failing to reply to telephone communications within three business days of receipt thereof with respect to the complaint of Ira E. Book.

73. By failing to reply to the Law Society with respect to the complaint by Ira E. Book, the Solicitor failed to comply with his Undertaking to the Law Society dated May 31, 1991. A copy of the Solicitor's Undertaking is contained at Tab 31, Volume II of the Document Book.

Particular 2c) He charged fees of \$20,781.06 after advising the client, Embassy Beach Hotel, that fees would be no greater than the sum of \$5,000.00.

Particular 2d) He removed the sum of \$16,719.67 from trust before delivering an account to the client, Embassy Beach Hotel.

74. The Solicitor was retained by Embassy Beach Resort (hereinafter referred to "Embassy") respecting a litigation matter in Ontario. Embassy is an entity carrying on business in the Dominican Republic and as a non-resident, it was required to post security for costs in the amount of \$16,719.67 with the Ontario Court. The action was settled with a payment to Embassy of \$115,000.00. By letter dated September 17, 1993 (Tab 32, Volume II, Document Book), the Solicitor advised Embassy that the balance of his fees would be no greater than \$5,000.00. Canadian Embassy had already paid the Solicitor \$29,000.00 in fees. The Solicitor further advised that the funds paid into court as security would be returned to it and that the monies would be released within 10 days.

75. By letter dated September 24, 1993 (Tab 33, Volume II, Document Book) to Embassy, the Solicitor advised that he had deducted the sum of \$5,000.00 from the proceeds of settlement in respect of his fees. The Solicitor further advised that he would attend to the transfer of the settlement funds to Embassy's account.

76. By letter dated September 27, 1993 (Tab 34, Volume II, Document Book), the Solicitor advised Embassy that he had submitted the necessary documentation to the court regarding the payment out of court. The Solicitor further advised that the procedure would take approximately two weeks and upon receipt of the monies, he would transfer the funds to Embassy's account.

77. By facsimiles dated November 3, November 26 and December 29, 1993 (Tabs 35-37, Volume II, Document Book), Embassy wrote to the Solicitor requesting the status of the security monies paid into court. The Solicitor did not respond to the inquiries.

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78. On or about January 10, 1994, Embassy contacted the court and was advised that the sum of \$16,719.67 had been paid to the Solicitor on November 2, 1993. By letters dated January 10, January 13, February 1 and February 10, 1994 (Tab 38-41, Volume II, Document Book), Embassy wrote to the Solicitor requesting the release of its money. The Solicitor did not respond to Embassy's requests.

79. Embassy subsequently retained David C. Poynton to assist it in recovering the monies. By letters dated May 10 and May 25, 1994 (Tab 42 & 43, Volume II, Document Book), Mr. Poynton wrote to the Solicitor requesting a response with respect to the monies paid into court as security for costs.

80. By letter dated May 27, 1994 (Tab 44, Volume II, Document Book), the Solicitor advised Mr. Poynton that the monies received by way of payment out of court had been applied to the Solicitor's final account. The Solicitor did not provide the final account or any supporting material. The Solicitor further advised that Embassy was aware of the same.

81. By letter dated June 3, 1994 (Tab 45, Volume II, Document Book), Mr. Poynton wrote to the Solicitor and referred him to the Solicitor's letter of September 17, 1993 wherein he indicated that his remaining fees would be no greater than \$5,000.00 and that such amount had been deducted from the settlement funds. The Solicitor was further advised that he had told Embassy that the monies posted for security for costs would be returned to it in addition to the settlement funds owing. The Solicitor was asked to provide Mr. Poynton with copies of his billings to Embassy. The Solicitor did not respond or provide billings.

82. By letter dated June 15, 1994 (Tab 46, Volume II, Document Book), Mr. Poynton again wrote to the Solicitor advising him that unless the funds paid into court together with interest were received by Mr. Poynton's office by June 17, 1994 at 5:00 p.m., he would refer the matter to the Law Society.

83. By facsimile dated June 17, 1994 (Tab 47, Volume II, Document Book), the Solicitor again advised that the monies were applied to his final account. The Solicitor suggested that Mr. Poynton have the account assessed. The Solicitor did not provide a copy of the account to Mr. Poynton.

84. By letter dated June 23, 1994 (Tab 48, Volume II, Document Book), Mr. Poynton requested copies of the Solicitor's accounts and confirmation as to the date that the accounts were sent to Embassy. The Solicitor did not respond.

85. The Solicitor did not provide an account at this time or return the monies to Embassy or its solicitor.

86. By letter dated July 12, 1994 (Tab 49, Volume II, Document Book), David C. Poynton made a complaint to the Law Society regarding the Solicitor.

87. By letter dated July 21, 1994 (Tab 50, Volume II, Document Book), the Law Society wrote to the Solicitor enclosing a copy of Mr. Poynton's letter dated July 12, 1994 and requested his comments within two weeks. The Solicitor did not respond to the Law Society's numerous requests. This matter was then referred to the Discipline Department on a charge of a failure to reply to the Law Society regarding the complaint of David Poynton.

88. By letter dated April 18, 1995 which was received by the Complaints Department on August 9, 1995 (Tab 51, Volume II, Document Book), the Solicitor advised the Law Society that the \$5,000.00 was not an indication of his final account. The Solicitor explained that any reference to payment of further funds to the client from the balance of monies to be paid out of court was with respect to the difference between the amount paid into court and the final account. The Solicitor further advised that the matter would best be dealt with by way of an assessment.

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89. By facsimile dated June 1, 1995 (Tab 52, Volume II, Document Book), the Solicitor provided the Law Society with a copy of his account to Embassy dated November 2, 1993. The account did not contain any supporting documentation.

90. By letter dated September 6, 1995 (Tab 53, Volume II, Document Book), Mr. Poynton advised the Law Society that Embassy had not received the Solicitor's account before it was sent to Mr. Poynton by the Law Society.

91. The Solicitor did not provide his final account directly to Embassy or its solicitor. The final account showed receipt of the amount of \$16,791.67 from the court by the Solicitor on November 2, 1993. The Solicitor admits that he received the amount of \$16,791.67. The final account also showed remaining fees of \$20,781.06 with a deduction of \$16,791.67 and a balance owing of \$4,061.39, in spite of the Solicitor's earlier statements and letters that the remaining fees would be no greater than \$5,000.00. No documentation was attached to the final account to support the fees charged.

Complaint D35/96

Particular 2a) He failed to co-operate with the Law Society's representative who attempted to conduct an audit pursuant to section 18 of Regulation 708 when he failed to produce his books and records.

92. Christine Phillips, an Examiner with the Law Society's Audit and Investigation Department, was authorized to conduct an audit of the Solicitor's books and records. Ms. Phillips attended at the Solicitor's office on September 27, 1995 and discussed the status of his books and records. The Solicitor advised that his records were with his accountant and that he would contact him and obtain the records. Co-signing controls were also obtained that day.

93. On October 2, 1995, Ms. Phillips called the Solicitor but received no answer. A copy of Ms. Phillips' handwritten notes of the attempt made to reach the Solicitor is contained at Tab 54, Volume II of the Document Book.

94. On October 2, 1995, Ms. Phillips called the Solicitor's accountant, Vincent Dong, and left a message for him. A copy of Ms. Phillips' handwritten notes of a telephone message left for Mr. Dong is contained at Tab 55, Volume II of the Document Book.

95. On October 3, 1995, Mr. Dong returned Ms. Phillips' call advising that he no longer represents the Solicitor but may be able to answer questions with respect to the Solicitor's previous records. A copy of Ms. Phillips' handwritten notes of the telephone conversation with Mr. Dong is contained at Tab 56, Volume II of the Document Book.

96. On October 5, 1995, Ms. Phillips called Mr. Dong who confirmed that he had some of the Solicitor's old records. Mr. Dong advised that Ms. Phillips was welcome to attend at his office to review the same. Mr. Dong further advised that the Solicitor's bookkeeper had resigned a number of years ago and that the bookkeeping had not been done since that time. A copy of Ms. Phillips' handwritten notes of the telephone conversation with Mr. Dong is contained at Tab 57, Volume II of the Document Book.

97. On October 25, 1995, Ms. Phillips called the Solicitor and left a message for him regarding reviewing his books and records. A copy of Ms. Phillips' handwritten notes of the message left for the Solicitor is contained at Tab 58, Volume II of the Document Book.

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98. On October 26, 1995, the Solicitor returned Ms. Phillips' call and advised that he would call her back later that day. The Solicitor did not call back. A copy of Ms. Phillips' handwritten notes of the telephone conversation with the Solicitor is contained at Tab 59, Volume II of the Document Book.

99. On October 27, 1995, Ms. Phillips called Mr. Dong and left a message advising that she wished to attend at his office to review the Solicitor's records. A copy of Ms. Phillips' handwritten notes of the message left for Mr. Dong is contained at Tab 60, Volume II of the Document Book.

100. On October 27, 1995, Ms. Phillips called the Solicitor and left a message advising him that she wished to meet with the Solicitor to review any records in his possession. The Solicitor did not return the call. A copy of Ms. Phillips' handwritten notes of the message left for the Solicitor is contained at Tab 61, Volume II of the Document Book.

101. On October 31, 1995, Ms. Phillips called the Solicitor and left a message advising that she wished to meet with him the following day. The Solicitor returned the call advising that he was not available the following day but to call back then to discuss his availability. A copy of Ms. Phillips' handwritten notes of the telephone communications with the Solicitor are contained at Tabs 62 & 63, Volume II of the Document Book.

102. On November 2, 1995, Ms. Phillips attended at Mr. Dong's office and found some records. On November 3, 1995, the Solicitor called Ms. Phillips and left a message advising that he would call her on November 6, 1995 to discuss a time to meet. A copy of Ms. Phillips' handwritten notes of the telephone message is contained at Tab 64, Volume II of the Document Book.

103. By letter dated November 7, 1995 (Tab 65, Volume II, Document Book), Ms. Phillips requested that the Solicitor provide her with his records from February 1993 to October 1995. The Solicitor was advised that if the records were not produced within two weeks, the matter would be reported to Discipline. The Solicitor did not respond and failed to respond to a further request on December 6, 1995.

104. To date, the Solicitor has not produced his books and records to the Law Society.

V. DISCIPLINE HISTORY

105. On June 25, 1991, the Solicitor was reprimanded in Committee for failing to reply and failing to honour a financial obligation.

106. On December 11, 1991, the Solicitor was reprimanded in Committee for failing to reply to the Law Society and failing to comply with his Undertaking.

107. On March 23, 1995, the Solicitor was reprimanded in Convocation and ordered to pay costs in the sum of \$1,000.00 for failing to file his forms 2/3 for the fiscal year ending January 31, 1993.

108. On May 2, 1995, the Solicitor was found guilty of professional misconduct for failing to reply to the Law Society, failing to comply with his Undertaking to the Law Society dated May 31, 1991 and failing to file for the fiscal year ended January 31, 1994. On October 27, 1995, Convocation made an order suspending the Solicitor for a period of two months and ordered that the suspension continue until the filings are made.

DATED at Toronto this 17th day of October, 1996."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Stanley David Goldberg be disbarred, unless the Solicitor attends and provides a persuasive explanation when this matter comes before Convocation, in which case the Committee recommends that there be a twelve month suspension, with the suspension to continue until the Solicitor provides a medical certificate to the Secretary confirming his fitness to practise.

REASONS FOR RECOMMENDATION

This hearing commenced on March 26, 1996, without the Solicitor being present or represented. Ten witnesses were called by the Law Society. On March 27, 1996, a request for an adjournment was made on behalf of the Solicitor and granted for medical reasons. The matter came back on before the Committee numerous times. Eventually, the Solicitor entered into an Agreed Statement of Facts. A finding of professional misconduct was made with respect to each of the particulars in the four complaints and the matter was adjourned to enable the Solicitor to obtain an updated medical report. The hearing was again adjourned several times to provide the Solicitor with every opportunity to file a medical report on the issue of penalty. No such medical report has been filed.

The Committee proceeded with the penalty portion of the hearing on January 24, 1997. The Solicitor did not attend although the Law Society served the Solicitor at his last known address as well as at the home of his parents. We are satisfied that the Solicitor was given proper notice of the penalty portion of this hearing proceeding on January 24, 1997.

The Law Society called Ira Book, Solicitor for Ziad El-Amad, formerly represented by Mr. Goldberg, on the issue of penalty. Mr. Book testified that all of his efforts on Mr. El-Amad's behalf to reinstate the action which was dismissed as a result of the Solicitor's negligence had been unsuccessful and it was very unlikely the client would recover anything from a motor vehicle accident. For two years the Solicitor allowed his client, Mr. El-Amad, to believe that his personal injury lawsuit was proceeding when the Solicitor was fully aware that it had been dismissed. Mr. Book testified that his client had suffered very badly from the Solicitor's conduct and it had seriously affected Mr. El-Amad's life and family.

The Solicitor has been found guilty of professional misconduct on four prior occasions. He had been administratively suspended and through the discipline process indefinitely suspended since 1995.

The Solicitor has not learned from either the prior reprimands or suspension. The Solicitor has demonstrated clear ungovernability. No mitigation has been put forward on the Solicitor's behalf. His misconduct has been serious and pervasive over a number of years. His failure to participate in the hearing and provide an explanation for his conduct reinforces our conclusion that the Solicitor is ungovernable. There was an element of dishonesty and misleading in the Solicitor's failure to tell his client, Mr. El-Amad, that his action had been dismissed. The Solicitor was less than forthcoming to his client, Embassy Beach Hotel, with respect to his receiving monies paid into Court by the client and applying them to an account not provided by the Solicitor to the client.

22nd May, 1997

Stanley David Goldberg was called to the Bar on March 24, 1972.

ALL OF WHICH is respectfully submitted

DATED this 5th day of March, 1997

Nancy Backhouse, Chair

The Report of the Discipline Committee dated April 18th, 1997 is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Philip Epstein, Q.C., Chair
Nora Angeles
Gavin MacKenzie

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

Georgette Gagnon
for the Society

STANLEY DAVID GOLDBERG
of the City
of Toronto
a barrister and solicitor

Not Represented
for the solicitor

Heard: April 16, 1997

TO THE BENCHERS OF THE LAW SOCIETY OF UPPER CANADA

IN CONVOCATION ASSEMBLED

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On December 12, 1996 Complaint D353/96 was issued against Stanley David Goldberg alleging that he was guilty of professional misconduct.

The matter was heard in public on April 16, 1997 before this Committee composed of Philip Epstein, Q.C., Chair, Nora Angeles and Gavin MacKenzie. The Solicitor did not attend the hearing nor was he represented. Georgette Gagnon appeared on behalf of the Law Society.

DECISION

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

Complaint D353/96

2. a) On November 25, 1994, the Solicitor accepted an Offer to Settle Action 329967/88 in the District Court of Ontario on behalf of his clients, the plaintiffs, Rosario Grande and Mr. Grande's infant children, Andrea Grande and Marco Grande, without the clients' instructions;
- b) On or about December 1, 1994, the Solicitor misappropriated \$30,139.00, more or less, which he held in his trust account to the credit of his clients Rosario Grande and Mr. Grande's infant children, Andrea Grande and Marco Grande;
- c) The Solicitor failed to reply to the Law Society regarding a complaint by Rosario Grande in spite of letters dated February 15, 1996 and March 26, 1996 and telephone messages on March 14 and March 18, 1996;
- d) Between May 26, 1995 and February 26, 1996, the Solicitor practised law while his rights and privileges as a member of the Law Society were suspended due to the Solicitor's failure to pay the errors and omissions levy;
- e) The Solicitor breached his undertaking to the Law Society dated February 12, 1996 not to engage in the practice of law pending the completion of Complaints D181/95, D292/95, D381/95 and D35/96 before a Discipline Committee or Convocation, by practising law between February 12 and February 26, 1996.

Service

Mr. Goldberg did not attend at the hearing. The Law Society made significant efforts to serve him and the service brief, exhibit 2, sets out the considerable efforts of the Law Society and their staff to properly serve Mr. Goldberg in accordance with the Act.

We are satisfied that Mr. Goldberg has been properly served in accordance with the Act. We are also advised that Mr. Goldberg was made aware that this Complaint was about to be issued when he was before the Society in an earlier complaint.

Finding of the Committee

Particular 2 (a) and 2 (b)

The Solicitor acted for Rosario Grande and Andrea Grande, infants under the age of 18 years, that were represented by their litigation guardian and their father, Rosario Grande. The infants and the litigation guardian were involved in a motor vehicle accident on August 10, 1986. As a result of relatively minor injuries of the infants, but more serious injuries by the father, an action was commenced by a Statement of Claim in the District Court of Ontario in July of 1988.

The action moved slowly. The history of the action in the correspondence is set out in the Document Brief, filed as exhibit 6 to this hearing. These documents were obtained from the court file and from the file of opposing counsel. The documents indicate that there were negotiations between Mr. Goldberg and counsel for the insurer and there was a mediation process that was undertaken in an attempt to resolve the matter. The mediation was unsuccessful and the action continued.

22nd May, 1997

On November 15, 1994, the solicitors for the insurer offered to settle the matter by way of a written offer to settle, dated November 15, 1994. Mr. Rosario Grande filed an affidavit, exhibit 3 in this proceeding, and also testified for us viva voce. We have no hesitation in accepting his evidence.

His evidence in brief indicates that he was not made aware of the offer to settle by Mr. Goldberg and had he been aware of the offer to settle, he would not have accepted same.

Mr. Goldberg, in a letter dated November 25, 1994, accepted the offer to settle without the authority of his clients. It was apparently, however, to be subject to court approval in view of the fact that it was an infant settlement. Pending court approval, the solicitors for the insurer confirmed the settlement on November 30, 1994 and forwarded funds from State Farm Insurance Co. to Mr. Goldberg, being the sum of \$20,092.67 on November 30, 1994, which from the evidence of Ms. McCann, and the trust reconciliation records, we have determined went into Mr. Goldberg's trust account.

In addition, Mr. Goldberg received from the solicitor for Mr. Holtby, a further sum of \$10,046.33 which also went into his trust account and was to be held in trust on the same conditions as the trust cheque sent to him by Mr. Wright.

Ms. McCann from the Law Society's Audit Department has reconstructed Mr. Goldberg's trust account. It indicates that on December 1, 1994, a cheque in an amount corresponding to the monies received from State Farm were deposited into Mr. Goldberg's trust account. Thereafter, on twenty-nine separate occasions, Mr. Goldberg wrote cheques on his trust account for his own personal benefit. He continued to write cheques on the trust account until the amount in the trust account was exhausted. Those cheques included personal cheques to Mr. Goldberg, cheques to his health club, cheques for holidays and most regrettably of all, cheques to the Law Society of Upper Canada in payment of Mr. Goldberg's outstanding fees. It appears that Mr. Goldberg went on to further misappropriate the monies sent to him by Mr. Dallal, the solicitor for Mr. Holtby, for a total misappropriation of the combined monies of slightly in excess of \$30,000. None of the money has been recovered.

Mr. Goldberg has tendered no explanation to the Committee for this egregious misconduct.

Particular 2 (c)

The document brief indicates that Mr. Rosario Grande made a complaint to the Law Society in connection with matters referred to in 2(a) and (b) above. He was unable to receive a response from Mr. Goldberg as to the progress of his action. The Law Society wrote to the Solicitor, but in spite of the letters dated February 15, 1996, March 26, 1996 and telephone messages left on March 14 and March 18, 1996 Mr. Goldberg did not respond to that complaint.

The misappropriations set out in the paragraphs above with respect to 2(a) and (b) explain why the Solicitor did not respond to the complaint.

Particular 2(d)

Ms. McCann from the Law Society Audit Department attended at the Solicitor's office and was able to examine both a docket sheet and a significant number of the Solicitor's files. It is clear from the document brief and Ms. McCann's evidence that between May 26, 1995 and February 26, 1996, the Solicitor was practising law while his rights and privileges as a member of the Law Society were suspended, as a result of a suspension on May 26, 1995 due to the Solicitor's failure to pay the Errors and Omissions levy. The activities of the member included correspondence with his clients, issuing Statements of Claim, and sending out statements of account.

Particular 2(e)

On February 12, 1996, the Solicitor gave an undertaking to the Law Society not to engage in the practice of law pending the completion of Complaints D181/95, D292/95, D381/95 and D35/96 that were pending before a discipline committee or Convocation. Notwithstanding that undertaking, the Solicitor immediately breached it by continuing to practise law between February 12 and February 26, 1996 by again engaging in correspondence and litigation matters on behalf of his clients.

Accordingly the Committee finds that the complaints in 2(a), (b), (c), (d) and (e) have been made out and the Solicitor is guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Stanley David Goldberg be disbarred.

REASONS FOR RECOMMENDATION

The Solicitor has misappropriated a significant amount of money. It is of interest to note that he did so, not simply by writing one cheque, but consciously wrote twenty-nine cheques in order to deplete the trust account of all of the monies paid in on behalf of his clients. It appears to us that Mr. Goldberg must have appreciated the seriousness and significant consequences of his continued misappropriations. None of the money has been recovered and no explanation whatsoever has been tendered by Mr. Goldberg.

In addition, the Solicitor has failed to respond to complaints from the Law Society, practised while under suspension and breached an undertaking to the Law Society. It is clear that the Solicitor is ungovernable and is a serious danger to the public. If that were not bad enough, the Solicitor has a significant discipline record. A committee as recently as March of 1997, recommended Mr. Goldberg be disbarred for matters that arose in 1991 through 1995. Convocation has not yet dealt with that matter. The Solicitor was suspended in October, 1995 for a period of two months for failure to file. In 1995, the Solicitor was reprimanded in Convocation and ordered to pay costs in the sum of \$1,000 for again failing to file. In 1991, the Solicitor was reprimanded in Committee in connection with a complaint for failure to reply to the Society regarding complaints and failure to honour a financial obligation to a client. Finally, the Solicitor was reprimanded in Committee in December 1991, again as a result of failure to reply to complaints and again, failure to honour an undertaking given to the Society.

22nd May, 1997

The only appropriate penalty in this case for the serious misconduct of the Solicitor, including misappropriation, failure to respond to the Law Society, breach of undertakings, and practising while under suspension, have all indicated his lack of respect for the Law Society Rules and Regulations and accordingly, we recommend to Convocation that the Solicitor be disbarred.

Stanley David Goldberg was called to the Bar on March 24, 1972.

ALL OF WHICH is respectfully submitted

DATED this 18th day of April, 1997

Philip Epstein, Q.C., Chair

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

It was moved by Mr. Carey, seconded by Ms. Stomp that the Reports be adopted.

Carried

The recommended penalty in both Reports was that the solicitor be disbarred.

Counsel for the Society made submissions in support of disbarment.

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

Carried

CONVOCATION ROSE AT 12:30 P.M.

Confirmed in Convocation this 27 day of June, 1997


Treasurer