MINUTES OF DISCIPLINE CONVOCATION

Friday, 8th December, 1995
9:00 a.m.

PRESENT:

The Treasurer (Susan Elliott), Aaron, Backhouse, Banack, Bobesich, Carey, Cole, Copeland, Cronk, Crowe, Curtis, Feinstein, Gottlieb, Goudge, Lax, MacKenzie, Millar, O'Connor, Puccini, Ross, Sachs, Scott, Sealy, Strosberg, Swaye, Thom, Topp, Wilson and Wright.

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IN PUBLIC

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Mr. Brown, Senior Counsel - Discipline introduced Mr. John Morin who acted as Duty Counsel for Discipline Convocation.

DISCIPLINE COMMITTEE

Re: Frank Nemo MANTELLO - Sault Ste. Marie

The Deputy Secretary placed the matter before Convocation.

Messrs. Strosberg and Carey and Ms. O'Connor withdrew for this matter.

Mr. Scott did not participate.

Mr. Neil Perrier appeared on behalf of the Society and Mr. Joseph Bisceglia appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 18th September, 1995, together with an Affidavit of Service sworn 21st November, 1995 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 3rd November, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 5th December, 1995 (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

Thomas J. P. Carey, Chair
Jane Harvey
Shirley O'Connor

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

FRANK NENO MANTELLO
of the City
of Sault Ste. Marie
a barrister and solicitor

Christina Budweth
for the Society

Joseph A. Bisceglia
for the solicitor

Heard: June 27, 1995

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On August 12, 1993, Complaint D218/93 was issued against Frank Neno Mantello alleging that he was guilty of professional misconduct.

The matter was heard in public on June 27, 1995 before this Committee composed of Thomas J.P. Carey, Chair, Jane Harvey and Shirley O'Connor. Mr. Mantello attended the hearing and was represented by Joseph A. Bisceglia. Christina Budweth appeared on behalf of the Law Society.

DECISION

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

2. a) He breached Rule 7 of the Rules of Professional Conduct by borrowing from clients in the following three cases and failing to discharge his liability despite repeated requests from the Law Society:

   i) direct indebtedness to Dolinda Albanese in the amount of $25,000 on security of promissory note dated July 31, 1990;

   ii) indirect indebtedness to Dolinda Albanese in the amount of $220,000 on security of a second mortgage dated December 20, 1989 and direct liability due to personal guarantee;

   iii) indirect indebtedness to Mr. and Mrs. Victor Dottor in the amount of $35,000 on security of a first mortgage dated January 27, 1989 and direct liability due to personal guarantee;

   b) He failed to disclose his indirect indebtedness to Dolinda Albanese in the amount of $220,000 and to Mr. and Mrs. Victor Dottor in the amount of $35,000 on his 1991 Form 2 Declaration to the Law Society.

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 D218/93 and is prepared to proceed with a hearing of this matter on June 27 and 28, 1995.

II. IN PUBLIC/IN CAMERA

2. The Solicitor does not agree that this matter should be heard entirely in public pursuant to Section 9 of the Statutory Powers Procedure Act. The Solicitor will take the position that portions of this matter involve intimate financial and personal matters, matters which if disclosed may affect his reputation in the community. The Society agrees with this position and will consent to the Solicitor's request that a portion of this matter be heard in camera pursuant to Section 9 of the Statutory Powers Procedure Act.

III. ADMISSIONS

3. The Solicitor has reviewed Complaint D218/93 and this agreed statement of facts with his counsel, Joseph Bisceglia. The Solicitor admits all of the facts as hereinafter set out and admits that these facts constitute professional misconduct as alleged in the Complaint.

IV. FACTS

4. The Solicitor was called to the Bar on March 19, 1970. He practices as a sole practitioner in the City of Sault Ste Marie.

$35,000 loan from Mr. and Mrs Dottor

5. On January 27, 1989, the Solicitor borrowed $35,000 from his clients, Victor and Ellen Dottor (the "Dottor Loan").

6. The Dottors had known the Solicitor and the Solicitor's parents for many years prior to 1989. The Solicitor had previously acted for Mr. Dottor on a number of occasions.

7. As security for the Dottor Loan, the Solicitor's wife, as sole owner of the matrimonial home, gave the Dottors a second mortgage in the amount of $35,000. The Solicitor signed the mortgage as guarantor. A copy of this mortgage is attached as Exhibit 1 to this agreed statement of facts.

8. The Solicitor's position is that the Dottors were told to obtain and did receive independent legal advice from solicitor William R. Scott. Mr. Scott's evidence will be to the contrary. Mr. Scott will be offered as a witness at the hearing.

9. Mrs. Mantello paid for the legal services provided by Mr. Scott to Mr. Dottor. Mr. Scott copied Mrs. Mantello on the reporting letter to Mrs. Dottor, a copy of which is attached as Exhibit 2 to this agreed statement of facts.

10. At the time that Mr. Dottor was asked to make the loan to the Solicitor, she was not provided with any information regarding the Solicitor's financial position from either the Solicitor or Mr. Scott, although the Dottors knew that the Solicitor's wife was injured in a car accident and that litigation had resulted therefrom.

11. Mr. Scott advised the Law Society examiner that he did not provide independent legal advice to Mr. Dottor regarding this transaction because he viewed Mr. Dottor to be an experienced and sophisticated business man.

12. The $35,000 Dottor Loan was paid in late 1989 or early 1990.

13. The Solicitor borrowed an additional sum of $17,000.00 from Mr. Dottor in 1989 to finance the purchase of a new car. The current balance on that loan is $17,771.00 which is currently being repaid at rate of $350.00 per month.

14. The Solicitor did arrange for a chattel mortgage on the car to be registered in favour of Mr. Dottor. A copy of the report to the Dottors is attached as Exhibit 3 to this agreed statement of facts.

15. Mr. Dottor has provided a sworn statement to the Law Society in which he indicates that over the course of his lifetime he has made numerous loans both secured by mortgages as well as unsecured. Mr. Dottor has deposed that the fact that the Solicitor was a lawyer did not play "an overly important role" in deciding whether or not he lent him the money. Mr. Dottor has indicated he does not wish to see any disciplinary proceedings taken against the Solicitor because he believes that it probably would hurt the Solicitor and the Solicitor's ability to continue to make monthly payments.

$200,000 Loan from Dolinda Albanese

16. The Solicitor acted for Mr. Albanese during his lifetime. Mr. Albanese died on or about October 22, 1988. The Solicitor had prepared Mr. Albanese's will and was aware that Mrs. Albanese had inherited $221,000.00 from her late husband's estate. He was also aware that she held certain joint assets with her late husband such as the matrimonial home which he believed to be valued at approximately $200,000.00. The Solicitor applied for probate of the estate. Mrs. Albanese knew the Solicitor's wife, Rose.

17. Following the loan transaction described below, the Solicitor prepared a will for Mrs. Albanese and also prepared a promissory note and a mortgage in her favour from a son-in-law.

18. The loan from Mrs. Albanese came about in the following way. Mrs. Albanese and the Solicitor were discussing Mrs. Albanese's opportunity to lend $200,000.00 to an individual who had offered her a rate of interest at approximately 10 percent. Mrs. Albanese sought the Solicitor's advice as to whether or not this was a fair return for her investment. The Solicitor advised Mrs. Albanese that he understood loan rates to be more along the line of 12 percent. The Solicitor's evidence would be that he knew this because Mrs. Mantello was considering taking out a loan to assist in the reorganization of the Mantello's personal debts and the rate quoted to Mrs. Mantello was 12 percent. After some discussion, Mrs. Albanese offered to lend the money to the Solicitor. The Solicitor recommended that Mrs. Albanese receive independent legal advice.

19. The Solicitor did not recommend any one lawyer to Mrs. Albanese but gave her a list of individuals. Mrs. Albanese chose Mr. Scott because she recognized his name.

20. As security for the $200,000 Albanese Loan, the Solicitor's wife gave Mrs. Albanese a mortgage on the matrimonial home in the amount of $200,000, a copy of which is attached as Exhibit 4 to this agreed statement of facts. The Solicitor signed the mortgage as guarantor.

21. Mrs. Albanese signed an Acknowledgement dated December 20, 1989, a copy of which is attached as Exhibit 5 to this agreed statement of facts. The Acknowledgement is addressed to the Solicitor and his wife as well as to William R. Scott, Barrister and Solicitor. The Acknowledgement includes statements that

Mrs. Albanese attended at William Scott's office, that he reviewed with her the terms and conditions of the $200,000 Albanese Loan, that she was aware that it would be secured by a first mortgage on the matrimonial home, that she understood the transaction, that she was satisfied with the security and that she waived any recourse to the Lawyer's Fund for Client Compensation.

22. Mr. Scott's evidence regarding what he saw as his role in the transaction is recorded in a letter attached as Exhibit 6 to this agreed statement of facts. Mr. Scott provided a formal report to the Solicitor's wife dated December 20, 1989, a copy of which is attached as Exhibit 7 to this agreed statement of facts.

23. Mr. Scott never formally reported to Mrs. Albanese regarding this transaction.

24. The mortgage securing the $200,000 Albanese Loan was in fact a second mortgage as the mortgage securing the $35,000 Dottor Loan remained on title as a first mortgage. Although the Dottor first mortgage on title was paid out neither the Solicitor or Mr. Scott discharged the mortgage. It is the Solicitor's position that this was Mr. Scott's responsibility and in fact Mr. Scott held back $100.00 of the mortgage proceeds for discharge purposes.

25. The $200,000 Albanese Loan was due and payable on December 31, 1990. Mrs. Albanese has received a total payment of $4,400 on the $200,000 Albanese Loan, the last payment being in March of 1990. The total amount owing to Mrs. Albanese with interest now substantially exceeds $220,000.

26. The Retta Street property on which Mrs. Albanese had obtained a mortgage has been appraised. The appraisal indicates that in December 1989 the property had a fair market value of $254,000.00. The market value at February 15, 1993 was appraised to be $229,000.00 The Law Society has been provided with a copy of the appraisal which was provided by Royal LePage it is attached as part of Exhibit 30.

27. The lands on which Mrs. Albanese had a first mortgage were sold on or about March 23, 1995 and Mrs. Albanese received the net sum of $153,000.00 on the sale. A copy of the Statement of Adjustments is attached as Exhibit 8 to this agreed statement of facts.

<u>$25,000 Loan from Dolinda Albanese</u>

28. On or about July 31, 1990, the Solicitor borrowed a further $25,000 from Mrs. Albanese. Attached as Exhibit 9 to this agreed statement of facts is a copy of a Promissory Note from the Solicitor to Mrs. Albanese for the sum of $25,000.

29. The $25,000 Albanese Loan was repayable on demand. There was no security provided.

30. The Solicitor did arrange for Mrs. Albanese to receive counsel regarding the loan. A solicitor Richard DiLorenzi attended at her home on July 31, 1990 to review with her the $25,000.00 loan she intended to make with the Solicitor. A copy of a reporting letter from Mr. DiLorenzi to Mrs. Albanese, complete with enclosure, is attached as Exhibit 10 to this agreed statement of facts.

31. The Solicitor provided the Society with a copy of a letter dated March 9, 1994 from Mr. DiLorenzi to the Solicitor, a copy of which is attached as Exhibit 11 to this agreed statement of facts. The letter indicates he attended at Mrs. Albanese's home on July 31, 1990 and "reviewed with her a Promissory Note your office had prepared and gave her independent advice as you were both a friend and her solicitor".

32. Mrs. Albanese has received no payments on the $25,000 Albanese Loan. The amount owing under the $25,000 Albanese Loan now exceeds $40,000.

Failure to Disclose the Dottor Loan to the Society

33. The Solicitor's year end is January 31. The Solicitor did not report the Dottor Loan on his annual filings for his fiscal year ending January 31, 1989. A copy of the Solicitor's Form 2 for 1989 is attached as Exhibit 12 to this agreed statement of facts.

34. On July 31, 1990, the Law Society received the Solicitor's completed Forms 2 and 3 for his fiscal year ending January 31, 1990. The Solicitor disclosed indebtedness to a client but did not provide details. A copy of the Form 2 is attached as Exhibit 13 to this agreed statement of facts.

35. By letter dated September 21, 1990, a copy of which is attached as Exhibit 14 to this agreed statement of facts, the Law Society requested that the Solicitor provide further particulars of the loan transaction within one month.

36. By letter dated February 12, 1991, a copy of which is attached as Exhibit 15 to this agreed statement of facts, the Solicitor advised that the Dottor Loan occurred on January 27, 1989 but was mistakenly omitted from his filings for the year ending January 31, 1989 because he was under the mistaken impression that the loan occurred in February of 1989.

37. By letter dated March 20, 1991 Mr. Thomas Stephany, then Manager of the Spot Audit Program, wrote to the Solicitor advising that personal borrowing from clients violated Rule 7 of the Rules of Professional Conduct. A copy of that letter is attached as Exhibit 16 to this agreed statement of facts. The Solicitor denies receiving this letter but does not deny that it was sent.

Failure To Disclose the $200,000.00 Albanese Loan

38. On August 2, 1991 the Law Society received the Solicitor's completed Forms 2 and 3 for his fiscal year ended January 31, 1991. A copy of the Form 2 is attached as Exhibit 17 to this agreed statement of facts. The Solicitor disclosed indebtedness to clients.

39. By letter dated November 19, 1991, a copy of which is attached as Exhibit 18 to this agreed statement of facts, the Society requested particulars of the Solicitor's client borrowings within one month.

40. The Solicitor responded by letter dated January 29, 1992, a copy of which is attached as Exhibit 19 to this agreed statement of facts, advising that he was indebted to Mrs. Albanese in the amount of $25,000.

41. The Solicitor sent to the Law Society further information regarding the Albanese loan on the same date. A copy of the additional information forwarded to the Society is attached as Exhibit 20 to this agreed statement of facts.

Failing to Discharge Liability to Date

42. Sometime between the Solicitor's January 29, 1992 letter and the Society's letter described in paragraph 46 below, the Solicitor had a telephone conversation with Margot Devlin of the Law Society's Audit Department. The Solicitor acknowledges that Ms. Devlin requested he discharge his liability to the client and make alternate financing arrangements. The Solicitor advised Ms. Devlin that that would be difficult in light of the economic conditions in Sault Ste. Marie. It would be the Solicitor's evidence that Ms. Devlin did not specifically advise him of in that conversation about the impropriety of the transaction although there was a discussion about a concern in the ranking of Mrs. Albanese's mortgage. The Solicitor's evidence would be that he did not understand that a complaint of professional misconduct might follow after this conversation.

43. By letter dated February 5, 1992, a copy of which is attached as Exhibit 21 to this agreed statement of facts, the Society reiterated that Rule 7 prohibits personal borrowing from clients and that the issue of independent legal representation is not relevant. The Society requested that he discharge his liability and make alternate arrangements for financing.

44. Notwithstanding follow up letters of March 25 and May 19, 1992, copies of which are attached as Exhibit 22 to this agreed statement of facts, no response was received from the Solicitor until he telephoned the Society on June 4, 1992 and advised a staff member he would be forwarding his reply shortly. The Solicitor's evidence would be that he did not respond because he felt there was nothing to advise Ms. Devlin of.

45. The Solicitor did telephone the Law Society on June 4, 1992 and followed that conversation by letter dated June 15, 1992, a copy of which is attached as Exhibit 23 to this agreed statement of facts, the Solicitor advised the Society that he proposed to resolve the matter of the $25,000 Albanese Loan by having his wife give a second mortgage on the matrimonial home in the sum required to pay the note in full.

46. The following receipt of the Solicitor's June 15 letter, transmitted by facsimile, the Solicitor had a telephone conversation with Margot Devlin, of the Audit Department, to discuss the financing arrangements that would be made. A copy of Ms. Devlin's notes regarding that conversation is attached as Exhibit 24 to this agreed statement of facts. The Solicitor admits that the notes accurately reflects the essence of their conversation.

47. By letter dated June 17, 1992, a copy of which is attached as Exhibit 25 to this agreed statement of facts, the Society confirmed its June 15, 1992 telephone conversation with the Solicitor. The Solicitor did not respond to this letter and the Society sent a follow-up letter dated September 9, 1992 to which the Solicitor also did not respond. The Solicitor's evidence would be that because he had not had any success in obtaining refinancing he felt there was nothing to report.

48. Thereafter, the Solicitor made his Form 2 filing for the year 1992 which was received by the Society in early September, 1992. As a result of receiving the filing, Ms. Devlin wrote to the Solicitor by letter dated September 11, 1992, a copy of which is attached as Exhibit 26 to this agreed statement of facts. The Solicitor did not respond and a follow up letter was sent on October 13, 1992. The Solicitor did not respond in writing to this correspondence until a letter dated January 29, 1993, a copy of which is attached as Exhibit 27 to this agreed statement of facts.

49. In the interim, the Society examiner had visited the Solicitor's office in late July 22, 1992. An Audit questionnaire was filled out and a copy provided to the Solicitor. As a result of her attendance in the Solicitor's office the examiner prepared a memorandum dated July 30, 1992, a copy of which is attached as Exhibit 28 to this agreed statement of facts. The Solicitor acknowledges that the memorandum accurately sets out discussions between himself and the examiner.

50. By letter dated February 22, 1993, a copy of which is attached as Exhibit 29 to this agreed statement of facts, the Society advised the Solicitor that the matter was to be referred to Senior Counsel for the Professional Conduct Committee.

51. By letter dated February 23, 1993, the Solicitor forwarded a copy of the appraisal of the matrimonial home, valuing it at $229,000.00 on February 15, 1993 and $254,000.00 on December 31, 1989. Copies of the February 23, 1993 letter and the appraisal are attached as Exhibit 30 to this agreed statement of facts.

52. By letter dated April 2, 1993, a copy of which is attached as Exhibit 31 to this agreed statement of facts, the Society advised the Solicitor that Senior Counsel of the Professional Conduct Committee recommended that his matter be referred to Discipline.

53. By letter dated April 5, 1993, a copy of which is attached as Exhibit 32 to this agreed statement of facts, the Solicitor advised that since receiving the valuation, he had unsuccessfully attempted to make arrangements to pay Mrs. Albanese. The Solicitor advised that in 1990, the matrimonial home had sufficient equity to discharge this indebtedness, but that the property had since declined in value.

54. In the Solicitor's April 5, 1993 letter he failed to reiterate the information previously supplied to Marlene Chapman of the Audit Department, that in fact his wife had received a pre-payment of $50,000.00 netting $35,000.00 for her motor vehicle injuries and that those funds had been used to retire a portion of the Toronto Dominion Bank debt rather than being used to pay Mrs. Albanese. The money was never promised to Mrs. Albanese.

Previous Loans from Clients

55. In October of 1982, the Solicitor was involved in a loan transaction in which two of his clients (Giles and Madeleine Prevost) loaned money to a third party for use in a real estate project in which the Solicitor and his wife had an interest. The loan was secured by a promissory note from the debtor and by the Solicitor's guarantee. The clients received independent legal representation. The Solicitor indicated indebtedness to clients on his Form 2 declaration for the relevant time period. This resulted in certain inquiries being made by the Society, which the Solicitor answered. At no time did the Society ever indicate to the Solicitor that it had any concerns regarding the propriety of the Solicitor's involvement in this transaction, not that the transaction in any way conflicted with Law Society rules; however, at the time of the revelation of these matters the Law Society believed that the Solicitor had already repaid the borrowed sums.

56. In February of 1983, the Solicitor and the client referred to in paragraph 48 above, borrowed $10,000.00 from another client of the Solicitor (Mary Balfour). There was no security given for this debt, apart from a promissory note. The client received independent legal advice. The Solicitor reported indebtedness to clients on his Form 2 declaration for the relevant period, and the Society made certain inquiries as a result, which the Solicitor answered. At no time did the Society ever indicate to the Solicitor that it had any concerns regarding the propriety of this transaction, the lack of security for the debt, or that the transaction in any way conflicted with Law Society rules; however, at the time of the revelation of these matters the Law Society believed that the Solicitor had already repaid the borrowed sums.

57. Correspondence between the Solicitor and the Society regarding these transactions is attached as Exhibit 33 to this agreed statement of facts.

V. SUMMARY

58. Neither Mr. Dottor nor Mrs. Albanese complained to the Law Society about these transactions.

VI. DISCIPLINE HISTORY

59. The Solicitor does not have a discipline history.

VII. JOINT SUBMISSION

60. Following lengthy pre-trial negotiations as well as a pre-hearing conference, the Society and the Solicitor jointly, respectfully submit the following as an appropriate penalty in all of the circumstances of this matter:

(a) The Solicitor be Reprimanded in Convocation;

(b) The Solicitor take immediate steps to resolve his outstanding loans and liabilities with clients including providing his client, Dolinda Albanese with a mortgage on lands and premises located at 179 and 183 Albert Street, Sault Ste. Marie; and

(c) The Solicitor provided an Undertaking to the Law Society not to borrow any further funds from clients.

DATED at Toronto this 27th day of June, 1995."

RECOMMENDATION AS TO PENALTY

The Committee recommends that the Solicitor be reprimanded in Convocation provided that the following conditions are first met:

a) The Solicitor take immediate steps to resolve his outstanding loan and liabilities with clients including providing his client Dolinda Albanese with a mortgage on lands and premises located at 179 and 183 Albert Street, Sault Ste. marie, and,

b) The Solicitor provide an undertaking to the Law Society not to borrow any further funds from clients; and,

c) The Solicitor provide the Law Society with a written resolution of the Albanese indebtedness signed by Mrs. Albanese and a written acknowledgement by Mr. Dottor that he is prepared to continue the $17,000.00 loan with the Solicitor subject to the terms of the loan being met (or other written resolution of the Dottor indebtedness signed by Mr. Dottor),

d) The Solicitor provide the Law Society with a sworn financial statement showing net worth at the date of the hearing, including assets, debts and contingent assets and debts (litigation) and gross and net income for the present calendar year to date and past calendar year from the Solicitor. The Solicitor has agreed to use his best efforts to provide to the Law Society the same sworn information from his wife. If the Solicitor is not able to provide his wife's statement he must provide his statement of her affairs to the best of his knowledge and belief.

REASONS FOR RECOMMENDATION

The facts before us disclosed that the Solicitor has obtained four (4) loans from two (2) clients over an eighteen (18) month period in 1989 and 1990 totalling $277,000.00. $188,000.00 was repaid to clients and $277,771.00 (of which there is a large interest component) remains unpaid. According to the evidence the Solicitor had previously obtained two (2) loans from clients in 1982 and 1983 which were repaid in full.

The Committee felt that the final status of the unpaid loans should be known prior to determining penalty.

The Solicitor was not aware that he was breaching the Rules of Professional Conduct by obtaining loans from clients. On every loan he had the Client obtain independent legal advice. On every loan save one, he gave security which appeared to be sufficient to adequately secure the loan. When the security was sold the client was paid the net proceeds of the secured property. The shortfall appears to have been at least partially caused by the drop in value of the secured property (real estate).

The Rule, however, is designed among other things to prevent just this situation where a loan from a client to his solicitor is unpaid, for whatever reason.

As to the issue of partial non-disclosure of indebtedness to clients to the Law Society, it does not appear that omissions were intentional, and full information was provided by the Solicitor.

Frank Neno Mantello was called to the Bar on the 19th day of March, 1970.

ALL OF WHICH is respectfully submitted

DATED this 18th day of September, 1995

Jane Harvey (for the Committee)

There were no submissions and the Report was voted on and adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation together with the conditions set out in the Report.

Mr. Perrier advised that the conditions set out in the Report had been met and made brief submissions in support of the recommended penalty.

Mr. Bisceglia made brief submissions in support of a reprimand in Convocation.

The recommended penalty was voted on and adopted.

The solicitor was reprimanded.

Mr. Copeland suggested that the circumstances which led to this discipline case be published in general terms to the profession.

Counsel and solicitor retired.

<u>Re: Derek Gordon BALL - Mississauga</u>

The Deputy Secretary placed the matter before Convocation.

Messrs. Gottlieb and Millar and Ms. O'Connor and Ms. Cronk withdrew for this matter.

Mr. Scott did not participate.

Ms. Lesley Cameron appeared for the Society and Mr. John Morin, Duty Counsel, appeared for the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 7th September, 1995, together with an Affidavit of Service sworn 24th October, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 6th October, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th December, 1995 (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

Gary L. Gottlieb, Q.C., Chair
W. A. Derry Millar
Shirley O'Connor

In the matter of The Law Society Act and in the matter of	Lesley M. Cameron for the Society
DEREK GORDON BALL of the City of Mississauga a barrister and solicitor	Not Represented for the solicitor
	Heard: July 25, 1995

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 18, 1995, Complaint D86/95 was issued against Derek Gordon Ball alleging that he was guilty of professional misconduct.

The matter was heard in public on July 25, 1995 before this Committee composed of Gary L. Gottlieb, Q.C., Chair, W.A. Derry Millar and Shirley O'Connor. The Solicitor attended the hearing and represented himself. Lesley M. Cameron appeared on behalf of the Law Society.

DECISION

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

Complaint D86/95

2. a) he failed to serve his client, Graciela Cutone, in a conscientious, diligent and efficient manner, in respect of enforcement of child support arrears, in that he failed to proceed with his client's support enforcement proceedings in a timely manner;

b) he misled his client, Graciela Cutone, by informing her that:

i) he had obtained an order increasing child support payments when this was not true; and

ii) he had obtained the sum of $800.00 from the client's former spouse in connection with support arrears when this was not true.

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 D86/95 and is prepared to proceed with a hearing of this matter on July 25 and 26, 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 D86/95 and admits the particulars contained therein. The Solicitor further admits that these particulars supported by the facts set out below constitute professional misconduct.

IV. FACTS

4. The Solicitor was called to the Bar on March 29, 1977. He practises as a sole practitioner.

5. On February 11, 1982, the court ordered that Ernesto Cutone pay Graciela Cutone the sum of $60.00 per week for child support commencing that day. A copy of the Decree Nisi setting out the above is contained at Tab 1 of the Document Book.

6. On July 15, 1983, a Notice of Default (Tab 2, Document Book) was issued against Ernesto Cutone requiring him to appear before the court on August 10, 1983. Mr. Cutone did not appear on that date or any subsequent dates. As a result, on April 19, 1984, a Warrant of Committal (Tab 3, Document Book) was issued ordering that Mr. Cutone be imprisoned unless payment was made to the court by April 15, 1984. The warrant was not served upon Mr. Cutone by either the courts or by the police. (Tab 4, Document Book).

7. Ms. Cutone retained the Solicitor in June 1990 to assist her in collecting child support arrears from her ex-husband which amounted to approximately $120,000.00. By letter dated July 3, 1990 (Tab 5, Document Book), the Solicitor confirmed to Ms. Cutone that he was retained by her and that he would investigate her ex-husband's assets in order to determine whether it would be to her advantage for him to take over the enforcement of the support order.

8. By letter dated July 9, 1990 (Tab 6, Document Book), the Solicitor forwarded searches concerning her ex-husband's assets to Ms. Cutone. She met with him and he suggested that he take over the enforcement of the support order from the Support and Custody Enforcement Branch. He also suggested bringing a motion to enforce the order.

9. During 1991 and 1992, Ms. Cutone called the Solicitor and met with him three or four times to discuss her case. The Solicitor told her that he was trying to bring a motion for the arrears and to increase the monthly support payments. He also told her that he had set up court dates but that as her ex-husband did not attend, the motion could not go forward.

10. By letter dated June 5, 1992 (Tab 7, Document Book), Ms. Cutone wrote to the Solicitor indicating that she had had no response to her numerous phone calls, that her financial circumstances were desperate, and requesting an update or at least an indication as to whether anything could be done.

11. The Solicitor called Ms. Cutone in response to this letter but had nothing to tell her as to work in progress.

12. Following another telephone conversation with the Solicitor and in the hopes of getting a response, Ms. Cutone faxed the Solicitor a letter dated January 28, 1993 (Tab 8, Document Book), attaching copies of various overdue bills.

13. In early July, 1993, Ms. Cutone called the Solicitor and he told her that he had brought a motion to increase the child support payments which was scheduled for July 16, 1993. The Solicitor told her that her ex-husband did not attend and that the judge ordered that payments be increased to $600.00 per month. The Solicitor did not bring this motion and there was no such order.

14. Ms. Cutone continued to call the Solicitor on a regular basis and in September of 1993, she received a cheque in the sum of $800.00 from the Solicitor who told her that he had seized the money from her ex-husband's bank account. This was untrue and the cheque was from the Solicitor.

15. The Solicitor also told Ms. Cutone that her ex-husband would be appearing at the Newmarket Family Court to answer for the arrears owing. This was also untrue.

16. On December 15, 1993, Ms. Cutone retained a new lawyer, Nella Macchia. Ms. Cutone picked up her file from the Solicitor and at the suggestion of Ms. Macchia, attended at the Brampton court to determine the status of her case. She discovered that neither the Brampton Court nor the Newmarket Court had a record of any motions brought on her behalf by the Solicitor.

17. By letter dated March 21, 1994 (Tab 9, Document Book), Ms. Cutone outlined her complaint to the Law Society.

18. By letters dated April 8, 1994 and June 17, 1994 (Tabs 10 and 11, Document Book), the Law Society wrote to the Solicitor and requested his comments regarding Ms. Cutone's complaint.

19. By letter dated June 27, 1994 (Tab 12, Document Book), the Solicitor advised the Law Society that he did his best for Ms. Cutone and regrets that he could not have done better.

20. By letter dated June 30, 1994 (Tab 13, Document Book), the Law Society asked the Solicitor to address the delay in pursuing Ms. Cutone's case, whether he brought a motion before the Brampton court and the reasons for his failure to follow Ms. Cutone's instructions.

21. By letter dated August 9, 1994 (Tab 14, Document Book), Ms. Cutone again wrote to the Law Society providing her comments on the Solicitor's June 27, 1994 reply to the Law Society.

22. By letter dated February 20, 1995 (Tab 15, Document Book), the Solicitor explained that he was trying to get an address for Ms. Cutone's ex-husband so that he could bring the necessary proceedings. The Solicitor further explained that he was trying to help Ms. Cutone and that the $800.00 he gave to her was intended to be a loan.

V. DISCIPLINE HISTORY

23. The Solicitor does not have a discipline history.

DATED at Toronto this 18th day of July, 1995."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Derek Gordon Ball be suspended for a period of one month and pay Law Society costs in the amount of $1,425.00.

REASONS FOR RECOMMENDATION

We have found the Solicitor guilty of professional misconduct on the basis of the Agreed Statement of Facts and we have considered what Law Society counsel's submissions have been and what the Solicitor had to say on his own behalf and we have unanimously agreed that the Law Society's submissions should be accepted and the Solicitor suspended for the period of one month and pay costs in the sum of $1,425.

The Law Society complaint succinctly sets out what the professional misconduct was. The Solicitor failed to serve his client in a conscientious, diligent and efficient manner in respect of enforcement of child support arrears and failed to proceed with his client's support enforcement proceedings in a timely manner.

Furthermore, a period of three and a half years elapsed before something was finally done and that was when the client finally retained another solicitor.

Furthermore, during the time that the case was being handled by the Solicitor he informed his client that he had obtained an Order increasing child support payments when this was not true. He also told her that he obtained the sum of eight hundred dollars from her former spouse in connection with support arrears and this was not true either. What the Solicitor did was pay his client eight hundred dollars out of his own pocket.

We would like to point out what is stated in a letter from the client's new solicitor to the Law Society. She said, "I hope the Law Society will take these issues seriously so that the public can have confidence and trust in the legal profession and ultimately our legal system."

The Law Society does take these matters very seriously. We want to state that in no uncertain terms.

The Law Society counsel has referred us to the case of Timothy David Salomaa which was a matter of failing to diligently serve the client and falsely reporting to the client. In that case, while the Solicitor did have a discipline history for failing to reply, and while here the Solicitor does not have a previous discipline history, the case still serves as a good precedent, and in that case the solicitor was suspended for a period of one month and it was so ordered by Convocation on June 24th, 1993.

By the Solicitor's own characterization, he realizes that the behaviour that took place with regards to this matter was shameful. Certainly it was not appropriate. The Solicitor has indicated that he had a great deal of work and to use his own words he was 'over his head' at the time this occurred and he subsequently volunteered for practice review. He has undergone practice review. He has indicated that he has learned not to take more work than he can handle. He has indicated that he has received an education in time management. He has indicated that in the future he will promptly attend to clients' matters and he will respond fully to them.

We are recommending to Convocation that the Solicitor be suspended for the period of one month and pay costs in the sum of $1425.

Derek Gordon Ball was called to the Bar on 29th day of March, 1977.

ALL OF WHICH is respectfully submitted

DATED this 7th day of September ,1995

Gary L. Gottlieb, Q.C.
Chair

There were no submissions and the Report was voted on and adopted.

The recommended penalty of the Discipline Committee was that the solicitor be suspended for a period of 1 month and pay costs in the amount of $1,425.

Ms. Cameron made submissions in support of the recommended penalty and asked on behalf of the Society and the solicitor that the suspension commence January 8th, 1996.

Mr. Morin made brief comments on the present status of the solicitor's practice.

The recommended penalty was voted on and adopted with the amendment that the suspension commence on January 8th, 1996.

Counsel and solicitor retired.

Re: Nigel SVAMI - Toronto

The Deputy Secretary placed the matter before Convocation.

Ms. Backhouse and Ms. Lax withdrew for this matter.

Mr. Scott did not participate.

Mr. Neil Perrier appeared on behalf of the Society and Mr. Richard Baker appeared on behalf of the solicitor who was present.

Convocation had before it the majority Report of the Discipline Committee dated 1st November, 1995, together with an Affidavit of Service sworn 21st November, 1995 by Ronald Hoppie that he had effected service on the solicitor by registered mail on 3rd November, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 9th November, 1995 (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

Nancy L. Backhouse, Chair
Tamara K. Stomp
Vern Krishna, Q.C.

In the matter of The Law Society Act and in the matter of	Neil J. Perrier for the Society
NIGEL SVAMI of the City of Toronto a barrister and solicitor	Richard Baker for the solicitor
	Heard: September 13, 1995

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 18, 1995, Complaint D70/95 was issued against Nigel Svami alleging that he was guilty of professional misconduct. This complaint was withdrawn on September 13, 1995 and replaced with Complaint D70a/95.

The matter was heard in public on September 13, 1995 before this Committee comprising Nancy L. Backhouse, Chair, Tamara K. Stomp and Vern Krishna, Q.C. The Solicitor attended the hearing and was represented by Richard Baker. Neil J. Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D70a/95

2. a) He submitted numerous Legal Aid billing certificates (Form 51, the Civil Certificate - Standard Form Accounts) to the Ontario Legal Aid Plan in the period January 1, 1991 to March 27, 1992 which he knew or ought to have known, were inaccurate in that:

i) the billing certificates represented that he had performed work which was in fact performed by non-lawyer assistants whose services were compensable at a lower rate or not at all;

ii) he submitted certain billing certificates which included overlapping time claims with other billing certificates;

iii) he improperly claimed travel expenses.

b) He contravened the Commissioners for Taking Affidavits Act, R.S.O. 1990, c. C.17 by commissioning affidavits without being present when the deponent signed the affidavit or administering any oath to the deponent of the affidavit.

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 D70a/95 and is prepared to proceed with a hearing of this matter on September 13, 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 D70a/95 and admits the particulars contained therein. The Solicitor further admits that the said particulars constitute professional misconduct.

IV. BACKGROUND FACTS

4. The Solicitor was called to the Bar in March, 1971. Since 1983, he has been a sole practitioner whose practice consisted almost entirely of refugee cases, mainly from the Sri Lankan community. He was entered onto the Civil Panel of The Ontario Legal Aid Plan in 1985 and states that Legal Aid billings constitute more than 90% of his practice revenues. The Solicitor states that during the period 1983 to 1992 he handled approximately 3000 refugee applications with an excellent success ratio. He has been suspended from the practice of law for not paying his insurance levy since May 26, 1995.

5. For most of the period in question, January 1, 1991 to March 27, 1992, the Solicitor employed the following two full time assistants and two part time assistants:

Full time assistants:

a) Ms. Sakunthala Nadarajah, employed as a secretary;
b) Ms. Meena Sakthivel, who the Solicitor describes as a "*law clerk*".

Part time assistants:

a) Mr. Sam Kumarasamy;
b) Mr. Ramalingham Thanabalasingham.

(The two part time assistants were apparently hired because of their familiarity with the immigration system and assisted in file administration and translation.)

6. An audit of the Solicitor's books and records was conducted by an Investigation Auditor of Law Society under Sections 9 and 18 of the Regulation pursuant to the Law Society Act. The investigation commenced in September of 1993. OLAP began its investigation into the Solicitor's billing practices in or about April 1992. Some of the following information is obtained through an investigation of the Solicitor's practice. Other information was provided by Mr. Larry Kowan, Senior Investigator at the Ontario Legal Aid Plan ("OLAP").

Background - Billing

7. The Solicitor's hourly rate charged to OLAP after factoring an experience allowance is $79.56, the OLAP rate for work completed by a law clerk is $23.00, and secretarial costs are not recoverable from OLAP.

8. OLAP paid a total of $285,987.00 to the Solicitor for work performed between August 1989 and February 1992 on 115 files. During the period of time January 1, 1991 to March 27, 1992, the Solicitor submitted 215 billing certificates for payment to the OLAP. All of these certificates were included in the investigation by the OLAP.

Background - Billing Certificates

9. Examples of billing certificates can be found at Document Book - Tabs 8, 11, 13 and 16. A solicitor must certify the information contained in the certificate as correct:

> *"I certify that the legal aid herein was rendered by me or by such other person as is described herein, and that the disbursements set out herein were paid or liability incurred and they were necessary and proper, and that I have performed all my duties under Sections 114 and 115 of the Legal Aid Regulation..."*

V. FACTS
Particular 2 of Complaint D70a/95

a) He submitted numerous Legal Aid billing certificates to OLAP in the period January 1, 1991 to March 27, 1992 which he knew, or ought to have known, were inaccurate in that:

(i) the billing certificates represented that he had performed work which was in fact performed by non-lawyer assistants whose services were compensable at a lower rate or not at all;

(ii) he submitted certain billing certificates which included overlapping time claims with other billing certificates;

(iii) he improperly claimed travel expenses.

10. Andrew Lennard, an examiner at OLAP, completed a calendarization based on the accounts the Solicitor submitted to OLAP during the period January 1, 1991 to March 27, 1992. The calendarization sets out the date, time and client regarding the work allegedly performed by the Solicitor. The total of the alleged billing hours are at the bottom right hand corner of each day. The complete calendarization and summary is attached as Document Book - Tab 4.

11. The calendarization isolated a total of 1,028 overlapping hours (i.e. work allegedly performed by the Solicitor on different files at the same time). The results of the investigation show that the Solicitor overcharged OLAP by the sum of $81,764. The overlapping hours were calculated without including travel time to and from hearings. A further limited review by OLAP Investigators show that the Solicitor improperly charged an additional 97 hours in travel fees totalling $10,417.75. Details of the improper charging of travel fees are set out later in this Memorandum.

12. Some days, the Solicitor billed for more than 24 hours a day, with the worst example being April 15, 1991 when the Solicitor had a total of 38.5 hours billed for the day. Details are set out on Document Book - Tab 5. In 1991, there were a total of 226 days with overlapping hours.

13. A column in the time analysis portion of the billing certificate (examples of which are on Document Book - Tabs 8, 11, 13 and 16) is headed "*Work Done By*". One of the primary reasons for the overlapping times is that the Solicitor's accounts attached to the certificates always contain the initials "*N.S.*", attributing work to the Solicitor.

14. Telephone assistance on billing procedures is provided by OLAP. OLAP also provides a comprehensive Tariff Manual to all lawyers admitted to OLAP. Relevant instructions contained in the Tariff Manual are:

- In calculating maximum and minimum hours, law student time is differentiated from solicitor time,

- When completing the "Work Done By" column, the column is to be left blank if the solicitor did the work, otherwise there are codes to differentiate between work done by articling students, law clerks, investigators and other solicitors,

- compensation for students at law is set at $23 per hour.

15. The Solicitor informed OLAP investigators that his accounts to OLAP were compiled using both time dockets and his diary as sources.

16. The Solicitor claimed that he attributed all work to himself on the billing accounts as it was "*his certificate*". The Solicitor stated that one reason for the overlapping times is that the accounts attribute the work to one person. He said there were times when up to five people were actually doing the work, being the Solicitor, his two full time assistants and two part time assistants.

17. A primary reason for the overlapping hours which resulted in an overcharge to OLAP of $81,764.00 is that the Solicitor's accounts record him as doing all the work at his rate of $79.56 per hour. No work is attributed to his assistants, none of whom are eligible for recovery from OLAP.

18. The transcript for Vyravananathan Sangarappillai v. Minister of Employment & Immigration (Inquiry) (extract attached at Document Book - Tab 15) shows a purported "*law clerk*", Sakthivel, appearing at the Inquiry instead of the Solicitor. The Solicitor billed OLAP setting out that he had personally appeared a total of 10.25 hours as set out in the account forming part of Document Book - Tab 13. Ms. Sakthivel did not adduce any evidence or make any submissions even though the onus for proving a credible basis for refugee status is on the refugee claimant. Her participation was limited to filing the Personal Information Form, promising that the applicant would present himself to be deported, and a comment on a minor variance in translation.

19. As part of the investigation, the two Toronto offices of the Immigration and Refugee Board ("I.R.B.") were asked to provide details on certain refugee hearings. Details on the location of the hearing, the time and duration, and counsel present were provided and are attached at Document Book - Tab 11. The reply from the two Toronto offices of the I.R.B. illustrates that on five of eleven hearings investigated, Ms. Sakthivel represented the Solicitor's client, but OLAP was charged as if the Solicitor had attended. The accounts for two of these clients, V. Sreesgantharajah and J. Anthonipillai are included as part of Document Book - Tab 11.

20. The Solicitor's offices are at St. Clair Avenue and Bathurst Street within the City of Toronto. Statements from clients, immigration officials and the Solicitor's staff show that the inquiries and hearing which the Solicitor had to attend were either at 70 University Avenue or 1 Front Street, both in the Toronto downtown core. For the same time period investigated, the solicitor improperly charged OLAP $10,417.75 (204 hours of travel time claimed x $51.06 per hour).

21. OLAP does not pay for either travel time or expenses for distances less than 25 km one way. The Solicitor had earlier received written notification from OLAP not to charge for distances of less than 25 km. The distance from the Solicitor's office to the downtown core is less than 25 km, yet for virtually every hearing, the Solicitor has claimed travel time, including "*CIC 35 km*" or "*Miss CIC 35 km*" on his billing certificates. The latter represents to Immigration offices in Mississauga. The Document Book - Tab 11 confirmations referred to above from the I.R.B. are utilised in Document Book - Tab 17 again by confirming that the hearings were held at 1 Front Street and not in Mississauga. Document Book, Tab 17 also contains copies of four billing certificates in which the Solicitor claims travel time to these downtown Toronto hearings. The total monies improperly billed by the Solicitor to OLAP and paid total $10,417.75.

22. From January 1, 1991 to March 27, 1992 the Solicitor submitted accounts relating to 189 non-appeal Sri Lankan refugees. Appeal cases are segregated from non-appeal cases as appeals are contested on issues of law, and not on the specific facts of the case. On the 189 non-appeal certificates, the Solicitor billed for "*review situation in Sri Lanka*" (226 times) and "*explaining and discussing situation in Sri Lanka*" (124 times) for a total of 348 times. This means an average of 1.8 times per client, or more than once every business day.

23. A listing of billing accounts noting the number of times the situation in Sri Lanka is reviewed or discussed is attached as Document Book - Tab 18. Some billing accounts contain this billing description more than three times, for instance certificate #46644564 details five occasions.

Particular 2 of Complaint D70a/95

b) He contravened the Commissioners for Taking Affidavits Act, R.S.O. 1990, c. C.17 by commissioning affidavits without being present when the deponent signed the affidavit, or administering any oath to the deponent of the affidavit.

24. Affidavits are prepared in refugee cases to supplement the standard information required by Employment and Immigration Canada's Personal Information Form. The affidavit should contain the personal knowledge of the claimant and should not contain legal arguments and citations. At the initial immigration hearings and subsequent appeals the onus is on the immigrant to justify his refugee claim using relevant personal information. Affidavits and oral submissions are the main vehicles used to provide this information.

25. Clients such as Kumaraswamy Sathasivakkurukkal, Ragavan Ratnasingham and Vijayan Nayagam were given their affidavits to sign by the Solicitor's secretary. They did not assist in its preparation, it was not translated or described to them, they did not affirm the truth of the document, and the Solicitor was not present when they executed the affidavits. The Solicitor admitted that on some occasions he was not in the room when the clients executed their affidavits, but that he was usually in the next room and commissioned the affidavits soon afterwards. He further admitted that on 1 or 2 occasions he may not have been in the next room due to time constraints.

26. Copies of affidavits for the clients in the above paragraph are attached as Document Book - Tab 22.

V. PRIOR DISCIPLINE

27. The Solicitor has had no prior discipline.

DATED at Toronto, this 13th day of September, 1995."

RECOMMENDATION AS TO PENALTY

The committee is unanimously of the view that the solicitor, by his conduct, has forfeited his right to continue as a member of the Law Society of Upper Canada. Two members of the committee, Ms. Backhouse and Mr. Krishna, recommend that the solicitor be permitted to resign, while one committee member, Ms. Stomp, recommends that the solicitor be disbarred.

REASONS FOR RECOMMENDATION

The view of the majority of the committee is that although the conduct of the solicitor in his dealings with the Ontario Legal Aid Plan was very serious, and would normally result in disbarment [see: Law Society v. Kopyto, November 10, 1989], there are sufficient mitigating circumstances that the ultimate penalty of disbarment is not required.

The solicitor cooperated fully with the Law Society's investigation, and acknowledged his professional misconduct by entering into an agreed statement of facts. He has made full restitution of $92,181. During the period of the overbilling, between August 1989 and February, 1982, his taxable income was in the $30,000 range.

Circumstances Surrounding the Misconduct

The misconduct occurred during a time when the solicitor was under severe practice pressure working evenings and weekends in an effort to cope with a demanding and rapidly growing refugee practice.

In acknowledging personal responsibility for the billing inaccuracies, the solicitor admitted responsibility for failing to adequately train and supervise his secretary in the preparation of his accounts. He testified that he simply signed the accounts which she prepared without reviewing them, but conceded that he should have known that the billings will incorrect. He acknowledged not only his failure to conscientiously supervise his employees but also his failure to properly scrutinize his legal aid bills. He testified that he never intended to defraud Legal Aid, and expressed deep remorse for his conduct.

Character Evidence

Numerous former refugee clients provided letters of reference attesting not only to Mr. Svami's professionalism, honesty, reliability and efficiency, but also to his human compassion and commitment to his clients.

Several former clients gave evidence before the committee. One witness was Mr. Tam Sivathasan, a former Tamil refugee now employed by the TTC as an electrical engineer. He testified that the solicitor enjoyed the respect of the Tamil community and described him as a rare person capable of delivery high quality professional service while at the same time demonstrating deep compassion for his clients. He expressed the hope that the solicitor, who had given so much to others, would be treated with compassion.

Sam Kumarasamy, a veterinarian who formerly worked part-time as an interpreter for the solicitor, also attested to his honesty, integrity, and commitment to his refugee clients.

Peter Math, a solicitor and friend of Mr. Svami since the 1960's described him as an honest, hardworking, trustworthy person whose duty to his clients always took precedence over personal interests, including fees. He testified that these proceedings had such a deleterious effect upon Mr. Svami that he found him barely recognizable from a year ago.

Mr. Clifford Lax, a solicitor, supplemented his letter of reference with testimony. He told the committee that during his 25 years of friendship with Mr. Svami, he had never had reason to doubt his integrity and good character. He described him as being dedicated to the highest ideals of the legal professional, always putting the interests of clients ahead of his own. In his letter, he wrote that Mr. Svami was a leader in the Sri Lankan community, and had helped may of his fellow countrymen escape brutal ethnic hostility. In his testimony, he said that it was inconceivable to him that the person he had known could consciously or deliberately engage in fraud. Mr. Lax testified that Mr. Svami often talked about his belief that he had a debt to repay to society. Mr. Lax observed that Mr. Svami had little interest in material things, and was more interested in helping his clients than attending to administrative matters. He urged the committee to recommend a lesser penalty than disbarment.

Submissions of Counsel

Mr. Baker, on behalf of Mr. Svami, referred extensively to the evidence of his good character, and to the various other factors in mitigation, and urged the committee not to recommend disbarment, but to permit the solicitor to resign.

Mr. Perrier, on behalf of the Law Society, urged the committee to recommend disbarment. He relied heavily upon the Kopyto case, supra, and submitted that the overriding considerations in this case must be the principles of general deterrence, as well as the preservation and enhancement of public respect for the profession of law. Mr. Perrier relied in particular upon Kopyto, supra, at p. 22, in which it was concluded that Mr. Kopyto's willful recklessness in knowingly dictating false legal aid accounts required the ultimate sanction of disbarment.

Conclusion

The majority of this committee accepts the solicitor's evidence that he did not intentionally submit accounts which he knew were inaccurate. In our view, the very serious misconduct of the solicitor requires that he no longer have the right to continue as a member of the Law Society. The majority of the committee stops short, however, in light of the mitigating factors from recommending the ultimate sanction of disbarment. In our view, Mr. Svami has much to contribute to the community as a private citizen, and having regard to all of the circumstances, he should be permitted to resign.

Dated at Toronto this 1st day of November, 1995

Nancy Backhouse
Chair

DISSENT

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF The Law Society of Act;

AND IN THE MATTER OF NIGEL SVAMI of the City of Toronto, a Barrister and Solicitor (Hereinafter referred to as "the Solicitor");

AND IN THE MATTER OF a Discipline Hearing heard on September 13, 1995.

REASONS FOR DISSENT

I set out herein my reasons for dissenting from the majority view of permission to resign as a penalty in the matter of NIGEL SWAMI, Solicitor. I am of the view that disbarment is the appropriate penalty in the circumstances.

An Agreed Statement of Facts was filed in Complaint D70a/95 with respect to this matter.

Taking into consideration all of the evidence before this Committee, and especially the statement made by NIGEL SVAMI, I am of the view that the professional misconduct admitted, was reckless in the least but more appropriately termed wilfully blind. This conduct amounts to civil fraud. The Society's counsel provided a copy of the Reasons for Decision, both majority and dissenting, of Convocation in the matter of Harry Kopyto, Solicitor. Therein, is noted the unanimous Supreme Court of Canada decision in Sansregret v The Queen (1985) 18 C.C.C. (3d) 233 wherein the principles of recklessness and wilful blindness were reviewed. Further, the Kopyto decision quotes that of the House of Lords in Derry v Peek, 14 App. Cas. 337 wherein "fraud is proven when it is shown that a false representation has been made ... recklessly, careless whether it be true or false".

It is my view that Mr. Svami has been reckless and wilfully blind to the extend that fraud is made out. In support, I have considered the following evidence presented before the Committee:

1. In his statement to the Court, NIGEL SVAMI indicated that he "did not stop to reflect or consider what was happening and what the consequences of my actions would do". In this context, he admitted that in hindsight, he could see that his failure to monitor and oversee the preparation of his Legal Aid accounts, resulted in him being derelict and negligent in his responsibility to the Plan.

However, the benefit of hindsight does not dismiss the behaviour of the present. Even though Mr. Svami's staff prepared the Legal Aid accounts, it was he who had the opportunity to oversee them and it was he who actually signed them.

2. It is no excuse of Mr. Svami to indicate that he delegated the task of the preparation of the accounts to his law clerk, Meena Sakthivel. Mr. Svami admitted and Ms. Sakthivel confirmed, that Ms. Sakthivel came to the office without experience in legal work or Legal Aid procedures. Yet,both agree that the content of the instruction from Mr. Svami was three or four hours, conducted during separate periods and thereafter, Ms. Sakthivel was told to call Legal Aid directly if she had any questions. Mr. Svami admits "I never gave her any direct instructions in relation to the accounts as they were being submitted". However, Ms. Sakthivel testified that she wrote notes on Certificates to "check" them. Inevitably, they came back with Mr. Svami's signature without any corrections. Mr. Svami had the final ability, and certainly he had the duty, to make sure that the billings were accurate.

3. It is no excuse to say that there was an assumption that the bills were correct as they came back paid. The Ontario Legal Aid Plan, administered in the fashion that it is, has the expectation of honesty and accuracy from the lawyers who submit accounts to it. It cannot run effectively without relying on that integrity. The Legal Aid Plan can only check an account as against another account for double billing with an investigation or audit. There has to be a discrepancy that triggers that. In Mr. Svami's accounts, there are major discrepancies.

However, it is the Certificate holder who certifies the account to be accurate that bears the responsibility of that accuracy. In this case, Mr. Svami failed miserably. Mr. Svami testified regarding the accounts that "I didn't discuss them with her and had virtually no input into their preparation". However, it was his responsibility to communicate with his staff, instruct them property and if his initial instruction was inadequate, he should have up-dated it from time-to-time. The ultimate responsibility for accuracy and honest is upon the solicitor rendering the account.

4. Mr. Svami testified that he understood and accepted that the entries on the accounts were based entirely "first, on the entries in the diary maintained by the secretary ... and second, on the docket/time sheet kept in every file and written up, usually by me, contemporaneously with the appointment or service provided". Ms. Sakthivel testified that she only used the docket/time sheet kept in the file and never referred to the main diary. Although much time was spent in viva voce testimony in stressing the point that it was Meena Sakthivel who drew up the account, I am still lead back to the inescapable fact that Mr. Svami signed the accounts. I cannot believe Mr. Svami when he asserts that he did not take the best advise of a lawyer, that being, to read everything before you sign. Further, I find this an effort to divert from the issue. The fact is admitted that the accounts were prepared from the dockets that Mr. Svami wrote inside each file. If you take as an example the chart set out at Tab 5 of the Document Book, entered as an Exhibit in the proceedings, you see that Mr. Svami billed for 38.5 hours in a 24 hour day. 26.25 of the hours appear to over-lap. In that example, there are seven Legal Aid Certificates that Mr. Svami states he did work on, all

starting at 10:00 a.m. and ending at varying times thereafter. Two files start at the same time of 10:30 a.m. Two files start at the same time of 8:30 a.m. Two files start with work performed at 11:00 a.m. and two files start with work performed at 3:00 p.m. In most of the files of that day, the times overlap. It is Mr. Svami who made these dockets: No one else can be blamed. He testified he made the dockets contemporaneously with work done on the file. That therefore, means that on April 15, 1991, Mr. Svami had seven files in front of him where he would have marked that he had started work on each file at 10:00 a.m. This is not a case of reconstructing dockets. Ms. Sakthivel cannot be blamed for writing what is contained in the dockets, as that was her job and her instruction. She is not to be blamed for preparing accounts as per dockets as she saw them. It is Mr. Svami who should not have been preparing dockets as he did.

It is no excuse for Mr. Svami to say that there were a number of clients in his office at the same time. He has staff and if he admits that his staff were seeing the clients for him, then he obviously was not. He could not, in all conscience, certify that he worked on all seven files when he testified that he very well knew that there were other members of his staff working on those files instead of he. Further, the Solicitor billed for Immigration and Refugee Board attendances as if he attended himself, when a check of the Immigration and Refugee Board records show that Ms. Sakthivel actually appeared.

Again, if Mr. Svami tries to explain that it is Ms. Sakthivel's misunderstanding that all entries on the Legal Aid account have "N.S." beside them as attributing the work to Mr. Svami because it was his Certificate, then I do not see the point of filling in the space at all. That space on the Legal Aid account says clearly "work done by". It means none other than the plain English. It is not confusing and out of all of the explanations in the Legal Aid Tariff Manual, it can be argued that the explanation dealing with that part of the Legal Aid account is easiest to understand. Even if Ms. Sakthivel did not understand or appreciate the significance of it, that still does not excuse Mr. Svami from failing to correct the inaccuracies when he saw them. In fact, there were two inaccuracies he had an obligation to correct in this regard. Not only should Mr. Svami not have had his initials in the "work done by" category, but he should also have been charging the lesser rate for law clerk services.

It is incredible to believe Mr. Svami's contention that he thought his secretary used the daily diary to prepare accounts. Ms. Sakthivel stated that she did not. Further, Mr. Svami stated that he never checked with her or monitored what she did to any extent one would think reasonable when acting in the position of employer to an employee. However, if Mr. Svami understood that the diaries were being used, then it only provides a further opportunity for him to realize that the account is prepared inaccurately when there is no reference to the other employees in his office seeing clients when they certainly did, on days such as April 15, 1991.

In fact, Mr. Svami admits "I was aware that she was inserting my initials for all the items of service and that no attempt was made to claim a lesser amount for subordinates' work. She and I never considered nor discussed this fact until after the investigation was commenced".

5. Mr. Svami improperly billed the Plan more than $10,000.00 for travel time to Immigration Inquiries and Hearings that were less than 25 kilometres away. The Agreed Statement of Facts indicates that Mr. Svami had earlier received written notification not to charge for distances of less than 25 kilometres. The reference to this travel time in the accounts is clearly deliberate. In testimony, Mr. Svami dismissed this concern as "such a small amount in comparison with the total bill". In further aggravation, the Solicitor rendered accounts that charged mileage to the Mississauga CIC office when the attendance was really at 1 Front Street, Toronto.

Mr. Svami also admitted in testimony that "I'm a bad administrator ... I found the work tedious ... I couldn't bring myself to do it". In this context, he was referring to the proper preparation of the Legal Aid accounts. However, to accept this explanation for the inaccuracies would be to offer an excuse to any other lawyer who wished to pay less than scrupulous attention to matters in the practice of law that they may also find "tedious". The practice of law requires the strict attention to all detail, no matter how much it is disliked. To fail to keep the highest of standards in any one area, only reflects upon other areas.

To state that Mr. Svami's clients were all satisfied and his success rate was 95 per cent or more, does not address the issue. It is obvious that his clients would not be complaining as they did not pay the bill, although the Ontario Legal Aid Plan did. No individual was hurt directly by the inaccurate billings. However, the private retainer client can be used in example to show the magnitude of the misconduct. If, for example, each one of those seven people that Mr. Svami states that he saw starting at 10:00 a.m. on April 15, 1991 received bills for that hour of work and later compared their bills and realized that Mr. Svami had stated he had spent the time with each one of them to the exclusion of the other, there would be a hue and cry from those private retainer clients. There should be no less of a hue and cry because it is a public institution that had been defrauded. In fact, it is often said that it should be a greater hue and cry because of the defrauding of public funds which represent the tax payers' money.

Creating the greatest impression upon me was the fact that none of the references, including the two Solicitors who gave evidence on behalf of Mr. Svami, his own counsel nor any other evidence produced before the Court, explains why Mr. Svami would not pay attention to these matters. No medical evidence was given to suggest a possible situation that may be interpreted beyond Mr. Svami's control. All that I can be assisted with is that Mr. Svami was too busy and he just simply did not take the time, nor did he have an interest in taking the time to ensure that the accounts were accurate. This is a blatant admission. In some senses, it therefore goes further than the Kopyto facts even though the sums defrauded and the hours over-lapping are less. Nonetheless, there are striking similarities between the two cases and it is my view that the principles set out in the Kopyto decision are precedents for the matter at hand. Therefore, I can find no other alternative than that disbarment be the penalty recommended to Convocation.

ALL OF WHICH is respectfully submitted

DATED this 27th day of October, 1995

TAMARA STOMP

There were no submissions and the Report was voted on and adopted.

Counsel for the solicitor requested Convocation for leave to tender evidence on behalf of the solicitor.

Counsel for the Society did not object.

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

It was moved by Mr. Strosberg, seconded by Mr. MacKenzie that the evidence be heard.

Carried

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

The recommended penalty of the majority Report was that the solicitor be permitted to resign and the recommended penalty of the minority Report was that the solicitor be disbarred.

Mr. Perrier made submissions in support of the minority recommendation.

Mr. Baker made submissions in support of the majority recommendation of the Discipline Committee and read a statement from the solicitor to Convocation.

Mr. Clifford Lax was sworn and gave evidence.

There was a brief reply by Mr. Perrier and then questions taken from the Bench.

Mr. Strosberg brought to Convocation's attention the issue of whether those members who serve on the Legal Aid Committee should be excluded.

Mr. Baker replied that he had no objection to any member of the Legal Aid Committee sitting on this matter.

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

There was discussion concerning the issue of Legal Aid Committee members sitting for this matter.

Mr. Topp withdrew and took no part in the deliberations or vote.

It was moved by Mr. Millar, seconded by Ms. Sachs that the recommended penalty of the majority Report be adopted, that is, that the solicitor be permitted to resign.

Carried

It was moved by Ms. Ross, seconded by Mr. Aaron that the recommended penalty of the minority Report be adopted, that is, that the solicitor be disbarred.

Lost

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

Counsel were advised that Mr. Topp did not participate or vote.

Convocation took a brief recess at 11:12 a.m. and resumed at 11:30 a.m.

Re: Clare Colin GREEN - Toronto

The Deputy Secretary placed the matter before Convocation.

Messrs. Aaron, Gottlieb and Strosberg and Ms. Cronk and Ms. Curtis withdrew for this matter.

Mr. Scott did not participate.

Mr. Neil Perrier appeared for the Society and Mr. Morin appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 18th October, 1994, together with an Affidavit of Service sworn 19th July, 1995 by Ron Hoppie that he had effected service on the solicitor by registered mail on 28th June, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 28th September, 1995 (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

Ian Blue, Q.C., Chair
Neil Finkelstein
Nora Richardson

In the matter of The Law Society Act and in the matter of	Neil J. Perrier for the Society
CLARE COLIN GREEN of the City of Toronto a barrister and solicitor	Not Represented for the solicitor Heard: May 2nd, 1995

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On May 30, 1994 Complaint D104/94 was issued against Clare Colin Green alleging that he was guilty of professional misconduct.

The matter was heard in public on May 2, 1995 before this Committee comprised of Ian Blue, Q.C., Chair, Neil Finkelstein and Nora Richardson. The Solicitor attended the hearing and represented himself. Neil Perrier appeared on behalf of the Law Society.

DECISION

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

Complaint D104/94

2. (c) He continued to act for Evelyn Agnew and Robert Mervyn Vaughan in connection with the transfer, mortgaging and subsequent sale of a property located at 550 Lake Drive South, in the Town of Georgina, Ontario (the "Property") when he knew or ought to have known that he could not properly protect the interests of both parties.

Findings of the Committee

At the outset of these proceedings, Mr. Perrier, for the Law Society of Upper Canada, withdrew particulars 2(a), (b) and (d) and the complaint proceeded only on particular 2(c).

As a preliminary matter, an Agreed Statement of Facts was tendered as an exhibit and is attached to these reasons as Appendix "A". It became clear in the course of hearing evidence that some of that evidence was inconsistent with the Agreed Statement of Facts. It was agreed by all parties that, to the extent that the evidence was inconsistent with the Agreed Statement of Facts, the Committee would make findings of fact and that those would be conclusive on those contradictory points. Otherwise, the Agreed Statement of Facts would continue to apply.

The Rule which is engaged in this case is Rule 5 of the Rules of Professional Conduct. The relevant portions are as follows:

> Rule 5
> The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.
>
> COMMENTARY
> 4. The Rule requires adequate disclosure to enable the client to make an informed decision about whether to have the lawyer act despite the presence or possibility of the conflicting interest. As important as it is to the client that the lawyer's judgement and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead it may be only one of several factors which the client will weigh when deciding whether or not to give the consent referred to in the Rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer and the latter's unfamiliarity with the client and the client's affairs. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.
>
> 5. Before the lawyer accepts employment for more than one client in a matter or transaction, the lawyer must advise the clients concerned that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely. If one of such clients is a person with whom the lawyer has a continuing relationship and for whom the lawyer acts regularly, this fact would be revealed to the other or others with a recommendation that they obtain independent representation. If, following such disclosure, all parties are content that the lawyer act, the latter should obtain their written consent, or record their consent in a separate letter to each. The lawyer should, however, guard against acting for both sides where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.

17. Generally speaking, in disciplinary proceedings under this Rule the burden will rest upon the lawyer of showing good faith and that adequate disclosure was made in the matter and the client's consent was obtained.

The evidence in this case, as supplemented by the Agreed Statement of Facts at Appendix "A", is as follows. In the first week of June, 1989, the solicitor, Mr. Green, was contacted by Robert Mervyn Vaughan to discuss the latter's mother's and step-father's home property. Mr. Vaughan informed Mr. Green that the property was formally in the name of the Director - Veterans Lands Act, that his step-father was ill in hospital, and that his parents were having financial difficulty. Vaughan instructed Green that the property was to be transferred into his (Vaughan's) name.

The evidence of Mrs. Agnew, Mr. Vaughan's mother, was as follows. She is 81 years old. Mr. Green did not discuss the legal ramifications or advisability of signing the home over to her son. She does not recall whether it was her idea to transfer the house to her son, but in any event the transfer was made without Mr. Green giving her any advice. Mr. Green wrote a letter dated June 15th, 1989 to Veterans Affairs Canada advising that the property was to be transferred into Mr. and Mrs. Agnew's name. Mr. Green testified that the transfer was initially into Mr. and Mrs. Agnew's name rather than that of Mr. Vaughan because Veterans Affairs Canada will not make such a transfer to a third party such as Mr. Vaughan.

When the property was conveyed to Mr. and Mrs. Agnew, Mr. Green met with Mrs. Agnew and advised her that the property was being transferred into her and her husband's joint names. He does not recall saying anything about a second stage transfer to Mr. Vaughan's name. Mr. Green then arranged a second stage transfer of the property into Mr. Vaughan's name, with a life interest in Mrs. Agnew. Mr. Green does not recall advising Mrs. Agnew of the legal implications of that second transfer. Mrs. Agnew's evidence is that no such advice was given, and this Committee accepts that no such advice was given. Mr. Green did not advise Mrs. Agnew to obtain independent legal advice.

The result of all this is that a property which was held in Mr. and Mrs. Agnew's joint name ended up in Mr. Vaughan's name, with only a life interest in Mrs. Agnew. Mr. Green's rationale for not advising Mrs. Agnew to obtain independent legal advice or setting out the legal implications for the transaction is that, in his view, the transaction was in her best interests. He reasoned that, in order to transfer the property out of the name of Director - Veterans Lands Act, certain monies had to be paid. Mrs. Agnew did not have the funds, and Mr. Vaughan agreed to pay. Because Mr. Vaughan was financing the transaction, and Mr. and Mrs. Agnew would not have been able to do so at that time, Mr. Green did not consider it necessary to review the facts or the advantages and disadvantages of the transaction.

Subsequently, in 1992, a neighbour offered to purchase the property from Mr. Vaughan at an advantageous price, and the sale was completed. A dispute then arose between mrs. Agnew and Mr. Vaughan about the disposition of the sale proceeds. Mr. Green acted for Mr. Vaughan in the negotiations between the two of them, and Mr. Monteith acted for Mrs. Agnew. When the negotiations became contentious, mr. Green told Mr. Vaughan to obtain other counsel.

There are essentially two transactions of concern here. The first is the transfer of the property from Mr. and Mrs. Agnew to Mr. Vaughan. At that stage, in the Committee's view, Mr. Green should have advised Mrs. Agnew to obtain independent legal advice. At the very least, he should have made complete and full disclosure to Mrs. Agnew of the advisability and legal ramifications of the transaction, advised her of his conflict, and asked her whether she consented to Mr. Green acting for both her and Mr. Vaughan pursuant to Rule 5, Commentary 5 of the Rules of Professional Conduct.

Mr. Green does not even see a conflict, and that is of some concern to the Committee.

The second transaction of concern relates to the distribution of the proceeds of sale. Mr. Green did not comply with Rule 5, Commentary 5 at the outset of his relationship with Mr. Vaughan and Mr. and Mrs. Agnew. He should have disclosed at that time that, to the extent the matter became later contentious, he could not act for either party. He did not make such disclosure when he made the original transfers to Mr. and Mrs. Agnew and later to Mr. Vaughan, so he could not act against Mrs. Agnew at the time of the subsequent sale and ensuing negotiations between her and Mr. Vaughan.

For the foregoing reasons, the Committee is of the view that particular 2(c) of the complaint has been made out, and that Mr. Green is guilty of professional misconduct.

RECOMMENDATION AS TO PENALTY

The Committee recommends that Clare Colin Green be reprimanded in Convocation and pay costs of the Law Society in the amount of $2,000.

REASONS FOR RECOMMENDATION

The Committee is concerned with Mr. Green's conduct in both of the transactions indicated, but considers his failures in the first to be considerably more serious. Whatever harm was done was done at that stage, when Mrs. Agnew significantly changed her legal position relative to Mr. Vaughan, than later when there was a dispute with Vaughan. Counsel for the Law Society urged upon us that we suspend Mr. Green for a period of one month. He pointed to the seriousness of the conflict and, most particularly, to the prior discipline history set out in paragraphs 23 through 25 of the Agreed Statement of Facts.

The Committee is not disposed to suspend Mr. Green. The prior discipline has occurred over the course of a forty-five career, and in each case the penalty was only a Reprimand in Committee.

Mr. Green in his own mind was trying to act in Mrs. Agnew's best interests, and thought that he was doing so. Unfortunately, he did not consider that it is difficult to act in the best interests of two people whose interests conflict. That being said, Rule 5 itself recognizes that there may be situations where one can act for both sides of a transaction, and this illustrates that conflicts of interest are not automatically disciplinary offences which give rise to suspensions.

The Committee takes into consideration Mr. Green's long years at the Bar, and that when Mr. Perrier was asked whether a Reprimand in Convocation was within the range given the offence and circumstances in this case, he agreed that it was (albeit, according to him, at the low end).

For those reasons, the Committee recommends that Mr. Green be reprimanded in Convocation, and pay costs to the Law Society in the amount of two thousand dollars.

Clare Colin Green was called to the Bar on the 19th day of April, 1920.

ALL OF WHICH is respectfully submitted

DATED this 7th day of June, 1995

Neil Finkelstein
for the Committee

There were no submissions and the Report was voted on and adopted.

The recommended penalty of the Discipline Committee was that the solicitor be reprimanded in Convocation and pay costs in the amount of $2,000.

Both counsel made submissions in support of a reprimand in Convocation but that the costs be waived due to hardship.

There were questions from the Bench and the Report was amended to reflect the solicitor's call to the Bar as 1955, not 1920.

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

It was moved by Mr. Topp, seconded by Mr. Bobesich that Convocation reconsider the acceptance of the Report and set aside the finding of professional misconduct.

Carried

Counsel, the solicitor, the reporter and the public were recalled and advised of Convocation's decision that the Report was reconsidered and the finding of professional misconduct set aside.

Mr. Perrier made submissions in support of adopting the finding of professional misconduct of the Discipline Committee.

Mr. Morin asked Convocation to receive the affidavit evidence of the solicitor.

Counsel for the Society opposed the request of receiving the affidavit as it was not before the Discipline Committee.

The Treasurer ruled that Convocation not receive the affidavit evidence.

There were further submissions by Mr. Morin and brief reply by Mr. Perrier.

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

Convocation deliberated.

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

APPLICATION FOR READMISSION

Re: Hart Melvyn ROSSMAN - Richmond Hill

The Deputy Secretary placed the matter before Convocation.

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER OF section 46 of the *Law Society Act*;

AND IN THE MATTER OF the readmission of Hart Melvyn Rossman, of the Town of Richmond Hill.

REASONS FOR DECISION

The application of Hart Melvyn Rossman for readmission to the Law Society of Upper Canada was heard on July 15, 1994 and May 10, 1995 by a panel consisting of Netty Graham, Chair, Maurice C. Cullity, Q.C. and Donald H. L. Lamont, Q.C. The applicant was represented by Frank P. Oster. Stephen Foster appeared on behalf of the Law Society on July 15, 1994 and Neil Perrier on May 10, 1995.

Background

By Order of Convocation dated May 24, 1984, Hart Melvyn Rossman was given permission to resign his membership in the Law Society of Upper Canada. The Discipline panel found the solicitor guilty of the following particulars of misconduct.

(Para. 2)
" (a) 438 Perth Avenue
Toronto, Ontario

(i) On or about October 14, 1982, he deposited to his law office general account the sum of Forty-Eight Thousand Seven Hundred and Fifty Dollars ($48,750,00), more or less, which had been remitted to him in trust by his client, the Royal Bank of Canada, as the proceeds of a mortgage loan to his client, Alex Kotlar.

(ii) In or about December 1982, he willfully attempted to mislead the Society about his disbursement of the proceeds of the mortgage loan referred to in the preceding subparagraph.

(iii) As at November 18, 1982, he did not have sufficient funds on deposit in his law office bank accounts to meet his trust obligations to clients. In particular, at that date his trust obligations to his clients, the Royal Bank of Canada and Alex Kotlar, totalled Thirty-Four Thousand Five Hundred Nine Dollars and Ninety Cents ($34,509.90); whereas the total of funds on deposit in his law office accounts were Twenty-Five Thousand Eight Hundred Six Dollars and Thirty-Five Cents, ($25,806.35), more or less.

(v) He did not serve his client, the Royal Bank, in a conscientious, diligent and efficient manner, and did not provide them with a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.

a) He did not deliver a written report to either client on completion of the transaction;

b) He did not keep notes on his search of the title to 438 Perth Avenue;

(b) 417 Harvie Avenue
Toronto, Ontario

(i) When representing both the borrower and the lender on a mortgage transaction in the amount of Forty-Three Thousand Five Hundred Dollars ($43,500.00) in or about the month of May 1982, he failed to serve the lender, National Trust, in a conscientious, diligent and efficient manner and he failed to provide it with a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation. In particular:

(a) He failed to notify the lender that the borrower had, on or about May 19, 1982, purchased the property for the sum of Twenty-Nine Thousand Dollars ($29,000.00), more or less, and that the purchase-money mortgage was 150% of the purchase price, when he knew, or ought to have known, that such information would likely have caused the lender to re-assess its security on the mortgage loan transaction;

(b) He did not keep notes on his search of the title to 417 Harvie Avenue, Toronto;

(c) He did not deliver a written report to either the borrower or the lender upon completion of the transaction.

(ii) He deducted the sum of One Thousand Dollars ($1,000.00), from the mortgage loan proceeds on account of his fees and disbursements without rendering a fee billing or other written notification to either of his clients.

(c) 299 Old Weston Road
Toronto, Ontario

(i) On or about the 27th day of August, 1982, he knowingly and willfully prepared and swore a false Affidavit of Residence and of Value of the Consideration in connection with the sale of this property from Manju and Surrender Saini as Grantors to Karl and Rose Rafaelli as Grantees. He falsely swore that the consideration for the grant was Ninety-Five Thousand Dollars ($95,000.00), rather than Sixty-Two Thousand Dollars ($62,000.00), to assist his clients, the Rafaellis, in obtaining additional mortgage financing.

(iii) He failed to honour the personal Undertaking he gave to have an agreement postponing an existing mortgage on 299 Old Weston Road, Toronto, executed and fully registered.

(d) He deposited to his law office general account the following amounts remitted to him in trust for clients:

Client	Date Deposited to General Account	Amount
Kotlar (417 Harvie Ave.)	May 19, 1982	$43,500.00
Rafaelli (299 Old Weston Rd.) "	August 26, 1982	$16,350.07

The penalty of permission to resign was a joint submission and it is pertinent to note that the panel had some reservations in connection with the joint submission. At page 16 of their report, under Conclusions, they say:

> "It is with some reservations that the Committee has decided to accede to the joint submission of counsel and recommend that Mr. Rossman be permitted to resign. We are particularly disturbed by his participation in the creation of the false affidavit, his failure to protect client interests and his failure to report to clients. We also are mindful that he derived no personal gain from the subject transactions, and that he permitted himself to be used as a pawn by his client because in his distress he was not tough-minded enough to resist his clients' blandishments."

Subsequent to the discipline matter with the Law Society, the solicitor was charged with fraud arising out of one of the matters before the Law Society.

On the plea of guilty before his Honour Judge Wren, Mr. Rossman was granted a conditional discharge and a period of probation on the conditional discharge for a period of eighteen months on the condition that Mr. Rossman perform two hundred and fifty hours of community service.

Mr. Rossman was also sued civilly by National Trust Company in connection with the damages as a result of fraud, breach of trust, breach of contract and negligence on the part of the solicitor in relation to the purchase of a residential property known as 417 Harvie Avenue in Toronto, Ontario.

McMurtry, A.C.J.O.C. found the evidence did not support a finding of fraud but he found the solicitor to be both negligent and in breach of his fiduciary duty to National Trust. He awarded damages to National Trust in the amount of $20,541.49 plus interest and costs on a party and party basis.

Mitigating Circumstances

Mr. Rossman has gone through some very difficult personal problems and significant health conditions over the past several years:

1979 - father passed away
1980 - suffered from kidney stones
1981 - suffered bronchial pneumonia
1982 - mother passed away suddenly
1983 - wife diagnosed with cancer
1984 - given permission to resign
1985 - wife passed away

Since that time he has remarried and recently undergone a kidney transplant which he has reported as being a success.

Mr. Rossman submitted several character letters on his behalf and Mr. Jeffery Lyons gave evidence orally before the Committee. He has been involved with various charitable activities in his Synagogue and the Men's Club of his Congregation. His Rabbi, Irvin S. Beigel wrote that he is a loyal and devoted member of the Synagogue and has been for many years. He indicated that Mr. Rossman is a man of integrity and honesty. Indeed, in light of the significant medical conditions endured by the applicant over the last many years, it is a wonder that he could give as much as he did.

Conclusions

Despite the favourable testimonials and his horrendous personal problems, the Committee has found this to be a difficult application to deal with. To a large extent, the difficulty arises because of the nature and the thrust of the submissions made on behalf of Mr. Rossman.

The Committee understands those submissions as follows:

(i) Mr. Rossman has always been of good character;

(ii) Although they were serious, the discipline offences were essentially "errors in judgement" committed when he was under conditions of considerable personal stress;

(iii) Mr. Rossman has purged his guilt by remaining outside the profession for eleven years during which he was prosecuted, sued and paid damages; and

(iv) In these circumstances, no question of reaffirmation or rehabilitation arises as his misconduct did not involve any fraudulent intention or personal benefit.

We are not able to accept that these submissions satisfy the tests that Convocation has applied in cases such as Goldman and Manek. In particular, we cannot accept the applicant's attempt to characterize the offences as essentially errors of judgement and, as a consequence of this mischaracterization, we believe that counsel's submission that there is no need to demonstrate reaffirmation or rehabilitation was misconceived. Nor do we believe that the evidence we heard indicates a sufficient degree of rehabilitation.

Reasons

The Applicant had been found guilty of very serious professional misconduct for which he was made to leave the profession. He prepared and swore a false affidavit to assist his clients in obtaining additional mortgage financing, he failed to honour a personal undertaking he gave to have a mortgage postponement agreement registered, he had deposited trust funds in his general account, he attempted to mislead the Law Society about his disbursement of certain mortgage proceeds, he failed to maintain sufficient funds to meet his obligations and he failed to serve clients in a conscientious, diligent and efficient manner. Today we are being asked to characterize these offences as merely errors of judgement and this Committee does not accept that submission.

Much of the evidence given by Mr. Rossman and a large part of his counsel's submissions appeared to be designed to play down and detract from the degree of culpability in the acts of misconduct. This was taken to such an extent that, until advised to the contrary by his counsel, members of the Committee were under the impression that the solicitor was attempting to resile from the agreed statement of facts. It appeared to be clear that the Applicant does not accept the reservations expressed by the Discipline Committee on the seriousness of their findings. We put considerable weight on this fact in making our determination and in trying to assess the Applicant's character today.

Mr. Rossman's continuing failure to recognize that his flagrant breaches of fiduciary duty to his clients demonstrated a lack of integrity that fell far short of the standards required of members of the profession, is in our view, quite inconsistent with the requirement of rehabilitation. There is, in our view, very little material difference between acts of dishonesty that are intended to put the client's money into the solicitor's pockets and breaches of fiduciary duty that, forseeably, would divert funds from one client to another to the former's detriment.

It seemed to the Committee that rather than demonstrating a degree of remorse that would be relevant to the question of rehabilitation, Mr. Rossman is more concerned to clear his name and vindicate his character. This was shown not only in his characterization of the offences as errors of judgement but also in his references to the conduct of Mr. Sheriff when the agreed statement of facts was being negotiated, to Mr. Greenspan's conduct with respect to the failure to disclose the record of the preliminary hearing before Judge Hogg and his subsequent conduct at the time of Mr. Rossman's trial. Mr. Rossman's evidence before the Committee regarding Mr. Sheriff's conduct was that in consideration of Mr. Rossman signing an agreed statement of facts and agreeing to resign, Mr. Sheriff would not recommend criminal charges be laid. In connection with his evidence regarding Mr. Greenspan's conduct, he told us that he pleaded guilty at his hearing because he had "succumbed to duress from Greenspan and the police on the other side". Mr. Rossman's attitude to these events seemed, again, more consistent with an attempt to clear his name rather than an acceptance of the seriousness of his misconduct, remorse and rehabilitation.

In this case there appear to be no significant disputes as to the facts and Mr. Rossman's submissions were largely directed at minimizing the gravity of his offences.

Mr. Rossman's counsel's references to the Discipline Committee's conclusion that he should be permitted to resign because of his personal problems appeared to be suggesting that it was consistent with the Discipline Committee's position that, when those problems were removed, he should be readmitted. In fact, it seems to have been clearly the view of the Discipline Committee that, but for the personal problems, Mr. Rossman would have been disbarred. In consequence, it does not follow that the disappearance of the personal problems is sufficient to justify his readmission.

In consideration of all of the above it is respectfully submitted by this Committee that the Applicant has not shown by way of submissions or satisfactory evidence that there is no possibility of re-offending in the future or that he is presently of good character. The Applicant has not passed the test as set out by Convocation in the Goldman and Manek cases which set out the principles governing readmission. The oral character evidence of Mr. Lyons whose only real contact with the Applicant was of a political nature while they were students at law school, set out that if Mr. Rossman were to be readmitted, there should be conditions to the readmission. Most of the letters of reference from the community did not acknowledge the prior discipline history.

On the totality of the evidence before us we submit that the Applicant not be readmitted.

ALL OF WHICH is respectfully submitted

DATED this 25th day of May, 1995

Netty Graham
Chair

Mr. MacKenzie withdrew for this matter.

Mr. Perrier appeared on behalf of the Society and Mr. R. Zemla appeared on behalf of the applicant who was present.

Counsel for the applicant made submissions in support of the applicant being readmitted and that the Admissions Committee had erred in their decision.

Mr. Perrier made submissions in support of the decision of the Admissions Committee. He advised that Convocation had three options: (1) to adopt the reasons and recommendation of the Committee (2) reject the Report and readmit the applicant but with conditions or (3) send the matter back to a new committee.

There was a brief reply by Mr. Zemla.

There were questions from the Bench.

The matter was stood down until after the lunch break.

Re: Vernon Isadore BALABAN - Toronto

The Balaban discipline matter was referred to the Convocation Assignment Tribunal.

CONVOCATION ADJOURNED FOR LUNCHEON AT 1:40 P.M.

CONVOCATION RECONVENED AT 2:30 P.M.

PRESENT:

The Treasurer, Arnup, Backhouse, Banack, Bobesich, Carey, Cole, Copeland, Cronk, Crowe, Curtis, Eberts, Feinstein, Gottlieb, Millar, Puccini, Ross, Sachs, Scott, Sealy, Strosberg, Swaye, Thom, Topp, Wilson and Wright.

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APPLICATION FOR READMISSION

HART MELVYN ROSSMAN (cont'd)

Convocation deliberated in camera.

It was moved by Mr. Strosberg, seconded by Ms. Sealy that Convocation accept the Report but the Report be amended to reflect that the test was "no probability of re-offending" rather than "no possibility of re-offending".

Carried

Counsel, the applicant, the reporter and the public were recalled and advised of Convocation's decision that the applicant be denied readmission and that the Report be amended to reflect that the test was "no probability of re-offending" rather than "no possibility of re-offending".

Counsel and applicant retired.

Re: Michael Elliot CHODOS - North York

The Deputy Secretary placed the matter before Convocation.

Messrs. Topp and Banack withdrew for this matter.

Mr. Scott did not participate.

Ms. Nancy Spies appeared on behalf of the Society and Mr. Brian Greenspan appeared on behalf of the solicitor who was present.

Convocation had before it the Report of the Discipline Committee dated 23rd May, 1995, together with an Affidavit of Service sworn 14th June, 1995 by Louis Katholos that he had effected service on the solicitor by registered mail on 13th June, 1995 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th December, 1995 (marked Exhibit 2). Copies of the Report having been forwarded to the Benchers prior to Convocation, the reading of it was waived.

The Report of the Discipline Committee is as follows:

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Ronald D. Manes, Chair
May P. Weaver, Q.C.
Fatima Mohideen

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

MICHAEL ELLIOT CHODOS
of the City
of North York
a barrister and solicitor

Nancy Spies
for the Society

John Laskin and Brian Greenspan
for the solicitor

Heard: April 28, 1993
June 30, 1993
August 4, 1993
March 28, 1995

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

The DISCIPLINE COMMITTEE begs leave to report:

D139/92

THE LAW SOCIETY OF UPPER CANADA

IN THE MATTER of the LAW SOCIETY ACT;

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

This matter has come for a decision before this Discipline Committee in respect of a Complaint by the Law Society that Michael Elliot Chodos is guilty of conduct unbecoming a barrister and solicitor in that:

> "He took steps which were calculated to ensure that a former client could not realize on a civil judgment in action no. 14659/81 dated April 24, 1986 for damages for breach of his professional duty to that client and, after he went into bankruptcy and applied for a discharge from bankruptcy, his conduct with respect to

that judgment (which conduct) was criticized by the Honourable Mr. Justice Lane in a civil judgment dated January 22, 1992, which was made public."[1]

FACTS

Michael Chodos is a general litigation practitioner who was called to the bar in 1975. He practised in partnership for approximately twelve years until that partnership was dissolved in July 1988, and has since continued as a sole practitioner. In 1981, Mr. Chodos represented Mr. Soel Szarfer in a wrongful dismissal action. Mr. Szarfer was a hairdresser of modest circumstances who was dismissed from his employment after sustaining an injury.

During the course of representing Mr. Szarfer, Mr. Chodos became apprised of confidential information relating to Mr. Szarfer's personal circumstances including details concerning the fragility of the marital relationship between Mr. and Mrs. Szarfer. Mr. Chodos then proceeded to have a brief affair with Mrs. Szarfer which was discovered by Mr. Szarfer. The affair caused Mr. Szarfer great emotional upset.

Mr. Szarfer commenced a lawsuit against Mr. Chodos ("the Szarfer lawsuit") essentially for breach of fiduciary duty alleging that Mr. Chodos utilized confidential information for his own advantage and placed his personal interest in conflict with his duties as a fiduciary.[2] Mr. Chodos defended the proceedings which culminated in a trial before the then and now late Associate Chief Justice Callaghan in March, 1986. Justice Callaghan found Mr. Chodos was in breach of his professional duty constituting breach of confidence, professional negligence and an unreasonable lack of skill and fidelity in his fiduciary duties as a lawyer.[3] Judgment was awarded in favour of Mr. Szarfer in the amount of $68,000.00 (including pre-judgment interest) with interest thereon.

Mr. Chodos appealed the decision to the Court of Appeal. In the period prior to and immediately following the hearing of the appeal approximately two years later, Mr. Chodos continued to practice law and was involved in several financial transactions which are relevant to this Complaint:

a. In April, 1986, Mr. Chodos acquired a one-eighth interest in a property in the Township of Innisfil ("the Alcona Co-Tenancy"). Mr. Chodos "went along" with an agreement whereby his interest would be held in trust by one of his partners (at the time) in an effort to insulate this interest from the Szarfer Judgment.[4]

b. In 1987, Mr. Chodos received a capital gain from a successful MURB investment amounting to approximately $65,000.00 after taxes.

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1 Complaint of Jonathan E. Feder, sworn August 28, 1992 staff lawyer for the Law Society of Upper Canada, D139/92.

2 Reasons for Judgment of Callaghan A.C.J.H.C. released April 24, 1986, p. 1.

3 Ibid. p. 25.

4 Agreed Statement of Facts, Exhibit 2, paragraph 9.
Transcript, p. 65-66, lines 23 - 31
lines 1 - 5

Transcript of Proceedings before Lane J. dated January 14th and 15th, 1992, p. 27.

c. In June, 1988, Mr. Chodos liquidated flow-through shares in an amount of between $3,500.00 and $4,000.00.

d. In November 1988, Mr. Chodos liquidated his RRSPs which had a value of approximately $39,000.00.

In July 1988, Mr. Chodos left his partnership. The evidence indicates that Mr. Chodos was earning an annual income of between $80,000.00 and $100,000.00 from this practice prior to his departure.

Mr. Chodos' appeal was heard and dismissed on November 10, 1988. The damages and costs from the Szarfer lawsuit amounted to approximately $170,000.00 by this time. Mr. Szarfer became Mr. Chodos' largest creditor.

Mr. Chodos was scheduled to attend a judgment-debtor examination in relation to the Szarfer Judgment on January 26, 1989 at which he failed to appear. He was scheduled to attend a second judgment debtor examination on May 30, 1989 but again did not attend and instead filed a Proposal to creditors under the Bankruptcy Act on that very day.

The Proposal did not provide for any payment to Mr. Chodos' unsecured creditors. Instead it offered the proceeds from Mr. Chodos' interest in his former partnership and his interest in the Alcona Co-Tenancy (net of any legal costs incurred in the realization of these assets) in full satisfaction of the claims of unsecured creditors. By this time Mr. Szarfer's Judgment with interest and costs had grown to approximately $210,000.00 and comprised about two thirds of the unsecured debt and a little less than that as a percentage of Mr. Chodos' overall indebtedness.[5]

Mr. Chodos' Proposal was rejected at a general meeting of creditors in November, 1989, and he was deemed bankrupt as of May 30, 1989. The evidence indicates that Mr. Chodos lived relatively modestly during the period of his bankruptcy and received substantial financial assistance from his relatives. He then applied for a discharge and appeared before Justice Lane who granted a conditional discharge on January 22, 1992.

Justice Lane granted the discharge conditional upon Mr. Chodos consenting to a $100,000.00 Judgment which was designed principally to ensure that Mr. Szarfer received some payment.[6] Justice Lane further indicated that the Trustee was to set up an appropriate schedule of payments, and Mr. Chodos was to provide the Trustee with statements of his business income certified by an accountant on a regular basis satisfactory to the Trustee. Mr. Chodos has not made any payments under this judgment.

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[5] Statement of Affairs of Mr. Chodos dated October 23, 1989 lists debts of $386,000.00 of which $100,000.00 is for the Szarfer Judgment, $110,000.00 is for the draft Bill of Costs and $29,000.00 for Mr. Chodos' solicitor fees.

[6] Mr. Justice Lane stated: "certainly bearing in mind the impoverished condition of Mr. Szarfer and the fact that this condition is in his opinion entirely, and from a more objective viewpoint substantially, the fault of the bankrupt, I should, if possible, ensure that a payment is sufficient to constitute a significant recovery for him." Reasons for Judgment of Lane dated J. dated January 22, 1992, p. 13.

Mr. Szarfer is currently supported by a disability pension and a modest payment from Worker's Compensation totalling approximately $2,000.00 a month. He has borrowed $20,000.00 to keep current with all the expenses incurred in the ordinary course of living. Mr. Szarfer has been and continues to be devastated by these events.

ISSUE

The issue before this Committee is whether the Solicitor's conduct towards Mr. Szarfer falls below the standard of professional conduct one can reasonably expect from a solicitor in the circumstances.[7]

POSITION OF THE PARTIES

The Law Society takes the position that Mr. Chodos' conduct was calculated to ensure that Mr. Szarfer could not realize on the fruits of his civil Judgment obtained against Mr. Chodos. Ms. Spies argues that Mr. Chodos embarked upon a course of conduct and engaged in court proceedings which, when reviewed in their totality, demonstrate an animus towards Mr. Szarfer.

The Solicitor takes the position that the Law Society has failed to demonstrate through clear and cogent evidence that he did in fact take steps calculated to ensure that result. Mr. Laskin argues that Mr. Chodos was entitled to pursue his legal rights in relation to the Szarfer lawsuit and to structure his financial affairs according to law. Mr. Laskin further argues that Mr. Chodos should not be deprived of these legal rights or punished for exercising them simply because he is a lawyer.

DISCUSSION

The Szarfer lawsuit and the events which flowed from it have their origins in the solicitor-client relationship which existed between Mr. Chodos and Mr. Szarfer. Mr. Chodos acquired confidential information during the currency of that relationship and he misused it. I quote the findings of Justice Callaghan in that regard:

> "Mrs. Szarfer was vulnerable and the Defendant knew it and exploited it as a result of knowledge gained in relation to the claim for damages for mental stress in the wrongful dismissal action."[8]

and further:

> "[Mr. Chodos'] conduct was dishonourable. Integrity is the fundamental quality of the lawyer. Trustworthiness is the essential element in the true lawyer-client relationship."[9]

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7 The fact that a judge criticizes the behaviour of a solicitor is not grounds per se for a Complaint. However, it is proper to specify a judicial criticism of a solicitor's behaviour as a particular in so far as the particular serves to inform the solicitor of the grounds of the Complaint.

8 Supra, note 2 at p. 19.

9 Ibid. at p. 30.

We are not here to decide, however, Mr. Chodos' culpability with respect to the affair between Mrs. Szarfer and himself. Mr. Chodos has already been disciplined for that.[10] We must only decide whether the manner in which Mr. Chodos behaved subsequent to that misconduct gives rise to further culpability particularly with respect to his financial affairs.

Mr. Chodos refused to settle the litigation with Mr. Szarfer at any stage prior to or after the commencement of proceedings. The evidence indicates that Mr. Chodos could have settled the claim for as little as $15,000.00 prior to Justice Callaghan's judgment.[11] The refusal to settle led to the trial before Justice Callaghan which Mr. Chodos lost. This refusal to deal with Mr. Szarfer persisted and again manifested itself before the appeal, in that Mr. Chodos admitted that he may have been able to settle the action for less than the amount of the Judgment if he had done so before the appeal.[12] Yet Mr. Chodos made no attempt to do so. Mr. Chodos had every right to refuse to settle with Mr. Szarfer, but his dogged determination and resolute stance towards Mr. Szarfer provide a window into his thinking.

A telling indicator of Mr. Chodos' attitude toward Mr. Szarfer is provided by the Alcona Co-Tenancy transaction. The fact that Mr. Chodos structured the acquisition of his interest in the co-tenancy whereby it would be held in trust by one of his former partners in an effort to insulate that interest from the Szarfer Judgment, reveals that Mr. Chodos had determined early on that he would take the necessary steps to avoid his financial obligation to Mr. Szarfer. It is also important to note that the structuring of the Alcona Co-Tenancy was done specifically to avoid the Szarfer debt rather than Mr. Chodos' indebtedness in general.

Mr. Chodos maintained this resolute attitude even after receiving the capital gain from the MURB investment. At that time Mr. Chodos clearly had the funds with which to pay Mr. Szarfer and yet he did not do so. He did not to put any money aside so that in the event that his appeal was unsuccessful, he would be able to pay Mr. Szarfer. Mr. Laskin quite correctly maintains that there is no legal requirement for a judgment debtor to set aside money to address the possibility that an appeal will not be successful. But Mr. Chodos' actions are consistent with an avoidance of the Szarfer debt.

In June of 1988 Mr. Chodos liquidated flow-through shares in the amount of $3,500.00 to $4,000.00. He testified that this was done for his new law practice. Although this may be so to some extent, this transaction is consistent with the Alcona transaction and Mr. Chodos' continued intention to avoid responsibility for the Szarfer Judgment. It further demonstrates Mr. Chodos' preference for his own interests over those of Mr. Szarfer.

Mr. Chodos states that he was given legal advice that his appeal would be successful and accordingly, he did not offer any portion of the Judgment to Mr. Szarfer in settlement, nor did he put any of it aside against the possibility that the appeal might not be successful. Mr. Chodos' testimony in this regard is hearsay. The Law Society has been deprived of any opportunity to test Mr. Chodos' assertion, and therefore the evidence will receive little weight. In any event, I am of the opinion that even the most inexperienced amongst us are aware that

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[10] Complaint D94/86.

[11] Transcript, p. 28, lines 6 - 13
p. 63, lines 1 - 15.

[12] Transcript, p. 65, lines 7 - 14.

Agreed Statement of Facts, Exhibit 2, paragraph 8.

there are no guarantees in the Court of Appeal. It is inherently improbable that Mr. Chodos was advised that he would be successful in the appeal and equally improbable, given Mr. Chodos' litigation experience, that he would rely exclusively on such advice. In fact, the structuring of his financial affairs demonstrates the contrary. Mr. Chodos should have known, despite any legal advice he may have received, that most appeals are unsuccessful, and this case would be particularly difficult given the findings of fact by and the cogent reasons of Justice Callaghan.

Mr. Chodos' appeal was dismissed on November 10, 1988. The debt to Mr. Szarfer had increased to approximately $170,000.00. Mr. Chodos knew that he was insolvent. Mr. Chodos certainly had the legal right to pursue his appeal and to structure his finances pending that appeal without regard to Mr. Szarfer. But the fact that his course of action resulted in insolvency raises the inference that his intention was to defeat Mr. Szarfer's claim in any manner possible, even though it precipitated his financial ruin.

Mr. Chodos testified before Justice Lane that he liquidated his RRSPs in November, 1988 at approximately the time at which he found out that he was insolvent. Mr. Chodos directed the bank to withhold the minimum amount of income tax. He knew when he liquidated his RRSPs that the tax liability with respect to their liquidation exceeded the amount withheld by the bank for income tax.[13] Mr. Chodos admits that he knew at the time when he collapsed his RRSPs in November, 1988 that the approximate value of the RRSPs ($39,000.00) would be added to his 1988 taxable income. He knew that his taxable income in 1988 exceeded $98,000.00. He also knew that his income would be lower in 1989 given that he had just established a new partnership. Accordingly, he knew that he would be paying more tax by bringing the liquidation of the RRSPs into his income for the 1988 tax year than if he deferred liquidating some of the RRSPs to 1989, a year in which he would pay less tax.[14]

Mr. Chodos states that he and his wife required the money ($29,000.00 to $30,000.00 after tax) in order to meet ordinary living expenses. However, in his Affidavit of Income and Expenses sworn for the purposes of the Bankruptcy proceedings, his monthly deficit was less than $4,000.00. By November, 1988, Mr. Chodos' father and father-in-law were paying for his children's education, family vacations and the live-in nanny. The entire amount of the after tax RRSP proceeds would have covered over 7 months of Mr. Chodos' stated monthly deficit. Even if the Chodos' were relying on these funds to live, it was possible and certainly preferable to bring much of the RRSP liquidation into Mr. Chodos' 1989 income.

Mr. Chodos chose to liquidate his RRSPs in a manner that would maximize tax liability, and minimize the disposable income available to him. This treatment is consistent with the other financial transactions, and I am of the opinion that Mr. Chodos liquidated the RRSPs in such a manner so as to avoid their availability for the Szarfer judgment.

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[13] Transcript, p. 71, lines 15 - 23.

[14] Transcript, p. 71-72, lines 24 - 31.
lines 1 - 13.

Mr. Chodos twice failed to attend at scheduled judgment debtor examinations in relation to the Szarfer Judgment, on January 26, 1989 and May 30, 1989. He testified in his cross-examination at the bankruptcy hearing that he did not remember the reasons for his failure to attend on those two dates.[15] Mr. Chodos' failure to attend judgment-debtor examinations is a further expression of his rigid stance toward Mr. Szarfer. Mr. Chodos must have appreciated the extra procedures and expense to which he would put Mr. Szarfer in attempting to enforce his (Mr. Chodos') attendance at the judgment-debtor examinations. Mr. Chodos' non-attendances at the judgment-debtor examinations are consistent with his steadfast refusal to accept responsibility for his debt to Mr. Szarfer.

On May 30, 1989 Mr. Chodos made a Proposal to his creditors under the Bankruptcy Act. This Proposal did not contemplate any payment to the Trustee in favour of unsecured creditors of which Mr. Szarfer was by far the largest. The only provision for unsecured creditors was reference in paragraph 4(a) to a utilization of the proceeds from Mr. Chodos' interest in his former law partnership together with his interest in the Alcona Co-Tenancy to be paid to the Trustee, net of any legal expenses incurred in connection with the realization of those assets.

Mr. Chodos' interest in the Alcona Co-Tenancy could not be readily liquidated, particularly given his ongoing dispute with his former partners who were holding the interest in trust. I also note that the Proposal post-dated by some 10 months the date on which Mr. Chodos was locked out of his former partnership in July, 1988. There were only feeble attempts by Mr. Chodos between July of 1988 and May of 1989 to recover any amount from his former law partners in respect of his partnership interest. Mr. Chodos testified before Justice Lane that:

> "There had been some correspondence going back and forth. At some point early in or shortly after July of 1988, but I did not make any other attempts."[16]

Mr. Chodos was asked before Justice Lane whether it was fair to say that as of May 30, 1989, the only provision he was making for unsecured creditors was that if they wished to sue his former law partners, they could do so. Mr. Chodos' answer was "that's correct and I was prepared to cooperate."[17]

Mr. Chodos valued his interest in his former law partnership at $125,000.00. Nevertheless, he did not make any formal offer to settle his interest until June, 1989 after the Proposal to creditors. The offer was rejected by his former partners, and they invited him to make a counter-proposal to which Mr. Chodos failed to respond.[18] In my view, simply offering to give unsecured creditors the

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15 Transcript of Proceedings before Lane J. dated January 14th and 15th, 1992, p. 16-17, lines 16 - 31.
line 1.

16 Ibid. at p. 16, lines 3 - 6.

17 Ibid. at p. 16, lines 7 - 11.

18 See letter dated June 22, 1989 from M. O'Reilly to L. Banack, Exhibit 4.

See letter dated July 17, 1989 from L. Banack to M. O'Reilly, Exhibit 4.

See letter dated September 12, 1989, L. Banack to M. O'Reilly,

spoils of an uncertain lawsuit against his former law partners with an offer of cooperation in that regard, does not go far to satisfy the claims of unsecured creditors. It is therefore not surprising that this proposal was rejected at a meeting of creditors in November, 1989.

Ultimately, Mr. Chodos' interest in his former law partnership was released by the Trustee for no monetary consideration in exchange for a Release from his former partners in their claim against him.[19]

The Proposal provides another critical window into Mr. Chodos' thinking. The debt to Mr. Szarfer comprised approximately two thirds of Mr. Chodos' total indebtedness and yet the proposal made, at best, scant provision for unsecured creditors. I can only conclude that even in bankruptcy, Mr. Chodos chose to continue on his steadfast course in refusing to provide any payment in satisfaction of the Szarfer Judgment.

By Order dated January 22, 1992, Justice Lane discharged Mr. Chodos as a bankrupt. This Order stated that Mr. Chodos had continued to trade after knowing himself to be insolvent, and that he had failed to deliver all his property in his possession to the control of the Trustee. I need not elaborate on these findings as they were found by Justice Lane on the evidence and speak for themselves. Justice Lane ordered that the discharge be subject to the condition that Mr. Chodos pay the Trustee the sum of $100,000.00, which condition was ordered capable of satisfaction by a consent Judgment against Mr. Chodos in that amount. This Judgment was to be without interest until June 22, 1994 to give Mr. Chodos a chance to get his new practice in order and to make payments. After that date, a 9% interest rate was applicable. In his endorsement, but absent from the Order, Justice Lane directed the Trustee to remain in office and at the Trustee's discretion, to set an appropriate schedule of payments. Mr. Chodos was to provide the Trustee with statements of his business income certified by his accountant on a regular basis and appropriately remunerate the Trustee.[20]

Justice Lane summarized the evidence before him to indicate that on no occasion before, during or since the trial had Mr. Chodos made any offer of any sort to Mr. Szarfer.[21] Mr. Laskin argued that the Trustee has not set up nor enforced a payment schedule, and that Mr. Chodos is not required to make any payments until such a schedule is established. I do not agree. The obligation to pay a judgment arises from the date of the judgment. There is nothing in Justice Lane's endorsement or otherwise which relieves Mr. Chodos of the obligation to pay the Judgment simply because the Trustee has not devised a schedule of payments.

There is a small mortgage of approximately $40,000.00 on Mr. Chodos' house. Accordingly there is substantial equity in the house which Mr. Chodos insists is his wife's equity since the house is in her name. Nevertheless, Mr. Chodos made most if not all of the mortgage payments from November 1979 through August 1988 and conceded that in family law proceedings, he would have a good claim on a portion of the house.[22] Notwithstanding the substantial equity in the house, and

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Exhibit 4.

[19] See Agreed Document Book, Exhibit 3, Tab 10, Trustee's Supplementary Report dated January 13, 1992.

[20] Reasons for Judgment of Lane J. released January 22, 1992 at p. 17-18.

[21] Ibid. p. 3.

[22] Supra, note 15 at p. 39-40, lines 13 - 31.
lines 1 - 10.

Mr. Chodos' equitable entitlement, there were never any discussions of increasing the existing mortgage on the house which would have provided additional funds with which to pay the Szarfer Judgment or later, to turn over to the Trustee.[23]

Mr. Chodos has made no payments from his new practice to the Trustee. In addition, Mr. Chodos has paid nothing to the Trustee from his life insurance RRSP, worth some $35,000.00 at the time of the bankruptcy and worth approximately $30,000.00 in January 1992 before Justice Lane. The net after tax value of this item would be approximately $25,000.00. Justice Lane concluded that:

> "no undue hardship would be imposed on Mr. Chodos by including this RRSP as an asset, the after tax value of which is available to him (with the cooperation of his wife) to satisfy part of any Order I might make for payment."[24]

This is a valuable asset acquired out of previous earnings which is available to pay down the consent Judgment, and yet was not utilized by Mr. Chodos. I recognize that Mr. Chodos would need the co-operation of his wife in order to utilize this RRSP, but the point is that Mr. Chodos made no effort to obtain that co-operation.

The failure to pay the consent Judgment or to make any arrangements whatsoever in that regard is the culmination of a course of conduct by Mr. Chodos designed to avoid payment of any part of his just debt to Mr. Szarfer. Justice Lane stated the following in his reasons:

> "Accepting this statement of affairs at its face value, it shows that Mr. Chodos had suffered somewhat from the break-up of his law partnership but the scale of his non-Szarfer debts relative to his earning power were certainly not sufficient to lead to bankruptcy. *It is my view that his bankruptcy would have been unlikely to occur but for the Szarfer action.* He admits that he never made the slightest effort to settle with Szarfer....even when in 1987 as a result of his capital gain he was in funds which might well have succeeded in settling the case, he made no effort to do so. Once the case was decided against him in the Court of Appeal he liquidated those of his assets which could be reached by Mr. Szarfer and put the money out of reach. He attempted to hold the Alcona Investment in a manner that would enable him to protect it from Mr. Szarfer. When he was served with an appointment to appear to be examined as a judgment-debtor early in 1989 he did not go. When the appointment was re-served for May 30, 1989, again he did not attend. Instead on that very day he made the proposal to his creditors described above.

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[23] Ibid. at p. 45, lines 8 - 15.

[24] Supra, note 20 at p. 16.

See Re Larocque (1982), 38 OR (2d) 385 where an RRSP was considered to have been acquired by the bankrupt out of previous earnings and therefore, although not available to the Trustee, was available to make some monetary contribution to creditors.

> *It appears to me from all of this evidence that his primary motivation for going into bankruptcy was to avoid having to pay Mr. Szarfer anything upon this judgment.* His failure to make any effort to settle with Mr. Szarfer; his failure to make any proposal for the unsecured creditors in his proposal (other than they should engage in a lawsuit with his partners; his own statement that he knew he was insolvent as soon as the Court of Appeal decision came out; the speed with which he liquidated the RRSPs that would have been available to his creditors; the attempt to insulate the Alcona Investment from Szarfer; and his arrogant and belligerent attitude in the witness box towards counsel for Mr. Szarfer *all bespeak an original and continuing intention held adamantly until this day to avoid paying anything to Mr. Szarfer.*"[25]

I agree with Justice Lane's conclusion that the principal reason for the bankruptcy was to avoid paying anything to Mr. Szarfer. Although Mr. Chodos consented to the $100,000.00 judgment, to date he has not paid a cent on this Judgment. The inescapable inference to be drawn from the course of events occasioned by Mr. Chodos as outlined above is that Mr. Chodos engineered his financial affairs to avoid payment of the Szarfer judgment.

Mr. Laskin submitted that the apparent leniency of the conditions on which Mr. Chodos was discharged from bankruptcy (that being the entry into a consent Judgment for only $100,000.00 given the amount of the debt, interest free for 2 1/2 years) reflected that Justice Lane did not think that Mr. Chodos' conduct was "so culpable to warrant a more serious disposition against him."[26] I do not agree. Justice Lane was very direct in his criticism of Mr. Chodos' conduct. In addition to the passage from his Judgment to which I have referred, Justice Lane found:

> "the entire bankruptcy arises directly from his misconduct with Mrs. Szarfer and his determination to pay nothing to Mr. Szarfer by way of settlement on the judgment."[27]

Justice Lane attempted to fashion a remedy with a realistic prospect for payment to Mr. Szarfer. In the result, Justice Lane was lenient on Mr. Chodos so as to enable him to enter into a realistic plan for payment. Justice Lane's leniency was intended to enure to the benefit of Mr. Szarfer, and Mr. Chodos was the beneficiary of it. Unfortunately, consistent with his previous conduct, Mr. Chodos has not made any payments on this Judgment and has thwarted the purpose of Justice Lane's Order.

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[25] Supra, note 20 at p. 6-7.

[26] Submissions, p. 33.

[27] Supra, note 20 at p. 7.

It is important to note the impact of Mr. Chodos' behaviour on Mr. Szarfer, who was supposed to have benefited by way of Justice Callaghan's 1986 Judgment and to a lesser extent from the Judgement of Justice Lane in 1992. The original Judgment (and from it the indebtedness) flowed from Mr. Chodos' conduct during his representation of Mr. Szarfer. It is the impact upon clients, above all else, which determines the effect that a practitioner's conduct will have upon the integrity of the profession. Mr. Chodos well knew Mr. Szarfer's circumstances from the acquisition of intimate and personal details during the course of their solicitor-client relationship, and through Mr. Szarfer's explicit testimony in two subsequent court proceedings.

Mr. Szarfer testified before Justice Lane that he is now divorced. The mental and emotional ramifications found by Justice Callaghan, and the financial impact on Mr. Szarfer found by Justice Lane have apparently continued to a large extent. Mr. Szarfer is now on a disability pension of approximately $1,800.00 per month. Nevertheless Mr. Szarfer continues to make support payments to his children and had to borrow $20,000.00 from the Royal Bank to pay his Visa and living expenses. Mr. Szarfer has been able to keep current with all his debts. He has accomplished this in part by keeping expenses low, including living with his parents and girlfriend, with whom he contributes to the costs of the household.[28]

It is Mr. Szarfer who was required to make the most significant lifestyle adjustments and sacrifices to cope with the situation ensuing from Mr. Chodos' failure to pay the Judgment. Mr. Szarfer testified that he lost his family, his home and his career.[29] In describing his feelings towards Mr. Chodos to Justice Lane, Mr. Szarfer testified: "I felt that he acted not like a lawyer and I felt that his peers should judge on the act that he committed."[30]

Mr. Laskin argues in paragraph 11 of his Factum and in oral argument that following the dismissal of the appeal in November 1988, Mr. Chodos' situation was desperate. Mr. Laskin lists twelve different factors contributing to this desperate situation, including the fact that Mr. Chodos was effectively thrown out of his law firm; had to start a new practice on his own and had no other sources of income; suffered the agony of widespread publicity through Mr. Szarfer's lawsuit and had been disciplined as a result; and was facing a second discipline decision in an unrelated matter (which had been heard and was under reserve) in which he was expecting disbarment. Mr. Laskin maintains that these factors ought to be considered in assessing the conduct of Mr. Chodos.

Mr. Laskin further argues that the conduct of Mr. Chodos, including the indifference with which he treated Mr. Szarfer, is at least partly a result of these factors. He cites a report by Dr. Shalom Camenietzki, a psychologist, which indicated that Mr. Chodos exhibited protective behaviour brought on by stress which behaviour included withdrawal, avoidance and diminished judgment.

While these factors, if accepted, may mitigate sentence, they do not diminish liability for disciplinary offenses. The circumstances in which Mr. Chodos found himself were of his own making. They arise solely from the way in which he decided to conduct himself. Mr. Chodos must accept the consequences of his actions, both professionally and personally. That is part of his professional obligations to Mr. Szarfer and to the Law Society. Further, Mr. Chodos' animus toward Mr. Szarfer continued unabated from the time that litigation was

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[28] Supra, note 15 at p. 51 - 52, lines 25 - 31.
lines 3 - 7.

[29] Ibid. at p. 53, 6 - 12.

[30] Ibid. at p. 52-53, lines 26 - 31.
lines 4 - 5.

threatened to the time Mr. Chodos entered the witness box in this proceeding. Mr. Chodos acknowledged for the first time that his actions have had a serious and adverse effect on Mr. Szarfer[31], but this late acknowledgement does little to change the fact of Mr. Chodos' conduct continuing as it has for some seven years.

I am of the view that Dr. Camenietzki's report cannot be given much weight. It is not the best evidence. Although the contents of the report may have been entitled to greater weight had Dr. Camenietzki given evidence before this Committee, the conclusions of the report caution against placing too much emphasis on diminished judgment:

> "Despite these difficulties, it is clear to me that Mr. Chodos' capacity to distinguish reality from fantasy has been maintained. He has no signs of a thinking disorder and there are no indications for a psychotic process. ... Despite the stressful situation in which he finds himself, Mr. Chodos has been able to act in a clear manner. ... The steps he has taken and the rationale that he gave me attest to an unimpaired common sense and a capacity to act reasonably."[32]

While I accept without reservation the psychological profile of a person traumatized by the repercussions of his behaviour, Mr. Chodos had the capacity to act reasonably.

The evidence against Mr. Chodos is compelling and the explanations provided are unconvincing. I am therefore of the opinion that the facts upon which the Complaint is based have been proved and am left to consider whether, by taking steps calculated to ensure that Mr. Szarfer could not realize on his Judgment, Mr. Chodos has conducted himself in a manner which is subject to sanction by the Law Society.

THE LAW

The Complaint alleges that the facts as found substantiate a charge of conduct unbecoming a Barrister and Solicitor. Mr. Chodos has not been charged with an act of professional misconduct.

It is critical to note that we are not dealing with the determination of unlawful conduct. There is nothing in the evidence to suggest that Mr. Chodos did anything illegal in becoming bankrupt, or in the other steps taken to defeat the Szarfer Judgment.[33] Professional ethics are the issue here.

The situation in this case is somewhat unique and falls in a grey area, the consideration of which is not often necessary in discipline cases. It is with that view that I must deal with the difference between "professional misconduct" and "conduct unbecoming" since an understanding of the differences and similarities is essential to the resolution of this matter. The basic difference between a charge of conduct unbecoming and one of professional misconduct was considered by Justice Craig in Re Cwinn and Law Society of Upper Canada:

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[31] Transcript, p. 59, lines 25 - 27.

Transcript, p. 94, lines 6 - 23.

[32] Report of Dr. Shalom Camenietzki dated April 20, 1989, Exhibit 8.

[33] This is true other than some Bankruptcy Act infractions dealt with earlier.

> "It has been the traditional view that "professional misconduct" related to conduct while engaged as a barrister and solicitor, and that "conduct unbecoming" relates to conduct not in the course of the practice of law."[34]

Mr. Laskin takes the position that the Judgment owing to Mr. Szarfer was "clearly not a debt in relation to [Mr. Chodos'] practice".[35] Rather, Mr. Laskin advocated that this was a personal debt and accordingly, many of the Rules of Professional Conduct would not apply. I do not agree. This is not a debt which is "purely private". This debt arose directly out of a solicitor-client relationship and the abuse of confidential information obtained in the course of Mr. Chodos' representation of Mr. Szarfer in a wrongful dismissal action. It is a debt that arose in consequence of a breach of the fiduciary duty owed by a lawyer to a client. Accordingly, the solicitor-client relationship is at the heart of this dispute, and it follows that a charge of professional misconduct may well have been applicable in the circumstances.

In my view, the proximity of the debt (whether personal or professional) to the parameters of the solicitor-client relationship should certainly have served as a caution to Mr. Chodos to behave with the integrity and ethical fortitude demanded by that relationship.

However, Mr. Chodos has been charged with conduct unbecoming and the standards to be applied must be determined against that backdrop. Mr. Laskin submits that the facts as established do not give rise to a charge of conduct unbecoming or, in the alternative, the charge of conduct unbecoming is vague and therefore an infringement of Mr. Chodos' right to life, liberty and security of the person as guaranteed by Section 7 of the Charter.

I will deal with this latter submission at the outset as it may serve to bring the issues into sharper focus. It is common ground that this Discipline Committee has the jurisdiction to refuse to apply a law or rule which is unconstitutional.[36]

SECTION 7

It should be remembered that in order to sustain a challenge based on Section 7, it must first be shown that an enumerated interest (life, liberty or security of the person) has been violated, and the violation of such interest is contrary to the principles of fundamental justice:

> "The analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to "life, liberty and security of the person" and, secondly that that deprivation is contrary to the principles of fundamental justice."[37]

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34 (1980), 28 O.R. (2d) 61 (H.C.J.) at p. 67.

35 Submissions, p. 34.

36 Cuddy Chicks Ltd. v. Ontario (Labour Relations Board) (1991), 81 D.L.R. (4th) 121 (S.C.C.).

37 R. v. Beare, [1988] 2 S.C.R. 387 at 401.

Ms. Spies submits that Section 7 does not apply to disciplinary hearings and in any event, it does not encompass economic interests such as the right to practice a profession. Mr. Laskin contends that Section 7 encompasses such interests as stigmatization in the community and damage to an individual's self-esteem, worth and dignity resulting from a disciplinary finding.

The extent to which Section 7 protects interests such as those cited by Mr. Laskin raises a interesting question of law. It is well settled that it does not protect purely economic interests, but this does not end the discussion where interests such as reputation in the community and self-esteem are involved. I note however the scepticism of Lamer J. as he then was when addressing the issue in Reference Re Criminal Code:

> "If liberty or security of the person under section 7 of the Charter were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all-inclusive."[38]

However, I have come to the conclusion that the instant case can be decided without addressing these issues. The principle that a law or rule cannot be overly vague has an applicability and meaning independent of the Charter. It is fundamental to the notion of fairness and stems from the precepts of natural justice. The rules of natural justice apply to disciplinary proceedings[39] and underly the requirements of the *Statutory Powers and Procedures Act*.[40] The constitutional arguments, interesting though they may be, are unnecessary. It is the issue of vagueness in the context of natural justice to which I now turn.

VAGUENESS

The doctrine of vagueness was perhaps best summarized by Gonthier J. in R. v. Nova Scotia Pharmaceutical Society:

> "The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate. This statement of the doctrine best conforms to the dictates of the rule of law in the modern State, and it reflects the prevailing argumentative, adversarial framework for the administration of justice."[41]

The rationale behind this principle is frequently cited to be two-fold. Firstly, the need to ensure that citizens receive fair notice (both formal and substantive) that certain conduct will not be tolerated. Substantive notice has been held to require "an understanding that certain conduct is the subject matter of legal restrictions."[42] The second rationale relates to the need to limit enforcement discretion. Chief Justice Lamer, in delivering the judgment of the Court in R. v. Morales, discussed the limitation of enforcement discretion in the following terms:

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38 Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man)., [1990] 1 S.C.R. 1123 at 1170.

39 Posluns v. The Toronto Stock Exchange, [1964] 2 O.R. 547 (H.C.J.) p. 635.

40 R.S.O. 1990, c. S.22.

41 [1992] 2 S.C.R. 606 at 643.

42 Ibid. p. 635.

> "In the *Prostitution Reference* at p. 1157, I explained this rationale in terms of a 'standardless sweep': 'is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?' In my view the principles of fundamental justice preclude a standardless sweep in any provision which authorizes imprisonment."

and further:

> "I would also note that in *Nova Scotia Pharmaceutical Society* at p. 642, this Court expressly stated that the doctrine of vagueness applies to all types of enactments:
>
> > Finally, I also wish to point out that the standard I have outlined applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions.[43]

Absolute precision in the law is not required nor is it desired. The rationales for sufficient clarity in the law are satisfied through the creation of intelligible standards, not by precise delineation of all forms of conduct which will be subject to legal restrictions:

> "Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent in our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective."[44]

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[43] (1992), 17 C.R. (4th) 74 (S.C.C.) at 92-93.

[44] Nova Scotia Pharmaceutical Society at 638-639.

Justice Gonthier's insightful analysis of the law's method of defining ways of proscribing conduct addresses the difference between vagueness which will serve to invalidate a rule of conduct and flexibility which is necessary to develop rules of conduct. Chief Justice Lamer also dealt with the relationship between flexibility and vagueness in R. v. Morales:

> "A provision does not violate the doctrine of vagueness simply because it is subject to interpretation. To require absolute precision would be to create an impossible constitutional standard. As I stated in the *Prostitution Reference* at p. 1157:
>
> > The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at p. 107, "flexibility and vagueness are not synonymous." Therefore the question at hand is whether the impugned sections of the *Criminal Code* can be or have been given sensible meanings by the courts."[45]

Turning now to the case before us, the issue of vagueness, as refined by judicial guidelines, is whether the standard of conduct unbecoming is so imprecise as to either result in a failure to provide the practitioner with the fair notice to which he or she is entitled, or to permit a "standardless sweep" in the enforcement thereof.

Mr. Laskin argues that section 34 of the *Law Society Act* violates the doctrine of vagueness contrary to the principles of fundamental justice (in section 7 of the *Charter)*. He relies on several considerations which he maintains compel this conclusion:

(i) there is no definition of conduct unbecoming in the statute, in the regulation or in the Rules of Professional Conduct;

(ii) there is no settled jurisprudence in Law Society discipline cases or in the Courts delineating the boundaries of conduct unbecoming;

(iii) there is no regular reporting of Law Society discipline cases and only very recently has the Society distributed to the profession as a whole even synopses of discipline decisions decided by Convocation; thus no notice (formal or substantive) as to what constitutes conduct unbecoming has been given to the profession;

(iv) again until very recently Convocation did not even provide reasons for its decisions, so that the profession has no idea of what is encompassed within the standard;

(v) conduct unbecoming is an open ended standard; it is not capable of being given a constant and settled or working meaning; and

(vi) overall the standard does not allow an adequate basis for legal debate.

These are certainly considerations which are taken into account in determining the issue of vagueness, but they must be examined in light of the several rules, regulations and guidelines which may give meaning to the standard of conduct unbecoming.

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[45] Morales at 729.

Section 7(3) of Regulation 573 under the Law Society Act provides that a member, by becoming bankrupt under the Bankruptcy Act, may be guilty of conduct unbecoming a barrister and solicitor. Therefore, it should come as no surprise to the profession that bankruptcy may constitute conduct unbecoming. It is no stretch from this for lawyers to recognize that the nature and degree to which a bankruptcy impacts upon their clients will be a weighty consideration in determining whether the bankruptcy constitutes conduct unbecoming.

In addition, the Rules of Professional Conduct are grounded in the principle of integrity. Integrity is demanded of the solicitor both in his or her personal life and professional life, and the rules relevant to that principle bear repeating here.

Rule 1 of the Law Society Rules of Professional Conduct states that "the lawyer must discharge with integrity all duties owed to clients, the court, the public, and other members of the profession." Commentary 1 states that:

> "integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If the client is in any doubt as to the lawyer's trustworthiness the essential element in the true lawyer-client relationship will be missing. If personal integrity is lacking the lawyer's usefulness to the client and reputation within the profession will be destroyed..."

Commentary 2 states that:

> "dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice as a whole. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action."

While Commentary 3 of Rule 2 states that the Society "will not be concerned with the purely private or extra professional activities of a lawyer which do not bring into question the lawyer's professional integrity...", Rule 13 makes it clear that the integrity of lawyers includes meeting financial obligations both in their practice and to their clients. Commentary 6, referring to the duty to meet financial obligations, states that:

> "in order to maintain the honour of the bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients, or rather unless, before incurring such an obligation the lawyer clearly indicates in writing that the obligation is not to be a personal one."
>
> "Lawyers have a professional duty generally to meet financial obligations in relation to their practice..."

One of the best statements which captures the lawyer's role in society and society's expectation of a lawyer both professionally and personally is contained in the notes to Commentary 3, Chapter XIII of the Rules of Professional Conduct. Commentary 3 indicates that the principle of integrity is not restricted to the lawyer's professional activities but is a general responsibility flowing from the lawyer's position in the community. Note 4 to Commentary 3 states that:

> "the lawyer is more than a mere citizen...lawyers... are required to assume responsibilities of citizenship well beyond (the basic requirements of good citizenship)...this...is necessary because we are the profession to which society has entrusted the administration of law and the dispensing of justice."[46]

There is also guidance in previous decisions of Discipline Committees which have found that where an Assignment into Bankruptcy is caused by indebtedness to clients, or the solicitor has had an irresponsible or cavalier attitude with respect to his or her financial situation, such conduct is unbecoming a barrister and solicitor.[47]

Mr. Laskin argues that the previous Discipline cases in which section 7(3) of Regulation 573 has been considered are inapplicable in that they all deal with solicitors who are also alleged to have committed professional misconduct. Mr. Laskin further argues that none of these cases indicate that the Law Society would proceed against a solicitor for making an assignment into bankruptcy and nothing more. I do not accept this distinction. In Law Society and Rosen, the Committee was dealing with a bankruptcy caused largely by personal indebtedness and "readily concluded" it to be conduct unbecoming. The section itself is clear, and can and should be used for the purpose for which it was intended: to maintain fiscal responsibility from lawyers in order to ensure continuing public respect for the profession. The fact that there is flexibility in the determination does not detract from this proposition.

The standards of conduct expressed in the rules, regulations and commentaries are not an exhaustive list of the professional standards by which a solicitor must conduct himself or herself. They are not intended to be. Rather, they serve as guidelines by which a reasonable and competent practitioner can determine the type of conduct which is acceptable as opposed to that which is not. In short, they delineate a risk zone and provide both the practitioner and those called upon to adjudge his or her conduct, an intelligible standard against which to measure. The preface to the Rules of Professional Conduct states as follows:

> "No set of rules can foresee every possible situation, but the ethical principles set out in the Code are intended to provide a framework within which the lawyer may, with courage and dignity, provide the high quality legal services that a complex and ever-changing society demands."[48]

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[46] See Note 4 of Commentary 3 Chapter 13, The Lawyer and the Administration of Justice.

[47] See Tab 7 through 10 of the Law Society's Book of Authorities including Law Society of Upper Canada and Wunder dated September 23, 1977, Law Society of Upper Canada and Copeland dated July 16, 1981, Law Society of Upper Canada and Rosen dated April 22, 1983, Law Society of Upper Canada and Burley dated September 26, 1985.

[48] Rules of Professional Conduct at p. viii.

Mr. Laskin submits that several of the above quoted rules and regulations do not apply to the circumstances of Mr. Chodos' case. It is argued that these rules (Rule 13 Commentary 6, for example) address the professional and not the personal obligations of the Solicitor. This submission seeks to impose a technical difference between professional misconduct and conduct unbecoming. In reality, integrity is common to both for it is the foundation of our professional lives against which all of our conduct is measured.

I have already indicated that Mr. Chodos' conduct appears to be, if not strictly in relation to his professional life, certainly in a grey area between his professional and personal life. But even where the conduct complained of is clearly and exclusively done within a lawyer's personal sphere as opposed to his or her professional sphere, the principles underlying the rules, regulations and guidelines of the Law Society remain applicable. The determination of whether the charge is one of professional misconduct or conduct unbecoming is dependent upon the sphere in which the conduct occurs, but the immutable principle of integrity continues to govern the lawyer's conduct regardless of the sphere.

Professional standards are designed to ensure integrity, a quality that is expected to be present in both the practitioner's professional and personal life. The public has a right to expect a certain standard of ethics and upright conduct from lawyers. If the legal profession is to maintain itself as a self regulating profession, it must enforce high standards of integrity amongst its members. Lawyers can pursue their rights to the fullest extent of the law, but must do so at all times mindful of their duties to clients, the profession and to society which has entrusted them with their professional status. Lawyers must pursue their personal rights with integrity, and a failure to do so may result in conduct unbecoming.

The goal of a charge of conduct unbecoming under Section 34 of the Law Society Act is an essential one. The legal profession is a noble calling that is grounded in skill, knowledge and honour. As officers of the court, lawyers are cloaked with the stature and respect accorded to the courts and accordingly must discharge their duties with dignity and integrity. As Mr. Justice Felix Frankfurter wrote:

> "from a profession charged with such responsibilities there must be exacted ... qualities of truth-speaking, of a high sense of honour, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'."[49]

Ms. Spies argues that dishonourable conduct is that conduct reflecting adversely upon the integrity of the profession to the extent that it impacts on a lawyer's ability to command trust from his or her clients. Mr. Laskin contends that there is no evidence before the Committee that any client's trust in Mr. Chodos as a lawyer has been impaired. This submission misses the point. The Committee applies an objective test in determining such an issue. One of the cardinal principles of self-regulation is that this Committee is in the best position to judge the effect of a lawyer's conduct on a community of clients. The Committee need not

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[49] Going Beyond the Law, Marvin Joel Huberman, The Gazette, Volume 27, number 3/4, September/December 1993, at p. 199.

have specific evidence of any particular client's new found distrust of Mr. Chodos. Indeed, I am not sure than even Mr. Szarfer's evidence on this point is required (although its existence can certainly be inferred). The decision for the Committee is whether the solicitor has conducted himself in a manner which will reflect adversely upon the integrity of the profession and the administration of justice and whether such conduct would likely impair a client's trust in the lawyer.[50]

The ultimate repercussion of ethically irresponsible lawyers is the loss of confidence in and public respect for the legal profession and the administration of justice. American Chief Justice Benjamin Cardozo stated that "reputation in such a calling is a plant of tender growth, and its bloom, once lost, is not easily restored."[51] Thus the profession seeks to regulate itself by imposing a minimum standard of conduct "becoming" a solicitor. In this case, Mr. Chodos' conduct is unbecoming when measured against the standards imposed by his profession.

CONCLUSION

Michael Elliot Chodos breached his fiduciary duty to his client. When his client sued him for it, Mr. Chodos decided to stonewall. He played hardball. He was swept into a vortex of financial, personal and professional embarrassment, a condition of his own making. He dragged his client down with him. Any right-thinking person would know that this conduct was wrong. Any lawyer would know that this conduct was unbecoming, would invite the condemnation of his or her colleagues and the censure of the Law Society. Such is the result here. Mr. Chodos is guilty of conduct unbecoming a barrister and solicitor as charged.

ALL OF WHICH is respectfully submitted

DATED at Toronto, Ontario this 14th day of September, 1994

Ronald D. Manes
Chair

RECOMMENDATION AS TO PENALTY

Re: Michael Elliott Chodos

The conclusions of this Committee regarding Mr. Chodos' conduct are spelled out in our Reasons dated September 14, 1994.[1] His conduct in going bankrupt displayed a lack of professional integrity towards his client, Mr. Szarfer. Mr. Chodos has a disciplinary record for unprofessional conduct demonstrating similar characteristics. The question is this: Does this solicitor lack the integrity necessary to practice law?

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[50] See Rule 1, Commentary 2, Law Society Rules of Professional Conduct.

[51] Supra, note 49 at p. 200.

[1] The penalty portion of this hearing was delayed by the change of Counsel and scheduling difficulties arising therefrom. Mr. Greenspan acted on the penalty portion of the hearing replacing Mr. Laskin after the latter's appointment to the Court of Appeal.

Ms. Spies argues that the totality of the Solicitor's misconduct demonstrates a fundamental lack of professional character and, emphasizing general and specific deterrence, he should be disbarred.

Mr. Greenspan argues that the Solicitor's conduct represents an aberration during a chaotic period in his life and that any penalty should emphasize rehabilitation.

In support of their respective positions, Counsel have forcefully argued facts and both advanced and distinguished several cases while recognizing that the situation here is somewhat unique. We do not feel constrained by previous discipline case. We accept the general principle that where a Solicitor's unprofessional conduct (whether isolated or continuous) is such that the Solicitor cannot be trusted, the Solicitor will be disbarred. Where the Solicitor's conduct falls short of that mark, the Committee will endeavour to fashion a penalty emphasizing deterrence and rehabilitation to varying degrees as required by the circumstances of the case.

The Committee recognized that the positions of Counsel at the outset left us with little flexibility. We wished to canvass all penalty options and to that extent asked Counsel for their assistance. We have been provided with the opinion of an expert in bankruptcy[2] regarding the legality of imposing a financial sanction upon the Solicitor which would enure to the benefit of his client who has been victimized by his unprofessional conduct. We also had the benefit of a four-way discussion with this expert in the presence of Counsel. We thank Counsel for their assistance.

We are now satisfied that we have considered our full range of options and have a complete picture of the Solicitor. We have concluded that the penalty we impose upon Mr. Chodos should emphasize deterrence while recognizing that he may not be so bereft of integrity as to require disbarment. Accordingly, we have attempted to fashion a penalty to meet those objectives.

For the first number of years of his practice, and prior to the Szarfer matter, Mr. Chodos had not been involved in discipline proceedings. His antecedents are well documented in the Committee Report on the first Szarfer matter in November 1986 which recommended a reprimand in Convocation:[3]

> "On the evidence before us, this was the first occasion that Mr. Chodos was involved in disciplinary proceedings. Also, it appears to be an isolated event. Further, based on the evidence before us, the conduct is out of character for Mr. Chodos. This is substantiated by the numerous letters of character reference filed as evidence on behalf of Mr. Chodos. These letters come from a wide circle of members of the public, both clients and otherwise. It is not necessary to detail the seventeen character references. The Committee is persuaded that the conduct should be regarded as an isolated event and one that is out of character for Mr. Chodos."[4]

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[2] Letter from E. B. Bruce Leonard dated March 27, 1995

[3] Accepted by Convocation and imposed on November 27, 1986 pursuant to Convocation's order of that date.

[4] Report and Decision of the Discipline Committee released November 1986 at pages 9 - 10 per Ferrier (Chair) Guthrie and Philp.

On April 3, 1989, Mr. Chodos appeared before a Committee in the Titchell matter where he was found guilty of unprofessional conduct for attempting to conceal his negligence in the handing of Mr. Titchell's litigation by purging the client's file of incriminating evidence and misleading those involved in the investigation arising from his misconduct. This misconduct occurred in 1986 and 1987, mostly the matter. Accordingly, Mr. Chodos' misconduct in the Titchell matter was coincident in part with his misconduct in the case at bar, and in part occurred subsequent to the reprimand in Convocation in the first Szarfer matter. In its Reasons, after observing that Mr. Chodos displayed a fundamental lack of integrity, the Committee stated:

> "The facts in this case disclose that the conduct of Mr. Chodos was not simply a casual or isolated instance of deception. On the contrary, his conduct displayed a deliberate and consistent pattern of dishonesty. Your Committee notes in particular the premediation required for the Solicitor to consciously purge the client's file of the fourteen letters and documents which were evidence of the Solicitor's state of knowledge. This was in aid of the continued deception not only of his client but of the Errors and Omissions department of the Law Society and Discipline Department of the Law Society.
>
> Your Committee notes that the most culpable events in this pyramid of deception occurred subsequent to the disposition of Complaint D94/86 (this case was heard October 28, 1986). As a result of that complaint, Mr. Chodos was found guilty of conduct unbecoming a Barrister and Solicitor in relation to activities which Callaghan, A.C.J.H.C. had described as "dishonourable."
>
> It is quite obvious that Mr. Chodos is not a person who learns from his previous errors. Your Committee notes that at the previous hearing in October 1986 with reference to Complaint D94/86, Mr. Chodos's (sic) conduct was described as "out of character" and "an isolated event". We also note that there was substantial evidence of good character called at that time and this is in stark contrast to the complete absence of any character evidence called in the present proceeding.
>
> ...We do not [believe] there are any mitigating circumstances in the present case and accordingly recommend that Michael Elliott Chodos be disbarred (square brackets ours)."[5]

Although the Committee recommended disbarment, Convocation ordered a reprimand.[6] There were no written Reasons, but it is obvious that Convocation did not accept that Mr. Chodos could not be trusted.

We are of the view that Mr. Chodos' conduct towards Mr. Szarfer should be considered as a case of continuous misconduct given our conclusion as to Mr. Chodos' animus towards Mr. Szarfer. The Titchell misconduct was coincident with and parallel to the Szarfer misconduct, at least in part. Convocation punished these misconducts with reprimands. Whether the wisdom of foresight would have changed Convocation's thinking is idle speculation. In any event, this Committee has the wisdom of hindsight to some extent.

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[5] Report and Decision of the Discipline Committee released April 3, 1989 at pages 11 - 13 per Somerville (Chair), Kiteley and Callwood.

[6] Order of Convocation dated April 27, 1989.

Little has changed in the intervening years since Mr. Chodos' last reprimand in Convocation, except perhaps further revelations of character as evidenced in the case at bar, and the fact that he does not appear to have engaged in any subsequent misconduct. Although the latter merits some consideration, it is somewhat blunted by Mr. Chodos' meagre recognition of wrongdoing towards Mr. Szarfer in these proceedings.

Mr. Chodos now teeters at the precipice of disbarment. One can only view with astonishment his self destructive behaviour towards Mr. Szarfer subsequent to his professional misbehaviour towards Mr. Titchell, the Law Society and its Errors and Omissions Department. This most recent misconduct cost Mr. Chodos his partnership, his marriage and lead to his financial ruin.

We believe that Mr. Chodos did not fully appreciate the nature and quality of his professional misconduct towards Mr. Szarfer in going bankrupt so that Mr. Szarfer could not realize on his civil judgment. The most striking evidence of this lack of appreciation was provided by one of Mr. Chodos' supporters in this proceeding, a lawyer who wrote us as follows:

> "If Mr. Chodos has committed any offence in bankruptcy in my respectful view, the Court has dealt with the situation in its Order. That Mr. Chodos is compelled to respond to his bankruptcy in a manner other than any other bankrupt citizen because he is a lawyer seems to be the underlying rationale of the Discipline Committee and in all of the circumstances, I cannot agree with the Committee. Mr. Chodos should not be punished twice for his breach of fiduciary duty. If Mr. Chodos played hardball as the Committee concluded, isn't that what he was trained to do as a litigator - isn't that what any client would expect from his Counsel."[7]

We must bring home to the profession that a lawyer is not an ordinary citizen. A lawyer is not an ordinary litigant. A lawyer is not an ordinary business person. A lawyer is a lawyer and as such, so long as a lawyer is a member of this professional society, a lawyer's conduct will be constrained by the ethical imperatives of the legal profession. Wherever the line is ultimately drawn in any particular case by this professional body between professional and "purely" personal or private conduct, the day-to-day conduct of a lawyer is governed by integrity in a lawyer's dealings with others. If those dealings lack integrity, it may invite the intervention of the Law Society. Character and integrity are the fundamental qualities required of any person who seeks to practice law.[8] This is the standard for admission to the Law Society. It is our professional expectation that a Solicitor's trustworthiness will be fortified by the practice of law, not diminished by it. To paraphrase Justice Cardozo, a professional reputation is a plant of tender growth nurtured by the daily challenges of practising law where self-interest and client pressure may seek to undermine professional conduct.

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[7] Materials Filed on Behalf of Michael Elliott Chodos, Exhibit 3, Tab 7 at page 2.

[8] Commentary 1 of Rule 1 of the Rules of Professional Conduct.

The ethical weakness displayed by Mr. Chodos is certainly a character flaw. However, because these misconducts occurred in a time frame set off by no misconduct, given the awful toll that they have already exacted, and because of our conclusion that Mr. Chodos failed to fully appreciate his ethical obligations towards Mr. Szarfer, we conclude that the appropriate penalty will be a suspension with a term of reinstatement being a measure of financial restitution to Mr. Szarfer[9], failing which Mr. Chodos will be disbarred.

We must now decide the quantum of suspension and financial terms of reinstatement. Mr. Greenspan argues that such a condemnation could be a de facto disbarment given Mr. Chodos' financial circumstances. We remain unclear about Mr. Chodos' financial circumstances having reviewed the financial statements presented to us. In any event, we do not agree that disbarment can be de facto. Disbarment is disbarment. Suspension with terms avoids disbarment and provides the solicitor with the opportunity to reinstate himself in the profession, and to undo some of the damage he has done in the process.

We recommend the imposition of a six month suspension. Although onerous to a sole practitioner such as Mr. Chodos, anything less would not be a sufficient deterrent.

We recommend that as a term of suspension and reinstatement, Mr. Chodos be ordered to pay Mr. Szarfer the sum of $43,663.00 which is the amount of the original Szarfer judgment (without prejudgment interest). We believe Mr. Chodos can manage this payment in light of the evidence before us that his father was prepared to pay an almost identical amount if ti would mean that Mr. Chodos could continue to practice law.[10]

For the reasons expressed by Brendan O'Brien, Q.C. in dissent in the Clarke matter and by the Committee in the Horwood matter, we are of the view that we do not have the jurisdiction to award costs against the Solicitor and accordingly make no order in that regard.

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[9] It is our view that Mr. Szarfer's claim was not released by Mr. Chodos' discharge from bankruptcy as the indebtedness arose while Mr. Chodos acted in a fiduciary capacity such that Section 178 of the Bankruptcy Act exempted such debts from discharge. Nor would Mr. Szarfer's participation in the bankruptcy proceedings constitute a waiver such that it would release Mr. Chodos from his obligation to Mr. Szarfer. In any event, we are of the view that we have jurisdiction to impose such financial terms as part of a Solicitor's suspension and as a term of reinstatement therefrom pursuant to Section 34 of the Law Society Act. For these reasons, we do not believe that such a disposition is in conflict with Mr. Justice Lane's decision, the position of the trustee thereon nor of the unsecured creditors therein.

[10] Affidavit of Abe Chodos sworn March 25, 1995 and Exhibit "E" thereto, in Materials Filed on Behalf of Michael Elliott Chodos, Exhibit 3 at Tab 1.

Accordingly, we recommend that the Solicitor Michael Elliott Chodos be suspended from the practice of law for a period of six months with a term of such suspension and reinstatement being a payment to Mr. Szarfer in the amount of $43,663.00 within six months thereafter (such suspension to continue until this payment is made) failing which the Solicitor should be disbarred.

ALL OF WHICH is respectfully submitted

DATED at Toronto, Ontario, this 23rd day of May, 1995

Ronald D. Manes,
Chair

Both counsel made submissions in support of adopting the Report and recommended penalty.

Ms. Spies advised that there were 2 issues for Convocation to consider: (1) Mr. Greenspan requested that the commencement date of the suspension be April 1, 1996 and (2) should costs be ordered taking into consideration the decision of Convocation in the Horwood matter that the Society has jurisdiction to award costs.

Mr. Greenspan made submissions and advised that no funds were available to satisfy the costs ordered and that the commencement date of the suspension of April 1st was to allow the solicitor to complete the existing caseload of his practice.

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

There were discussions on whether the matter should be adjourned for 60 days to permit the settlement documents to be completed and executed and then return to Convocation for consideration.

It was moved by Mr. Strosberg, seconded by Ms. Eberts that the matter be adjourned to the February 1996 Discipline Convocation.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the matter be adjourned to the February 1996 Discipline Convocation.

Counsel and solicitor retired.

Re: Harvey Samuel MARGEL - North York

The Deputy Secretary placed the matter before Convocation.

Messrs. Strosberg and Feinstein withdrew for this matter.

Mr. Scott did not participate.

Mr. Michael Brown 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 18th March, 1994, together with an Affidavit of Service sworn 15th April, 1994 by Ron Hoppie that he had effected service on the solicitor by registered mail on 21st March, 1994 (marked Exhibit 1), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 26th May, 1994 (marked Exhibit 2), together with the Report of the Discipline Committee dated 7th January, 1995, together with an Affidavit of Service sworn 15th February, 1995 by Ron Hoppie that he had effected service on the solicitor by registered mail on 10th February, 1995 (Marked Exhibit 3), together with the Acknowledgement, Declaration and Consent signed by the solicitor on 8th December, 1995 (marked Exhibit 4). 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

Abraham Feinstein, Q.C., Chair
J. James Wardlaw, Q.C.
Netty Graham

In the matter of The Law Society Act and in the matter of	Gavin MacKenzie for the Society
HARVEY SAMUEL MARGEL of the City of North York a barrister and solicitor	Brian Greenspan for the solicitor
	Heard: December 6, 1993

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

The DISCIPLINE COMMITTEE begs leave to report:

REPORT

On April 16, 1993, Complaint D105/93 was issued against Harvey Samuel Margel alleging that he was guilty of professional misconduct.

The matter was heard in public on December 6, 1993 before this Committee composed of Abraham Feinstein, Q.C., Chair, J. James Wardlaw, Q.C. and Netty Graham. Mr. Margel attended the hearing and was represented by Brian Greenspan. Gavin MacKenzie appeared on behalf of the Law Society.

DECISION

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

Complaint D105/93

40 Paulart Drive, Etobicoke

(a) On or about November 14, 1988, he falsely reported to his client the Royal Bank of Canada that as of June 16, 1988, the client had a valid first mortgage registered against title to 40 Paulart Drive, Etobicoke, when in fact the mortgage registered on June 16, 1988 was a fourth mortgage, and did not become a first mortgage until June 29, 1989.

(b) He failed to serve his client, the Royal Bank of Canada, in a conscientious, diligent and efficient manner in the circumstances referred to in paragraph (a).

(c) He reported to his client, Ruth Perlmutter, on or about March 10, 1988 that she had purchased a $50,000 mortgage registered against title to 40 Paulart Drive, Etobicoke that was second in priority to a $50,000 first mortgage. On or about April 12, 1989, he asked Mrs. Perlmutter to sign an agreement whereby she postponed her mortgage to a mortgage to the Royal Bank of Canada without disclosing to her that the value of the prior encumbrance had increased from $50,000 to $184,000, in circumstances in which his non-disclosure resulted in Mrs. Perlmutter's realizing a significant loss upon the sale of the property under power of sale on May 27, 1991 for $235,000.

(d) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:

(i) Beaver Bend Investments Limited sale of $50,000 first mortgage to Hindy Greben, January 20, 1988;

(ii) Beaver Bend Investments Limited sale of $50,000 second mortgage to Ruth Perlmutter, January 26, 1988;

(iii) Royal Bank of Canada $184,000 first mortgage loan to Barry and Karen Benson, June 16, 1988;

(iv) Extension of Ruth Perlmutter $50,000 second mortgage to Barry and Karen Benson, January 18, 1990.

680 Tennent Court, London

(e) On or about August 10, 1988, he falsely reported to his clients, Vaughn and Colleen Kaleniuk that 680 Tennent Court, London, had been transferred to Barry Benson on July 18, 1988, whereas in fact the property was not transferred until November 30, 1988;

(f) He failed to serve his client, Airmark Travers Ltd., in a conscientious, diligent and efficient manner in representing it in relation to a $50,000 loan to Barry Benson to be secured by a second mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, October 13, 1988, Barry Benson was not the registered owner of the property;

(g) In the transaction referred to in paragraph (f), he breached his duty to his client, Airmark Travers Limited, in that he failed to inform it of either the priority of the mortgage or the particulars of prior encumbrances;

(h) He failed to serve his client, Jack Faulkner, in a conscientious, diligent and efficient manner in representing him in relation to a $31,000 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, October 13, 1988, Barry Benson was not the registered owner of the property;

(i) In the transaction referred to in paragraph (h), he breached his duty to his client, Jack Faulkner, in that he failed to inform him of either the priority of the mortgage or the particulars of prior encumbrances;

(j) In representing both the purchaser, Barry Benson, and the vendors, Vaughn and Colleen Kaleniuk, on the sale of 680 Tennent Court, London, on or about November 30, 1988, he prepared an affidavit under the Land Transfer Tax Act that specified that the value of the consideration for the property was $84,000 when to his knowledge the agreement of purchase and sale provided that the value of the consideration for the property was $180,000;

(k) On or about January 5, 1989, he breached his duty to his client, Vernon Moeller, for whom he acted in relation to a $25,681.50 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that he failed to inform him of either the priority of the mortgage or the particulars of prior encumbrances;

(l) On or about January 5, 1989, he breached his duty to this client, Edyth McAfee, for whom he acted in relation to a $37,009.71 loan to Barry Benson to be secured by a mortgage registered against title to 680 Tennent Court, London, in that he failed to inform her of either the priority of the mortgage or the particulars of prior encumbrances;

(m) He failed to serve his client, the Royal Bank of Canada, in a conscientious, diligent and efficient manner in representing it in relation to a $111,750 loan to Barry Benson to be secured by a first mortgage registered against title to 680 Tennent Court, London, in that as of the date the transaction was completed, May 11, 1989, the mortgage was in fact a seventh mortgage, and for a period of more than five months thereafter, ranked no higher than fifth in priority;

(n) On or about May 7, 1990, he breached his duty to his client, Gus Lazarakis, for whom he acted in relation to the extension of a $35,000 loan to Barry Benson that was to be secured by a second mortgage registered against title to 680 Tennent Court, London, in that he failed to inform him that the mortgage in fact ranked sixth in priority and failed to inform him of the particulars of prior encumbrances;

(o) On the following transactions in relation to the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:

(i) Vaughn and Colleen Kaleniuk sale to Barry Benson, October 13, 1988;

(ii) Airmark Travers Ltd. $50,000 mortgage loan to Barry Benson, October 13, 1988;

(iii) Jack Faulkner $31,000 mortgage loan to Barry Benson, October 13, 1988;

(iv) Ruth Margel $46,000 mortgage loan to Barry Benson, December 22, 1988;

(v) Vernon Moeller $25,681.50 mortgage loan to Barry Benson, December 22, 1988;

(vi) Edyth McAfee $37,009.71 mortgage loan to Barry Benson, January 10, 1989;

(vii) Royal Bank of Canada $111,750 mortgage loan to Barry Benson, May 10, 1989; and

(viii) Extension of Gus Lazarakis $35,000 mortgage loan to Barry Benson, May 7, 1990.

186 John Street, Ingersoll

(p) On or about April 26, 1989, he falsely reported to his client, Rose Glowinsky, that as of April 19, 1989, she had a valid second mortgage registered against title to 186 John Street, Ingersoll, when in fact the mortgage was a fourth mortgage.

(q) In or about January 1990, he failed to serve his client, Rose Glowinsky, in a conscientious, diligent and efficient manner in that he failed to cause a search of title to be performed and failed to report to his client upon arranging for the renewal of what the client believed to be a second mortgage but which in fact ranked third, in circumstances in which it is doubtful that the value of the property was adequate to support the third mortgage;

(r) On the following transactions involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 of rule 5 of the rules of professional conduct:

(i) Rose Yermus $50,000 first mortgage loan to First Western Ontario Properties Inc. in trust, November 30, 1987;

(ii) Carl and Belle Grossman $100,000 second mortgage loan to First Western Ontario Properties Inc. in trust, January 12, 1989;

(iii) Rose Glowinsky $50,000 second mortgage loan to First Western Ontario Properties Inc. in trust, January 25, 1989; and

(iv) Extension of Rose Glowinsky $50,000 second mortgage to First Western Ontario Properties Inc. in trust, January 1990.

451 The West Mall, Etobicoke

(t) On the following transaction involving mortgage security on the property, he acted for more than one party without making the disclosure to and obtaining the consent of his clients as required by commentary 5 to rule 5 of the rules of professional conduct:

(i) Beaver Bend Investments Limited $50,000 second mortgage loan to Maureen Harris, May 2, 1989.

564 Durham Crescent, Woodstock

(u) A syndicate in which he had a substantial (12.5 percent) interest borrowed $160,000 from a client of his firm, namely, Ganwood Inc., in circumstances in which the solicitor failed to disclose his interest and to ensure that the client's interests were fully protected by the nature of the case and by independent legal representation and in circumstances that resulted in Ganwood Inc.'s entire investment being lost, all contrary to rule 7 of the rules of professional conduct.

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 Solicitors admit service of Complaints D104/93 and D105/93 and are prepared to proceed with a hearing of these matters on December 6 and 7, 1993.

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 Solicitors have reviewed Complaints D104/93 and D105/93 with their counsel, Brian Greenspan. The Solicitors both admit that they are guilty of professional misconduct on the facts as hereinafter set out.

IV. BACKGROUND FACTS

4. Harvey Margel and David Warga were both called to the bar in 1973. They practised in partnership as Warga and Margel at all times material to the complaints. Their partnership was dissolved on April 27, 1991, and each is now practising as a sole practitioner. Neither lawyer has a discipline record.

V. FACTS RELEVANT TO COMPLAINTS D104/93 and D105/93

5. Most of the allegations of professional misconduct particularized in the complaints result from Warga and Margel's representation of the First Western group of companies, the directing mind of which was Barry Benson.

6. Warga and Margel first acted for Benson in 1975 when he purchased two apartment buildings. The firm had few business dealings with Benson over the next eleven years, as Benson retained Keyser, Mason, Ball & Lewis of Mississauga, as his principal solicitors during that period. Keyser, Mason, Ball & Lewis acted for Benson or companies that he controlled on the purchase of approximately sixteen apartment buildings between 1975 and 1986. Keyser, Mason, Ball & Lewis also represented Benson on the incorporation of some of the companies in the First Western group.

7. Benson and Keyser, Mason, Ball & Lewis had a falling out over fees in 1986, and Benson retained Warga and Margel to act on apartment purchases thereafter. Margel was primarily responsible for servicing the First Western group.

8. The First Western group generated a huge volume of legal work for the firm and in retrospect it is evident that the firm was poorly equipped to deal with such a sudden surge of new business. Much of the misconduct that has been admitted by the Solicitors may be explained in part by the firm's inadequate resources and poor state of organization, for which Margel, with respect to the First Western legal work, must accept the principal responsibility.

9. Benson had offices across the hall from the firm's offices for a period of several months. Four members of Warga and Margel's staff moved into the offices occupied by Benson and his colleagues during this time as well.

10. Typically, a First Western company, namely First Western Ontario Properties Inc. ("First Western") acted as trustee for various investors and title was taken in its name. Margel on several occasions found investors for First Western properties. Warga also found investors for First Western properties on at least two occasions when he was asked to seek out investment opportunities by potential investors. Both Margel and Warga, and their spouses, were themselves investors in the purchase of rental properties by First Western as trustee.

11. Margel and Warga, through four mortgage companies that they controlled, also provided mortgage financing for the purchase of apartment buildings by First Western as trustee. On a number of occasions, their mortgage companies eventually sold mortgages that they held to mortgage investors who approached them or who were approached by them. The mortgages were second or lower in priority, and interest rates were high.

12. Margel and Warga on many occasions acted for multiple parties both at the times the apartment buildings were purchased and at the time mortgages were sold.

13. On July 19, 1990, Margel and Warga learned that the First Western group was in serious financial trouble, and was realizing a cash flow shortfall of $400,000 to $600,000 a month. Mortgages on most of First Western's 150 properties went into default thereafter. Power of sale proceedings have been initiated on many of the properties. Some have been sold, generally at a price that has resulted in a shortfall for some mortgage holders.

14. Margel and Warga say that on September 4, 1990, they learned that Benson had misappropriated the August and September rents, and that the First Western group was insolvent.

15. The Society has received a number of complaints from investors, and numerous civil actions have been commenced in which Margel and Warga are named as defendants. Two claims in the total amount of $200,000 in respect of Warga and thirteen claims in the total amount of $2,000,000 in respect of Margel have been made to the Lawyers' Fund for Client Compensation.

16. The misconduct alleged involves conflicts of interest, false reporting of mortgage priority and prior mortgage encumbrances, failing to disclose material facts and failing to serve clients in a conscientious manner, among other things. The Solicitors' position is that at no time did they act dishonestly and that the admitted shortcomings in their practice were unintentional.

17. Margel and Warga have themselves lost a great deal of money as a result of the collapse of the First Western group. Warga has declared bankruptcy. Margel and Warga say that Benson was a charismatic person who victimized them and many others. They acknowledge that they did not provide legal services of a quality that their clients were entitled to expect, and that client-investors' funds were placed at risk as a result.

18. Warga and Margel increased the size of its staff as a result of the First Western work to approximately 14 employees. The firm's staff included an employed lawyer, a senior mortgage administrator, and a number of real estate secretaries. Some of the problems described below resulted from inadequate supervision of staff and misplaced confidence in their competence, for which Margel and Warga accept responsibility. The words "Warga and Margel" are used below to designate the joint responsibility of the partners for the acts of their staff.

19. The complaints concern seven transactions, most of which have been the subject of complaints by investors. In all, Warga and Margel acted on approximately 900 transactions on approximately 150 First Western or Benson buildings, and those examined by the Society exemplify the types of problems encountered by investors. The Solicitors' professional misconduct is addressed in relation to each of the seven transactions below.

40 Paulart Drive, Etobicoke

20. Margel acted for Benson and Benson's wife in November 1987, when they purchased 40 Paulart Drive in Etobicoke for $201,000 cash. By a letter dated December 29, 1987, Margel reported to Benson that the transaction had been completed on November 30.

21. On the same date, December 29, 1987, Mr. and Mrs. Benson applied to one of Warga and Margel's companies, Beaver Bend Investments Limited, for a loan of $50,000 to be secured by a first mortgage to be registered against 40 Paulart Drive. On the same date, Beaver Bend issued a cheque for $50,000 to Mr. and Mrs. Benson.

22. The following month, Margel arranged a second loan in the amount of $50,000 by Beaver Bend to Mr. and Mrs. Benson to be secured by a second mortgage to be registered against 40 Paulart Drive. The funds were advanced on January 18, 1988. Neither mortgage was registered at the time.

23. On January 20, 1988, Beaver Bend sold its first mortgage to Hindy Greben and on January 26, 1988, it sold its second mortgage to Ruth Perlmutter. Greben and Perlmutter each paid $50,000 to Beaver Bend.

24. On March 10, 1988, Margel reported to Greben on the first mortgage purchase and to Perlmutter on the second mortgage purchase.

25. On March 25, 1988, Warga caused the two mortgages in the amount of $50,000 to be registered. They were both registered, however, in Beaver Bend's name.

26. On March 30, 1988, assignments to Greben and Perlmutter were registered.

27. On May 31, 1988, Beaver Bend loaned a further $50,000 to Mr. and Mrs. Benson. On June 7, 1988, a third mortgage in that amount was registered in favour of Beaver Bend against title to 40 Paulart. The mortgage sheet used by the firm for internal purposes specified the value of the property to be $201,000, presumably on the basis of the November 1987 sale; no appraisal is in the file.

28. On June 16, 1988, the Royal Bank loaned $184,500 to Mr. and Mrs. Benson to be secured by a first mortgage. As in the case of the loans mentioned above, Margel acted for both the mortgage lenders and the Bensons with the knowledge and agreement of both. A mortgage in the bank's favour was registered against title to 40 Paulart Drive on the same date as the funds were advanced, June 16, 1988.

29. The mortgage was registered by a freelance title searcher instructed by Margel. In his letter of instructions, Margel directed the title searcher as follows:

"1. Subsearch (There should be a first mortgage in favour of Hindy Greben and second mortgage to Ruth Perlmutter and third to Beaver Bend);

2. Get execution certificate;

3. Please register the enclosed mortgage."

30. Margel released $132,983.34 of the mortgage advance to the Bensons on June 16, 1988. By a cheque dated June 16, 1988 and picked up by Greben on June 20, 1988, Margel paid $50,291.66 to Greben, whose first mortgage was discharged on June 21, 1988.

31. Margel did not report to the Royal Bank until November 14, 1988. In his reporting letter, Margel said that the bank had a first mortgage in the amount of $184,500. As of that date, the bank in fact had a third mortgage.

32. On November 30, 1988, Murray Ehrlick Insurance Agencies Limited purchased the Beaver Bend mortgage for $58,080.96, which sum was deposited in Beaver Bend's bank account the same day. Warga wrote to Ehrlick on November 30 to confirm that Ehrlick had purchased a $50,000 third mortgage, which stayed behind a $50,000 first and a $50,000 second mortgage. In fact, the mortgage was then in second position, behind Perlmutter's first but prior to the Royal Bank's $184,500 third. The Royal Bank's mortgage was intended to be a first; however, this would have resulted in the Ehrlick mortgage ranking third behind total encumbrances of $234,500 if this intention had been effected. No assignment of the Beaver Bend mortgage to Ehrlick was registered at that time.

33. In January 1989, Perlmutter entered into a written agreement to extend her mortgage for a year. The extension agreement was in a standard form and Margel arranged for it to be signed by Perlmutter and by the Bensons. The agreement does not specify either the priority of the mortgage or anything about any other mortgage.

34. On April 4, 1989, Warga (over Margel's signature) reported to Ehrlick that it had a $50,000 third mortgage that ranked behind a $50,000 first and a $50,000 second. An assignment of the Beaver Bend mortgage to Ehrlick was registered the next day, April 5, 1989. As mentioned above, the Ehrlick mortgage was in fact a second mortgage, but the Royal Bank's $184,500 loan was intended to be secured by a first mortgage rather than a third, and the Ehrlick mortgage would have ranked behind $234,500 of encumbrances rather than only $100,000 of encumbrances if this intention had been effected.

35. On April 12, 1989, by a standard form report over Margel's typewritten name, Ruth Perlmutter was informed that she had "purchased" a second mortgage in the amount of $50,000. The report specified that there was a first mortgage to the Royal Bank registered on title, but did not disclose the amount of that mortgage. (By way of contrast, when Margel reported in a similar standard form report to Mrs. Perlmutter on the original purchase of her second mortgage on March 10, 1988, the value of the first mortgage, $50,000, was specified.) The report is also inaccurate in that Margel confirmed the purchase of a second mortgage when in fact Mrs. Perlmutter was extending a mortgage that she had purchased a year earlier.

36. With the reporting letter, Margel enclosed a postponement of mortgage agreement to be signed by Mrs. Perlmutter. Mrs. Perlmutter signed the agreement on April 21. The postponement is in favour of the Royal Bank mortgage but again does not specify the amount of that mortgage. The postponement agreement is on a standard Newsome and Gilbert form that does not include a space for the amount of the mortgage which is the subject of the postponement.

37. On May 30, 1989 Murray Ehrlick, on behalf of Murray Ehrlick Insurance Agencies Limited, signed a postponement in favour of the new Royal Bank mortgage and signed an amending agreement that increased the interest rate from 14% to 17%. Again, the amount of the Royal Bank mortgage was not specified in the postponement agreement. The agreements were not registered until June 29, 1989. The registration of the postponement agreement finally put the Royal Bank mortgage in first position.

38. In June 1989, Warga acted for Ben, Esther, Steven and Francine Ross on their purchase of the $50,000 Ehrlick mortgage.

39. On September 25, Warga reported to the Rosses that they had purchased a second mortgage in the amount of $50,000 that was subject to a first mortgage in favour of the Royal Bank. The amount of the first mortgage was not specified. More importantly, the mortgage was in fact a third mortgage.

40. On January 3, 1990, Ruth Perlmutter signed a renewal agreement whereby she agreed to renew her mortgage for another year.

41. During the spring and summer of 1990, the Bensons defaulted on the various mortgages on 40 Paulart Drive. On May 27, 1991, the property was sold for $235,000 under a power of sale exercised by the third mortgagees, the Rosses. The sale resulted in the Royal Bank mortgage being paid off and the second mortgagee, Ruth Perlmutter, receiving approximately $20,000. The Rosses recovered only their legal fees for enforcing their security.

42. In each of the mortgage transactions referred to above, Margel or Warga represented more than one client. Although generally speaking investors knew that Margel and Warga were both investors in Benson transactions and acted on his behalf, nevertheless the Solicitors did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) They did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although Benson was a person with whom the Solicitors had a continuing relationship and for whom they acted regularly, they did not recommend that the clients obtain independent legal representation; and

(iii) They neither obtained the clients' written consent to their acting nor recorded their consent in separate letters to each client.

680 Tennent Court, London

43. In July 1988, Margel acted for both the purchaser and vendor on Benson's purchase from Benson's business associate, Vaughn Kaleniuk of 680 Tennent Court, London. Kaleniuk was a registered real estate broker with considerable experience who knew that Warga and Margel were also acting for Benson. In the agreement of purchase and sale, the purchase price was said to be $180,000, consisting of a $1,000 deposit, the assumption of an $82,700 mortgage to the Royal Bank and the balance to be paid on closing.

44. On August 10, 1988, Margel wrote to Kaleniuk to report that the property had been transferred on July 18, 1988. In fact, the property was not transferred until November 30, 1988.

45. In October 1988, Warga and Margel acted for Benson and Airmark Travers Ltd. on a $50,000 loan to be secured by a mortgage registered against title to 680 Tennent Court. On October 6, 1988, Airmark Travers advanced $50,000 and the mortgage, granted by Benson, was registered on October 13, 1988. On that date, Benson was not in fact the registered owner of the property.

46. On January 9, 1989, Warga and Margel reported to Airmark Travers that the transaction had been completed. The closing date was not specified in the reporting letter, but October 6, 1989 was specified as the maturity date. In the standard form report that was sent, the priority of the mortgage was not designated; nor was the space on the form allocated for details of prior encumbrances completed.

47. Also in October 1988, Margel acted for Benson and Jack Faulkner on a $31,000 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced on October 4, 1988 and the mortgage granted by Benson was registered on October 13, 1988, immediately after the mortgage to Airmark Travers. On that date, again, Benson was not in fact the registered owner of the property.

48. On January 5, 1989, Margel reported to the trustee of Faulkner's R.R.S.P., the Laurentian Bank, that the $31,000 mortgage had been registered on October 13, 1988. Again, neither the priority of the mortgage nor any information about prior encumbrances are specified in the report.

49. As mentioned above, title to 680 Tennent Court was transferred from Kaleniuk to Benson on November 30, 1988. Both the deed and the land transfer tax affidavit recite the consideration paid for the property to be $84,000, rather than $180,000 as specified in the agreement of purchase and sale. The deed and land transfer tax affidavit were prepared by Margel or under his supervision. The land transfer tax that was paid was based on the amount specified in the land transfer tax affidavit. Margel has explained the discrepancy on the basis that Kaleniuk agreed to transfer the property to Benson "as security for their business relationship" and that "as far as we were aware", Benson's only obligation was to assume the Royal Bank mortgage.

50. In November and December 1988, Margel acted for Benson and for Margel's wife, Ruth Margel, on a $46,000 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of Ruth Margel's R.R.S.P., the Laurentian Bank, on November 1, 1988. The mortgage was registered on December 22, 1988.

51. Also in December 1988, Margel acted for Benson and for Vernon Moeller on a $25,681.50 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of Moeller's R.R.S.P. the Laurentian Bank, on December 5, 1988. The mortgage was registered on December 22, 1988, immediately after the mortgage to Ruth Margel.

52. In December 1988 and January 1989, Warga and Margel acted for Benson and for Edyth McAfee on a $37,009.71 R.R.S.P. loan to be secured by a mortgage registered against title to 680 Tennent Court. The funds were advanced by the trustee of McAfee's R.R.S.P., the Laurentian Bank, on December 21, 1988. The mortgage was registered on January 10, 1989.

53. On January 5, 1989 (the same date on which he reported to the Laurentian Bank on the Faulkner R.R.S.P. mortgage) Margel reported to the Laurentian Bank, in its capacity as trustee for the R.R.S.P.'s of Moeller and McAfee, that their mortgages were registered on December 22, 1988 and January 20, 1989 respectively. Like the report on the Faulkner mortgage, these reports said nothing about either the mortgages' priority or prior encumbrances.

54. In May 1989, Margel acted for both the Royal Bank as mortgagee and Benson as mortgagor on the refinancing of the bank's mortgage loan with the knowledge and agreement of both. The new loan was to be in the amount of $111,750 and was to be secured by a first mortgage registered against 680 Tennent Court.

55. On May 10, 1989, the Royal Bank advanced the $111,750 and the mortgage was registered the same day by a London law firm retained by Warga and Margel to act as its agent. The London firm wrote to Warga and Margel (to Warga's attention) on May 11, 1989 to report on the registration. In this letter, the London firm confirmed that the Royal Bank mortgage ranked seventh, information communicated already to Warga and Margel by telephone.

56. On May 15, 1989, Benson provided $23,000 to Warga and Margel, in trust. These funds, together with the $111,750 advanced by the Royal Bank, were used on May 15 and 16 to discharge the first and second mortgages registered against title in favour of the Royal Bank and Airmark Travers, respectively. As of May 16, the new Royal Bank mortgage stood in fifth position rather than first, and all funds advanced by the Royal Bank had been disbursed.

57. Also in May 1989, Warga acted for both Gus Lazarakis as mortgagee and Benson as mortgagor on a $35,000 loan to be secured by a second mortgage registered against 680 Tennent Court.

58. Lazarakis advanced the $35,000 on May 25, 1989, and the mortgage was registered on May 26, 1989. Warga never reported to Lazarakis on the completion of the mortgage loan. Lazarakis was in fact a sixth mortgagee on May 26, 1989. As mentioned above, Warga and Margel had been informed on May 11 that the new Royal Bank mortgage ranked seventh when it was registered.

59. On October 20, 1989, Margel wrote the Laurentian Bank to obtain agreements on behalf of Faulkner, Ruth Margel, Moeller and McAfee to postpone their mortgages to the Royal Bank mortgage Margel enclosed authorizations from the R.R.S.P. account holders. The postponement agreements were executed on behalf of the Laurentian Bank and registered on October 30, 1989. Neither the R.R.S.P. mortgage lenders nor the Laurentian Bank were asked by Warga and Margel to postpone their mortgages to the Lazarakis mortgage.

60. On November 7, 1989, Margel reported to the Royal Bank that it had a valid first mortgage. In light of the registration of the postponement agreements on October 30, 1989, this report was accurate as of November 7, though the Royal Bank's mortgage had stood in no higher than fifth position since it was registered on May 11, 1989.

61. On May 7, 1990, Benson and Lazarakis signed a renewal agreement whereby Lazarakis agreed to renew his mortgage for a year. The agreement does not specify either the mortgage's priority or the particulars of prior encumbrances. Warga and Margel arranged for the renewal agreement to be signed and gave a copy of the agreement to the clients, but did not otherwise report on the renewal to either client.

62. Lazarakis' mortgage went into default in the fall of 1990 and on Warga's advice he retained another lawyer who informed him, and Warga and Margel, that his mortgage was not a second but a sixth. Warga reported the matter to the office of the Director of Insurance for the Law Society and explained that the R.R.S.P. mortgagees were at all times willing "to postpone to prior financing" but through an oversight were not asked to postpone their security to the Lazarakis mortgage. Perhaps because Benson's financial position was known to be weak by the fall of 1990, it was not possible to obtain postponement agreements from the R.R.S.P. lenders at that time.

63. In each of the mortgage transactions referred to above, Margel or Warga represented more than one client. Although generally speaking investors knew that Margel and Warga were both investors in Benson transactions and acted on his behalf, nevertheless the Solicitors did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) They did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although Benson was a person with whom the solicitors had a continuing relationship and for whom they acted regularly, they did not recommend that the clients obtain independent legal representation; and

(iii) They neither obtained the clients' written consent to their acting nor recorded their consent in separate letters to each client.

186 John Street, Ingersoll

64. Margel acted for First Western in trust on the purchase of 186 John Street, Ingersoll in November 1987. The purchase price was $320,000. The purchase was financed by way of a $220,000 first mortgage loan from Montreal Trust and a $50,000 second mortgage loan from Rose Yermus, for whom Margel also acted.

65. On January 12, 1989, Margel acted for Carl and Belle Grossman as mortgagees and for First Western in trust as mortgagor on a $100,000 loan that was to be secured by a second mortgage against title to 186 John Street. Although Margel reported to the Grossmans that their loan was secured by a second mortgage, it in fact ranked third as of the date of registration, January 12, 1989.

66. On January 25, 1989, Margel acted for Rose Glowinsky as mortgagee and First Western in trust as mortgagor on a $50,000 loan that was also to be secured by a second mortgage against title to 186 John Street. Mrs. Glowinsky's funds were advanced on January 25, 1989 and were used to pay off the Rose Yermus second mortgage, which had matured. The Glowinsky mortgage was not registered until April 19, 1989, though Mrs. Glowinsky received mortgage payments beginning on February 23, 1989. On April 26, 1989, Margel reported to Mrs. Glowinsky the registration of a second mortgage. At that time, the Glowinsky mortgage in fact ranked fourth, as no discharge of the Yermus mortgage had been registered and the Montreal Trust and Grossman mortgages were also on title.

67. In March 1989, Margel acted for First Western in trust on the refinancing of the first mortgage in favour of Montreal Trust. The amount of the first mortgage was increased from $220,000 to $320,000. Montreal Trust's solicitors requisitioned the discharge on postponement of both the Yermus and the Grossman mortgages before advancing the funds (the Glowinsky mortgage was not registered until April).

68. The new Montreal Trust mortgage was registered on March 23, 1989. It was guaranteed by Margel who had no direct interest in the property.

69. On June 5, 1989, Margel caused to be registered a postponement of the Grossman mortgage to the Montreal Trust mortgage.

70. In January 1990, Margel acted for First Western in Trust and Rose Glowinsky on the renewal of the latter's mortgage. He did not search or subsearch the title or report to either client.

71. First Western defaulted on its payments to Rose Glowinsky. It is likely that she will lose her $50,000 investment as her mortgage, which was to have been a second, ranks behind the $320,000 Montreal Trust first and the $100,000 Grossman second.

72. On each of the transactions referred to above, Margel represented more than one client. Although generally speaking, investors knew that he acted on First Western's behalf, nevertheless Margel did not comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and

(iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

<u>451 The West Mall, Etobicoke</u>

73. In May 1988, Warga and Margel acted for Maureen Harris as mortgagor on a $70,000 loan from the Royal Bank secured by a first mortgage on Ms. Harris' condominium at 451 The West Mall in Etobicoke. Ms. Harris used the proceeds of the loan to invest in a First Western property, 66 Mooregate Crescent, Kitchener. She was induced to invest in First Western properties by Benson.

74. In May 1989, Warga and Margel acted for Maureen Harris as mortgagor and Beaver Bend as mortgagee on a $50,000 loan secured by a second mortgage on 451 The West Mall. Ms. Harris used the proceeds of the loan to invest in another First Western property, 30 Bradmon Drive, St. Catharines.

75. In June 1989, Warga acted for Beaver Bend and Rick-Har Investments Limited on the sale of the second mortgage. Although Rick-Har Investments Limited were aware that Margel and Warga controlled Beaver Bend, Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) He did not advise the client that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

(ii) He neither obtained the client's written consent to his acting nor recorded their consent in separate letters to each client.

76. Power of sale proceedings have been commenced on both 66 Mooregate Crescent and 30 Bradmon Drive. Warga and Margel's representation of various parties in transactions relating to 66 Mooregate Crescent is dealt with below.

66 Mooregate Crescent, Kitchener

77. On July 7, 1989, Margel acted for First Western as trustee on the purchase of this rental property for $8,150,000 from Kingsgold Investment Inc.. First Western assumed a $5,300,000 first mortgage to Canada Trust. On closing, Margel registered second, third and fourth mortgages to Beaver Bend ($1,300,000), Kingsgold Investment Inc. ($300,000) and Kingsgold Investment Inc. ($1,150,000) respectively. Thus $8,050,000 in mortgages were registered against title as of the date of closing. Kingsgold was independently represented on this transaction.

78. In September and October, 1988, Warga acted for Werger Holdings Inc. as mortgagee and First Western as mortgagor on a $500,000 loan to be secured by a second mortgage on 66 Mooregate Crescent. The $500,000 was advanced on September 30, 1988. Werger Holdings Inc. had over 30 years of experience in real estate acquisition, evaluation, and mortgage lending, and had a portfolio measured in the millions of dollars.

79. On October 12, 1988, a member of Warga and Margel's staff wrote to a freelance conveyancer in Kitchener to instruct him to register a discharge of the $1,150,000 fourth mortgage to Kingsgold and the $500,000 mortgage to Werger Holdings. The conveyancer was instructed that no execution search or subsearch would be required. The Werger Holdings mortgage was registered on October 18, 1988.

80. On October 25, 1988, Warga reported to Werger Holdings that it had purchased a second mortgage in the principal amount of $500,000, and that the only prior encumbrance on title was a $5,300,000 first mortgage. In fact, the Werger Holdings mortgage was a fourth mortgage, ranking behind the $1,300,000 second mortgage to Beaver Bend and the $300,000 third mortgage to Kingsgold.

81. On February 10, 1089, Warga wrote to Werger Holdings as follows:

> *"You have a 2nd mortgage on this property which my clients purchased for $8,250,000 or so. At that time there was a first mortgage of 5,300,000.00 with Canada Trust, leaving about $2,450,000 equity.*
>
> *My clients have recently received a rent review approval for $1,569,000 (from $1,250,000) effective this year. On that basis Canada Trust has agreed to increase the first mortgage to $6,650,000 from the prior $5,300,000. The value of the property is now between $10,000,000 (conservative) to $11,000,000 depending on the capitalization rate used. I am enclosing a schedule of analysis.*
>
> *Would you have any objection to leaving your mortgage in place and postponing to the new first with Canada Trust. I believe your equity is well protected. I would be glad to answer any questions I can."*

82. Again, as of the date of the letter, the Werger Holdings mortgage was in fact a fourth mortgage. However, on March 8, 1989, the Kingsgold third mortgage was discharged and on April 4, 1989, the Beaver Bend second mortgage was discharged. The Werger Holdings mortgage then ranked second.

83. Warga's statement that the value of the property "is now between $10,000,000 (conservative) to $11,000,000" was based entirely on what he was told by Benson, although Warga's statement that First Western had recently received permission from the rent review board to increase rents in the building was accurate.

84. As a result of Warga's February 10, 1989 letter, Werger Holdings agreed to postpone its second mortgage to a new and larger Canada Trust first mortgage. Werger Holdings' willingness to postpone was communicated to Canada Trust's solicitors in a letter from Warga dated February 27, 1989, in which Warga identified himself as Werger Holdings' solicitor.

85. On February 27, 1989, a new first mortgage to Canada Trust in the amount of $7,250,000 (not $6,650 ,000 as represented by Warga in his letter of February 10, 1989 to Werger Holdings) was registered. Only $6,650,000 including the original $5,300,000 was advanced, however. Werger Holdings' postponement was registered on March 14, 1989.

86. On September 25, 1989, Warga wrote to Werger Holdings to suggest that Werger Holdings consider increasing its second mortgage from $500,000 to $750,000. Werger Holdings agreed to do so, and advanced $250,000 on September 28, 1989. The new mortgage was registered on the same day, and the original Werger Holdings mortgage was discharged on October 10, 1989.

87. As mentioned above, the property is at present the subject of power of sale proceedings.

88. Although Werger Holdings was aware that Warga and Margel were acting for First Western as well as itself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and

(iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

<u>564 Durham Crescent, Woodstock</u>

89. On September 2, 1986, Barry Benson in trust purchased 564 Durham Crescent for $915,888.69. Margel acted for the purchaser.

90. On October 18, 1989, Benson in trust transferred the property to First Western in trust. In the land transfer tax affidavit, Benson swore that the consideration was $2, and that First Western was a new trustee for the same beneficial owner of the property. Margel acted for both parties. This change was effected at the request of the first mortgagee, Montreal Trust (see below), which wanted a corporate trustee.

91. On the same date, October 18, 1989, First Western gave a first mortgage in the amount of $1,334,160 to Montreal Trust, which was independently represented. The proceeds of the first mortgage loan were used to pay out a prior first mortgage and a vendor take-back second mortgage. Margel acted for First Western.

92. In November 1989, Warga acted for Ganwood Inc. as mortgagee and First Western in trust as mortgagor on a $160,000 loan to be secured by a second mortgage on 564 Durham Crescent. The mortgage was registered on November 17, 1989.

93. This mortgage was arranged as a result of a request of First Western that Warga and Margel arrange secondary financing on this property. Margel was one of the beneficial owners of the property, holding a 12.5 per cent interest. Warga did not disclose that fact to Ganwood Inc.

94. The annual payments required on the first and second mortgages exceeded the net income expected to be generated by rents by $14,000 in 1990 and $5,000 in 1991.

95. In July 1990, First Western in trust defaulted on its mortgage payments on 564 Durham Crescent. The first mortgagee, Montreal Trust, initiated power of sale proceedings. On September 4, 1991, the property was sold for $1,275,000. The proceeds of sale were insufficient to pay the amount due to Montreal Trust; the shortfall was about $10,000. Ganwood Inc. lost its entire investment, $160,000 together with interest, and has brought a civil action against Warga and Margel in relation to this and other second mortgages.

96. Although Ganwood Inc. was aware that Warga and Margel were acting for First Western as well as itself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, they could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and

(iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

<u>85 Willow Road, Guelph</u>

97. On September 20, 1988, Barry Benson in trust agreed to purchase 85 Willow Road. The agreement (as amended on October 26, 1988) provided that the purchase price was to be $2,410,000, with the purchaser to arrange financing of $1,700,000 and the vendor to take back a second mortgage for $360,000. The closing date was to be February 23, 1989.

98. On January 16, 1989, Canada Trust agreed to provide a first mortgage loan in the amount of $2,125,000 but to advance only $1,575,000 initially.

99. The closing date was extended to February 27, 1989, at which time the transaction was completed. Margel acted for First Western, in whose name title was taken. Both the vendor and Canada Trust were independently represented. In addition to the Canada Trust first mortgage, a second mortgage to Beaver Bend in the amount of $125,000 and a third mortgage back to the vendor, Noble Property, in the amount of $400,000 were also registered. Although the agreement of purchase and sale called for the vendor to have a second mortgage for $360,000, the vendor did not take exception to the changes in the financing arrangements at that time.

100. On May 28, 1990, Sharon Noss (who was employed as a secretary by Warga and Margel) advanced $125,000 to Warga and Margel to purchase the Beaver Bend second mortgage. Warga acted for Ms. Noss, Beaver Bend, and First Western.

101. On June 5, 1990, a new mortgage to Sharon Noss and a discharge of the Beaver Bend mortgage were registered. Though Ms. Noss' mortgage was to rank second, it was in fact a third mortgage.

102. On June 21, 1990 and August 14, 1990, Warga and Margel wrote to Noble to ask that Noble postpone to Ms. Noss' mortgage. The August 14 letter was signed by Warga.

103. On August 17, 1990, Noble's solicitors wrote to Warga to say that Noble would not postpone the second mortgage because pursuant to the agreement of purchase and sale, the vendor was entitled to a second mortgage, and accordingly "the priorities now rank as they should."

104. On September 19, 1990, First Western defaulted on all three mortgages and power of sale proceedings were commenced on October 9, 1990.

105. On June 9, 1991, the property was sold under power of sale for $1,923,000. Sharon Noss lost her entire investment of $125,000 plus interest.

106. Although Sharon Noss was aware that Warga and Margel were acting for First Western as well as herself, nevertheless Warga failed to comply with the following requirements of commentary 5 to rule 5 of the rules of professional conduct:

(i) He did not advise the clients that no information received in connection with the matter from one client could be treated as confidential so far as any of the others were concerned and that if a conflict were to develop that could not be resolved, he could not continue to act for both or all clients and may have to withdraw completely;

(ii) Although First Western was a "person" with whom he had a continuing relationship and for whom he acted regularly, he did not recommend that it obtain independent legal representation; and

(iii) He neither obtained the clients' written consent to his acting nor recorded their consent in separate letters to each client.

DATED at Toronto this 6th day of December, 1993."

RECOMMENDATION AS TO PENALTY

The Committee recommends that Harvey Samuel Margel be suspended for a period of nine months.

REASONS FOR RECOMMENDATION

The Solicitor failed to conscientiously and diligently serve clients and practised in a reckless and careless manner.

The Solicitor advanced mortgage funds prior to the registration of security documents, advanced mortgage funds prior to the registration of a deed to the borrower and failed to disclose his interest in a syndicate that borrowed from a client. The Solicitor inaccurately reported to clients, falsely reporting priority of mortgages, failing to report particulars and dollar value of prior encumbrances, failing to report mortgage priority and falsely reporting the registration of a deed.

The Solicitor acted for more than one party in a number of transactions without making disclosure to and obtaining the consent of his client as required by Commentary 5, Rule 5.

Counsel for the Law Society recommended a suspension of nine months, while Counsel for the Solicitor argued that a lesser suspension would be more appropriate.

The Solicitor practised in a busy office with enormous activity. The Solicitor misplaced confidence in staff and proper standards were not met by unsupervised staff. Some of the problems occurred when the Solicitor was on vacation. Counsel advised that there was no dishonesty here and that the Solicitor has suffered financially. Numerous letters of support from colleagues and clients were filed on behalf of the Solicitor. In addition, there is medical evidence that a medical problem contributed to his performance. The Solicitor has suffered personally, professionally, financially and has undergone medical treatment as a result of serious stress.

However, these were not isolated incidents or technical deficiencies. Here there was repeated registration of mortgages in wrong priority, putting lenders at risk in the interim period until postponements could be registered. We were advised by Counsel that claims have been made against the Insurance Fund and the Compensation Fund. A solicitor must act conscientiously and with skill. Here the Solicitor acted recklessly and carelessly.

The public must be protected and the profession must know that clients must be served conscientiously and diligently. Much of what happened to this Solicitor may have been prevented if Convocation prohibited solicitors from acting for both parties in financing transactions.

Harvey Samuel Margel was called to the Bar and admitted as a solicitor of the Supreme Court of Ontario on the 23rd day of March, 1973.

ALL OF WHICH is respectfully submitted

DATED this 18th day of March, 1994

Abraham Feinstein, Q.C.
Chair

THE LAW SOCIETY OF UPPER CANADA

The Discipline Committee

REPORT AND DECISION

Abraham Feinstein, Q.C., Chair
J. James Wardlaw, Q.C.
Netty Graham

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

HARVEY SAMUEL MARGEL
of the City
of North York
a barrister and solicitor

Gavin MacKenzie
for the Society

Brian Greenspan
for the solicitor

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

The DISCIPLINE COMMITTEE begs leave to report:

Convocation returned this matter to the Committee for clarification of its reasons for recommendation.

The following matters were addressed by Counsel for the Law Society and the Solicitor for clarification:

1. Honesty
2. Compensation Fund
3. Non-Disclosure
4. Mitigating circumstances
5. The difference in penalties between Mr. Margel and Mr. Warga

1. HONESTY

There was no finding of dishonesty in the reasons for the Decision. The last sentence of paragraph 16 of the Agreed Statement of Facts states that the Solicitor's position is that at no time did they act dishonestly and that the admitted short-comings in their practice were unintentional. However, the Complaints and the Agreed Statement of Facts contain the word "falsely" in several places and the working of the reasons for the Recommendation follow the wording in the Complaints and the Agreed Statement of Facts. Counsel have agreed that the Complaints should be amended by replacing the word "falsely" with the word "incorrectly" in the following places:

- Page 1, under 40 Paulette Drive, Paragraph (a), in the first line, substitute the word "incorrectly" for "falsely";

- Page 2, under 680 Tenant Court, Particular (e) in the first line, substitute the word "incorrectly" for "falsely";

- Page 5, Particular (p) under sub-heading 186 John Street, in the first line, substitute the word "incorrectly" for "falsely";

- Page 9, Paragraph 16, in the first line, substitute the word "incorrect" for the word "false".

The Reasons for the Recommendation should follow the wording of the Agreed Statement of Facts and be clarified by substituting the word "incorrectly" for the word "falsely" in lines four and six, in the second paragraph of the Decision on Page 32. The word "falsely" used in the Reasons for Recommendation was not intended to suggest dishonesty but was merely tracking the wording of the Complaints and the Agreed Statement of Facts. With the amendments to the Complaints, Agreed Statement of Facts and Reasons for Recommendation replacing the word "falsely" with the word "incorrectly" this matter is clarified.

2. COMPENSATION FUND

There were no adverse inference as to honesty made by the Committee with respect to the claims made to the Compensation Fund. Counsel for the Solicitor argued that there was only one outstanding claim by Mrs. Perlmutter to the Compensation Fund and that no adverse finding should be made against the Solicitor. Since the Hearing, Counsel for the Solicitor has provided the Committee with evidence that this claim has been refused. In the report of the Referee dated October 17, 1994, a copy of which has been delivered to the Committee, the Perlmutter claim has been refused and on Page 8 of the Report, the Referee declined the evidence of Mrs. Perlmutter and accepted the evidence of Mr. Margel. In the last two sentences of Paragraph 15, on Page 9 of the Agreed Statement of Facts, it states that thirteen (13) claims in the total amount of Two Million ($2,000,000.00) Dollars in respect of Margel have been made to the Lawyers Fund for Client Compensation. The Committee did not draw any adverse inference as to honesty in respect tot he Compensation Fund claims made against Mr. Margel. However, the fact that there were 13 Compensation Claims in the total amount of $2,000,000.00 in respect to Mr. Margel was a factor in the Committee's reasons for recommendation that the solicitor was practising in a reckless and careless manner.

3. NON-DISCLOSURE

Paragraph 72 on Page 21 of the Agreed Statement of Facts states that on each of the transactions referred to in respect to 186 John Street, Margel represented more than one client. Although generally speaking, investors knew that Margel acted on First Western's behalf, nevertheless, Margel did not comply with the following requirements of Commentary 5 to Rule 5 of the Rules of Professional Conduct by not advising the clients that no information received would be confidential, not recommending that the client obtain independent legal representation and by not obtaining the client's written consent to his acting or requiring their consent in separate letters to his client.

No failure to disclose is established by the Agreed Statement of Facts. What is agreed is that Margel did not comply with certain requirements of Commentary 5 to Rule 5, as investors were generally aware that Mr. Margel was acting for more than one party and the failure to disclose was a disclosure required by Commentary 5 of Rule 5. The reasons for the Decision should be clarified by the following amendments to the Decision on Page 32:

(1) In the second line in the second paragraph, add the word "and" after the word "documents";

(2) In lines 2 and 3 of the second paragraph deleting the words "and failed to disclose his interest in a syndicate that borrowed from the client";

(3) In the second line of the last paragraph add the word "the" before the word "disclosure".

Counsel for the solicitor argued that this is not a case where the Solicitor made no disclosure to clients. He further argued that the failure to comply with Commentary 5 to Rule 5 was therefore of a technical nature.

The Society's Counsel did not agree that this is a technical breach where a lawyer has the continuing kind of relationship that the Solicitors had with First Western, they had such an intimate involvement and indeed a personal and

financial involvement. He further argued that the mere fact of disclosure is not sufficient as one does not know what these investors would have done had there been disclosure in accordance with Commentary 5, Rule 5. The solicitor for the Society statement that the Agreed Statement of Facts makes it clear that the Solicitor did not comply with Rule 5, Commentary 5, which requires more than disclosure of the fact that a solicitor is acting for both parties. He argued that the Solicitors agreed in the Agreed Statement of Facts that they did not comply with the requirements of Commentary 5 to Rule 5 which required a discussion with the clients of the consequences of the fact that the solicitors are acting for more than one party and the various eventualities that might happen, depending upon how the transaction develops.

The Committee, in making its recommendation as to penalty, accepted the argument of the Society's Solicitor.

4. MITIGATING CIRCUMSTANCES

The Counsel for the Solicitor argued that the Committee should consider important mitigating circumstances. The Solicitor has suffered financial devastation. He has lost somewhere over $5,000,000.00 and now has virtually no positive net worth. He drives a 1986 Oldsmobile and now rents the home he once owned. The Solicitor has chosen to try to pay his creditors without going into bankruptcy, which is a significant penalty in itself. The Solicitors' counsel argued that these last four years have been a form of suspension all in themselves. The Solicitor's Counsel argued that the Solicitor serves over 300 ongoing clients in virtually a walk-in-office, does so alone, and a nine month suspension for him means closing it up, firing his secretary and starting over once again. A nine month suspension would have a major impact upon the ongoing clients of the Solicitor. The Solicitor's Counsel argued that extreme health problems and the performance related health problems that the Solicitor in fact experienced ought to be given considerable weight.

The Solicitor suffered from a thyroid dysfunction. The thyroid problem existed months prior to July of 1988 and continued for a period of two years which correlates with the Solicitor's poor professional performance. Dr. Walfish's medical report states that the effects of the thyroid problem undoubtedly played an important role in the Solicitor's poor mental function and impaired professional performance. Dr. Walfish further states that the Solicitor suffered from associated depression and neurological complaints for which he was referred to a psychiatrist.

In addition, the Committee received numerous letters attesting to the Solicitor's good character and integrity. The Committee considered these mitigating circumstances in determining the recommendation as to penalty.

5. DIFFERENCE IN PENALTY BETWEEN MR. MARGEL AND MR. WARGA

Counsel for the Solicitor argued that this is a joint submission and there is collective and joint responsibility that Mr. Margel and Mr. Warga are prepared to sure, with their permission, and therefore the penalty for both Solicitors should be the same. Counsel for the Solicitor argued that, by making the penalties different, the Committee made findings of fact against Mr. Margel which were harsher than the findings of fact against Mr. Warga.

The Solicitor for the Society argued that it was appropriate for a greater share of responsibility for what happened to rest with Mr. Margel.

The last sentence of Paragraph 7 on Page 8 of the Agreed Statement of Facts states that Mr. Margel was primarily responsible for the serving of the First Western Group. Paragraph 8 on the same page states that the Western Ground generated a hugh volume of legal work for the firm. The firm was poorly equipped to deal with such a sudden surge of new business. Counsel for the Solicitor stated that much of the misconduct that has been admitted by the Solicitors may be explained in part by the firm's inadequate resources and poor state of organization with respect to First Western legal work.

In Paragraph 19 on Page 10 of the Agreed Statement of Facts, the Solicitors agreed that the Complaints concern seven transactions, most of which have been the subject of complaints by investors. In all, Warga and Margel acted on approximately 900 transactions on approximately 150 First Western or Benson Buildings, and those examined by the Society exemplify the types of problems encountered by investors. Based on the foregoing, the Committee found that these were not isolated incidents or technical deficiencies and a greater share of the responsibility should rest with Mr. Margel.

Having considered all of the foregoing matters, the consensus of the Committee was to recommend a nine month suspension.

ALL OF WHICH is respectfully submitted

DATED this 7th day of January, 1995

Abraham Feinstein, Q.C.
Chair

There were no submissions and the Report was voted on and adopted.

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

Mr. Greenspan made submissions in support of a lesser penalty.

The solicitor spoke briefly on his own behalf.

Mr. Brown made submissions in support of the recommended penalty and that there was no error in principle.

There were questions from the Bench.

Convocation took a brief recess at 4:30 p.m. and resumed at 4:45 p.m.

Re: Melvin Nathan DIAMOND and Sheldon Marshall FISCHMAN - Oshawa

The Diamond and Fischman Report was put over to the Discipline Convocation on Saturday, December 9th, 1995.

Harvey Samuel MARGEL (cont'd)

Mr. Greenspan made further submissions in reply.

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

It was moved by Ms. Curtis, seconded by Mr. Gottlieb that the solicitor be suspended for a period of 9 months.

Lost

It was moved by Mr. Carey, seconded by Ms. Eberts that the solicitor be suspended for a period of 3 months.

Withdrawn

It was moved by Mr. Copeland, seconded by Ms. Sachs that the solicitor be suspended for a period of 6 months.

Carried

Counsel, the solicitor, the reporter and the public were recalled and informed of Convocation's decision that the solicitor be suspended for a period of 6 months.

The request for the commencement of the suspension to be February 17th, 1996 was voted on and adopted.

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The Frederick Arthur Helson and Yaroslav Mikitchook Reports were referred to the Convocation Assignment Tribunal.

CONVOCATION ROSE AT 5:56 P.M.

Confirmed in Convocation this 23 day of February, 1996

Treasurer