DECISION OF THE DISCIPLINARY COMMITTEE OF THE

GENERAL LEGAL COUNCIL

JOSWYN LEO-RHYNIE Q.C. (A member of the General Legal Council

v. DENIS A. TOMLINSON an Attorney-at-Law

PANEL PAMELA E. BENKA-COKER Q.C. - CHAIRMAN
LINCOLN EATMON
RICHARD DONALDSON

NARRATIVE The respondent attorney-at-law Denis Tomlinson (hereinafter referred to as "the attorney") was admitted to practice as an attorney-at-law of the Supreme Court of Judicature of Jamaica on the 25th day of September 1972. The said attorney was admitted to practice as an attorney-at-law and Counsellor-at-law of the Sumpreme Court of the State of New York on the 24th day of February 1988. It is undisputed that at all material times the attorney maintained concurrent practices of law in Jamaica and in New York.

The attorney, and a fellow Jamaican attorney-at-law Lloyd Anthony McFarlane, purchased offices as tenants in common at premises 88-11 Francis Lewis Boulevard in the State of New York in the United States of America and each conducted his law practice from that address. The attorney and Lloyd McFarlane were not law partners. They conducted separate law practices but shared expenses such as secretarial help.

Attorneys-at-Law and Counsellors-at-Law who practice in the State of New York are obliged by the laws of that State to open Clients' accounts called Interest On Lawyers' Accounts (I O L A accounts). An I O L A account is an interest bearing escrow account regulated and managed by the State of New York. All interest goes to the State after charges and other expenses have been deducted. A cardinal rule in the operation of an I O L A account to which the attorney-at-law was obliged to have due regard was that at all times the money held in the account had to be enough to cover the amount of money held by the attorney-at-law on behalf of his clients'.

If the amount in the account fell below that held on behalf of the clients the attorney-at-law could find himself subject to disciplinary proceedings and subsequent disbarment.

The attorney-at-law Lloyd McFarlane had an I O L A account No. 53702671 at CitiBank in New York. In or around June 1991, Lloyd McFarlane returned to practice in Jamaica. Prior to his return he placed "The attorney" as an authorised signatory on the said account. Clients funds were in the account at the time that the attorney's name was added as an authorised signatory.

As a consequence of the manner in which the attorney managed the I O L A account 53702671, the Grievance Committee for the Second and Eleventh Districts for the State of New York commenced Investigative hearings against the attorney in September of 1992. Hearings were held before the said Committee on the 3rd September 1992, 10th May 1993, the 17th May 1993 and the 26th July 1993. The attorney gave sworn testimony before the Grievance Committee.

Before completion of these hearings and in keeping with the right given to him by Section 691-9 of the Rules governing the conduct of attorneys of the Appellate Division Second Judicial Department, the attorney voluntarily submitted his resignation from the New York State Bar. The substance of the complaint investigated by the Grievance Committee was that the attorney "improperly withdrew funds from the I O L A account of Lloyd McFarlane, namely account No. 53702671 without permission and authority".

By order dated the 25th October 1993, the Appellate Division of the Supreme Court of New York, Second Judicial Department disbarred the attorney by striking his name from the Roll of Attorneys and Counsellors-at-law for the State of New York.

Subsequent to his disbarment, the attorney continued to practise in Jamaica. Information relating to the investigative hearings held against the attorney by the Grievance Committee, his voluntary resignation dated the 12th August 1993, and his disbarment by the Appellate Division of the Supreme Court of New York, Second Judicial Department was supplied to the Secretary to the General Legal Council in or around October 1993.

By form of application dated the 22nd of February 1995, and supporting affidavit of the same date, the complainant, Joswyn Leo-Rhynie Q.C. a member of the General Legal Council formally laid a complaint against the attorney.

It is into this complaint that this Disciplinary Committee held hearings on the 5th of October 1996, the 19th October 1996, 2nd November 1996, the 30th November 1996, and the 14th December 1996.

THE COMPLAINT The gravamen of the complaint relates to the conduct of the attorney in his management and handling of the I O L A account of Lloyd McFarlane after his name was added as a signatory to the said account.

In the affidavit in support of the complaint, Joswyn Leo-Rhynie Q.C. depones as follows: In paragraphs 4 & 5 he recites the information given to the General Legal Council by the Grievance Committee relating to the attorney Denis Tomlinson, then in paragraph 6 he states "that I am also advised by the Grievance Committee and do verily believe that by letter dated 18th August 1992, the Respondent was informed that a "sua sponte" investigation had been initiated by the said Grievance Committee into the following allegation of professional misconduct:

(a) that the Respondent was named an authorised signatory on the Citibank I O L A escrow account of Lloyd A. McFarlane Esq. number 53702671; and

(b) that the Respondent improperly withdraw funds from the said escrow account without permission and authority".

Paragraph 7 of the said affidavit reads as follows;

" That the Respondent having appeared before the said Grievance Committee and given evidence at its investigative hearings on the 3rd September 1992, 10th May 1993, 17th May 1993 and 26th July 1993, voluntarily and in accordance with section 691-9 of the Rules Governing, the conduct of Attorneys of the Appellate Division Second Judicial Department submitted his aforesaid resignation stating inter alia that!

4. "This resignation is freely and voluntarily rendered. I am not being subjected to co-ercion or duress. I am fully aware of the implications of submitting my resignation.

5. I am aware that there is a pending investigation by the Grievance Committee for the Second and Eleventh Judicial Districts into allegations that I have been guilty of professional misconduct. The nature of the allegation is that I was named an authorised signatory

on the escrow account of Lloyd McFarlane Esq. and improperly withdrew funds from the said account without permission or authority.

6. I hereby acknowledge that if charges were predicated on the misconduct under investigation I could not successfully defend myself on the merits against such charges.

At paragraph 9 of his affidavit the complainant says this "that in view of the foregoing matters, and in particular, the Respondent's express and unequivocal admission that he improperly withdrew funds from an escrow account without permission or authority, I have reasonable and probable grounds to believe that the Respondent is guilty of misconduct in a professional respect in that he has conducted himself in a manner which is disgraceful, dishonourable and unbecoming of an attorney-at-law and which conduct tends to discredit the Legal Profession of which he is a member.

The affidavit in support of the complaint ends as follows; "that the applicant intends to place reliance, inter alia, on Cannon 1 (b) and Cannon VII (b) of the Legal Profession (Cannon of Professional Ethics) Rules."

Exhibited to the affidavit are the following;

(a) J.L.R. 1 - copy of a letter from the Grievance Committee to the General Legal Council dated the 28th day of October 1993 forwarding a certified copy of the Order dated the 25th day of October 1993 of the Appellate Division of the Supreme Court of New York disbarring the "attorney" and striking his name from the Roll of Attorney and Counsellors-at-Law for the State of New York aforesaid.

(b) J.L.R. 2 - copy of Order of the said Appellate Division of the Supreme Court of New York dated the 25th October 1993 disbarring the attorney.

(c) J.L.R. 3 - resignation of the "attorney" dated the 12th August 1993.

(d) J.L.R.4 - copy of letter dated the 18th August 1992 from the Grievance Committee to the attorney advising him of the investigation to be taken against him by the Grievance Committee.

(e) J.L.R. 5 - copy of Section 691 - 9 of the Rules governing

the conduct of attorneys of the Appellate Division Second Judicial Department by reason of which the attorney voluntarily submitted his resignation from the New York Bar.

(f) J.L.R. 6 - Transcript of the evidence given before the investigative hearings of the Grievance Committee in investigating the allegations of professional misconduct against the attorney.

JURISDICTION This Committee wishes to make it clear that its jurisdiction to enquire into the allegations of professional misconduct against "the attorney" as averred in the complaint and affidavit in support of Joswyn Leo-Rhynie Q.C. dated the 22nd of February 1995 is grounded in section 12 (1) of the Legal Profession Act of 1972. Section 12 (1) states as follows;

> "Any person alleging himself aggrieved by an act of professional misconduct (including any default) committed by an attorney may apply to the Committee to require the attorney to answer allegations contained in an affidavit made by such person, and the Registrar or any member of the Council may make a like application to the Committee in respect of allegations concern- any of the following acts committed by any attorney, that is to say (a) any misconduct in any professional respect (including conduct which, in pursuance of rules made by the the Council under this part is to be treated as misconduct in a professional respect").

Further section 14 (1) of the said Act reads as follows;

> "The Discipliary Committee may from time to time make rules for regulating the presentation, hearing and determination of applications to the Committee under this Act (2) Until varied or revoked by rules made by the Committee pursuant to Section (1) the rules contained in the Fourth Schedule shall be in force".

The Committee is of the considered opinion, that this hearing before it is not a re-hearing of the complaint against the "attorney" investigated by the Grievance Committee in the State of New York but a hearing into the allegations of misconduct against the attorney

contained in the complaint and affidavit in support under Section 12 (1) and 14 (1) and (2) of the Legal Profession Act.
This Commitee was obliged to hear evidence and come to its own determination on the evidence. This we did and reserved our decision to be delivered at a later date.

THE EVIDENCE Oral evidence was given by the following persons, JOSWYN LEO-RHYNIE Q.C. and Lloyd Anthony McFarlane in support of the Complaint, the attorney - Denis Tomlinson on his own behalf. The following documents were also tendered in evidence;

(a) Exhibit 1 - Application and Affidavit in Support of Joswyn Leo-Rhynie Q.C.

(b) Exhibit 2 - Response from "attorney" to the General Legal Council dated the 15th May 1990.

(c) Exhibit 3 Affidavit of Richard Lambardo

(d) Exhibit 4 - 15 cheques drawn on I O L A account of Lloyd McFarlane with relevant bank statements May-June 1991, June to July 1991, July to August 1991 and August to September 1991.

(e) Exhibit 4A 11 cheque stubs to cheques referred to in paragraph (d) above.

(f) Exhibit 5 - cheques drawn by Lloyd McFarlane on his I O L A account, to himself or to himself as attorney.

After Charles Piper, attorney-at-law opened to the case of the complainant Joswyn Leo-Rhynie Q.C. gave evidence. His evidence was largely of a formal nature. He re-counted the events that led up to the laying of the complaint against the attorney in this jurisdiction and identified exhibits 1,2 and 3 and also identified to the Committee, exhibits J.L.R. 1-6 attached to his affidavit dated the 22nd February 1995. Exhibits 1, 2 and 3 were by consent tendered through this witness.

Under cross-examination by Patrick Bailey, the witness said that he had known the name of Lloyd McFarlane and knew that he was an attorney-at-law but he did not know him very well. The witness was asked to look at the resignation of the attorney dated the 12th August 1992, and he agreed that nowhere in that resignation were the words "with intent to defraud" mentioned and that he saw no other

words of a similar nature.

The witness was asked questions as to the time the complaint was made, the time information was received from the Grievance Committee re "the attorney". The rest of the cross-examination does not affect the material issues to be decided by this Committee and was not extensive. The witness Lloyd Anthony McFarlane then gave evidence.

The salient evidence of his examination in chief is as follows; He is an attorney-at-law practising in Jamaica. He was admitted to practise law in the State of New York in the United States of America in the year 1984. He practised in New York and he practised in the same offices with "the attorney". He and the "attorney" practised from premises 88-11 Francis Lewis Boulevard. They shared all office expenses including mortgage payments and shared the same secretary. He told the Committee that although he shared office expenses with the attorney, they conducted separate practices. He gave in depth evidence about the requirement by the State of New York that if an attorney-at-law held monies for clients, the attorney was required to maintain an I O L A escrow account. He stated that this requirement was introduced from in or around February 1989. He re-affirmed that this was an interest bearing account. It was regulated by the State of New York, and the attorney-at-law could not keep the interest earned on the account. At no time were the funds in the I O L A account to fall below the money held on behalf of clients. If they did the attorney was subject to disbarment proceedings.

He stated that he discussed the question of the I O L A account with "attorney". That he opened an I O L A account in April 1990 and that he would have discussed the implications of such an account with the attorney sometime after that. He confirmed that in or around June 1991 he ceased active practise in the State of New York and returned to Jamaica to practise.

Before he returned to Jamaica he made arrangements with respect to his I O L A account. He had discussions with the attorney and then proceeded to add the attorney's name as an authorised signatory to his I O L A account. While practising in the State of New York, he had a criminal practice and a conveyancing practice. He said that

he did make arrangements for the management of his client's matters. He asked an attorney-at-law Alton Rose to handle some of the matters and he asked the attorney to handle some of the matters, in particular the real estate matters were to be handled by the attorney. Any matter which was concluded by the attorney, it was agreed that he should get 50% of the fees.

The money in his I O L A account was held for his clients some of it represented deposits and he held $36,400.00 for a particular client.

He knew "the attorney" from the attorney was a young lawyer at the firm of Myers Fletcher & Gordon and he, the witness, was in school at Wolmers High School for Boys. He regarded "the attorney' as a trusted friend. The attorney knew where he could be reached in Jamaica. He knew that he would be going into Chambers with Ian Ramsay at 53 Church Street.

On returning to Jamaica he communicated with the attorney on several occasions. The attorney would telephone him at home and the attorney's secretary would telephone him at home and he would visit the attorney's offices as a consequence of these telephone communications. The attorney's offices were then situated at Dominica Drive in New Kingston.

The witness did admit that there were occasions on which he would draw a cheque on his I O L A account to himself. For example if he drew fees from the account. If he drew a cheque to himself he would write on the back of the cheque "payment approved" and have the client sign it.

The witness further stated that he did become concerned about the management of his I O L A account. That he was served with a petition from the Grievance Committee making certain allegations about his escrow account. He said that the petition stated that his escrow account was completely depleted and that it did not cover the funds that he should be holding for clients.

He immediately went to New York but his attempts to contact the attorney before he left for New York were unsuccessful. On arriving in New York he was given certain information by an attorney-at-law

Courtney Hamilton and then he went to the premises of his former offices and collected among other documents, the cheque book to his I O L A account which he had left in "the attorney's care". This witness identified exhibit 4, that is to say, the four bank statements and 15 cheques attached and they were tendered through him. The cheques were numbered as follows - Attached to Bank Statement for the month of May 15th to June 16th 1991, cheque Nos. 1051, 1052, 1053, 1054, and 1055. Attached to the Bank Statement for the period June 17th to July 15th 1991 cheque Nos. 1056, 1057, 1058 and 1059. Attached to Bank Statement for the month July 16th to August 15th 1991 cheque Nos. 1060, 1061 and 1063, August 15th to September 16th 1991 with cheque Nos. 1062, 1064 and 1065.

The witness confirmed that 5 of the 15 cheques shown to him and tendered in evidence were signed by him and the rest were signed by "the attorney". Cheque stubs which were tendered in evidence as exhibit 4A were put in relation to the following cheques. Cheque Nos. 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065 and 1066! Cheque no. 1066 was not tendered in evidence.

The witness was asked about the petition which had been insti - tuted against him in the State of New York. He confirmed that the petition related to disciplinary proceedings taken by the Grievance Committee. There was a hearing in November of 1992 as a consequence of which he was disbarred from the New York State Bar. The charges against him had included "inter alia" the fact that his I O L A escrow account did not cover the funds that he held for his clients.

The witness stated that the balance in his I O L A escrow account at the time he put the attorney's name on it was $62,290.00 U.S. This amount represented the balance in his account after he had him- self drawn cheque Nos. 1051,1052, 1053, 1054 and 1055.
The attorney drew cheque Nos. 1056, 1057, 1058, 1059, 1060, 1061,1062 1063, 1064, and 1065 on the witness's I O L A account at Citibank in New York. He stated that he could draw cheques on the account and so could the attorney, but the attorney had the cheque book in his possession. The witness informed the Committee that cheque Nos. 1056 1057, 1058, and 1059 was drawn on the account by the attorney,cheque no. 1056 dated the 27th June 1991, was in the amount of $10,000.00 drawn to the attorney as payee. Cheque no. 1057 dated the 8th of

July 1991 was in the amount of $10,000.00 and drawn to the attorney as payee. Cheque no 1058 dated the 10th of July 1991 in the amount of $650.00 drawn to the attorney as payee. Cheque no. 1059 dated the 11th July 1991 drawn to Rhonda Frazer as payee in the amount of $5,000.00. The witness said that Rhonda Frazer was the purchaser of some real estate and one Mertilus who was his client was the Vendor. He went on to say that he did not authorise the drawing of cheque Nos. 1056 for $10,000.00 and 1057 for $10,000.00. There would have been an implied authorisation to draw 1058. The witness then looked at the bank statement July 16th to August 14th 1991. There are three cheques attached to this statement, cheque nos. 1060, 1061 and 1062. Cheque no. 1060 was in the amount of $400.00 dated the 15th July 1991 and drawn to the attorney as payee.

Cheque no. 1061 was dated the 17th July 1991 in the amount $8,000.00 with the attorney as payee.

Cheque no. 1063 dated the 7th August 1991 in the amount of $8,000.00 to Rhonda Frazer. The witness re-stated that there may have been implied authorisation for the attorney to draw cheque no. 1060. He did not authorise the drawing of cheque no. 1061 in the sum of $8,000.00 with the attorney as payee.

The witness identified cheque nos. 1062, 1064 and 1065 which are attached to bank statement for the period 15 th August 1991 - 16th September 1991. Cheque no. 1062 was to Mertilus for $3,887.89 drawn by the attorney.

Cheque no. 1064 dated the 23rd of August, 1991 in the amount of $375.42 drawn by the attorney to the New York Telephone Company.

Cheque no. 1065 in the amount of $15,000.00 drawn by the attorney to himself dated the 2nd of September 1991. The witness did not authorise cheque nos. 1064 and 1065. He did say that on one occasion he spoke to the attorney about his I O L A account. He asked the attorney why he had taken money from his I O L A account. He said the attorney advised him that he had done so to protect the witness because he was not sure of the intentions of the lawyer who was representing his ex-wife. The witness said he told the attorney that he should have been informed but the attorney did not respond. The witness told the Committee that his ex-wife had initiated divorce proceedings against him but he was not concerned that she would do

anything with his I O L A account.

The witness was then cross-examined by Patrick Bailey. He was asked about cheques which he had written to himself which were drawn on his I O L A account. The witness admitted that he had drawn cheques on his I O L A account representing fees to himself. There were also other unusual circumstances when he would draw cheques to himself on his I O L A account. The witness stated that he had offices at 88-11 Francis Lewis Boulevard for about 4 years prior to his return to Jamaica.

During that time he shared thesame secretary with the attorney. When he went into Chambers with Ian Ramsay he did not have his own secretary. He used one that was there, he did have a telephone number designated to him but he can't say when that was done. He agreed that when he came to Jamaica he had an exclusively criminal practice but he was not in Court every day. He did not have a National Criminal practice. It was not his habit to report his whereabouts to the Secretary.

The witness denied that he had abandoned his practice in New York. He admitted that he was disbarred from the New York Bar and that a report of his disbarment had been forwarded to the General Legal Council here. As a consequence a complaint was laid against him here and it is still pending. The witness was asked about the disciplinary proceedings which had taken place against him in the State of New York.

He further stated that he had retrieved the documents in relation to his I O L A account in about May of 1992. He gave sworn testimony at the disciplinary hearings instituted against him by the Grievance Committee of the Bar of the State of New York and that he was represented by Counsel at these hearings. He did tell them that the attorney had handled his I O L A account but in spite of that he was disbarred from practising Law in the State of New York. He said that the Disciplinary Tribunal was of the view that since he had voluntarily put the attorney's name on his I O L A escrow account he was ultimately, responsible.

There were other questions asked by Mr. Bailey relevant to the disciplinary proceedings against the witness in New York but after

objections raised by Mr. Piper, this line of cross-examination was not persued.

The witness did admit that the attorney had written a letter to Alton Rose, the attorney and counsellor-at-law who had represented him in New York, acknowledging that he had in his possession funds to the witness's credit. The witness was also aware that the attorney had paid over certain sums of money to Alton Rose. There is no dispute as to fact that the attorney did pay these sums to Alton Rose.

The witness also gave evidence that the first time he spoke to the attorney about his handling of the witnesses I O L A account was at a party of the Advocates' Association. The attorney did not on this occasion mention anything to him about a claim against his I O L A account by a Jewish Lawyer.

The only time the attorney discussed any claim by a Jewish Lawyer was on the date of a hearing of the within disciplinary pro - ceedings. He had, on a previous occasion,, prior to the hearing, called the home of the father of the witness, and advised him that a Marshall or Sheriff was trying to find him. This was shortly after he had left New York and in the year 1991.

In re-examination by Charles Piper, the witness was shown cheque Nos. 1042, 1004 and 1022 on all of which the witness was the payee. These cheques were tendered as exhibit 5.

It is to be observed that on all three cheques of exhibit 5,the words "payment approved" are endorsed, and signed by persons other than the witness. The witness did say that shortly after his return to Jamaica in 1991, he visited the attorneys office at Dominica Drive.

With leave of the panel, Patrick Bailey made enquiries of the witness about the sum of money that was paid over by the attorney to Alton Rose. He said that the attorney had paid over the sum of $48,000.00 to Alton Rose. This sum was paid over before September 1992.

The above is a fair summation of the oral evidence given for and on behalf of the complainant with relevant documents exhibited. It will be convenient at this stage to review the evidence given before the Grievance Committee for the Second and Eleventh Districts.

EVIDENCE BEFORE THE GRIEVANCE COMMITTEE

The evidence before the above was elicited in the form of an interrogation of the attorney on oath. The review will be limited to the important issues that arose there.

The hearing on the 3rd September 1992 was the first to take place. On this date, the attorney was formally advised of the purpose and procedure of the Grievance Committee and that it had received allegations of misconduct on the part of the attorney. He was advised that he had a right to be represented by an attorney. He was told that there were at that time no charges pending against him. The investigation took the form of questions and answers. The attorney admitted that he practiced both in the United States of America and Jamaica and that he had a civil practice only and that he was a solo practitioner. The attorney admitted that he shared office space and expenses with Lloyd McFarlane at 88-11 Francis Lewis Boulevard but they were not law partners.

The attorney was also told that it was alleged that he had used the monies on the account of Lloyd McFarlane, Citibank account number 53702671 for his own use and benefit.

The Bank Records relevant to the said account were put in evidence, namely Bank Records covering the period June 17th 1991 to November 14th 1991. It is to be noted here, that in the proceedings before this Disciplinary Committee bank statements and cheques for the period May 1991 to September 1991 were tendered in evidence as exhibit 4.

The attorney admitted, on being shown the bank records that the beginning balance of Lloyd McFarlane's account was $62,290.00. He admitted that on looking at the last page of the bank records the account had zero balance. The attorney was asked about cheque no. 1056 which was written to himself as payee, the attorney then gave an explanation as to how his name was put on the account. He did say that Lloyd McFarlane did not tell him what to do with the money in his escrow account but that he would tell him from time to time. He did get specific instructions from Lloyd McFarlane for two matters. These matters related to Rhonda Frazer a purchaser of real estate and

Mr. & Mrs. Lewis Mertilus vendors of real estate.

The attorney stated that the orginal plan re Lloyd McFarlane's escrow account was rather than operating Lloyd McFarlane's account, it was agreed and understood that the attorney would operate Lloyd McFarlane's account throught his the attorney's escrow account, and he would deal with the matters as they arose. The attorney was asked why he made out cheque No. 1056 date the 27th June 1991 to himself in the sum of $10,000.00. He said that for example, if he was doing a closing he would put the funds in his escrow account and deal with it from there. The attorney agreed that the money in the escrow account belonged to clients. He also moved from 88-11 Francis Lewis Boulevard because a lot of people were coming there making demands on him. He did not contact any of Lloyd McFarlane's client who may have had any claims to the monies in Lloyd McFarlane's escrow account.

Whenever he got a disciplinary complaint he the attorney would take them personally to Lloyd McFarlane in Jamaica and deliver them to him, and urge him to respond. He did remember that there was one attorney who was making a claim to $36,000.00 on Lloyd McFarlane's escrow account. He discussed it with him and McFarlane told him ,he would deal with it. The attorney had no instructions as to how to deal with it. He did not tell the attorney claiming the $36,000.00 that he was holding funds for McFarlane.

In a period of over a year McFarlane never initiated contact with him. He was the one always contacting him. He had great difficulty contacting MCFarlane. He did not have a phone number in Jamaica where he could contact McFarlane.

The attorney was again advised of the seriousness of the allegations against him and he then asked that he be afforded the opportunity to secure legal representation for the hearings before the Grievance Committee. The attorney was shown cheque No. 1064 made payable to the New York telephone Company in the amount of $375.42 and dated the 23rd of August 1991. The attorney gave a long explanation about him being entitled to take fees for himself at a closing and that cheque to the New York Telephone Company was client's funds but he had the full authority of the client to conduct the transaction in that manner.

The attorney was given a deadline of one month to produce the bank records to his own escrow account.

The next hearing before the Grievance Committee took place on the 10th May 1993. On this occasion and at all subsequent hearings the attorney was represented by Stephen J. Seigel. At this hearing the attorney was reminded by Counsel for the Grievance Committee that the allegation against him was that he "improperly converted funds from the account of Lloyd McFarlane. The attorney admits that between June and September 1991 he wrote about 11 cheques on McFarlane's escrow account namely cheques 1056 - 1066 inclusive. These were cheques 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, and 1066.

The attorney was again shown cheque No. 1056 for the sum of $10,000.00 made payable to himself. He was asked why he made out that cheque to himself. The attorney said that at this stage these funds were being transferred to his account to facilitate him dealing with matters which he knew about. He did agree that it was at his suggestion that he was made a signatory to McFarlane's escrow account instead of having the entire sum transferred to him. This deposit by cheque 1056 was in anticipation of his dealing with the Rhonda Frazer account. He did not transfer the entire sum of $62,290.00 which was in McFarlane's escrow account.

He agreed that McFarlane was holding in excess of $14,000.00 for Rhonda Frazer. Witness was then shown cheque No. 1059 for $5,000.00 payable to Rhonda Frazer 11th of July 1991. This cheque was signed by the attorney as payer and was drawn on the escrow account of Lloyd McFarlane.

The attorney was also shown cheque No. 1063 in the amount of $8,000.00 made payable to Rhonda Frazer and drawn on the escrow account of Lloyd McFarlane and dated the 7th of August 1991. The attorney stated that the amounts of $5,000.00 and $8,000.00 in cheque Nos. 1059 and 1063 represented a refund of Rhonda Frazer's deposit. The attorney admitted that he had just testified that the $10,000.00 of June the 27th 1991 had been transferred to his escrow account to pay out money to Frazer and other persons and yet he continued to pay the amounts to Frazer from McFarlane's escrow account. Although being pressed by Counsel for the Grievance Committee the attorney gave no credible explanation as to why he had transferred monies to his own escrow

account for a specific purpose and then continued to draw on McFarlane's escrow account.

Instead, he went off into a long dissertation on his inability to locate McFarlane and receive instructions from him about his escrow account, despite great effort to do so. He did admit that he did reach McFarlane on one occasion and get his permission to refund Rhonda Frazer's deposit to her. He reached McFarlane at his home,he had his home number although after while he couldn't reach him. The attorney stated that 95% of his practice was in Jamaica. He did also admit that he had had a meeting with McFarlane in his the attorney's office in Jamaica where McFarlane had given him instructions in the Frazer, Bailey and Mertilus matter. He had about two telephone conversations with McFarlane one before and one after the meeting in his office.

Cheque No. 1062 dated the 5th of August 1991 and drawn on McFarlane's escrow account to Mertilus in the amount of $3,887.47 was shown to the attorney. He drew that cheque. He drew this cheque although he had transferred funds to his own escrow account in the amount $10,000.00 on the 27th of June 1991.

The attorney moved offices in August or September 1991 and continued to draw cheques on McFarlane's escrow account. He in fact intended to transfer all the monies he held in McFarlane's escrow account to McFarlane in Jamaica. He had communicated this intention to McFarlane about two months after McFarlane had left New York.

He stated that he did keep a record of the transactions on McFarlane's escrow account. He had a little ledger. A photocopy of the ledger Book was produced in evidence.

The attorney was then shown cheque No. 1057 in the amount of $10,000.00 made out to Dennis Tomlinson dated the 8th July 1991 in the sum of $10,000.00. He admitted his signature on the cheque. When asked what was the purpose of this cheque. He said that he had then decided to transfer everything to McFarlane. he intention was to put everything in his own I O L A account and then transfer it to McFarlane. He was so fed up with the whole situation. He did not want to be associated with McFarlane any longer. He agreed that the

number of his own I O L A account was 049-04332-6 at the European American Bank. It was was agreed that on July 1st 1991 the balance in his escrow account was $10,262.11. This was after the June 27th deposit of $10,000.00. It was demonstrated to the Grievance Committee that at the time the deposit of $10,000.00 was made to the attorneys' I O L A account he had only $262.11 in it.

The attorney was asked about his own I O L A account with the European American Bank. He was asked about a cheque No. 1450 for $462.51. He was also asked why on July 2nd the balance in this account is $9,262.11 and on July 3rd it is as low as $4,262.11.

The attorney then mentions a Manufacturer'sHanover account where he would make contra-entries in getting the money to McFarlane in Jamaica That started the process of getting monies to McFarlane in Jamaica. The attorney denied disbursing monies from his escrow account to persons other than McFarlane's clients but sought to explain the balance being below $10,000.00 by saying that there were monies in other accounts. The attorney admitted that before he issued a cheque to Frazer, his own escrow account went below $10,000.00 to as low as $4,261.00. He said that along the way his records have gone away but he always held the correct balance for McFarlane.

The attorney was then shown cheque No. 1058 dated July 10th 1991 for $650.00 made payable to himself. This amount he says represented fees payable to him. He did not get a written authorisation from Mertilus but he had a closing statement. He agreed to produce this closing statement to the Grievance Committee within a week. The sum of $5,000.00 was held by McFarlane in his escrow account on behalf of Mertilus. The attorney stated that he disbursed $4,300.00 to Mertilus. This was by cheque No. 1062 dated the 5th of August 1991 drawn on McFarlane's escrow account in the sum of $3,887.49.

The attorney was questioned about the Rhonda Fraser transaction He agreed that he paid her a total of $13,000.00, $400.00 was left of the amount paid over by him. He think it was paid to him as fees but he could not explain how.

It is here that the attorney seeks to explain that his procedure for accounting may leave much to be desired. That he had the major

part of his practice in Jamaica and that the rules were somewhat different in Jamaica. The attorney again raises the question of contra-entries in his accounts, but insists that he did not borrow clients money nor did he steal it. He admitted co-mingling clients monies as they related to his practice in Jamaica and his practice in New York. He sought to explain his method of dealing with clients money by saying that he would for example, use funds in New York to pay a bill from Jamaica in New York and get back the money from the Jamaica in Jamaica and put it to his foreign account in Jamaica. This is the alleged contra-entry procedure.

When asked where he got back the money to pay Mr. Rose, the attorney said he always had it although part of it had gone down to Jamaica. Under further questioning the attorney said that McFarlane had abandoned his practice generally.

The attorney is then shown cheque No. 1064. The attorney informed the Grievance Committee that McFarlane had come to his office and taken all the records without his knowledge. Cheque No. 1064 was to the New York Telephone Company and drawn on McFarlane's escrow account by him and dated the 23rd of August 1991 in the amount of $375.48. The attorney said that the bill was to pay for his office telephone. He gave Mertilus cash for it and he had authority to draw the cheque on the account of Mertilus. The attorney did agree that when $3,887.49 is added to $650.00 and $375.42. The total is $4,803.17 and not $5,000.00. He may have given cash to Mertilus for the balance The cheque does not reflect that it forms part of the Mertilus transaction.

The hearing before the Grievance Committee continued on the 17th May 1993. The attorney produced a number of documents the Grievance Committee had requested and then he was asked about cheque No. 1065 dated the 2nd September 1991 and payable to the attorney in the amount of $15,000.00 the payee and payer being the attorney. When asked what was the purpose of this cheque, the attorney said it was put in his account preparatory to sending it to McFarlane in Jamaica. He repeated the difficulty he encountered in contacting McFarlane. He was going to write a cheque to McFarlane from his account

in Jamaica. The attorney again gave a long explanation as to his contra-entry system re his U.S. Currency accounts whether in the United States or Jamaica. The attorney re-affirmed that he always had all the funds to repay McFarlane if and when asked to do so and he would have done so either out of his New York account or his Jamaica account.

The attorney is then shown cheque No. 1060 payable to himself in the amount of $400.00 and dated the 10th July 1991 and drawn on the I O L A account of McFarlane. The attorney states that this could have been the fee payable to him by Rhonda Frazer.

The attorney is then shown cheque No. 1061 in the amount of $8,000.00 made payable to him and dated the 17th of July 1991. He admits that he made out that cheque. It was made out for the purpose of transferring the monies to McFarlane. The attorney was shown bank records for his own I O L A account. There was no evidence that cheque No. 1061 had been deposited to that account. He said it may have been deposited to his Manufacturers's Hanover account. The attorney could not tell the Grievance Committee to what account he had deposited that cheque. The attorney had not produced the deposit slips in relation to his Manufacturer's Hanover account and was asked to do so by Counsel for the Grievance Committee.

The attorney was subjected to detailed cross-examination by Counsel for the Grievance Committee on the closing statement he had produced in the Mertilus matter. He was unable to show that the total disbursements added up to $5,000.00 and he was unable to explain where the balance may be as he could not identify the other disbursements on the closing statement.

The attorney was then shown cheque No. 1066 made out to him in the sum of $977.09 dated the 27th of September 1991. He admitted that he signed that cheque. He admitted that the drawing of that cheque brought McFarlane's I O L A account to a zero balance. He did not remember what he did with that cheque. It would have been deposited to one of his accounts. There was no evidence that cheque No. 1066 had been deposited to his I O L A account. He admitted that it was possible that the cheque may have been deposited to one of his personal accounts but only if there was a corresponding entry in Jamaica. The attorney was then asked to produce at the next hearing

of the Grievance Committee deposit slips and cancelled cheques for his I O L A account at the European American Bank and for his escrow account at Manufacturer's Hanover.

The hearing was then adjourned to the 26th July 1993. The attorney did not appear at this hearing but was represented by his Counsel. His Counsel informed the Grievance Committee that the attorney was ill with an eye disability and was under-going eye surgery. No documentary evidence was produced to the Grievance Committee to verify this. The hearing was adjourned to August 17th 1991 on the following conditions that (a) the attorney either resign from the New York Bar before the next scheduled date or (b) submit medical documentation to the Committee to show that he is in patient at a Hospital or (c) If he does not fulfill (a) or (b) and does not appear at the next scheduled hearing of the Grievance Committee then the Committee may make a motion to suspend the attorney from practice.

The attorney submitted his resignation from the Bar of the State of New York on the 12th August 1993. This is exhibit J.L.R. 3 to the affidavit of Joswyn Leo Rhynie, the complainant in these disciplinary proceedings.

The above summary is an accurate representation of the evidence that was taken before the Grievance Committee for the Second and Eleventh Judicial Districts for the State of New York.

This Committee was of the opinion that an extensive review of the above evidence was necessary as it formed part of the record of the evidence given before this Tribunal in the complaint brought by Joswyn Leo-Rhynie Q.C., a member of the General Legal Council.

CASE OF THE ATTORNEY BEFORE THIS TRIBUNAL

Patrick Bailey opened the case for the attorney and the attorney then gave sworn testimony on his own behalf.

On examination in Chief, the attorney admitted certain facts that are not in controversy, namely that he was admitted to practise as an attorney-at-law in Jamaica in September 1992, and in New York in 1988. He admitted that he carried on simultaneous practices in Jamaica and New York. That up until 1995 his practice in Jamaica was at Dominica Drive in New Kingston and was now at 28 Roosevelt Avenue Kingston 6. He admitted all the circumstances under which he and McFarlane practised

at 88-11 Frances Lewis Boulevard in the State of New York and as recounted in the evidence given by McFarlane. This sharing arrangement with McFarlane could have commenced in 1988. This continued until sometime in 1991 when McFarlane told him that he was returning to Jamaica. His, the attorney's name was added to the I O L A account of McFarlane as a signatory.

McFarlane discussed two matters with him. They were the Mertilus matter and the Frazer matter. McFarlane discussed no other matters with him with which the attorney was to deal. He admits that McFarlane had files in the building and that he had access to those files. He accounted to Mertilus for about $6,000.00 which was being held on his behalf in the I O L A account. After McFarlane left New York he never saw him in New York again. He moved offices about November 1991 and went to 88- 22 Hillside Avenue. Cheque No. 1059 and 1063 were shown to the attorney. He stated that cheque No. 1059 for $5,000.00 was part of the deposit returnable to Rhonda Frazer. He admitted that he drew cheque No. 1063 for $8,000.00 to Rhonda Frazer and cheque No. 1062 to Mertilus. Mertilus was McFarlane's client, Rhonda Frazer was his client. The Mertilus matter was the only matter for McFarlane that McFarlane had asked him to deal with.

He did drew a cheque No. 1064 to the New York Telephone Company in the amount of $375.42. These funds represented part of the money due to Frazer. He gave Frazer cash that she had requested to pay some bill and he drew that cheque on the I O L A account in exchange for same.

He thinks that the amount in McFarlane's I O L A account when he was added as a signatory was $62,290.00. The total amount of the cheques drawn to other people was $17,262.91. The balance of $45,027.09 represented cheques drawn to himself. He did know Alton Rose an attorney-at-law. He heard from Mr. Rose and he sent him funds in the amount of $48,000.00 U.S. Fees were due to him. He did attend the hearings before the Grievance Committee and he did give an explanation about the cheques drawn to himself.

The attorney was then cross-examined by Charles Piper. He said that he had been an attorney-at-Law for 24 years. It was not his practice

to withdraw funds from clients' accounts for purposes other than they were intended.

He admitted that an I O L A account was clients' account. He withdrew funds payable to himself from McFarlane's I O L A account to make sure that the Jewish Lawyer did not get his hands on the account.

The attorney admitted drawing the following cheques to himself on McFarlane's I O L A account.

(a) cheque No. 1056 for $10,000.00 on the 27-6-91.

(b) cheque No. 1057 for $10,000.00 on the 8-7-91.

(c) cheque No. 1058 for $600.00 on the 10-7-91.

(d) cheque No. 1060 for $400.00 on the 15-7-91.

(e) cheque No. 1061 for $8,000.00 on the 17-7-91.

(f) cheque No. 1065 for $15,000.00 on the 2-9-91.

There is evidence before us that cheque No. 1066 drawn on the 27-9-91 in the sum of $977.09 was drawn by the attorney to himself. This cheque was not produced but the stub was in exhibit 4A.
Apart from the cheques which were for fees all were for preventing the Jewish lawyer from attaching McFarlane's I O L A account.

People did come to him asking about monies McFarlane had for them. He could find all files except one in relation to the Jewish lawyer. He did read the files on each occasion and he did gather that some of these clients were entitled to funds held in McFarlane's escrow account. He did not suggest that he be made a signatory to McFarlane's account. That was McFarlane's suggestion. He did not recall telling the Grievance Committee that McFarlane had suggested that the I O L A funds be transferred to his the attorney's account, and that he had suggested that his name be put as a signatory instead. It was put to him that he was not being truthful when he denied that he suggested that he be put as a signatory to McFarlane's account. The attorney denied that he was being untruthful. The cheque No. 1064 to the New York Telephone Company was in relation to the Frazer account. The attorney said that it could have related to the Mertilus account. The attorney further stated that it was not a practice of his to draw a cheque on a client's account to pay an office bill in Jamaica. He did agree that client's funds are clients funds and should only be drawn for the client business

except with the full knowledge and consent of the client. There was no specific letter authorising him to draw on the account of Frazer or Mertilus. The statements would show it. After being read a section of the transcript before the Grievance Committee, the attorney then said that the funds paid to the New York Telephone Company referred to the Mertilus situation and not Frazer. He imagined that the funds made payable to himself were deposited to an account in his name. At all times he had funds available to settle claims against McFarlane's escrow account. Under persistent cross-examination the attorney agreed that he did not make any of the funds paid to him available to any of McFarlane's clients. He could get no instructions from McFarlane although he tried. He telephoned McFarlane's house several times, he visited his house several times but he did not write any letters to McFarlane.

The attorney admitted having one meeting in Jamaica with McFarlane at that meeting they dealt with Jamaican matters. It is also possible that McFarlane signed documents in relation to the office at that meeting, he did not discuss the issue of McFarlane's New York clients looking for him at that meeting. The attorney also admitted that as of September 2nd 1991, McFarlane no longer had access to his I O L A account as he the attorney had the cheque book. The attorney again repeated that McFarlane specifically requested him to complete one matter, the Mertilus matter.

The attorney further stated that he would seek to get instructions from McFarlane on an on-going basis. He did not know severe sanctions would follow if an I O L A account fell below a certain amount as he was naive at the time. The attorney was not helpful when being questioned about the balance in his I O L A account before the cheque for $10,000.00 dated the 27/6/91 was drawn on McFarlane's account and deposited to his I O L A account. He did not know what the balance in the account was before that deposit. When read the notes from the evidence before the Grievance Committee of May 10, 1991, he said he did not remember, he did not recall. He admitted that after depositing that cheque to his I O L A account he probably disbursed funds from it to persons other than McFarlane's clients. The sum he disbursed may have exceeded $262.11.

He said he did consider these proceedings serious. The attorney when asked if he considered that he was under a duty to account to this tribunal as to what he did with the funds from McFarlane's account, he said it was so long ago he couldn't now recollect each one. He was of the opinion that he had accounted to the tribunal as he has given an explanation as to where the funds were.

The attorney said that the transcript of the evidence before the Grievance Committee was accurately represented save typograghical errors.

He did not attempt to give McFarlane any of the funds in his I O L A account. He never sent him a cheque for any money. The attorney never did really answer the question put to him by Charles Piper as whether or not he considered that as an attorney he had a duty to account to the clients whose funds were being held in McFarlane's I O L A account. He did become aware of the proceedings instituted by the Grievance Committee against McFarlane but he never communicated to the Grievance Committee that he was holding funds for McFarlane. He did not know whether the claims were genuine and he did not feel that he had an obligation to do so.

He said that he always had the funds from McFarlane's I O L A account. He had them in Manufacturer's Hanover, then transferred them into an "A" account in Jamaica Citizen's Bank. He did make a mistake as to how he handled McFarlane's I O L A account but he did nothing wrong. He did co-mingle his clients monies with the monies belonging to McFarlane's clients. When questioned about the monies the attorney could give no specific answers as to where the monies had been deposited. He never offered any assistance to McFarlane in the disciplinary proceedings against him. He did reverse this answer and say that he sent an additional $5,000.00 U.S. to Alton Rose on behalf of MrFarlane. He did agree that if a lien was placed on an account, the person placing the lien had to prove his right to the funds before being able to obtain any of the funds, then he went on to say he did not know as he was not a litigation attorney. In all the firms with which he had worked he had never heard of a lien being placed on anything. He again went on to say that he had heard of a lien.

He was then re- examined by Patrick Bailey. He stated that the monies he paid over to Alton Rose came from his "A" account in Jamaica

and a trust account.

The members of the panel then asked some questions of the attorney. The attorney could not give an explanation as to why he did not draw all the funds from McFarlane's account since the threat of the Jewish lawyer was so imminent. The opening of an I O L A account was a grey area and lots of attorneys didn't have I O L A accounts. The threat of the Jewish lawyer commenced in either May or June 1991. The Jewish lawyer probably placed the lien on the account after it was empty. Cheque No 1066 probably went into one of his accounts.

He had three accounts for clients in New York and two or three in Jamaica. He had one or two personal accounts in the United States and could have had a personal current account at a bank in Jamaica, National Commercial Bank. In 1991 he would have had an account at Citibank. He did bring some of the funds he had in McFarlane's account to Jamaica. He never got the permission of any of those clients to bring their funds to Jamaica. He never read the statutory regulations in relation to the I O L A account. He brought $20,000.00 of McFarlane's I O L A account to Jamaica. The rest was in the Manufacturers trust account. He assumed that the files in relation to McFarlane's I O L A account were closed files. He paid over the money to Alton Rose in August 1992. He took the last amount from McFarlane's I O L A account in September 1991.

Closing Submissions were presented in writing and orally, for and on behalf of the parties on the 14th of December 1996.

BURDEN OF PROOF It is trite law that he who alleges must prove. The burden of proof is therefore on the complainant to establish the allegations contained in the complaint dated 22nd of February 1995.

STANDARD OF PROOF The committee is of the opinion that the allegations of misconduct against the attorney and contained in the complaint are extremely serious and involve grave impropriety. In the circumstances the Committee is of the view that the criminal standard of proof is the one applicable here that is to say a standard of proof beyond reasonable doubt. We agree with the reasoning of the Privy Council in the case of BHANDARI V. ADVOCATES COMMITTEE 1956 3 ALL E R at p.743

and at page 744 paragraph I the Judgment of Lord Tucker when he said "We agree that in every allegation involving an element of deceit or moral turpitude a high standard of proof is called for and we cannot envisage any body of professional men sitting in Judgment on a colleague who would be content to condemn on a mere balance of probabilities."

EVALUATION OF EVIDENCE It is clear that the Courts have always been of the view that the standard of conduct demanded of solicitors. (lawyers, attorneys-at-law) is to be determined by the members of the legal profession to which the solicitor belongs. We rely on the following cases referred to by Charles Piper as authority for that principle. (a) IN RE A SOLICITOR EX PARTE THE LAW SOCIETY 1912 1 KINGS BENCH p. 302 AND AT PAGE 311 - 312 when the definition of professional misconduct in ALLINSON V. GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION was adopted.

"If it is shown that a medical man in pursuit of his profession has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency than it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect" / (b) R E A SOLICITOR 1974 3 ALL E.R. p. 853 and at p. 854 " A decision as to what was professional misconduct was primarly a matter for the profession expressed though its own channels, and the Court would not and should not question what a properly constituted disciplinary Committee considered was the standard of conduct required of members of its profession".

(c) IN R E A SOLICITOR EXPARTE THE INCORPORATED LAW SOCIETY 1894 1QB p. 254 and at page 256 "Upon the question of whether or not matters of this kind amount to professional misconduct, I cannot help thinking that the committee of the Law society ought to be very safe and sound guides".

In the light of the above authorities this Committee will proceed to evaluate the evidence on the basis of the statement of principle outlined above and thereby arrive at its conclusions.

The Committee is mindful of the fact that, there is a clear conflict of interest between Lloyd McFarlane and the attorney, and

therefore it is obliged to give careful scrutiny to the evidence of Lloyd McFarlane. We have done so, and conclude that Lloyd McFarlane spoke the truth on all matters related to the handling of his I O L A account by the attorney. He also spoke the truth about his relationship with the attorney and the manner in which they conducted their office operations when they shared offices at 88-11 Francis Lewis Boulevard in New York. We accept that the attorney knew at all times where to contact Lloyd McFarlane and was able to do so if he so desired. We accept that the attorney was asked to handle Lloyd McFarlane's real estate cases that were outstanding. We also accept that Lloyd McFarlane was to get 50% of the fees on all matters concluded on his behalf by the attorney. We accept as true Lloyd McFarlane's evidence that after his return to Jamaica in 1991, the attorney communicated with him on several occasions, that the attorney would telephone him at home or have his secretary call him and he would visit the attorney's office as a consequence of these communications.

We have also given very careful consideration to the attorney's evidence and have endeavoured to treat it fairly. We conclude that on a whole the attorney was not a credible witness. His evidence before the Grievance Committee on occasion contradicted his evidence before this Tribunal. For example he said before the Grievance Committee that cheque No. 1064 to the New York telephone company was drawn from funds due to Mertilus as he had given Mertilus cash. Before this Committee he said he had given funds to Frazer and he had drawn on the amount due to Frazer to pay that cheque.

Afterwards he recanted when challenged by Charles Piper as to the evidence before the Grievance Committee and then said the cheque was paid from the funds of Mertilus and not Frazer.

On occasion the attorney avoided answering specific questions and would go off in long and confusing explanations especially as they related to the alleged contra-entry system he employed when dealing with clients' funds in Jamaica and New York.

Further the attorney in various instances was unable to give specific answers to specific questions and would say that it was so long ago he didn't remember, he couldn't recollect. The above observations are relevant not only to the sworn testimony he gave before

the Grievance Committee but to that given before this Tribunal.

On occasion his answers were simply not credible coming from an attorney-at-law of 24 years standing at the Jamaican Bar. He pleaded ignorance and naivete as to the manner in which an I O L A account should be operated. He did not know about liens as he was not a litigation lawyer. We are of the view that this ignorance was feigned.

We do not believe the attorney when he said that he made many efforts to contact Lloyd McFarlane and was unable to do so. The attorney knew where to contact Lloyd McFarlane if he wished to do so. We do not accept the attorney's explanations as to why he dealt with the funds in McFarlane's I O L A account in the manner in which he did.

The attorney also made some very crucial admissions. They are as follows;

(a) That clients' funds should only be used for the purpose of the client unless otherwise authorised by the client.

(b) He paid monies from McFarlanes' I O L A account to persons other than McFarlane's clients.

(c) He transferred funds from the said I O L A account to Banks in Jamaica without the authority of the clients.

(d) He co-mingled the funds of his clients with that of McFarlanes' clients.

(e) He knew that the manner in which he handled the accounts was wrong.

In addition to the oral evidence, the Committee now examines the effect of exhibit J L R 3 attached to the affidavit of Joswyn Leo Rhynie Q.C. This is the resignation of the attorney from the New York Bar dated the 12th of August 1993.

The attorney acknowledged that the resignation was freely and voluntarily given. So no question of co-ercion or duress arises. He aslso depones that he is fully aware of the implications of submitting the resignation. Further, he is aware of the nature of the allegation against him, namely that he "improperly withdrew funds from the escrow account of Lloyd McFarlane without authority".

More importantly, he acknowledged that if charges were predicated

upon the misconductuct under investigation by the Grievance Committee he could not defend himself on the merits against such charges.

The resignation therefore amounted to a clear, and unequivocal admission by the attorney that he was guilty of "improperly withdrawing funds from the escrow account of Lloyd McFarlane."

Exhibit 2 is the attorney's response to the complaint received from the General Legal Council dated the 22nd February 1995. This response in our opinion does not address the allegations of professional misconduct against the attorney.

It gives a number of excuses as to why the attorney resigned from the New York Bar. In the light of the gravity of the allegations this Committee is of the opinion that it would have expected the attorney to do everything to maintain his professional status at the New York Bar not withstanding the time it may take or the cost.

The attorney also re-iterates in this letter that he always had the funds from McFarlane's I O L A account although he does not say where, and that he could not get any instructions from McFarlane as to what to do with the account.

After a careful examination of the evidence in its, totality, this committee makes the following findings of fact as it is obliged to do in keeping with section 15 (1) of the Legal Profession Act. We find the following;

FINDINGS OF FACT AND MIXED LAW AND FACT

1. The "attorney" was admitted to practise at the Jamaican Bar in 1972.
2. That he was admitted to practise as an attorney and counsellor-at-law of the Bar of State of New York in the United States of America in 1988.
3. That the attorney had law offices in Jamaica and in New York in the United States of America.
4. That he conducted simultaneous law practices in Jamaica and in New York.
5. That he conducted his law practice from the same offices as Lloyd McFarlane attorney-at-law, namely premises 88-11 Francis Lewis Boulevard, New York.
6. That the attorney and Lloyd McFarlane conducted separate practises but shared expenses.

7. That the attorney and Lloyd McFarlane had known each other for many years prior to their sharing law offices.

8. That Lloyd McFarlane during his practice in New York operated an Interest On Lawyer Account. (I O L A account) No. 53702671 at Citibank in New York.

9. That Lloyd McFarlane returned to practice in Jamaica in or around June of 1991.

10. That prior to his returning to Jamaica, Lloyd McFarlane had discussions with the attorney and added the attorney's name as a signatory to his I O L A account.

11. That he made arrangements with the attorney that he should handle his real estate matters.

12. That if the attorney needed to contact Lloyd McFarlane in Jamaica he knew where and how to do so.

13. That on being made a signatory to the I O L A account the attorney was given the cheque book relative to the account.

14. That the attorney drew 11 cheques on the said I O L A account namely cheques Nos. 1056 - 1066 inclusive.

15. That when the attorney assumed responsibility for the said account in June 1991 the balance was $62,290.00 U.S.

16. That at the end of September 1991 there was a zero balance in the said account.

17. That the attorney himself operated an I O L A account, at the European American Bank and in June of 1991 the balance in the attorney's I O L A account was 262.11

18 That in August 1992, the Grievance Committee for the Second and Eleventh District for the State of New York commenced investigative proceedings against the attorney concerning allegations of professional misconduct as they related to his handling of Lloyd McFarlane's I O L A account.

19. That there were various hearing dates at which the attorney gave sworn testimony in response to questions put to him by the counsellor for the Grievance Committee.

20. That arising from these investigations the attorney by way of affidavit of resignation dated the 12th August 1993 resigned as an attorney and counsellor-at-law from the Bar of the State of New York with effect from the 1st of October 1993.

21. By order of the Supreme Court of the State of New York dated the 25th October 1993, and on the recommendation of the Grievance Committee, the attorney was disbarred and his name struck from the roll of attorneys and counsellors-at-law of the State of New York.

22. Sometime in 1993 the General Legal Council was informed of the proceedings which had been instituted against the attorney by the Grievance Committee and of the outcome of these proceedings.

23. That an I O L A account is an escrow account into which the state of New York required that clients' funds be placed.

24. That it is an interest bearing account regulated by the State of New York. All interest went to the States's office.

25. The State of New York required that at all times the money in an I O L A account was not to fall below the sum held on behalf of clients.

26. The attorney knew of the requirements of the State of New York and was aware of the implications of an I O L A account.

27. A clients' account is a trust account, see the cases of LOESHER V. DEAN 1950 1Ch. p. 491 at pp. 493 - 495 the Judgment of HERMAN J. and SOAR V. ASHWELL 1893 2 Q.B. pp. 390 - 294.

28. The attorney became a trustee of the funds in Lloyd McFarlane's I O L A acount the moment his name was added as a signatory to the account and he was given the cheque book to the account.

29. The attorney drew cheque no. 1056 in the amount of $10,000.00 to himself and deposited the funds in his own I O L A account.

30. The attorney converted funds from this cheque to the use and benefit of persons other than Lloyd McFarlane's clients to whom the funds in the I O L A account belonged.

31. The attorney drew cheque No. 1057 to himself in the amount of $10,000.00 on Lloyd McFarlane's I O L A account.

32. The attorney drew cheque no. 1061 to himself for $8,000.00 on the said I O L a account. The attorney could not advise this Committee as to where he had put these funds.

33. The attorney drew cheque no. 1065 in the sum of $15,000.00 to himself on the said I O L A account. Those funds were deposited

to the attorney's I O L A account.

34. The attorney drew cheque no. 1066 to himself in the sum of $977.09. The attorney could not explain what had become of these funds.

35. The attorney drew cheque no. 1064 in the amount of $375.42 to the New York Telephone Company. The attorney failed to provide any proof that either Mertilus or Frazer had authorised this cheque.

36. The attorney drew cheque no. 1058 in the sum of $650.00 to himself. This sum may have represented fees to the attorney.

37. The attorney drew cheque no. 1060 to himself in the sum $400.00 This sum may have represented fees due to the attorney.

38. The attorney drew cheque no. 1059 in the sum of $5,000.00 to Rhonda Frazer on Lloyd McFarlane's I O L A account in spite of the fact that he alleged that cheque no. 1056 had been drawn to facilitate refund to Frazer and others.

40. The attorney transfered funds in the said I O L A account from the United States of America to Jamaica without the consent of the clients whose money was in the account.

41. The attorney converted these funds by using them to pay persons other than those who were entitled to the funds.

42. The attorney d id not transfer the funds from Lloyd McFarlane's account because of the threat of any Jewish lawyer to seize these funds.

43. The attorney has not accounted for the interest that was due on the funds in the said I O L A account and which belonged to the clients.

44. The attorney paid an amount of $48,000.00 to Alton Rose in or around September 1992 as representing the monies due in Lloyd McFarlane's I O L A account.

45. The attorney has failed to properly account to this Committee as to the funds he held on behalf of clients in McFarlane's I O L A account.

46. The attorney co-mingled his client funds with those of Lloyd McFarlane.

47. The attorney produced no records before this Committee to show

where these funds were held from June 27th 1991 until in or around September 1992 when monies were paid over to Alton Rose.

48. The attorney produced no records before this Committee to show his compliance with proper accounting principles in the conduct of his accounts especially as regards accounting for the funds of his clients.

49. The attorney improperly withdrew funds from the I O L A account of Lloyd McFarlane namely account no. 53702671 at Citibank without permission or authority.

50. The attorney is guilty of a beach of trust when he so improperly withdrew the funds in the said account without permission or authority.

CONCLUSIONS The Committee after an examination of the evidence in its totality, oral and documentary and after careful scrutiny of the relevant law has arrived at the decision that the conduct of the attorney as supported by our findings at paragraphs 11, 12, 20, 21, 26 27, 28, 29, 30, 31,32, 33, 34, 35, 38, 39, 40, 41, 42, 43, 45, 46, 47 48, 49, and 50 was disgraceful, dishonourable and unbecoming of an attorney-at-law and tends to discredit the Legal Profession of which he is a member.

We find, that the Complainant has discharged the burden of proof and the standard of proof required. The evidence satisfies us beyond reasonable doubt that Denis Tomlinson, attorney-at-law is in breach of Canons 1(b) and VII (b) of the Legal Profession Act (Canons of Professional Ethics) Rules, and that he did not act in a manner that promotes public confidence in the integrity of the legal system and the legal profession.

In light of the above we find Denis Tomlinson, guilty of misconduct in a professional respect.

It remains for the Committee to determine the appropriate sanction in the circumstances of this case. We approach our painful duty,mindful of the fact that in these proceedings the important consideration in determining adequate punishment for professional misconduct is to protect the collective reputation of the profession and to maintain public confidence in the integrity of the profession. We place reliance on a quotation from the Judgment of Sir Thoman Bingham M.R. at paragraph

(b) p. 492 in the case of BOLTON V. LAW SOCIETY reported at 1994 1 All E. R. p. 486. "It is important that there should be full understanding why the Tribunal makes orders which might otherwise seem harsh. There is in some of these orders a punitive element, a penalty may be visited on a solicitor who has fallen below the standard required of his profession in order to punish him for what he has done and deter any other solicitor from behaving in the same way. But often the order is not punitive in intention. Particularly is this, so where a criminal penalty has been imposed and satisfied ..... in most cases the order of the Tribunal will be primarily directed to one or other or both of two other purposes., One is to ensure the offender does not have the opportunity to repeat the offence..... the second purpose is the most fundamental of all to maintain the reputation of the solicitors profession as one which any member of whatever standing may be trusted to the ends of earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that these guilty of serious lapses are not only expelled but denied-readmission. We cannot agree with Patrick Bailey that the attorney was only guilty of unorthodox accounting and should be reprimanded or fined. Nor do we think a period of suspension appropriate in this case. The attorney is guilty of professional misconduct of the gravest and most serious kind.

We are of the unanimous opinion that the name of Denis Tomlinson attorney-at-law should be struck from the Roll of attorneys-at-law entitled to practise in the several Courts of the Island of Jamaica and we so order.

This order is made under section 12 (4) of the Legal Profession Act.

Dated the 15th day of February. 1997.

PAMELA E. BENKA-COKER Q.C.

LINCOLN EATMON

RICHARD DONALDSON