

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST HOWARD B. MITZ,  
ATTORNEY AT LAW.

OFFICE OF LAWYER REGULATION,

CASE NO. 2013AP 2300 -D

Complainant;

HOWARD B. MITZ

Respondent.

**RECEIVED**

OCT 16 2013

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COMPLAINT

CLERK OF SUPREME COURT  
OF WISCONSIN

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NOW COMES the Wisconsin Supreme Court - Office of  
Lawyer Regulation (OLR) by Assistant Litigation Counsel  
Julie M. Spoke, and alleges as follows:

1. The OLR was established by the Wisconsin Supreme  
Court and operates pursuant to Supreme Court Rules. This  
complaint is filed pursuant to SCR 22.11.

2. Howard B. Mitz (Mitz) was admitted to the practice  
of law in Wisconsin on September 28, 1973, State Bar No.  
1014090. The most recent address furnished by Mitz to the  
State Bar of Wisconsin is 11124 N. Cedarburg Road, Suite  
340, Mequon, Wisconsin 53092-4300.

3. Mitz represented Mark Fielkow (Fielkow), Mitz's first cousin, in a personal injury action against Johnnie Johnson (Johnson) following a car accident that occurred on December 8, 2003, *Mark D. Fielkow vs. Johnnie M. Johnson, et al.*, Milwaukee County Case No. 2004-CV-005270.

4. Fielkow was unable to work due to his injuries and informed Mitz he wanted to borrow money from Pre-Settlement Finance, LLC (PS Finance). Fielkow provided Mitz with the PS Finance loan documents for his review.

5. According to Mitz, he advised Fielkow not to complete the loan with PS Finance and arranged for other family members to provide him with interest free loans: a \$5,100 loan from Milton A. Mitz and a \$2,500 loan from Morry Mitz.

6. Despite Mitz's purported advice, on July 28, 2006, Fielkow prepared a "Client Application" requesting a loan of \$15,000 from PS Finance for the reason of "preventing foreclosure on home." Mitz signed the client application.

7. Also, on July 28, 2006, Mitz prepared a "Attorney Questionnaire" providing the details of Fielkow's case for PS Finance to determine Fielkow's eligibility for the loan.

8. Mitz faxed the "Client Application" and "Attorney Questionnaire" to PS Finance.

9. On August 3, 2006, Fielkow signed a "Plaintiff's Agreement to Pay Proceeds Contingent on Successful Settlement, Judgment or Verdict and Receipt of Proceeds; Agreement to Assign Proceeds" (Plaintiff's Agreement) in favor of PS Finance for a loan in the amount of \$8,000 plus a \$250 processing fee. The Plaintiff's Agreement provides, in part,

In consideration of PSF agreeing to purchase proceeds prior to settlement, judgment or verdict of Plaintiff's action, Plaintiff instructs (his or her) counsel to pay PSF in accordance with Disclosure Statement on Page 1 of Plaintiff's Agreement. Plaintiff's Attorney shall contact PSF prior to disbursing the Funds for a confirmation of the total amount due PSF.

10. Mitz notarized the Plaintiff's Agreement.

11. On August 3, 2006, Fielkow signed a "Plaintiff's Irrevocable Grant of Lien, Assignment of Proceeds and Lien Payment Instructions" (the Lien) in favor of PS Finance. The Lien provides, in part,

I hereby authorize and direct you, as my attorney, Howard B. Mitz, Esq., its Successors and/or Assigns and any subsequently engaged attorney... to pay directly to PSF sums due and owing for the purchase of proceeds from me and for which I have granted this lien in the sum of

\$9,250.00 (the "Payment") plus any greater sum as may be due and owing pursuant to paragraphs 3 and 4 of the Disclosure Statement and Exhibit A of the plaintiff's agreement. The Payment amount shall be and is an Irrevocable Lien on the proceeds of my Action until it is paid.

12. Mitz notarized the Lien.

13. On August 3, 2006, Fielkow signed a "Pre-Settlement Finance Funding Instructions" form (Funding Instructions) providing PS Finance with Mitz's trust account information for a wire transfer of the loan proceeds.

14. Mitz notarized the Funding Instructions.

15. On August 4, 2006, Mitz signed an "Attorney Acknowledgment of Explanation of Terms to Plaintiff, of Irrevocable Lien and Assignment to Pre-Settlement Finance, LLC" (Attorney Acknowledgment), which provides, in part,

...I hereby consent and agree to fully execute this document to pay PRE-SETTLEMENT FINANCE, LLC all funds due them at the close of this case, before final distribution to the Plaintiff or (his or her) successors and/or assigns.

16. On August 4, 2006, Mitz faxed to PS Finance the executed Plaintiff's Agreement, Lien, Attorney Acknowledgment, and Funding Instructions.

17. On August 7, 2006, Mitz issued trust account check #1394 payable to the City Treasurer of Milwaukee on Fielkow's behalf in the amount of \$12,644.03, which used all of PS Finance's loan proceeds.

18. On August 8, 2006, PS Finance mailed to Mitz, via certified mail, a fully executed Lien.

19. On May 21, 2007, Mitz settled with Johnson's insurer, Badger Mutual Insurance, in the amount of \$100,000. Mitz failed to notify PS Finance of the settlement. Fielkow's claim against Johnson, personally, survived the Badger Mutual settlement.

20. Mitz made numerous disbursements out of the \$100,000 settlement. The balance remaining in Mitz's trust account attributable to Fielkow after these disbursements was \$0. Mitz failed to pay PS Finance pursuant to the Plaintiff's Agreement, Lien, Attorney Acknowledgment, and the Funding Instructions.

21. On September 4, 2008, the Milwaukee County Circuit Court issued a Judgment in favor of Fielkow and against Johnson in the amount of \$21,616.40. Mitz failed to notify PS Finance of the Judgment.

22. Around February 12, 2009, PS Finance discovered that Fielkow's case had settled. Veronica Mormando (Mormando), Chief Operating Officer for PS Finance, sent a letter to Mitz with the current payoff amount due to satisfy the lien.

23. On that same day, an employee from PS Finance also telephoned Mitz requesting payment. The notes from the conversation provide, "s/w Atty - they are waiting for the final settlement check which s/b here w/in 45 days. Sent a p/o to atty and calendared for 45 days."

24. On March 30, 2009, a PS Finance employee had another telephone conversation with Mitz. The notes from the conversation provide, "s/w atty - he said he is still waiting to collect on the balance directly from the defendant. The INS CO paid and now the rest is due from A Johnson directly." PS' notes from a second phone conversation that day provide, "he rec'd \$100K from Badger Insur & is expecting \$20K from A... he said we are protected... he is still negotiating med liens."

25. On May 20, 2009, June 16, 2009, September 17, 2009, October 13, 2009, January 15, 2010, March 3, 2010, April 2, 2010, May 7, 2010, July 29, 2010, October 13, 2010,

and November 10, 2010, Mormando sent correspondence to Mitz requesting payment.

26. On March 16, 2010, Johnson declared bankruptcy and Mitz was unable to collect any funds from Johnson.

27. Between February 2009 and October 2011, PS Finance had numerous phone calls with Mitz in which Mitz repeatedly promised PS Finance he would soon make full payment.

28. In telephone conversations on December 21, 2010, and October 13, 2011, Mitz informed PS Finance that the money was still in his trust account and no one had yet been paid.

29. Beginning on March 3, 2011, Mormando sent Mitz a series of emails requesting payment.

30. On January 9, 2012, Anna Pasquale from PS Finance sent Mitz an email providing,

On October 13, 2011 you had a phone conversation with Veronica Mormando discussing the status of the proceeds from the settlement regarding the accident dated 12/8/2003 involving your client Mark Fielkow. At that time, you said that you would be sending to Veronica's attention a letter stating that the money from this settlement is still in your attorney trust account. To date, we have not yet received your letter. We would appreciate that you forward your letter to us as soon as possible.

31. On February 12, 2012, Mormando filed a grievance with OLR against Mitz.

32. On March 29, 2012, in response to Mormando's grievance, Mitz sent a letter to OLR intake investigator Jonathan Zeisser providing that Fielkow agreed to put a loan from PS Finance on hold while Mitz tried to find other sources of funding for him. Mitz arranged for \$7600 in loans for Fielkow, \$5100 from his father, Milton Mitz, and \$2500 from his uncle, Morry Mitz. Mitz further wrote,

As a result of my litigating the matter, I was able to convince Badger Mutual Insurance to settle Mark's claim against them for \$100,000. That sum was received on May 21, 2007. Prior to that date, I was never served with notice of a lien from PS Finance and it was my understanding that Mark did not have further involvement with the company and the loan was not closed because I had obtained an interest free loan, with no payment date, for \$7600...

Unfortunately, I first became aware that the loan had in fact been closed and the existence of PS Finance's claimed lien in 2008, after the settlement with Badger Mutual...

33. Mitz's statements in his March 24, 2012, correspondence directly contradict the fact that he assisted Fielkow with the preparation of his loan documents, notarized the loan documents, signed the Attorney Acknowledgment, provided PS Finance with his trust account



information so that they could wire the loan proceeds, and disbursed the loan proceeds via check #1394 to the City of Milwaukee.

34. On August 29, 2013, Mitz sent PS Finance a check in the amount of \$11,637.00 as payment in full, which represented the full balance due on the loan at the time Fielkow settled with Badger Mutual.

#### COUNT ONE

35. By failing to promptly notify PS Finance in writing that he had received funds in settlement of the personal injury matter of Mark Fielkow, for which PS Finance previously had advised Mitz that it had entered into a loan agreement with Mr. Fielkow and that Mr. Fielkow had signed an agreement assigning to PS Finance the right to any proceeds from a legal claim arising from Mr. Fielkow's personal injury matter, and by failing to promptly deliver to PS Finance the funds it was due, Mitz violated SCR 20:1.15(d)(1)<sup>1</sup>.

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<sup>1</sup> SCR 20:1.15(d)(1) provides: "Upon receiving funds or other property in which a client has an interest, or in which the lawyer has received notice that a 3rd party has an interest identified by a lien, court order, judgment, or contract, the lawyer shall promptly notify the client or 3rd party in writing. Except as stated in this rule or otherwise permitted by law or by agreement with the client, the lawyer shall promptly deliver to the client or 3rd party any funds or other property that the client or 3rd party is entitled to receive."

## COUNT TWO

36. By misrepresenting to PS Finance, between February 2009 and October 2011, that he had its funds on deposit in his trust account, that no one else had been paid from the settlement proceeds, and that he would disburse the funds to PS Finance soon, when in fact he had already disbursed the \$100,000 portion of the settlement he had received and he knew that the defendant had declared bankruptcy and, therefore, he would be unable to collect on the remaining judgment for \$21,000, Mitz violated SCR 20:4.1(a)(1)<sup>2</sup> and SCR 20:8.4(c)<sup>3</sup>.

## COUNT THREE

37. My making misrepresentations in his March 29, 2012 letter to OLR to the effect that he was unaware that Mr. Fielkow had taken an \$8,000 loan from PS Finance and that he was unaware PS Finance had a lien against Mr. Fielkow's personal injury claim until sometime in 2008, after Mitz had disbursed the \$100,000 settlement proceeds from Badger Mutual Insurance; when in fact Mitz was aware of the PS Finance loan, had signed the lien and other loan documents, had faxed

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<sup>2</sup> SCR 20:4.1(a)(1) provides: "In the course of representing a client a lawyer shall not knowingly make a false statement of a material fact or law to a 3rd person."

<sup>3</sup> SCR 20:8.4(c) provides: "It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

the loan documents to PS Finance, received the loan proceeds by wire transfer into his trust account, promptly disbursed such proceeds in payment of his client's debt, and was aware that Mr. Fielkow did not have sufficient funds to pay such debt without the PS Finance loan, **Mitz violated SCR 20:8.4(c).**

**WHEREFORE**, the Office of Lawyer Regulation asks that Attorney Howard B. Mitz be found in violation of the Supreme Court Rules as alleged in connection with Counts One through Three of this complaint; that the Court suspend Howard B. Mitz's license for sixty (60) days; and that the Supreme Court of Wisconsin order such other and further relief as may be just and equitable, including an award of costs.

Dated this 16 day of October, 2013.

OFFICE OF LAWYER REGULATION



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