

IN THE MATTER OF DISCIPLINARY  
PROCEEDINGS AGAINST MICHAEL M.  
RAJEK, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,

CASE NO. 2014AP 75Y -D

Complainant;

MICHAEL M. RAJEK,

Respondent.

**RECEIVED**

APR 07 2014

CLERK OF SUPREME COURT  
OF WISCONSIN

**COMPLAINT**

NOW COMES the Wisconsin Supreme Court - Office of Lawyer Regulation (OLR), by its Retained Counsel, Matthew F. Anich, and alleges as follows:

1. 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. Michael M. Rajek (Rajek) is an attorney admitted to the practice of law in Wisconsin in 1974. Rajek's address is 306 Barstow Street, Suite 105, Eau Claire, Wisconsin 53703 and his State Bar Membership Number is 1015231.

3. Rajek's disciplinary history consists of the following:

- a. In 1986, Rajek received a consensual private reprimand for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *Private Reprimand 1986-5.*
- b. In 2006, Rajek received a consensual public reprimand for misconduct consisting of committing a criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer in other respects, and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. *Public Reprimand of Michael M. Rajek, 2006-4.*
- c. Additionally, a disciplinary proceeding is currently pending against Rajek. Sup. Ct. Case No. 2011AP387-D.

#### **Regarding Livingston**

4. In October of 2010, Troy Livingston (Livingston) hired Rajek to represent him on a criminal misdemeanor charge. *State v. Troy A. Livingston, Trempealeau County Case No. 2010CM0202.*

5. The fee agreement signed by Livingston on October 12, 2010 called for Livingston to pay Rajek \$3500 prior to Rajek commencing work in the matter. The \$3500 payment, although characterized in the agreement as a "non-refundable retainer," was in fact an advanced fee as that term is defined in SCR 20:1.0(ag), as the funds were paid in contemplation of future services to be provided in a particular matter.

6. The fee agreement also stated, "Mr. Rajek will bill at an hourly rate of \$300.00," but added that other factors would affect the "ultimate" fee in the matter, and further provided, "Client understands that under this analysis, given the particular facts and circumstances of Client's representation and legal work performed, Client may not be entitled to any refund."

7. The fee agreement specifically stated that the fee in the matter would not be held in trust, rendering the funds delivered by Livingston subject to SCR 20:1.15(b)(4m), titled "Alternative protection for advanced fees." Under SCR 20:1.15(b)(4m), a lawyer may place an advanced fee in his or her business account, as long as the attorney provides the client with certain notices upon accepting the advanced fee, and provides certain notices and takes certain actions upon termination of the representation.

8. Under SCR 20:1.15(b)(4m)a, an attorney electing not to hold an advanced fee in trust is required to provide the following six notices to the client, in writing, upon accepting the advanced fee payment: (1) the amount of the advanced payment; (2) the basis or rate of the lawyer's fee; (3) any expenses for which the client will be responsible; (4) that the lawyer has an obligation to refund any unearned advanced fee,

along with an accounting, at the termination of the representation; (5) that the lawyer is required to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of such dispute; and (6) the ability of the client to file a claim with the Wisconsin lawyers' fund for client protection if the lawyer fails to provide a refund of unearned advanced fees.

9. The fee agreement in Livingston's matter did not include required notices (4), (5) or (6), nor did any other document provide these required notices to Livingston at the outset of the representation.

10. At some point, Livingston determined that he no longer wanted Rajek's assistance in the matter. In December of 2010, the State moved to amend the charge down to an ordinance violation and Livingston, *pro se*, pled guilty to that charge.

11. In January of 2011, Rajek issued a refund to Livingston in the amount of \$3000.

#### COUNT 1

12. Upon receipt of funds from Livingston, specifically in anticipation of providing legal representation to Livingston, by electing not to hold those funds in trust and failing to include in his fee agreement the notices thereby

required by SCR 20:1.15(b)(4m)a. 4. 5. and 6, **Rajek violated those subsections of SCR 20:1.15(b)(4m)<sup>1</sup>.**

#### **Regarding Jakobitz**

13. In August of 2011, Miriam Jakobitz (Jakobitz) hired Rajek to represent her on a non-criminal traffic charge. *State v. Miriam L. Jakobitz*, Eau Claire County Case No. 2010TR9904.

14. The fee agreement signed by Jakobitz on August 7, 2011 called for Jakobitz to pay Rajek \$2500 prior to Rajek commencing work in the matter. The \$2500 payment, although characterized in the agreement as a "non-refundable retainer," was in fact an advanced fee as that term is defined in SCR 20:1.0(ag), as the funds were paid in contemplation of future services to be provided in a particular matter.

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<sup>1</sup> SCR 20:1.15(b)(4m)a. 4, 5 and 6 provide: A lawyer who accepts advanced payments of fees may deposit the funds in the lawyer's business account, provided that a court of competent jurisdiction must ultimately approve the lawyer's fee, or that the lawyer complies with each of the following requirements:

a. Upon accepting any advanced payment of fees pursuant to this subsection, the lawyer shall deliver to the client a notice in writing containing all of the following information:

4. that the lawyer has an obligation to refund any unearned advanced fee, along with an accounting, at the termination of the representation;

5. that the lawyer is required to submit any dispute about a requested refund of advanced fees to binding arbitration within 30 days of receiving a request for such a refund; and

6. the ability of the client to file a claim with the Wisconsin lawyers' fund for client protection if the lawyer fails to provide a refund of unearned advanced fees.

15. The fee agreement also stated, "Mr. Rajek will bill at an hourly rate of \$300.00," but added that other factors would affect the "ultimate" fee in the matter, and further provided, "Client understands that under this analysis, given the particular facts and circumstances of Client's representation and legal work performed, Client may not be entitled to any refund."

16. The fee agreement specifically stated that the fee in the matter would not be held in trust, rendering the funds delivered by Jakobitz subject to SCR 20:1.15(b)(4m), titled "Alternative protection for advanced fees." Under SCR 20:1.15(b)(4m), a lawyer may place an advanced fee in his or her business account, as long as the attorney provides the client with certain notices upon accepting the advanced fee, and provides certain notices and takes certain actions upon termination of the representation.

17. Under SCR 20:1.15(b)(4m)a, an attorney electing not to hold an advanced fee in trust is required to provide the following six notices to the client, in writing, upon accepting the advanced fee payment: (1) the amount of the advanced payment; (2) the basis or rate of the lawyer's fee; (3) any expenses for which the client will be responsible; (4) that the lawyer has an obligation to refund any unearned advanced fee,

along with an accounting, at the termination of the representation; (5) that the lawyer is required to submit any unresolved dispute about the fee to binding arbitration within 30 days of receiving written notice of such dispute; and (6) the ability of the client to file a claim with the Wisconsin lawyers' fund for client protection if the lawyer fails to provide a refund of unearned advanced fees.

18. The fee agreement in Jakobitz's matter did not include required notices (4), (5) or (6), nor did any other document provide these required notices to Jakobitz at the outset of the representation.

19. In December of 2011, following a jury trial, Jakobitz was found guilty of that single charge. On April 2, 2012, Rajek filed a Notice of Appeal on Jakobitz's behalf. On May 15, 2012, Rajek was allowed to withdraw as counsel for Jakobitz. Jakobitz proceeded *pro se* and her appeal was eventually dismissed on a delinquency motion.

20. On April 26, 2012, Rajek sent Jakobitz an invoice for services rendered in preparation for trial, for the trial, and for a post-trial motion. The bill indicated a balance due of \$8250. Prior to the April 26, 2012 bill, Jakobitz had paid the entire advanced fee, as well as paying a jury fee and a fee to secure an expert witness.

21. On May 2, 2012, Jakobitz sent Rajek a letter indicating she disputed the bill.

22. Jakobitz and Rajek failed to reach an agreement regarding the outstanding fees.

23. With respect to attorneys making use of the alternative protection for advanced fees, SCR 20:1.15(b)(4m)c provides as follows when a fee dispute cannot be resolved upon termination of representation:

Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client.

24. On May 11, 2012, Rajek wrote to Jakobitz, stating in part:

I am in receipt of your letter disputing the bill that was sent to you regarding trial expenses followed by a notice informing the court that I will no longer be representing you. It is mandatory that your dispute be subject to binding arbitration. I have scheduled this matter with Judge Proctor for June 5, 2012, at 11:00 a.m. at Proctor ADR, LLC located at 116 West Grand Ave. Eau Claire, WI 54703.

25. Judge Proctor is former Eau Claire County Circuit Court Judge Benjamin D. Proctor, who now provides alternative dispute resolution services. Judge Proctor is not affiliated



with the State Bar Fee Arbitration Program or a similar local bar association program. Rajek's selection of Proctor was unilateral.

26. Jakobitz objected to Rajek's selection of Judge Proctor as arbitrator.

27. Jakobitz thereafter contacted the State Bar of Wisconsin Fee Arbitration Program requesting binding arbitration. The State Bar contacted Rajek regarding Jakobitz's request for binding arbitration. Rajek never submitted to the State Bar arbitration.

28. On October 16, 2012, OLR sent Rajek a letter, via first class U.S. mail, informing him of the nature of OLR's investigation of this matter. Rajek was put on notice that, pursuant to SCR 22.03(2), he was required to provide a written response by November 8, 2012. OLR's letter further advised Rajek of his duty to cooperate with OLR's investigation under SCR 21.15(4) and SCR 22.03(6).

29. On November 8, 2012, Rajek sent a facsimile to OLR indicating that he would not be able to respond by November 8, 2012 but hoped to be able to do so by the next week.

30. By letter dated November 12, 2012, OLR indicated to Rajek that his response was expected by November 21, 2012. The

letter further indicated that Rajek should contact OLR if he was going to be unable to meet that deadline.

31. By facsimile dated November 21, 2012, Rajek informed OLR that he would submit a response by "next week Monday or Tuesday," those dates being November 26 and 27, 2012.

32. Having received no response from Rajek, on December 3, 2012, OLR sent Rajek a letter via U.S. mail and personal service, requesting a response by December 10, 2012. Rajek was again reminded of his duty to cooperate and the possible consequences of not cooperating, including OLR's Director seeking the suspension of Rajek's law license for willful non-cooperation. OLR was unable to obtain service of the letter on Rajek.

33. On December 10, 2012, Rajek submitted a response to this matter via facsimile. The attached letter provided to OLR was facially dated November 21, 2012; however, OLR's first receipt of that letter occurred on December 10, 2012.

#### **COUNT 2**

34. Upon receipt of funds from Jakobitz, specifically in anticipation of providing legal representation to Jakobitz, by electing not to hold those funds in trust and failing to include in his fee agreement the notices thereby required by

SCR 20:1.15(b)(4m)a. 4. 5. and 6, **Rajek violated those subsections of SCR 20:1.15(b)(4m).**

**COUNT 3**

35. After failing to resolve the fee dispute with Jakobitz, by failing to agree to submit to binding arbitration with the State Bar Fee Arbitration Program or other similar local bar association program, **Rajek violated SCR 20:1.15(b)(4m)c<sup>2</sup>.**

**COUNT 4**

36. By failing to respond to OLR's letter of October 16, 2012 until December 10, 2012, **Rajek violated SCR 22.03(2)<sup>3</sup>.**

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<sup>2</sup> SCR 20:1.15(b)(4m)c provides: "Upon timely receipt of written notice of a dispute from the client, the lawyer shall attempt to resolve that dispute with the client, and if the dispute is not resolved, the lawyer shall submit the dispute to binding arbitration with the State Bar Fee Arbitration Program or a similar local bar association program within 30 days of the lawyer's receipt of the written notice of dispute from the client."

<sup>3</sup> SCR 22.03(2) provides: "Upon commencing an investigation, the director shall notify the respondent of the matter being investigated unless in the opinion of the director the investigation of the matter requires otherwise. The respondent shall fully and fairly disclose all facts and circumstances pertaining to the alleged misconduct within 20 days after being served by ordinary mail a request for a written response. The director may allow additional time to respond. Following receipt of the response, the director may conduct further investigation and may compel the respondent to answer questions, furnish documents, and present any information deemed relevant to the investigation. SCR 22.03(2) is enforced under the Rules of Professional conduct via SCR 20:8.4(h), which states, "It is professional misconduct for a lawyer to . . . fail to cooperate in the investigation of a grievance filed with the office of

**WHEREFORE**, the Office of Lawyer Regulation asks that Respondent, Michael M. Rajek, be found in violation of the Supreme Court Rules as alleged in the Complaint, that his license to practice law in Wisconsin be suspended for 60 days, and that the Court grant such other and further relief as may be just and equitable, including an award of costs.

Dated this 2<sup>nd</sup> day of April, 2014.

OFFICE OF LAWYER REGULATION

By: Matthew F. Anich  
Matthew F. Anich  
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lawyer regulation as required by SCR 21.15(4), SCR 22.001(9)(b), SCR 22.03(2), SCR 22.03(6), or SCR 22.04(1).