IN RE: DAVID ZAK

NO. BD-2015-080

S.J.C. Judgment of Disbarment entered by Justice Lenk on March 4, 2016, with an effective date of April 3, 2016.[1]

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[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. BD-2015-080

IN RE: DAVID ZAK

AMENDED MEMORANDUM OF DECISION

This matter came before me on an information and record of proceedings pursuant to S.J.C. Rule 4:01, § 8(6), and a recommendation and vote by the Board of Bar Overseers (board), recommending that the respondent be disbarred from the practice of law in the Commonwealth. The respondent generally does not contest that he undertook the actions asserted in bar counsel's petition, and that the special hearing officer and the board found were well supported in the evidentiary record. The disputed issues are the manner in which those actions should be viewed, and the appropriate sanction to be imposed for conduct which, had there been only one instance, would warrant at most a term suspension. At a hearing before me on December 17, 2015, bar counsel supported the board's recommendation, and the respondent maintained that the appropriate sanction would be a public reprimand. Having considered carefully the petition for discipline, the special hearing officer's findings, adopted by the board, the record before me, and the representations of both

counsel at the hearing before me, I conclude that disbarment is the appropriate sanction in these circumstances. Nothing less would be adequate both to protect the public from harm and to prevent further damage to the public's view of the integrity of the legal profession than already has resulted from the respondent's misconduct. Accordingly, a judgment shall enter striking the respondent's name from the roll of attorneys admitted to the Massachusetts bar.

1. Procedural history. In April, 2013, bar counsel filed a seven-count petition for discipline against the respondent. The chair of the board appointed a special hearing officer to conduct evidentiary hearings and issue written findings of fact and conclusions of law. In August, 2013, the special hearing officer conducted a hearing on bar counsel's motion for issue preclusion on the question whether the respondent and Elizabeth Reed (a real estate mortgage broker and at that time a loan originator) had been partners in the entity Loan Modification Group, Inc. (LMG), that the respondent had incorporated. Bar counsel's motion thereafter was allowed. The respondent filed, then withdrew, a petition to pursue an interlocutory appeal of the hearing officer's order. In March and April, 2014, the special hearing officer conducted an evidentiary hearing over twelve noncontiguous days; closing arguments were held in early May, 2014. Twenty-five witnesses testified and 220 exhibits were

introduced, including 190 to which the parties had stipulated. Bar counsel presented testimony from five of the respondent's former employees, twelve former clients, another attorney, and two expert witnesses. Two former employees and one former client testified on behalf of the respondent. In December, 2014, the special hearing officer issued findings of fact and rulings of law and recommended that the respondent be disbarred.

The respondent appealed and the board heard arguments on that appeal on May 11, 2015. On July 13, 2015, the board adopted the special hearing officer's findings of fact and rulings of law and voted unanimously that the respondent should be disbarred from the practice of law in the Commonwealth. The board declined to adopt the hearing officer's suggestion that the respondent be required to pay restitution as part of his sanction. Bar counsel then filed this information in the county court, requesting that the respondent be disbarred.

2. Facts. The special hearing officer found the following, as adopted by the board. The respondent was admitted to the Massachusetts bar in December, 2006, and opened his law firm, Zak Law Offices, P.C. (ZLO) in January, 2007. His practice initially focused on regulatory compliance, representing lenders against actions by the Attorney General and the United States Attorney. In the fall of 2008, the respondent entered into discussions with Reed (a nonlawyer) about forming a business to provide loan

modification and related services to clients having difficulty paying their mortgages or facing foreclosure. Well aware that she would be making cold calls or in person visits asking homeowners she knew of to contact him, the respondent began paying Reed $1,000 per client for each client she referred to ZLO for mortgage related services who hired the respondent to perform such services. Between November, 2008 and February, 2009, the respondent paid Reed $10,000 for such referrals.

In February, 2009, the respondent and Reed discussed anticipated Federal legislation to help homeowners avoid foreclosure by providing incentives to mortgage holders and lenders to modify existing loans. On February 18, 2009, President Obama announced the Homeowner Affordability and Stability Plan, intended to help families encountering difficulties paying their mortgages to obtain modifications of existing loans, or to refinance, in order to avoid foreclosure. In March, 2009, the Federal Home Affordable Modification Program (HAMP) was introduced. The HAMP plan offered mortgage holders and lenders financial incentives to modify existing loans and to refinance loans.

The respondent incorporated LMG on February 6, 2009, and thereafter operated it in partnership with Reed, as a loan modification business that also offered legal services. The legal services included analysis of mortgage documents to

determine whether there had been any violations of State or Federal law or regulations in processing the original loan; loan modifications; foreclosure prevention; and facilitating short sales. The respondent also offered such services through ZLO. Until June, 2009, he continued to pay Reed for each client she obtained, as well as for each "agent" she brought in to work for LMG; thereafter, the respondent and Reed entered into an agreement to share equally in the combined net profits of LMG and ZLO derived from the loan modification clients. The respondent hired "agents" to work for LMG, generally mortgage brokers with lists of clients, who were to contact those clients offering the respondent's services, as well as to handle calls received as a result of the respondent's radio and Internet advertisements. The agents were paid between $1,000 and $1,500 for each client who signed an agreement that the respondent would provide loan modification services or other foreclosure related services, and who paid the initial $2,000 to $3,000 fee. The agents were required to obtain ten new clients, with signed fee agreements, each month, or they were not paid. Agents also were encouraged to recommend other agents to be hired, and were paid a fee (termed an "override") for each client obtained by the agents they had recommended.

In January, 2010, after the Massachusetts Commission of Banks ordered Reed to stop operating her loan origination

business (she later pleaded guilty to multiple counts of wire fraud and money laundering), the respondent terminated his business relationship with her, and shortly thereafter LMG stopped accepting new clients. The respondent continued to offer loan modification services, as well as foreclosure related legal services, through ZLO, and continued to operate ZLO largely through the use of the nonlawyer agents.

At all times relevant to this matter, the offices of ZLO were located in Massachusetts, at different points in locations in Needham and in Revere. The respondent also maintained an office in Rhode Island, staffed by two agents, who informed clients that they worked for LMG. At all relevant times, the services the respondent offered his loan modification clients were deemed "foreclosure related services" pursuant to 940 Code Mass. Regs. § 25.01, and "mortgage assistance relief services" (MARS) as defined in 16 C.F.R. Part 322, recodified on December 30, 2011, as Regulation O, 12 C.F.R part 1015. Under 940 Code Mass. Regs. § 25.02, an attorney is prohibited from soliciting, arranging, or accepting an advance fee for offering, arranging, or providing foreclosure-related services, unless the fee is deposited in an IOLTA account until earned. An attorney may, however, accept an advance fee for preparing and filing bankruptcy petitions, or for making filings in other court proceedings intended to prevent foreclosure. Additionally,

pursuant to 940 Code Mass. Regs. § 25.03, advertising or offering foreclosure related services without clearly explaining the services to be provided, and how those services will assist an individual seeking to avoid or delay foreclosure, cure a default, or address late or missed payments, is deemed an unfair or deceptive practice under G. L. c. 93A, § 2 (a). An unfair or deceptive practice also is a violation of the MARS regulations, and an unfair, deceptive, or abusive act or practice is a violation of the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 5531 and 5536. Rhode Island statutes contain similar provisions relative to a "foreclosure consultant." See R.I. Gen Laws, §§ 5-79-1 through 5-79-9. The special hearing officer concluded, and the board adopted the finding, that the respondent was aware of and understood all of these statutory and regulatory provisions during the period of the misconduct at issue here.

I turn to consideration of each of the seven claims for discipline.

Fee sharing with a nonlawyer (count one). The respondent does not dispute that he paid Reed and the agents, all nonlawyers, between $1,000 and $1,500 for each client from whom they obtained an agreement to retain the respondent for loan modification or other foreclosure related services. The respondent also does not dispute that he paid Reed and the agents "override" fees (in Reed's case $450 per client) for each client

acquired by one of the agents they had recommended. Nor does the respondent dispute that between June, 2009 and January, 2010, he paid Reed fifty per cent of the net combined profits of ZLO and LMG, after deducting expenses and payments to a reserve fund, derived from the loan modification clients. The respondent contends, however, that this profit sharing arrangement was not improper, under Mass. R. Prof. C. 5.4(a)(3), an exception to the general prohibition on fee sharing, encompassing "profit-sharing benefits an employee receives" as part of a firm's compensation plan, that are net profits of the firm and not "tied to a specific client or to specific cases." I address this contention in my discussion of the appropriate sanction, infra.

The board found, and I agree, that this method of paying his employees and agents violated Mass. R. Prof. C. 7.2(c) (giving something of value to someone for recommending lawyer's services) and 7.3(f) (giving something of value to individual or organization to solicit professional employment for lawyer from prospective client). As the board determined, the conduct also violated Mass. R. Prof. C. 5.4(a) (sharing legal fees with nonlawyer); Mass. R. Prof. C. 5.4(b) (forming partnership or other business entity with non-lawyer where any portion of activities of that entity consist of practice of law); Mass. R. Prof. C. 7.3(d) (prohibiting payment of fee for in-person or personal communication soliciting professional employment); and

8.4(a) (violating rules of professional conduct through acts of another). Lastly, by not explaining to Reed and the agents, nonlawyers over whom he had direct supervisory authority, the actions they could take consistent with the respondent's ethical obligations under the rules of professional conduct; by not making reasonable efforts to ensure that their conduct was consistent with his ethical obligations; and by instructing them to engage in practices he knew were not consistent with his ethical obligations, the respondent violated Mass. R. Prof. C. 5.3(a), (b), and (c).

False and misleading advertising (count two). The board found that, while some clients were obtained as a result of cold calls, the vast majority of the respondent's loan modification business was acquired as a result of radio advertising. The respondent also advertised on television and on his ZLO website. The content of the radio advertisements was particularly egregious, containing numerous misrepresentations as well as omissions that were highly misleading. Although the respondent is licensed to practice law only in Massachusetts, the radio advertisements were aired in Massachusetts, Rhode Island, New York, Pennsylvania, and Virginia. They stated that the respondent was the only lawyer [impliedly in that jurisdiction] who knew how to obtain permanent loan modifications. This statement is patently false as to the knowledge of other

attorneys. It also does not explain that all decisions concerning whether to grant a loan modification are made by the lender; all decisions whether to make an initial, temporary loan modification permanent are made by the lender; and that the respondent is not admitted to practice law other than in Massachusetts, and did not employ or have business relationships with attorneys licensed in Pennsylvania or Virginia.

The advertisements also claimed that the respondent "sued the bank in every case," when his business model was such that he never filed such suits, but, in rare instances, referred clients to other attorneys, who would require additional payment from the client before undertaking any court proceedings. In addition, the advertisements stated that the respondent would obtain trial loan modifications within thirty to sixty days, when he was aware that any modification likely would take much longer, on terms that the respondent knew were highly unlikely to be accepted by any lender, such as obtaining a thirty-year mortgage with a two per cent interest rate, on a reduced loan amount equal to the fair market value of the property, or guaranteeing to cut the client's mortgage payment in half. The advertisements also said that the respondent would "pre-qualify" clients for the HAMP program at no cost, whereas the respondents' clients actually were charged between $2,000 to $3,000 during their initial visit, where an agent used a computer program to make a prequalification

determination. The respondent would file an application for a loan modification only after having received an additional payment also of roughly $2,000 to $3,000.

The advertisements also contained other intentional, significant, and serious omissions that made them highly misleading. Listeners were not told that none of their money would be refunded, even if they did not meet the prequalification requirements, the respondent never filed a loan modification application on their behalf, or the lender declined to offer a modification or offered one on terms the client found unacceptable. Listeners also were not told that they were statutorily entitled to a full refund if the respondent did not obtain an acceptable loan modification offer. Nor were they informed that the particular results described by clients featured in the ads were unusual, that their situation might differ, or that the lender alone had the authority to make a loan modification offer, on terms the lender chose. The radio advertisements also did not confirm to various requirements in the rules of professional conduct in Massachusetts, Rhode Island, New York, and Virginia, regarding providing notification of the content of the advertisements to the proper entities (e.g., such as boards of bar overseers or attorneys general), and retaining copies of the content for specified periods.

Similarly, the respondent's Web Site intentionally

misrepresented his firm's purported (but nonexistent) association with highly qualified and experienced attorneys in other jurisdictions, misstated the jurisdictions in which the firm practiced, misstated the respondent's prior positions, experience, training, and the length of time that the firm had been in operation, and did not disclose that the respondent was the only lawyer employed by the firm, or that he was licensed only in Massachusetts, deliberately stating or implying otherwise. The Web Site also contained intentional misrepresentations about other types of experts supposedly employed by the firm, when in actuality there were no such employees.

The board determined, correctly, that these false, material representations of fact, and significant omissions that rendered other statements misleading, violated Mass. R. Prof. C. 7.1 and 7.2(a), concerning a lawyer's communications about his or her services, as well as Mass. R. Prof. C. 8.4(c), prohibiting dishonesty, fraud, deceit, or misrepresentation. The advertisements also violated similar provisions in the rules of professional conduct in Rhode Island, New York, and Virginia. The respondent's contention that the statements were "puffery" or "salesmanship," or merely inadvertent, imprecise use of language, are unavailing, as is his contention that the misrepresentations were not relevant and material because the evidence did not

establish that any of the named clients were obtained as a result of radio advertising. It is not necessary to show that a client or potential client relied on the respondent's deliberate misrepresentations in order to establish that he made them. See Matter of Angwafo, 453 Mass. 28, 35 (2009).

Illegal and excessive fees (count three). The special hearing officer, and the board, found that the respondent charged fees which were both "illegal" and "clearly excessive" within the meaning of Mass. R. Prof. C. 1.5(a). The board described the fees as "clearly excessive because the services provided in exchange for them were routine, worthless, or both." At their first meeting with someone from the respondent's office (typically an agent and not the respondent), clients were charged between $2,000 to $3,000 for prequalification under the HAMP program, and provision of a "lender benefit analysis" and a "forensic loan audit." These services were, as the board described, "routine, worthless, or both." A HAMP prequalification could have been obtained at no cost through certain legal service organizations, and neither of the two documents provided were of any value in applying for or obtaining a loan modification.

The HAMP prequalification was a simple and straightforward procedure in which the agent entered a few pieces of basic information (such as the clients' current income, when the loan

had been obtained, and its interest rate) into a computer program the respondent had installed on his computer system. Little legal reasoning was required, and the process took little time for a trained agent once a client had provided all of the necessary information.[1] Online tools were available from which homeowners could make a similar determination, and nonprofit agencies and government services were available to help homeowners obtain a HAMP prequalification at no cost.

The lender benefit analysis was generated through another computer program, after an agent entered a few items of basic information, such as a client's current income, loan amount, term of loan, and interest rate. The program created a printed document purporting to compare the terms of a client's existing loan with the terms of a proposed modified loan. The proposed terms, including reductions in the principal loan amount and a lower interest rate, generally were highly unrealistic,[2] and also inconsistent with HAMP standards; the respondent knew that lenders did not offer modifications on such terms. The respondent's agents who testified before the special hearing officer viewed the loan benefit analysis as useless, did not rely

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[1] Some clients brought the required documents to the first meeting, and others had to be contacted numerous times in order to obtain the necessary information.

[2] Frequently proposed terms, for example, included a reduction by half of the principal loan amount, on a thirty-year mortgage, at a two per cent interest rate.

on it, and, in some cases, said that they did not include it in the package of documents attached to applications for modifications. The hearing officer, and the board, determined that the loan benefit analysis was used as a marketing tool, intentionally giving clients a false impression of the terms of a loan modification that they reasonably could anticipate.

The forensic loan audit purported to describe errors in regulatory compliance during issuance of the initial loan or in transferring the loan to a new mortgage holder. The forensic loan audit relied on an affidavit (in English) prepared by an agent and signed by the clients, who generally were not asked to read or review it carefully, and who often were unable to read English. The contents of the affidavit were based on the clients' statements of their memories of things such as notices they had received, without any effort by the agent to obtain documentary records or to ascertain that the clients' memories were accurate.

The clients were not told that the flat fee charged for these initial services was nonrefundable, or that payment of additional fees, generally ranging from $2,000 to $3,500, would be required in order for the respondent to draft a G. L. c. 93A demand letter to the lender, and file an application for a loan modification. The hearing officer rejected the respondent's contention that drafting the consumer protection act demand

letter required substantial time and legal research, justifying these fees; the hearing officer stated that the mortgage loan forms used are generally standardized across lenders, the letters were largely boilerplate, and the legal research required was not extensive.

The respondent deposited all of the flat fees thus obtained into one of his business or operating accounts, not into an IOLTA trust account, and used the money before he had provided all of the services for which the fees had been paid. Neither the respondent nor his agents informed clients during this initial, two-step process, that any filings or appearances in court would require the payment of additional fees, and that the respondent would not himself pursue such litigation, but rather would refer the client to other attorneys.

Under the Massachusetts rules of professional conduct, the respondent was not required to deposit flat fees (unlike retainers) into an IOLTA account, or to hold them in trust until the services had been provided. However, because the flat fees for "foreclosure related services" were collected before the respondent even filed an application for a loan modification, much less before a lender provided a modification offer that the client would accept, both the initial fee payment, and the payment required for the respondent to file an application for a loan modification, violated 940 Code Mass. Regs. § 25.02(b) and

12 U.S.C. §§ 5531 and 5536, which prohibit an attorney from accepting advance payment of loan modification fees unless the funds are deposited and held in an IOLTA account until the fee has been earned.

Based on these findings, the special hearing officer, and the board, concluded that the respondent had violated both the Massachusetts and Rhode Island versions of Rule 1.5(a) of the rules of professional conduct, prohibiting illegal or excessive fees. Before the board, as before me, the respondent challenged the findings that the fees were excessive, claiming, as discussed, that they were justified by the extent of the work required. Further, he pressed forcefully, as he does here, his argument that the fees were not illegal, because the necessary legal research and analysis, for which advance fees permissibly may be charged under the Massachusetts rules of professional conduct, was intertwined with the loan modification services. The board concluded, as do I, that the fees were illegal notwithstanding any argument that they were not explicitly prohibited under Mass. R. Prof C. 1.5(a), since that rule prohibits "illegal" fees, and other State and Federal statutory provisions prohibited charging advance fees for loan modification services. See, e.g., Matter of Dialessi Lafley, 26 Mass. Att'y Disc. R. 133 (2010) (fee illegal where it was in violation of Federal statute prohibiting collection of fees for acting as

representative payee for individual who was receiving Social Security benefits).

Practices followed in entering into contracts with clients (count four). Under this count, bar counsel included many of the practices discussed, supra, with respect to misrepresentations or misleading statements by the respondent's agents concerning the limited scope of the work that actually would be provided, the (impermissibly) nonrefundable fees that would be charged, and the results likely to be achieved, as well as the differences between the loan modification services provided by LMG and the legal services provided by ZLO, which led many clients to conclude, reasonably, that they had retained the respondent to perform legal services when they had not done so. Bar counsel also pointed to the fact that many of the documents provided were written only in English and not explained carefully to the non English speaking clients, particularly the fee agreement. While the respondent eventually had a written fee agreement in Spanish, he did not modify it when he modified the English version, and he had no version written in Portugese, notwithstanding that a substantial portion of his clients spoke Portugese as their primary language.

The respondent did not instruct his agents to inform clients that, under Federal law, any fee paid had to be refunded if the lender did not offer a loan modification on terms acceptable to

the client, and condoned the fact that they were not making these required disclosures. He instructed his agents to provide the deceptive and misleading hypothetical lender benefit analysis, without telling them, as they were legally required to do, to inform clients that such results were not guaranteed, only the lender could decide to offer a loan modification, and the terms of any such modification, and that the lender might refuse to enter into any loan modification. Nor did the agents inform clients, as statutorily mandated, that additional fees would be required for legal services that might be necessary to forestall foreclosure, such as filing a court action. The respondent was well aware of, and condoned, or encouraged, these practices.

Although the fee agreements and "disclosures of non guarantee of result," written in English, that the clients signed, did contain accurate information about the limited scope of the representation, the fees charged, and the possibility that less favorable results would be obtained, the agents did not explain these documents in detail in a language the clients understood. Moreover, the respondent testified that he deliberately had clients sign fee agreements written in English because he was not sure that he would be able to file fee agreements other than in English in court proceedings he might undertake against clients from whom he was seeking payment of fees.

The board found further that "in fact many of the respondent's clients did not obtain beneficial loan modifications." While a beneficial result for many clients would not, as the respondent suggests, have been a factor in mitigation, it could have reduced the aggravating factor of the degree of harm to clients upon which the board relied. The record, however, does not contain sufficient information by which to determine how many clients received loan modifications, whether those modifications were temporary or permanent, the terms of the modifications, and whether they were sufficiently beneficial to serve the clients' goals of being able to afford their monthly mortgage payment and remain in their homes. The special hearing officer stated also that even if the respondent's clients did receive loan modifications, he was certain that they were all treated as poorly as the three named clients. This statement, too, is unsupported in the record and cannot properly be deemed a finding of fact. The one issue regarding poor treatment that the record does appear to support is that clients were charged excessive fees for services that were of little or no value to them, and that could have been obtained without cost if the client were sufficiently sophisticated in using the Internet,[3] or through legal services organizations. Nonetheless,

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[3] Given that many of the clients had very low levels of education, and that most apparently did not speak English well, if at all, or read and write in English, they may have received

even if many clients had received beneficial loan modifications, the respondent's misconduct with respect to three named clients would still warrant disbarment.

Considering the entirety of the respondent's conduct, as described above, the special hearing officer and the board found that the respondent violated Mass. R. Prof. C. 5.3(a) and (b), by failing to provide direct supervision or to implement systems to give reasonable assurance that his nonlawyer employees complied with his ethical obligations as an attorney. By failing to explain clearly, or to have his agents explain, the limited scope of the representation and to obtain the clients' informed consent to that limitation, the respondent also violated Mass. R. Prof. C. 1.1 (competence); Mass. R. Prof. C. 1.2(c) (limited objectives of representation requires client consent); Mass. R. Prof. C. 1.4(b) (consultation with client required in order for client to make informed decisions); and Mass. R. Prof. C. 8.4(a) (fraud, deceit, misrepresentation). Further, the respondent's and his

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some benefit from the respondent's agents' prequalification determinations. That work, however, clearly did not warrant the $2,000 to $3,000 in fees (approximately eight hours of time at the respondent's billing rate, which would not be a reasonable hourly fee for the nonlawyer agents). The board found that the prequalification determination required little information from the client and little expertise: it was necessary to ask only basic questions of the client; the few pieces of basic information were quickly and readily entered into the respondent's computer program; and, after having been trained, the nonlawyer agents were almost always able to make the prequalification determination independently, asking the respondent for guidance only in unusual cases.

agents' intentional efforts to mislead clients as to the nature and scope of the services to be provided, and the provision of incompetent, deceptive, and misleading information about the actions the respondent recommended be undertaken, and their possible risks, violated Mass. R. Prof. C. 1.4(b), and Mass. R. Prof. C. 8.4(a) and 8.4(c).

In addition to the above general misconduct related to all of the respondent's loan modification clients, bar counsel's petition for discipline included three counts concerning misconduct toward individual, named clients. The special hearing officer and the board found that the evidence substantiated bar counsel's assertions as to the respondent's misconduct toward these clients.

Irahetta matter (count five). In the fall of 2009, Jesus and Ermelinda Iraheta, who owned a two-family house in Lynn, were experiencing serious financial difficulties and were having trouble making their mortgage payments. They were one month behind in their payments when they heard one of the respondent's Spanish language radio advertisements and contacted the number provided, which was to the LMG office in Revere. The Irahetas, who had had sixth grade educations in El Salvator, spoke little English and were able to read and write very little in English. Jesus Iraheta worked as a truck driver and his wife worked as a cleaning woman. He understood from the advertisement that the

respondent, as an attorney, would obtain a loan modification for them with a lower interest rate and a lower monthly payment.[4] The advertisement did not mention the amount of the respondent's fees.

In November, 2009, the Irahetas went to LMG's Revere office and met with one of the respondent's agents. She informed them, in Spanish, that she worked for LMG, that LMG and ZLO operated together, and, after having obtained some basic information and entered it into the respondent's computer system, that they qualified for a HAMP loan modification. She did not explain that LMG did not provide legal services, that the initial fee they paid that day was not refundable, or that they would be required to pay the respondent, as president of ZLO, additional fees in order for him to file an application for a loan modification. The board found that the Irahetas reasonably understood that the agent worked for the respondent's law firm and that they were obtaining legal services to modify their mortgage loan.

The agent provided the Irahetas a lender-benefit analysis, using a computer program in which she had entered the Irahetas' basic information, and also asked Jesus Iraheta to sign a "borrower affidavit," written in English, describing the disclosures supposedly made to the Irahetas when they originally

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[4] The Irahetas' mortgage was for a term of thirty years, on a principal balance of $244,000, at a fixed rate of 6.65 per cent.

obtained the loan, and when it was assigned to the then-current loan servicer. She did not explain the content of the affidavit, which Jesus Iraheta signed without reading or understanding it. The agent also had the Irahetas sign, again without explanation, another document written in English, titled "Non-Guarantee of Loan Modification Result." She then said that, to obtain a loan modification, the Irahetas would have to pay $5,000, half of which was due that day. The agent gave the Irahetas a written fee agreement, in English, setting forth the two stages of services described above, with a non-refundable initial payment of $2,500 to LMG, due that day, and a non-refundable $2,500 fee to ZLO, due thirty days later, for the second stage. The fee agreement stated that there no guaranteed results and that additional services, such as litigation to contest foreclosure, would require additional fees.

While the statements in the written fee agreement and the non-guarantee document were accurate representations of the services to be provided, the agent verbally told the Irahetas, that, as they had requested, they were retaining the respondent to obtain a loan modification for them, on similar terms to those shown in the lender benefit analysis. She also did not explain that the $2,500 fee for the first stage of services was not refundable even if the respondent did not file an application for a loan modification on their behalf. When Jesus Iraheta said

that he could pay only $2,000, and would pay an additional $500 the following week, the agent agreed. Iraheta then signed the fee agreement, believing that he had paid $2,000 as a deposit towards a $5,000 total fee for loan modification services. The respondent deposited the $2,000 in a business checking account in the name of LMG, not into an IOLTA account.

The Irahetas were unable to pay the remaining $3,000 balance and, on December 5, 2009, Jesus Iraheta told the agent that he did not want to pursue a loan modification with the respondent and that he wanted a refund. At that point, no work had been done for the Irahetas beyond the HAMP prequalification, and creation of the lender benefit analysis and the loan audit report. The agent told the Irahetas that, because the loan modification work had not yet started, ZLO would issue a refund. When the agent told the respondent that she had agreed to issuance of a refund, he refused. On December 16, 2009, Jesus Iraheta met the respondent for the first time, and again said that he could not afford to pursue a loan modification and that he wanted a refund. The respondent again refused, falsely stating that he had begun work on the case. Jesus Iraheta terminated the respondent's representation that day. The special hearing officer did not credit the respondent's testimony that he had not been discharged that day because he had not received written notice of the termination.

On February 5, 2010, the Irahetas sent a letter to bar counsel requesting an investigation, and stating that they did not want to continue the respondent's representation and that he was refusing to provide a refund. The respondent received a copy of this letter from bar counsel approximately one week later. On June 28, 2010, the respondent sent a G. L. c. 93A demand letter to the Irahetas' lender, falsely asserting that he represented them. At that point, the Irahetas had obtained a temporary loan modification, with the assistance of another attorney. That loan modification became permanent shortly after the respondent's letter was sent, indicating, according to the special hearing officer, that the trial loan modification had to have been in place for several months by the time the respondent sent the demand letter. During the course of the disciplinary investigation, however, the respondent falsely told bar counsel that he had obtained a loan modification agreement for the Irahetas. The hearing officer rejected the respondent's assertion that he was uncertain whether he had been discharged when he sent the demand letter. To date, the respondent has not refunded any of the $2,000 payment.

The board determined that the respondent violated Mass. R. Prof. C. 1.2(c), 1.4(b), 8.4(a), and 8.4(c), by failing to explain to the Irahetas the services to be provided for a fee, intentionally misleading them about the nature and scope of those

services, and failing to obtain informed consent to the limited scope of the services to be provided. The respondent also violated Mass. R. Prof. C. 1.1, 1.3, 1.4(b), and 8.4(a), when his agent had Iraheta sign the borrower affidavit without explaining it and without attempting to verify any of its statements; Mass. R. Prof. C. 1.5(a), by charging illegal and excessive fee; Mass. R. Prof. C. 1.16(a)(3) and 8.4(c), by failing to withdraw after having been discharged, and by falsely stating to the Irahetas' lender that he represented them concerning a loan modification, after he had been discharged; Mass. R. Prof. C. 1.16(d). by failing to return the unearned portion of the fee after his discharge; Mass. R. Prof. C. 8.1(a), (c), and (d), by intentionally misrepresenting to bar counsel that he had obtained a loan modification for the Irahetas; and Mass. R. Prof. C. 5.3(a) and (b), by failing to provide reasonable assurance, through direct supervision or procedural requirements, that his nonlawyer employees complied with his ethical obligations as an attorney.

Monterroza matter (count six). In April, 2010, Andrea Valdes, a Rhode Island resident, heard the respondent's Spanish language radio advertisement for ZLO's loan modification program. She and her husband, Jorge Castro, were having difficulty paying the mortgage on a two-family house in which they lived, where the second apartment was rented to tenants who had ceased making

payments. Although they were having financial difficulties, at that point they had not missed any mortgage payments.

Valdes and Castro owned the house with another couple, Carlos and Maria Monterrozas. In 2006, the Monterrozas, who previously had owned the entire house and lived in one of the apartments, executed a deed transferring title to themselves and to Valdes and Castro, jointly, while the mortgage remained only in the Monterrozas' names. The understanding of the parties was that Valdes and Castro would refinance the mortgage after they had built up their credit rating, and the Monterrozas then would transfer their interest in the property to Valdes and Castro. In the interim, Valdes and Castro would pay the mortgage payments, as well as taxes, utilities, and the costs of upkeep and maintenance of the property, and would retain all income from the rental unit. In January, 2007, the Monterrozas moved to Arkansas.

Sometime around April 29, 2010, Valdes called the respondent's Rhode Island office and spoke with one of the respondent's agents. Valdes told the agent that she and her husband owned the house together with the Monterrozas. The agent scheduled an appointment for the two to come to the Rhode Island office, and sent Castro received a document stating that prequalification for a HAMP loan modification would be free. Early in May 2010, Castro and Valdes met with the agent, who

identified himself as an employee or agent of the respondent and his law firm. Castro explained that they owned the house jointly with the Monterrozas, and the Monterrozas alone were liable on the mortgage note. He also described the arrangements concerning payment of costs and management of the property, and said that he and Valdes were having difficulty making the mortgage payments. Castro provided the agent his and his wife's financial information, but provided no information concerning the Monterrozas.

When Castro inquired whether the mortgage could be modified under these circumstances, the agent contacted the respondent's office in Massachusetts and explained the circumstances. He then told Castro and Valdes that he had been informed that they qualified for a loan modification. Notwithstanding that he had no information concerning the Monterrozas' financial status, the agent told Castro and Valdez that ZLO could obtain a loan modification that would significantly reduce the amount of their monthly payment. The agent provided a "lender benefit analysis" comparing to existing loan to one in which the principal amount had been reduced to less than half of the original loan amount, the interest rate had been reduced from 7.85% to 2.00%, and the total monthly payment had dropped from $2,345.00 to $476.09. The hearing officer concluded that Castro reasonably understood these were the terms the respondent would obtain.

The agent told Castro that the total fee for the loan modification would be reduced from the usual amount of $5,000 to $4,500. Castro was to pay $2,000 that day, and the remainder was to be paid before the respondent applied for the loan modification. The agent added that, for that fee, the respondent also would enter into negotiations concerning substituting Castro and Valdez for the Monterrozas on the mortgage loan. The agent did not explain that the initial payment of $2,000 would apply only to the HAMP prequalification and the creation of the lender benefit analysis and the loan audit report; that the two documents provided were of no use in obtaining a loan modification; and that all payments were non-refundable. The agent provided Castro with a written fee agreement, in which the Monterrozas were named as the clients, although the agent did not inform Castro that LMG considered the Monterrozas to be its client, not Castro and Valdez, or that the written fee agreement provided, contrary to the agent's oral representations, that additional fees would be required for drafting of the demand letter, for negotiation, and, if necessary, for filing a complaint in the trial court.

When Castro told the agent that he could not afford the fee for the loan modification services, the agent told him to stop making the monthly mortgage payment so that he could pay the fee. The agent did not explain that failing to pay the mortgage

payments likely would result in foreclosure proceedings or that it likely would have an adverse impact on the Monterrozas' credit rating. In accordance with this advice, Castro agreed to pay the fee of $4,500, and to contact the Monterrozas to obtain a signature on the fee agreement. He and Valdes stopped making the mortgage payments. On May 11, 2010, Castro gave the agent a check in the amount of $2,000, reasonably believing that this amount was a partial payment for obtaining a loan modification. He also mailed the fee agreement to Carlos Monterroza, who signed it and returned it to the agent.

By May 14, 2010, the respondent's view of the matter was that Castro had hired him to obtain a loan modification for the Monterrozas, the co-owners, who lived in Arkansas, and that Castro would pay the fees for this service. Neither the respondent nor the agent advised Carlos and Maria Monterroza, or Castro and Valdez, that their interests in the matter differed, what those differences were, and the various risks and benefits of such joint representation, where the Monterrozas' interest was to be relieved of liability for the mortgage and to preserve their credit rating (even if by a sale prior to foreclosure proceedings), and Castro and Valdez wanted to retain onwership of and to continue living in the property.

On June 7, 2010, Castro paid the remaining fee due of $2,500. A few days later, on June 11, 2010, the respondent sent

the lender a demand letter pointing to various asserted violations in the transfer of the loan. He took no further action until September 2, 2010, when he sent the lender an application for a HAMP loan modification. The application named Castro and Valdez as the borrowers and provided their financial information. Because they were not the borrowers, Castro and Valdez were not eligible for a HAMP loan modification. Because they were not living in the house, the Monterrozas also were not eligible for a HAMP loan modification. By the time he sent the HAMP application to the lender, the respondent had informed Castro that he was not eligible for a HAMP loan modification, although he might be eligible for other, private relief.

On the same day that the respondent sent the loan modification application to the lender, the Monterrozas received a thirty-day notice of the lender's intention to foreclose. Castro promptly informed the respondent, and gave him a copy of the notice. On September 14, the lender told the respondent that it needed the Monterrozas' financial information in order to process the application for the loan modification and also that the Monterrozas would not be eligible for certain other forms of relief because they did not live in the house. The respondent met with Castro and Valdes and offered to represent them in a short sale of the property, for an additional payment of $2,000. At the same time, the respondent contacted Carlos Monterroza and

offered to represent the Monterrozas in the short sale. The respondent did not inform any of the parties of the potential risks of this conflicting representation. All four agreed to the proposed representation. During the rest of the month, Castro attempted several times to reach the respondent concerning the status of the matter, but was unsuccessful. The respondent ultimately did answer Castro's final call toward the end of September.

On September 22, 2010, Castro filed complaints concerning the respondent with the Rhode Island Attomey General and the Massachusetts Office of Bar Counsel. When he learned of Castro's complaints, the respondent offered to handle the short sale at no charge if Castro withdrew the complaints; Castro declined to do so and requested a refund of his $4,500 payment. The respondent refused to provide a refund, and, to date, has not refunded any part of Castro's payment.

The special hearing officer and the board found, and I agree, that the respondent's conduct in this matter violated numerous rules of professional conduct, including the following:

(1) Mass. R. Prof. C. 5.3(a) and (b), by failing to provide direct supervision or to implement systems affording reasonable assurance that the respondent's nonlawyer employees complied with the respondent's ethical obligations as an attorney; (2) Mass. R. Prof. C. 1.4(b), 8.4(a), and 8.4(c), by permitting, failing to

correct, or ratifying the agent's misleading statements; (3) Mass. R. Prof. C. 1.5(a), by charging an illegal and excessive fee; (4) Mass. R. Prof. C. 1.2(c), 1.4, and 8.4(a), by failing to explain, or to have his agent explain, the scope of services so that the client could make an informed decision; (5) Mass. R. Prof. C. 1.4 and 1.7 (conflicts of interest between clients), by representing the Monterrozas, and Castro and Valdez, at the same time, in a matter where their interests conflicted, without explaining the potential risks and obtaining their consent; (6) Mass. R. Prof. C. 1.1, 1.3, 1.4, and 8.4(a), by, directly or through his agent, providing incompetent services, failing to act with diligence, failing to keep the clients informed and to respond to reasonable requests for information, and failing to inform the clients of their available options; (7) Mass. R. Prof. C. 8.4(a) and 8.4(d) and S.J.C. Rule 4:01, § 10, by asking Castro to withdraw his complaint to bar counsel in exchange for handling the short sale at no cost; and (8) Mass. R. Prof. C. 1.16(d), by failing to return the unearned portion of the $4,500 fee Castro paid.

Onyriuka matter (count seven). Caroline Onyiriuku contacted the respondent after she had encountered difficulties in paying the mortgage on her single-family house in Milton.[5] At that

[5] The client lived in the house with her husband, but his name was not on the deed or the mortgage.

point, she was ten months behind in her mortgage payments, had been denied a HAMP modification by the lender, and had received a notice of foreclosure. During her first meeting with the respondent, she showed him the HAMP denial letter and the foreclosure notice. The respondent told her that he had a ninety-nine per cent success rate in obtaining loan modifications and avoiding foreclosure. He said that he would represent her in the loan modification process for a flat fee of $4,000, to be paid that day. The respondent did not explain that services beyond the loan modification effort, such as bankruptcy or litigation, likely would be required to avoid foreclosure, and would cost substantial additional amounts. He also did not tell Onyiriuka that, by Federal statute, she would be entitled to a full refund of the fee if the lender did not offer a modification of the mortgage on terms acceptable to her.

Although the respondent told Onyiriuka that he would be representing her for a flat fee, he had her sign a fee agreement that he had drafted, and that he did not review with her in detail, which treated the $4,000 fee the client paid as a retainer, with services to be provided at a rate of $350 per hour and any unearned amount to be refunded to the client. The special hearing officer found not credible the respondent's testimony that he charged Onyiriuka a flat fee for loan modification services and that his use of a standard fee

agreement in her matter was inadvertent; the hearing officer pointed to the plain language on the face of the agreement, and also to the respondent's careful and precise wording throughout his testimony. In addition, the hearing office noted that, had the respondent reviewed the fee agreement with Onyiriuka line by line, as he asserted he had done, the fact that it was not for a flat fee would have been immediately obvious.

Between April 16, 2011, and August 23, 2011, the respondent submitted three HAMP application forms for loan modification to the lender, each of which was denied. Following the third denial, the respondent told Onyiriuka that there was no other form of relief, such as a private investor loan, available to her. He did not advise her that, according to Federal statute, she was entitled to a refund of her $4,000 payment, and he did not refund her any of that payment. Instead, he told her that her $4,000 retainer was almost exhausted, and that he would need an additional $3,000 to take any further action to stop the foreclosure. He also said that he would file another HAMP modification application in order to delay the foreclosure in the event a foreclosure sale were to be scheduled. While thereafter failing to respond to Onyiriuka's calls, the respondent filed another HAMP application for a modification on October 12, 2011, which was denied on December 1, 2011. In the interim, Onyiriuka hired another attorney to represent her in Chapter 13 bankruptcy

proceedings. The claim for reorganization bankruptcy was filed on November 18, 2011. Onyiriuka and her husband requested that the respondent refund the $4,000; he refused to do so, but, in January, 2012, said that he would provide an itemized bill for services that had been rendered. The purported "invoice" that he thereafter provided did not itemize the work performed, the hours worked, or the hourly fee charged.

As with the Monterroza matter, the hearing officer and the board concluded, as do I, that the respondent's conduct with respect to Onyiriuka violated numerous rules of professional conduct, including Mass. R. Prof. C. 1.2(c), 1.4(b), and 8.4(c), by making intentionally misleading statements about the services he would provide and how they would benefit Onyiriuka, failing to explain the scope of his services and to obtain informed consent, and failing to disclose to Onyiriuka information required under Federal law. The respondent also violated Mass. R. Prof. C. 1.5(a), by charging and collecting an illegal advance fee that he did not deposit in a trust account, as was required under Federal law; Mass. R. Prof. C. 1.4(b), 1.5(a), and 8.4(h), by failing to advise Onyiriuka of her right to a refund when she was denied a loan modification, and by failing to refund the fee; and Mass. R. Prof. C. 1.4(a), by failing to respond to Onyiriuka's reasonable requests for information.

In addition, the respondent violated a number of provisions

of Mass. R. Prof. C. 1.15, regarding notice and accounting of funds held in his IOLTA account, depositing and holding trust funds in an IOLTA account, failing to segregate his own funds from clients' funds in his IOLTA account, and withdrawing funds from the IOLTA account without proper notice or accounting, paying himself unearned amounts, and converting them to his own use. This misuse of his IOLTA account, and his failure to deposit, segregate, and retain unearned funds in his IOLTA account, also violated Mass. R. Prof. 8.4(c).

3. Discussion. The primary purpose of imposing disciplinary sanctions on attorneys who have engaged in misconduct is to protect the public and to maintain its confidence in the integrity of the bar and the fairness and impartiality of our legal system. See, e.g., Matter of Alter, 389 Mass. 153, 156 (1983). "The appropriate level of discipline is that which is necessary to deter other attorneys and to protect the public." Matter of Curry, 450 Mass. 503, 530 (2008), citing Matter of Concemi, 422 Mass. 326, 329 (1996). Although the sanction imposed should not be "markedly disparate" from sanctions imposed on other attorneys for similar conduct, each case should be decided on its own merits, and the attorney should receive "the disposition most appropriate in the circumstances." See Matter of Pudlo, 460 Mass. 400, 405-407 (2011); Matter of Goldberg, 434 Mass. 1022, 1023 (2001), and cases cited.

The special hearing officer commented in discussing the recommended sanction that he had found no Massachusetts cases involving similar misconduct, and looked to conduct in other states in which attorneys were disbarred because of repeated violations involving loan modification and foreclosure clients, working in conjunction with nonlawyers over a substantial period of time. See, e.g., Matter of Lapin, No. 10-O-03758-LMA (Calif. State Bar Ct., S.F. Hearing Dept., Nov. 7, 2012). The board focused on the repeated nature of the conduct, involving multiple offenses over a lengthy period of time, the numerous other aggravating factors,[6] and the respondent's extensive efforts to delay the proceedings, and his willful pattern of refusing to comply with repeated discovery orders, both before bar counsel and in proceedings before the Attorney General.

In contesting the board's recommendation of disbarment, the respondent asserts repeatedly that a number of the violations here ordinarily would result in admonitions, public reprimands, or in some instances a term suspension. He does not focus at all on the repeated misconduct in this case, over apparently a period of at least eight years, see, e.g., Matter of Saab, 406 Mass.

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[6] The board also found in aggravation that the respondent took advantage of vulnerable and desperate clients; acted for selfish, pecuniary interests; refused to acknowledge the wrongfulness of his conduct; refused to refund unearned fees; and that his actions caused the clients harm, such as the loss of their homes.

315, 326-327 (1989), involving hundreds of poor, often uneducated, non-English speaking clients, in desperate financial circumstances, and facing the dire prospect of losing their homes.[7] See, e.g., Matter of Lupo, 447 Mass. 345, 357 (2006).

Moreover, in at least two matters involving named clients, the respondent's agents' advice to stop making mortgage payments (in one case in order to be able to pay the respondent, see Matter of Lupo, supra at 359), where the clients were struggling but were not facing foreclosure, resulted in those clients being forced into foreclosure and losing their homes. See Matter of Pike, 408 Mass. 740, 745 (1990). The respondent has expressed not one iota of remorse for the harm he caused, and has engaged in no effort whatsoever to make restitution. See Matter of McCarthy, 23 Mass. Att'y Disc. R. 469, 470 (2007). To the contrary, where his own actions have resulted in foreclosures against his clients, or where another attorney has successfully aided them after the respondent provided no useful services, the

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[7] Bar counsel asserted at the hearing before me, undisputed by the respondent's counsel, that the respondent is continuing to practice law, notwithstanding the recommendation of disbarment that he received in December of 2014. Bar counsel asserted also, again undisputed that the respondent had 600 loan modification clients, between forty and sixty of them have filed claims with the Attorney General, and approximately twenty of whom have filed complaints with the Massachusetts Commission Against Discrimination. The respondent's counsel suggested that restitution of the amounts the special hearing officer viewed as due the various clients would be in the hundreds of thousands of dollars, and that the respondent would be filing for bankruptcy protection.

respondent has refused to return unearned (if not also illegal) fees paid to him in advance of his having provided any services, notwithstanding multiple requests from the clients. See Matter of Kennedy, 428 Mass. 156, 159 (1998). Furthermore, it is undisputed, as bar counsel stated at the hearing before me, that, notwithstanding the recommendation of disbarment more than two years prior to the hearing before me, the respondent continues to practice law in the same area. See Matter of Cobb, 445 Mass. 452, 480 (2005).

The respondent also apparently lacks any understanding of the seriousness of his misconduct with respect to the radio advertisements, promising that the respondent is the only lawyer who can guarantee a permanent loan modification, on impossibly unrealistic terms, and that he has relationships with well known, highly experienced attorneys in this specialized field. These advertisements, aired across the country, are not, as he claims, "mere puffery," or inadvertent and sloppy use of language. As the board found, they are deliberate falsehoods concerning the nature of the respondent's essentially sole practitioner firm (otherwise staffed by nonattorneys, apparently working on a commission basis), and the results the respondent would be able to achieve given the best possible outcome. See Matter of Crossen, 450 Mass. 533, 574 (2008) ("Cumulative and wide-ranging misconduct may warrant the sanction of disbarment, even if the

individual instances of unethical conduct would not warrant so severe a sanction").

As noted in discussing count one, supra, the respondent contends that the profit sharing arrangement with Reed, whereby they split equally the net profits from ZLOs and LMG's foreclosure services clients, was permissible under Mass. R. Prof. C. 5.4(a)(e), an exception for nonlawyers who are paid by inclusion in a firm's compensation or retirement plan, which in fact disburses portions of legal fees earned to nonlawyers. As the board noted, the interaction between this exception and the general prohibition in Mass. R. Prof. C. 5.4 on fee sharing with nonlawyers is "not pellucid." Yet, even if the respondent is correct in his proposed interpretation (and it is far from clear that that is the case), his claim is unavailing.

As the board observed, the purpose of the prohibition on fee sharing with nonlawyers is "not to prohibit profit-sharing per se, but instead 'to protect the lawyer's independence of judgment,' Mass. R. Prof. C. 5.4, comment (1), and to limit 'the influence of non-lawyers on the lawyer-client relationship.' Annotated Model Rules, at 456." The exception in Mass. R. Prof. C. 5.4(a)(e) allows a firm to share profits with nonlawyer employees, while ensuring that the amounts the nonlawyer receives are not tied to any specific client or case, thereby removing any financial incentive the employee might have to attempt to

influence the lawyer's conduct as to a particular client matter. The respondent's profit-sharing agreement with Reed does not appear to fall within the provisions of Mass. R. Prof. C. 5.4(a)(e), in that the profits shared explicitly included fees from only a particular class of clients. In any event, even if the exception applies to the profit sharing agreement, the respondent's undisputed conduct in paying Reed, and the agents, $1,000 to $1,500 for each client they acquired, and for condoning and encouraging their solicitation of potential clients for a fee, itself clearly violates Mass. R. Prof. C. 5.4.

The respondent appears to suggest, also, that the sanction imposed should be far less severe than disbarment, as was found appropriate in several instances of similar misconduct in other jurisdictions, because, unlike those attorneys, he obtained beneficial outcomes for most of his clients. Even if I were to accept the respondent's argument that he was entitled to collect legal fees in advance for the legal component of his services, and even if I also accepted the respondent's unsupported assertion that he helped hundreds of his clients to avoid foreclosure, I cannot conclude that charging clients of small means, who were in what the board termed "dire circumstances," a $2,000 to $3,000 fee for prequalification services they could have obtained at no cost provided a "benefit" to the clients. Moreover, obtaining a client's goal through properly performed

legal work is not a factor in mitigation; it is simply the type of conduct expected of an ordinary reasonable attorney.

In concluding that disbarment is warranted here, the board focused on the extensive scope of the misconduct, involving numerous violations over an extended period of time, while indicating that a single violation of failing adequately to supervise nonlawyer employees would warrant a term suspension, see e.g., Matter of Jackman, 444 Mass. 1013 (2005); one instance of collection of clearly excessive fees would warrant a public reprimand, see Matter of Fordham, 423 Mass. 481 (1996), and one or two instances of neglect of client matters, incompetence, or false adverting presumptively would warrant a private admonition. See Matter of Kane, 13 Mass. Att'y Disc. R. 321 (1997); AD 98-64, 14 Mass. Att'y Disc. R. 928 (1998). The board noted that, far from a single instance, this matter involves "a pervasive pattern for taking advantage of clients." See Matter of Saab, 406 Mass. 315, 326-327 (1989) ("Even minor violations, when aggregated, can result in a substantial sanction exceeding what each alone would receive").

The board concluded in summarizing the respondent's misconduct that he

> "systematically extracted illegal and excessive fees from numerous vulnerable and desperate clients with deceptive advertisements, misleading contractual arrangements, and deceptive and useless services such as the 'lender benefit analysis' and the 'forensic loan audit.' In addition, he engaged in unlawful fee-splitting to provide

> his partner and his employees with the financial incentive to use these machinations to enhance his personal financial interest at the expense of his clients."

The respondent's objection to the characterization of his business as a "loan modification mill" does not carry much weight.

While noting, as did the special hearing officer, that there appear to be no Massachusetts cases involving the same misconduct, the board concluded that the misconduct in Matter of Cammarano, 29 Mass. Att'y Disc. R. 82 (2013), was similar, albeit, in its view, far less egregious than the respondent's misconduct. In that case, the attorney was indefinitely suspended for charging "nonrefundable" advance fees to several non-English speaking clients in immigration matters; doing little of value for them; making statements misrepresenting the status of their cases; refusing to provide requested refunds; giving false and incredible testimony at the disciplinary hearing; asserting others were responsible for his actions; and refusing to acknowledge the wrongfulness of his conduct.

I agree that the respondent's misconduct is more egregious than the misconduct in that case. Considering the respondent's actions with respect to Onyiriuka's payments alone, the board found that the respondent violated Mass. R. Prof. C. 1.15 (b) and (d), and Mass. R. Prof. C. 8.4(c), by failing to deposit the purported flat fee into an IOLTA account, failing to provide

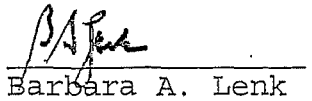
required notices, bills, and accountings before withdrawing any of the funds, failing to segregate the client's funds from his own, and converting the funds to his own use.

Onyiriuka's payment was not deposited in the respondent's IOLTA account because he treated it as a flat fee. The hearing officer and the board concluded, however, based in part on the language of the fee agreement, that it properly was a retainer and not a flat fee. Treated as a retainer, the payments should have been deposited in the respondent's IOLTA account. Had this been done, the respondent's deliberate misuse of Onyiriuka's funds, being held in his IOLTA account, with deprivation to her, and without restitution, would have resulted in a presumptive sanction of disbarment. See Matter of Sharif, 459 Mass. 558, 565 (2011); Matter of Schoepfer, 426 Mass. 183, 186 (1997) (presumptive sanction for intentional misuse of client funds in IOLTA account, with deprivation to client and without restitution, in violation of Mass. R. Prof. C. 1.15 (a) and (b), is disbarment). In such situations, an offending attorney faces a "heavy burden" in presenting evidence of mitigating circumstances sufficient to justify a lesser sanction. See Matter of Schoepfer, supra at 187. Absent "clear and convincing reasons" for departing from the presumptive sanction, a reviewing court will not do so. See Matter of Sharif, supra at 566-567; Matter of Schoepfer, supra. Moreover, a history of prior

disciplinary violations, or other violations of disciplinary rules in the same proceeding, may be considered as aggravating circumstances that could justify imposing a greater sanction. See Matter of Schoepfer, supra at 188. Here, there were no factors in mitigation, and the respondent has not made restitution. On this basis alone, a sanction of disbarment would be appropriate, see Matter of LiBassi, 449 Mass. 1014, 1016-1017 (2007), and, as discussed, the respondent's other misconduct harmed many other clients as well.

4. Conclusion. For the foregoing reasons, an order shall enter disbarring the respondent from the practice of law in the Commonwealth, and striking his name from the roll of attorneys.

By the Court



Barbara A. Lenk
Associate Justice

Entered: March 16, 2016