COMMONWEALTH OF MASSACHUSETTS
BOARD OF BAR OVERSEERS
OF THE SUPREME JUDICIAL COURT

BAR COUNSEL, **Petitioner** **vs.** **DANIEL G. RUGGIERO, ESQ.,** **Respondent**	**B.B.O. File No. C4-18-253773**

HEARING REPORT

On March 4, 2021, bar counsel filed a petition for discipline against the respondent, Daniel G. Ruggiero, Esquire. In essence, the petition charged the respondent with participating in a scheme with nonlawyers to charge and collect illegal and excessive fees from fifteen clients - vulnerable homeowners in Massachusetts and Rhode Island, desperate to save their homes. It also charged him with failing to supervise the nonlawyers with whom he worked, using a misleading law firm name, and sharing fees with nonlawyers. Count 1 of the petition challenges the respondent's activities generally, while Count 2 focuses on one particular Rhode Island client, Lisa McConaghy. The respondent is alleged to have violated disciplinary rules in Massachusetts and Rhode Island.

Represented by counsel, the respondent filed his answer on June 23, 2021, and an Amended Answer July 19, 2021.

The hearing was held remotely on November 30, 2021, December 7, 2021, December 9, 2021, December 10, 2021 and December 20, 2021. Seventeen exhibits were admitted. Two witnesses testified: the respondent, and Lisa McConaghy. On February 15, 2022, the parties

filed their proposed findings and conclusions.

Findings and Conclusions[1]

Facts Common to Counts 1 and 2

1. The respondent, Daniel G. Ruggiero, was admitted to the Massachusetts bar on December 1, 2006, and to the Rhode Island Bar on January 1, 2007. The respondent is also admitted to practice in a number of federal and state jurisdictions. Ans. ¶ 2; see Ex. 12 (0983).

2. After graduating law school, the respondent worked briefly as an associate at Gordon & Rees, in New York City, doing products liability defense and some employment discrimination defense. Tr. 3:18-19 (Respondent); Ex. 12 (0983). Next, he worked for a few months at Governo Law Firm, in Boston, handling asbestos-related products liability claims. Tr. 3:19 (Respondent); Ex. 12 (0983). He left Governo in September 2007, and until June 2011, worked for Consumer Legal Services, P.C. in Lakeville, Massachusetts, handling primarily lemon law, auto warranty, and consumer protection related claims. Tr. 3:24-25 (Respondent); Ex. 12 (0983).

[1] The transcript shall be referred to as "Tr. __: __"; the matters admitted in the Amended Answer shall be referred to as "Ans. ¶_"; and the hearing exhibits shall be referred to as "Ex. _." The matters admitted by the Amended Answer include those deemed admitted as a result of the respondent's failure to deny them in accordance with B.B.O. Rules, § 3.15(d). See Matter of Moran, 479 Mass. 1016, 1018, 34 Mass. Att'y Disc. R. 376, 379 (2018). We have considered all of the evidence, but we have not attempted to identify all evidence supporting our findings where the evidence is cumulative. We credit the testimony cited in support of our findings to the extent of the findings, and we do not credit contradictory testimony. In some instances, we have specifically indicated testimony that we do not credit.

3. The respondent was laid off from Consumer Legal Services and decided to start his own practice in June 2011, representing consumers against creditors, primarily credit card creditors. Tr. 3:26-27 (Respondent); Ex. 12 (0983). His resumé states that he has handled "a variety of consumer banking issues"; that he is experienced as "compliance counsel regarding FTC's Telemarketing Sales Rules"; and that he has "[s]uccessfully represented law firms before bar ethical committees and US Trustees." Ex. 12 (0983).

Context for the Respondent's Loan Modification Activities and Alleged Misconduct

4. Some of the charges against the respondent concern his violations of particular regulations intended to protect consumers from unfair and deceptive acts and practices. To put these charges and the corresponding behavior in context, we summarize in this section the relevant history and regulations.

5. In 2009, in light of high consumer debt, increased unemployment, and a stagnant housing market, the Federal Trade Commission (FTC) was directed to draft a Rule addressing unfair or deceptive acts or practices concerning mortgage loans. See generally Mortgage Assistance Relief Services, 75 Fed. Reg. 75092-01, 2010 WL 4859939 (December 1, 2010), at *75092, *75093. In explaining the need for its Rule, the FTC cited the activities of, and need to regulate, "for-profit companies who act as intermediaries between consumers and their lenders or servicers in obtaining mortgage assistance relief services – including loan modifications." Id. at *75094.

6. The FTC noted that mortgage assistance relief services, or MARS, "commonly initiate contact with prospective customers through Internet, radio, television, or direct mail advertising," where a consumer is urged to call a toll-free number or email a provider. Id. at

*75096. The MARS entities typically promised results they were unable to achieve. Id. at *75116.

7. A particular problem the FTC noted was the MARS business model of the collection of advance fees, i.e., charging fees for MARS before delivering results. Id. It cited evidence that "MARS providers do not achieve successful results for the vast majority of their customers," and that "[c]onsumers are especially unlikely to obtain the claimed results if the MARS provider has promised a loan modification." Id. at *75116. It concluded that "[c]onsumers are injured by a business model that forces them to bear the full risk of nonperformance and the resulting harm, particularly, as in this context, where the seller is in a better position to know and account for the risks." Id. at *75117.

8. The FTC paid particular attention to the role of attorneys offering MARS services. It noted, among other things, "the propensity of attorneys to act as fronts for MARS companies and the recent trend of national MARS providers to retain 'local counsel' to attempt to take advantage of attorney exemptions in state MARS laws." Id. at *75125.

9. The Rule that was ultimately adopted is now codified as Regulation O, 12 C.F.R. § 1015, et seq., and is now under the auspices of the Consumer Financial Protection Bureau (CFPB). The respondent's compliance with the Rule is one of our focuses, infra.

10. Title 12 C.F.R. § 1015.7(a) exempts from most of its proscriptions attorneys who meet specific criteria: they provide MARS as part of the practice of law; are licensed to practice in the state where the client or client's dwelling is located; and comply with applicable state laws and regulations.[2] See 75 Fed. Reg. 75092-01 at *75128. This limited exemption struck "a

[2] These laws and regulations include: "the competent and diligent provision of legal services, communication with clients, charging and receipt of fees, promotion of services, and not engaging in fraudulent or

balance between allowing consumers to continue to have access to bona fide legal assistance, while at the same time preventing or deterring unfair or deceptive practices by attorneys." Id. (footnote omitted).

11. The general exemption for particular, compliant attorneys does not, however, automatically exempt them from the advance fee ban. Exemption from that ban, at 12 C.F.R. § 1015.7(b), depends on the satisfaction of further, more specific requirements. Specifically, exemption from the advance fee ban is available only to those attorneys who "(1) [m]eet all of the conditions required for the general exemption [i.e., are exempt under subsection (a)]; (2) deposit any advance fees they receive into a client trust account; and (3) comply with all state laws and regulations and licensing regulations governing the use of such accounts." Id. at *75132.

The Respondent's Practice and Prior Involvement in Mortgage Loan Modification and Debt Relief Work

12. At all times relative to the petition for discipline, the respondent lived and worked mostly in Florida and had "by appointment only" offices in Massachusetts, New York and New Jersey. Ans. ¶ 10 ; Tr. 2:23-24 (Respondent). He owns homes in both Florida and Massachusetts, has a Massachusetts office, and spends a significant amount of time in Massachusetts. Tr. 2:22-23 (Respondent). His New York and New Jersey offices are "Regus" offices; this is a type of shared office, where the respondent has access to an office and can receive mail there. Tr. 2:24 (Respondent).

deceitful conduct. In addition, an attorney that meets these criteria is exempt from the advance fee ban if the attorney deposits any advance fees in a client trust account and complies with all state laws and licensing regulations relating to the use of those accounts." 75 Fed. Reg. 75092-01, at *75128.

13. The respondent "started off years ago" reviewing loan modification submissions. Tr. 2:26 (Respondent). He has admitted familiarity with the practices of mortgage loan modification and debt relief service providers, as well as the federal prohibitions on charging and collecting advance fees. Ans. ¶ 11.

14. As part of his practice, from about 2012 until 2013, the respondent reviewed mortgage loan modification submission packages as a so-called "Class B partner" of both The Mortgage Law Group, LLP ("Mortgage Law") and Consumer First Legal Group, LLC ("Consumer First"). Ans. ¶ 12.

15. During the course of his work for Mortgage Law and Consumer First, the respondent reviewed hundreds of mortgage loan modification intakes, and hundreds of mortgage loan modification submission packages. Tr. 2:38 (Respondent). He was paid $25.00 to review an intake, and $40.00 or $50.00 dollars to review a modification package. Tr. 2:40 (Respondent). It took him anywhere from three to fifteen or twenty minutes to review a package, depending on the client's situation and what the bank required. Tr. 2:42 (Respondent).

16. For both entities, when a new client would come on board, the respondent would review an initial intake screen to assess if the client would be a good candidate for a loan modification. Later on in the process, he would review loan modification packages before submission to a lender. Tr. 2:37-38 (Respondent).

17. In 2014, the CFPB brought an action against Mortgage Law, Consumer First and others pursuant to the Consumer Financial Protection Act and the MARS Rule/Regulation O challenging, inter alia, the defendants' mortgage loan modification services and unlawful collection of advance fees. See CFPB v. Mortgage Law Group, LLP, et al., C.A. No. 3:14-cv-00513 (W.D. WI) ("the Mortgage Law Group case"). In part, CFPB alleged in the Mortgage

Law Group case that "Defendants attracted financially distressed homeowners through various marketing methods, deceptively promising that they would assist homeowners in obtaining loan modifications and foreclosure relief in exchange for the payment of advance fees." Complaint, dated July 22, 2014, at ⁋ 13. Ans. ¶ 14.

18. The respondent was not named as a defendant, and was not served with a copy of the Complaint. Id. He was, however, deposed on July 8, 2015 by the lawyers representing CFPB. Ans. ¶ 16; Ex. 9 (0778). He explained in his statement under oath in this case that he had been deposed because he had worked for both Mortgage Law and Consumer First. Ex. 9 (0778).

19. Although before us the respondent denied knowledge about the advance fee issue in the Mortgage Law Group case, Tr. 2:81 (Respondent), we do not credit this denial. For one, he had stated otherwise in his statement under oath, explaining there that among the allegations against Mortgage Law was "regarding advance fee collection and work being done by non-attorneys." Tr. 2:82 (Respondent); Ex. 9 (0779).

20. Further, in a September 5, 2018 letter to bar counsel, the respondent wrote that he had provided testimony on behalf of the CFPB "on this exact issue in a case that resulted in a $39 Million Judgment against a law firm that the CFPB alleged violated this rule (among other violations)." Ex. 7 (0690). He did admit before us that he was familiar with "the practice of certain entities attempting to circumvent the advance fee ban." Tr. 2:84 (Respondent).
We find that the respondent has been aware at least since 2014 of the prohibition against collecting advance fees.

21. In March 2015, the respondent incorporated Pinnacle L. Group, Inc. ("Pinnacle") as a Florida company that he owns and operates. Ans. ¶ 15. He is the president and sole

shareholder. Id. The respondent is not, and has never been, licensed to practice law in Florida. Id.; see Ex. 15, ¶ 1 (1182).[3]

22. In 2020, the CFPB brought another action, this one against the respondent and others including GST Factoring, for violating the Telemarketing and Consumer Fraud and Abuse Prevention Act and the Telemarketing Sales Rule ("TSR").[4] Ans. ¶ 18; see Ex. 16. The CFPB alleged in part that the respondent "knew that [co-defendant] GST was receiving fees before consumers' debts were settled because he was receiving payments from GST for consumers whose debts had not been settled." Complaint, dated July 13, 2020, at ⁋ 28. Ans. ¶ 19. CFPB further alleged that the respondent "has set up a similar debt-relief company where lead generators used telemarketing to recruit consumers." Id. at ⁋ 27; Ans. ¶ 19.

23. The respondent entered a Stipulated Final Judgment and Order dated August 17, 2020. Ex. 16 (1201). He admitted that in the course of providing telemarketed debt relief services "from February, 2018 to the Effective Date [on or around August 17, 2020], [he] provided substantial assistance or support to a seller or telemarketer when [he] knew or consciously avoided knowing that the seller or telemarketer had requested or received" advance fees. Ex. 16, ¶ 5 (1186-1187).[5,6]

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[3] Pinnacle L Group is also called Pinnacle Law Group. See Ex. 3 (0226). The respondent gave conflicting testimony as to whether it was or was not a law firm. See generally Ex. 3 (0245) (Pinnacle identified as law firm); Ex. 9 (0772) (agreeing that Pinnacle is not a law firm); Tr. 2:153-154 (Respondent) (Pinnacle "can be considered a law firm that I use as a holding company"); Tr. 3:186-187 (Respondent) (evasive testimony as to whether he told Florida bar Pinnacle was/was not classified as a law firm in Florida).

[4] We recognize that neither the Telemarketing Act or its Rule is at issue in this case.

[5] This underscores our conclusion, in ¶ 20 above, that for years, the respondent has been well-aware of the prohibition against charging and collecting advance fees in the consumer debt-relief context.

[6] In ¶ 2 of the Stipulated Final Judgment and Order, the respondent "neither admit[ted] nor denie[d] the allegations in the Complaint, except as specifically stated herein." Ex. 16 (1186). However, this failure to admit is not wholly neutral; ¶ 35 provides that the facts alleged in the Complaint "will be taken as true and be given collateral estoppel effect, without further proof, in any proceeding based on the entry of the Order, or in any subsequent civil litigation by or on behalf of the Bureau . . . ." Ex. 16 (1195).

24. The respondent was permanently restrained and enjoined from particular activities in connection with telemarketing. Ex. 16, ¶ 9 (1189). A judgment for $125,000 was entered against him. Ex. 16, ¶ 18 (1192). Full payment of this was suspended upon satisfaction of certain obligations, but the respondent was obligated to promptly pay $30,000 in partial satisfaction of the judgment. Ex. 16, ¶¶ 18, 19 (1192). He also had to pay a civil money penalty of $1.00. Ex. 16, ¶ 28 (1194).

The Respondent's Association with NVA Financial Services and ND Processing

25. We turn to the specific facts at issue in this case. During the relevant time period, 2017-2018, the respondent had 2,000 to 2,500 cases. Tr. 4:8 (Respondent). Indeed, in his July 30, 2018 letter to bar counsel, in describing his billing rates and work, he admitted to having "thousands of clients at one time." Ex. 6 (0530)). He testified, and we agree, that his business model during the 2017 to 2018 time frame was to have a large volume of cases. Tr. 4:6 (Respondent).

26. The respondent became involved with NVA Financial Services (NVA) and ND Processing (ND) in 2017. Tr. 2:88 (Respondent). Neither entity is a law firm. Id. Both were owned and operated by non-lawyers. Tr. 2:89 (Respondent).

27. The respondent began what would be a year-long relationship with NVA after receiving a call from Lee Friedman, an attorney he knew in New York. Tr. 3:52 (Respondent). Friedman told the respondent that he had been contacted by NVA, "that they had potential clients that needed foreclosure defense or loan modification assistance in Mass. and Rhode Island," and that he thought the respondent "would be a good attorney" for them. Tr. 3:52 (Respondent).

28. NVA did customer service related work, marketing and intakes. Tr. 3:53 (Respondent). The respondent was attracted by this opportunity because these activities,

especially marketing, would have been too difficult and expensive for him to do on his own. Tr. 3:53 (Respondent).

29. NVA worked with thirty-seven "affiliate" lawyers or law firms. See Ex. 4, Affidavit of Brady Mullis, ¶ 7 (0333, 0419). NVA provided customer service and support, but it was the affiliate attorney or law firm that signed the retainer agreement. Tr. 3:194 (Respondent). This is reflective of a common practice in the mortgage loan modification industry, where an entity like NVA would affiliate itself with a lawyer, to take advantage of the attorney exception to the advance fee ban. Tr. 3:200 (Respondent). Cf. Mortgage Assistance Relief Services, supra, 75 Fed. Reg. 75092-01 at *75125 (FTC notes "the propensity of attorneys to act as fronts for MARS companies and the recent trend of national MARS providers to retain 'local counsel' to attempt to take advantage of attorney exemptions in state MARS laws.").

30. During 2017 and 2018, NVA assigned to the respondent fifteen loan modification clients who lived in either Massachusetts or Rhode Island. Tr. 2:90 (Respondent). The respondent testified that all were in financial distress, and all were vulnerable. Id.

31. We find that the respondent handled all his fifteen mortgage loan modification clients in the same way. NVA would be the first point of contact, bringing in the client and obtaining certain financial information. See Tr. 3:82 (Respondent); Ans. ¶ 25.

32. NVA obtained basic information about the client during an initial telephone call, but did not then receive any documents. Ans. ¶ 25. Afterwards, NVA would send the client the respondent's Fee Agreement, and would notify him that he had been assigned a new client. Ans. ¶ 25; Ex. 2 (0128).

33. NVA drafted the Fee Agreement the respondent used. Tr. 2:101; Ex. 9 (0833). The respondent testified that he edited and reviewed it, and made the changes to it he thought

were appropriate. Tr. 2:101, 105 (Respondent). He used the same agreement for all fifteen clients, with no modifications from client to client. Tr. 4:79-80 (Respondent).

34. The Fee Agreement required all the clients to enter into an "Account Servicing Agreement" with Reliant Account Management ("RAM") that authorized RAM to automatically debit the fee payments from the clients' personal checking accounts, and to charge each client $7.00 per month. See Ans. ¶ 41; Ex. 10 (0947-0949); Tr. 2:160-161 (Respondent).

35. Upon executing the agreement, clients were required to make an initial fee payment of $1250 "for negotiating a loss mitigation solution," and were required to make a recurring monthly payment of $900 "for continued loss mitigation services" while their file remained open. Ex. 10 (0942); see Ans. ¶ 39. The respondent admitted that the $900, charged to all the mortgage loan modification clients, was charged regardless of the amount of work actually done on a case. Tr. 2:187-188 (Respondent).

36. The respondent paid NVA for its services. In 2017, the respondent agreed to pay NVA ninety percent of the gross amounts collected from all his mortgage loan modification clients. Tr. 2:159-160 (Respondent); Ex. 9 (0801-0802). This fee sharing agreement was never written down; the respondent never signed a contract with NVA. Ex. 6 (0593); Ex. 9 (0802-0803); Ans. ¶ 24.

37. In the spring of 2018, the respondent advised NVA that he wanted the split to be eighty/twenty instead of the ninety/ten they had been operating under. Ex. 9 (0804). This, too, was communicated orally; the respondent "just made a phone call." Id.

38. The respondent has admitted, and we find, that this financial arrangement with NVA constitutes fee sharing in violation of Mass. and R.I. R. Prof. C. 5.4. Tr. 2:160 (Respondent); Respondent's Post- Hearing Brief (Respondent's PHB), ¶ 174. We infer, from his

failure to put anything in writing, that the respondent knew from the beginning of the relationship with NVA that this arrangement constituted illegal fee sharing.

39. A modification case could not proceed until after the client's retainer had been paid in full. Tr. 2:92-93; 168 (Respondent). Once the retainer had been paid, NVA would internally code the file from "Retainer Payment Pending" to "Ready for Processing." See Ex. 2 (106).

40. At that point, the case would proceed to another entity, ND Processing. See Tr. 2:93-94 (Respondent). ND Processing, not NVA, was responsible for providing and organizing the loan-modification package, and for handling any discussions with the bank. Tr. 3:54-55 (Respondent).

41. Pursuant to a separate agreement between ND and the respondent, ND would collect financial documentation from the clients, and ND would submit that documentation to the applicable lenders as applications for mortgage loan modifications. Ans. ¶ 26.

42. The respondent's contract with ND, which is unsigned, provides that ND will "process" the respondent's loan mitigation files, including "[c]alling, emailing and correspondence with the client"; "[c]onducting an internal welcome call"; "[c]ollecting all documentation needed to apply for loss mitigation assistance"; [s]tructuring, compiling, and submitting loss mitigation package"; "[r]eviewing any modification offer with client"; [a]ssessing any liens that may be impediments to a final modification; and "[w]orking with client to obtain subordination agreements or payoffs of for [sic] liens that may preclude final modification." Ex. 5 (0524-0525, 0593).

43. The documents that ND submitted to the lenders were provided by the clients and faxed by ND to the lenders. Tr. 3:241-242 (Respondent). It was up to ND, supervised by the respondent, to make sure nothing was missing. Tr. 2:94 (Respondent).

44. On the respondent's behalf, NVA paid ND $75.00 upon submission of a completed loan modification application, and an additional $75.00 for each month in which the application remained open for processing. Ans. ¶ 29. The respondent paid ND to do this work because, he told us, it is very time-consuming to gather information and documentation – a lot for a lawyer to do on his own – and because ND "was really, really good at that particular work. . . . [T]hey did a really good job at getting a lot of positive results for clients." Tr. 3:55-56 (Respondent); Ex. 6 (0593).

45. The respondent was responsible for supervising the NVA and ND employees who worked on his client files. Ans. ¶ 52; Tr. 2:90, 139 (Respondent). Contrary to what the respondent told bar counsel in a September 29, 2018 letter, see Ex. 6 (0533, 0535), no lawyer from Friedman Law supervised the work that ND was doing for the respondent's clients. Tr. 2:133 (Respondent).

The Respondent's Fee Agreement

46. The respondent's Fee Agreement, in evidence as Ex. 10 (0934-0947) is a representative example of the fee agreements that were used with all clients assigned to him by NVA. See Tr. 2:98-99, 4:79-80 (Respondent).

47. The Fee Agreement, and its related documents, covers sixteen pages. We find that it is deeply misleading and oppressive in many particulars, beginning with the first page.

48. The Fee Agreement made numerous representations to the client that the respondent planned to negotiate with the lender, stressing to the client the need to provide

accurate information so that the respondent could "build[] as strong a case as possible with the maximum amount of leverage with which to negotiate." Ex. 10 (0934). See also Ex. 10 (0939) (if lenders do not accept initial "proposed terms," Law Firm "will negotiate to try to finalize either the initial proposal or a revised proposal . . . .").

49. The promise of negotiation was illusory and false; the respondent knew that he would not negotiate with lenders in mortgage loan modifications, and did not do so. See Ans. ¶ 36; Tr. 2:120-121; Tr. 3:78-79 (Respondent). NVA had supplied the "negotiation" language but, despite his alleged careful review of the Fee Agreement, the respondent did not remove it. Tr. 2:118 (Respondent).

50. We find the Fee Agreement's language about fees to be especially onerous, oppressive and one-sided and, as explained further below, inconsistent with the Rules of Professional Conduct. An advance fee can never be nonrefundable. Yet, the Fee Agreement warns and threatens repeatedly that fees paid can be waived or forfeited. The cover page proclaims: "I/We realize I/we waive the right to any return fee from Daniel Ruggiero, Esq. & Associates should any . . . information prove inaccurate or incomplete." Ex.10 (0934).

51. The Fee Agreement provides further: "This agreement will take effect on your signing, however its effective date will be retroactive to the date I first performed services. All fees are considered earned as of the date said money is remitted, tendered or otherwise paid." Ex. 10 (0940).

52. A further clause repeats the threat that a failure to cooperate, or the provision of false or inaccurate information, gives the firm "the right to retain any amounts already paid. . . .

If you cancel our services during the negotiation process, we have the right to retain any amount already paid towards services." Ex. 10 (0942).[7]

53. Buried within the "Client Authorizations" is the following:

> (e) The Client(s) expressly agree and authorize that in light of the fact that **fees are deemed to be earned upon receipt** as set forth in this agreement that the **monies remitted to the Attorney can be deposited directly into the Attorneys operating account**. The Client(s) understand and acknowledge that **it has been explained that the traditional or standard escrow agreement usually entails said retainer monies, legal fees, and cost monies to be deposited into the Attorney Trust Account and by granting this permission they may run the risk of paying for services which do not actually get rendered but having been so advised, expressly authorize and grant permission for these monies to retained [sic] by and deposited into the Attorney's operating or business account**. Notwithstanding this express grant and authorization, the Client is at all times allowed to request, and will be provided on a timely basis, a full and complete accounting of all monies remitted.

Ex. 10 (0940) (emphasis added).

54. This section is not only a violation of the Rules, as detailed below, but is, at least in part, patently false. We find below that no one spoke to McConaghy about escrow agreements, or anything else before she signed, and we infer that no one spoke to any of the other fourteen clients about any of this, either. See Tr. 1:48 (McConaghy); Tr. 4:74-75 (Respondent).

55. As stated in the Fee Agreement, the fees that the respondent charged and collected from his loan modification clients were not deposited into an IOLTA account or a client trust account. See Ans. ¶ 42; Tr. 2:164, 4:77 (Respondent).

[7] A third of the fifteen clients never provided the paperwork necessary for a loan modification. Tr. 3:91-92 (Respondent). The respondent has no memory of giving any of these people a refund, and conceded that he likely did not do so. Tr. 3:209-210 (Respondent). In light of this concession, and the Fee Agreement's representation that the respondent was entitled to keep any fees received where the clients failed to cooperate or provided incomplete information, we find that, as to this subset of clients, no refunds were issued.

56. The Fee Agreement does not include the respondent's office address, and does not include his phone number. Tr. 2:103, 108-109 (Respondent); Ex. 10 (0934). The only phone number provided is NVA's. Tr. 2:109 (Respondent).

57. The Fee Agreement describes the respondent's firm as Daniel Ruggiero, Esq. and Associates, and the respondent as the "Managing Attorney." Ex. 10 (0934). This is misleading. The respondent had no associates, and was the only attorney in the firm. Tr. 2:110, 112 (Respondent); Ans. ¶ 38.

58. This misleading description enabled further misrepresentations, among them that the firm "reserve[d] the right to assign and delegate all aspects of such representation among their Attorneys as they deem appropriate." Ex. 10 (0942). However, the respondent knew very well that there *were* no other associates.

59. Related to this misrepresentation is an inconsistent clause stating that while all legal services will be provided by the respondent, non-legal services "may be provided by outside servicing Agents, all of whom shall be engaged, compensated and supervised by Daniel Ruggiero, Esq. and Associates . . . ." Ex. 10 (0944).

60. There are at least two problems with this clause. First, it begs the inference that most of the services for which the client was paying would be provided by the respondent. This was clearly untrue. The respondent's business model, as we conclude below, shows he did very little work, delegating most of the heavy lifting to NVA and ND.

61. Next, it is factually untrue; the respondent did not engage, compensate or supervise the so-called "outside servicing Agents." For example, he specifically admitted that ND's Jackie Pulcano was employed and paid by ND; that he provided her with no guidelines or instructions; and that any mortgage loan modification guidelines were set by the banks. Ex. 9

(0857, 0858-0859); see Tr. 2:170 (Respondent). He delegated to Pulcano the supervision of Janet Delgado, another ND employee. Ex. 9 (0883).

62. While the respondent claimed to have spoken regularly on the phone to NVA attorney liaison Jay Krueger, he was unable to identify any actual supervision he had provided to Krueger, and he admitted giving him no guidance or instructions, aside from telling Krueger the respondent wanted to handle any "issues" personally. Ex. 9 (0866-0867, 0868, 0869).

Findings of Fact as to Lisa McConaghy

63. At all times relevant to the petition for discipline, Lisa McConaghy lived in Rhode Island. Ans. ¶ 62. McConaghy is currently a third grade teacher, a position she has held for twenty-two years. Tr. 1:35 (McConaghy). To supplement her income, she has held a series of part-time jobs, at Walgreen's and Home Depot. Tr. 1:35-36 (McConaghy).

64. On or about October 30, 2017, at a time when she was in default on her home mortgage loan payments, McConaghy telephoned a toll-free number of a company advertising its loan modification services on television. See Ex. 1 (0001); Ex. 2 (0107). McConaghy was connected with an employee of NVA. Ex. 2 (0107); Ex. 6 (0531).

65. During the October 30, 2017 telephone call, McConaghy informed NVA that she did not want to pay money attempting to obtain another loan modification if it was unlikely that she would succeed. See Tr. 1:38 (McConaghy); Ex. 1 (0001). She told them she had already had three modifications. Ex. 1 (0001). She explained that she had to hold on to all the money she could, and said she did not want to go forward if her application had no hope of success. Tr. 1:47 (McConaghy). NVA reassured her that they could "definitely help." Id.

66. On October 30, 2017, NVA assigned McConaghy's case to the respondent. Jay Krueger, a so-called "Attorney Liaison" at NVA who is not himself a lawyer, emailed the

respondent an "Attorney New Client Notification." Ans. ¶ 66; Ex. 2 (0128); Tr. 3:83 (Respondent). The email identified McConaghy by name, listed her contact information, and identified her lender as Seterus/LBPS. Ex. 2 (0128).

67. On October 30, 2017, NVA noted in its internal records concerning McConaghy the following: "Primary file status changed from Lead to Retainer Payment Pending." Ans. ¶ 67.

68. The respondent and McConaghy entered into a fee agreement in October 2017. Ex. 10 (0934). By its terms, as discussed above, McConaghy was obligated to pay an initial fee of $1,250 "for negotiating a loss mitigation solution, including a loan modification offer[,]" as well as a recurring monthly fee of $900 "for continued loss mitigation services." Ex. 10 (0942).

69. In accordance with Respondent's Fee Agreement, RAM would withdraw the fees from McConaghy's checking account. See Ex. 10 (0947-0949).

70. McConaghy could not afford to make the full initial fee payment of $1,250 at the time she signed the respondent's Fee Agreement in October 2017. Tr. 1:49-50 (McConaghy). NVA authorized McConaghy to split the initial fee into two payments of $625 to be paid on November 14 and November 28, 2017. See Ans. ¶ 70.

71. Consistent with its practice, NVA informed McConaghy that no work would be done on her case until she paid the entire initial fee payment. See Tr. 1:50 (McConaghy).

72. On November 13, 2017, RAM withdrew $625 from McConaghy's checking account. Ans. ¶ 72. In accordance with NVA's instructions (and after deducting its $7.00 monthly fee), RAM subsequently disbursed 90% of McConaghy's fee payment to NVA and 10% to the respondent through Pinnacle. Id; see Ex. 3 (0328). The respondent's share was $61.80. Id.; Ex. 9 (820).

73. On November 16, 2017, McConaghy contacted NVA and complained, via voice mail message, that her lender kept contacting her. Tanya Rivera ("Rivera") of NVA made a note in the file, reflecting that she had left McConaghy a return message, stating in essence that there was nothing they could do, and that work on her case would begin only after the initial fee payment was made in full. Ex. 2 (106).

74. The respondent has no specific memory of when he saw the November 16, 2017 note, where NVA informed McConaghy that no work would be done on her case until her retainer was paid in full. Tr. 4:34-35. Although the respondent claimed this was not an accurate statement, and that he had done work before the retainer was paid, Tr. 3:111-113 (Respondent), there is nothing in McConaghy's file evidencing that he took any corrective action when he did see it, and we find that he did nothing in response. Tr. 4:36 (Respondent).

75. On November 27, 2017, RAM withdrew $625 from McConaghy's checking account. In accordance with NVA's instructions, RAM subsequently disbursed 90% of McConaghy's fee payment to NVA and 10% to the respondent through Pinnacle. See Ans. ¶ 74. The respondent's share was $62.50. Ex. 3 (0226).

76. On December 4, 2017, McConaghy contacted NVA complaining again that her lender was calling her repeatedly and that she was anxious to move forward now that she had fully paid the initial fee of $1,250. Ex. 2 (0106).

77. Later in the day on December 4, 2017, NVA noted in its internal records concerning McConaghy the following: "Primary file status changed from Retainer Payment Pending to Ready for Processing." Ex. 2 (0106).

McConaghy's Loan Application

78. On December 5, 2017, Jackie Pulcano of ND noted in NVA's internal records concerning McConaghy the following: "Primary file status changed from Ready for Processing to Opening Dept." Ex. 2 (0106). The file was assigned to ND's Jennifer Bonilla, who began working on the case, starting with a welcome call to McConaghy. Ex. 2 (0104-0106).

79. ND's notes reflect that on several occasions, it asked McConaghy for documents, and she sent them. E.g., Ex. 2 (0099-0106).

80. On December 27, 2017, the day before her monthly fee payment of $900 was due to be withdrawn, McConaghy contacted NVA and requested that the fee payment be moved to January. Ex. 2 (0100). She was advised that she had already requested to change it. Id. The notes do not indicate that the respondent was ever made aware of this request. Id.

81. On December 27, 2017, RAM withdrew $900 from McConaghy's checking account. In accordance with NVA's instructions (and after deducting its $7.00 monthly fee), RAM subsequently disbursed 90% of McConaghy's fee payment to NVA and 10% ($89.30) to the respondent through Pinnacle. Ex. 3 (0226).

82. At 10:32 a.m. on December 28, 2017, Pulcano of ND sent an email to Krueger and Rivera of NVA and the respondent, stating as follows:

> Just a head's up that I conducted the bank call and the account is coded as 'continuous default only option is reinstatement or liquidation[.]'
>
> The Investor is FNMA and the borrower has received perm mods in 8/2010, 7/2013, 10/2015 and 1/2017 and defaulted on all four. **She was miraculously approved** for another trial in October of 2017 and also defaulted.
> I requested copies of all mods by email or fax but was denied due to too many pages. They are being mailed to us.

> The file is ready to move forward. Please let me know if that's what you would like me to do. Should we be denied, she can afford a 13. Arrears are estimated at 11,000 without costs and fees.

Ex. 2 (0110) (emphasis added).

83. Pulcano's notes of the bank call are consistent with the email she sent. Ex. 2 (0027). Her notes include additional information: foreclosure proceedings had begun; a foreclosure attorney was listed; and there was no sale date yet. Id.

84. Neither the respondent nor anyone else told McConaghy any of the information Pulcano had learned and reported. Tr. 1:62 (McConaghy).

85. Within ten minutes of Pulcano's email, at 10:41 a.m. on December 28, 2017, Krueger responded with an email directing her to submit the mortgage loan modification package "quickly and then address matters after the denial is generated." Ex. 2 (0110). The respondent remained silent; he did not respond to either Pulcano's or Krueger's emails. Ans. ¶ 82.

86. Neither the respondent nor anyone else discussed with or even told McConaghy that despite the status of her account, a decision had been made nonetheless to submit her loan modification, with the expectation that it would be denied. Tr. 1:62 (McConaghy).

87. We find that the respondent failed to advise McConaghy of the material information contained in Pulcano's and Krueger's emails. Indeed, no one informed McConaghy that in December 2017, Pulcano of ND found her approval for a fourth modification "miraculous," or that the respondent, ND and NVA all knew that her loan application was going to be denied. See Tr. 2:281-282 (McConaghy).

88. We note as well that the package of documents submitted on behalf of McConaghy consisted of documents collected by McConaghy to which ND added a cover page.

Without adding any other documents, ND then faxed the package to Seterus. Tr. 3:240-242 (Respondent).

89. The respondent was supposed to review McConaghy's package to ensure that everything was filled out accurately. He had no memory of doing so, and we find that he did not. See Tr. 3:238, 239 (Respondent). Additionally, nothing in the files notes mentioned review by the respondent. Further, McConaghy made an error in the form she filled out, writing incorrectly that she had monthly wages of "$7400." Ex. 1 (0029); Tr. 2:245-246 (McConaghy). The tax return she submitted (Ex. 1 (0044, ln. 38)) and her pay stub (Ex. 1 (0045)) do not support the $7400 figure. Had the respondent reviewed her package, he would likely have caught this discrepancy.[8]

90. Miller left a message for McConaghy on January 15, 2018, that she had spoken with her lender, Seterus, and that the file was under review. Pulcano noted on January 15, 2018 that the file's status had changed from "Ready for Submission" to "In Bank." Ex. 2 (0097).

Denial of McConaghy's Application

91. Miller called Seterus January 22, 2018, and learned that the request for modification had been denied. Ex. 2 (009). She wrote in the notes that the request had been denied "for all available programs. Approx 12k in arrears and sale date set for 3/9/18." Ex. 2 (0096).

92. On the morning of January 22, 2018, Miller sent an email to Pulcano and Krueger, copying NVA's Rivera, stating: "**As expected**, this was denied due to previous MODS.

[8] The respondent tried to underplay his failure to review and correct this figure, stating: "[I]t doesn't matter because her pay stubs are included, so they're not going to look at what she wrote anyway. They're going to go by based on what her pay stubs are. So that 7400 is not correct, but it doesn't matter with the submission." Tr. 3:239 (Respondent). We do not agree that a failure to review is justified, even if the respondent is correct that the error would inevitably have been detected by the lender.

Approx 12k in arrears and sale date set for 3/9/18." Ex. 2 (108-109) (emphasis added). She did not include the respondent in her correspondence.

93. Krueger called McConaghy on January 22, 2018. He told her that the respondent would "reach out to her to discuss retention options." Ex. 2 (0096). He emailed the respondent later that day, explaining that "[p]rocessing has exhausted efforts" and asking the respondent to "[p]lease contact the client and discuss retention options and exit strategies." Ex. 2 (0108).

94. We find that the respondent called McConaghy only after being instructed to do so by Krueger. He responded to Krueger that she was "very nice but in really bad shape," and that she needed to file for bankruptcy, which he could help her do for about $400. Ex. 2 (0111). He wondered if it would "make sense for us to credit her back and cover those costs so she could get it filed? She kinda indicated she wish [sic] she never paid us and used it to pay back the mortgage." Id.

95. Krueger promptly responded, later on January 22, 2018, that billing had been suspended and that "[t]here is no refund to be issued," claiming that McConaghy earns "considerably more than the $4700 per month that was first indicated at intake" (see Ex. 10 (936)); that her income "appears to be in excess of $7000 per month," and that her recurring payment was $900 and had been due now, "so paying $400 should be easy for her." Ex. 2 (0111).

96. The respondent replied: "ok ty for clarifying ill talk with her [sic]." Id. Following Krueger's "clarification," the respondent did not offer McConaghy a refund of $400 to cover bankruptcy costs or, indeed, any portion of the monies she had paid.

97. McConaghy was charged another $900 on January 26, 2018, $89.30 of which was disbursed to the respondent through Pinnacle. This was after billing should have been suspended.

See Ex. 2 (0111). This unauthorized withdrawal caused McConaghy's checking account to "bounce" and "made hell out of everything"; she called on January 29, 2018, and requested a refund. Tr. 1:73-74, 75 (McConaghy); Ex. 1 (0004); Ex. 2 (0095) (Delgado entry). No refund was forthcoming until February 5, 2018. Ex. 3 (0226). The second $900 payment was refunded on February 7, 2018. Id.

98. McConaghy called NVA again February 8, 2018, and asked to speak to Krueger. Ex. 2 (0095). They spoke later that day, and she requested a full refund. Kruger refused, saying she had already been given a partial refund, of the two $900 payments. Krueger sent a summary of the call to NVA's Steve Nahas and Tanya Rivera, but did not copy the respondent. Id.

99. The respondent eventually refunded $1250 to McConaghy. This was on or about June 20, 2018, sometime after she filed the complaint against him with bar counsel. Ex. 2 (0093); Ex. 6 (0527). This refund was for the balance of all the fees she had paid. Ex. 6 (0527, 536).

McConaghy's Complaint to Bar Counsel and Hearing Testimony

100. While we found McConaghy generally credible, there were some inconsistencies in her recitation of events, and some of her testimony was confusing and contradictory.

101. We credit that during the October 30, 2017 telephone call with NVA, McConaghy said that she had previously entered into three loan modifications with her lender. Ex. 1 (0001); see Ex. 2 (0046-0088, 0098 (1/8/18 Pulcano entry)). We also credit that she made clear that as of January 2017, her financial situation was "really bad," and she "had to hang on to whatever money [she] had." Tr. 1:42 (McConaghy).

102. We find, however, that McConaghy had had at least four modifications before October 2017. She testified to this effect at the hearing, Tr. 1:41-42, 2:233 (McConaghy), and the documentation would appear to bear this out. Ex. 2 (0046-0088).

103. McConaghy testified that she was three months behind when she engaged the respondent in late October 2017. Tr. 1:43, 95; Tr. 2:235-236, 248 (McConaghy). Her monthly payment appears to have been about $1168. Ex. 2 (0027). The "three months behind" testimony is impossible to reconcile with her intake form, which says she was six months behind (Ex. 10 (0936)), or with Seterus's position that, as of January 2018, she was approximately $12,000 in arrears. Ex. 2 (0027, 0096 (Miller 1/22/18 10:42 A.M. entry)). With a payment of $1168 per month, this would mean she was at least ten months behind, and that she had not paid her mortgage since the spring of 2017.

104. McConaghy wrote that her hardship began in August 2015 and resolved as of February 2017. Tr. 2:247 (McConaghy); Ex. 2 (0030). This was not consistent with her testimony before us, where she identified an accident in 2009, stated that she then lost child support she had been receiving, and then testified that after this "it just snowballed," and it was "a trickle-down effect" from that time on. Tr. 1:40 (McConaghy).

105. Finally, McConaghy agreed that she had, in the past, brought lawsuits against companies for their conduct in collecting debt. Tr. 2:267 (McConaghy). She identified one such action, brought in New York against Administrative Recovery. Tr. 2:269 (McConaghy). This suit identified her as a New York resident. Tr. 2:270 (McConaghy). While she protested that she would never have said that, she admitted it was inaccurate. Id.

106. We attribute McConaghy's errors and inconsistencies to mistakes, not deceit. She had gotten earlier modifications by herself, without using an attorney. Tr. 2:275 (McConaghy). She was, necessarily, familiar with the process and must have known that she would need to supply documentation to support all of her claims. It would have availed her nothing to

misrepresent to her lender what she earned, how many modifications she had had, or how much she owed.

107. Nor would it have been productive to misrepresent these things to the respondent or his agents. We credit that she wanted a modification, and that she did not want to spend money unnecessarily. This created an incentive for her to be truthful in her statements, as well as in her application materials.

108. Despite our findings that in some particulars McConaghy was mistaken or confused, we credit other aspects of her testimony. Cf. Matter of Cammarano, 29 Mass. Att'y Disc. R. 82, 103 (2013) (factfinder can believe some portions of witness's testimony while disbelieving others). We credit that the respondent did not call her until January 22, 2018. Although he spoke repeatedly and vaguely about his "practice" of calling clients when they first signed up with him, we do not credit this and note that there does not seem to be any real dispute that he and McConaghy first spoke January 22, 2018. See Tr. 2:181, Tr. 4:73 (Respondent). Accordingly, we find that he did not make a welcome call to her, did not explain any aspect of the fee agreement, and did not explain to her the decision to move forward, and to continue to bill her on an account described by the lender as "continuous default," with very limited options. We find that the respondent made no effort to communicate with her in October, November or December 2017.

109. We credit that McConaghy made clear in her calls and correspondence with NVA that she "was desperate to do anything just to save my home." Tr. 1:38 (McConaghy). We credit that she did not know, when she first contacted NVA, that her home was already in foreclosure and had been since August, 2017. See Ex. 2 (0027). The respondent apparently made no effort to learn this, and did not contact her once he did; we credit McConaghy's testimony that she

learned about the foreclosure in January 2018, by calling her lender herself. Ex. 1 (0003); Tr. 1:38-39 (McConaghy).

110. McConaghy appears to have first made contact with bar counsel's office on or about April 23, 2018. Ex. 1 (0006). She filed her complaint with bar counsel in early May 2018. Ex. 1 (0001).

111. In a June 12, 2018 email to Krueger, the respondent described himself as "beyond furious" about McConaghy's complaint to bar counsel. Ex. 8 (0727). Krueger's response, after the exchange of a few other emails, is instructive:

> "Dan, you were emailed on this file and told to discuss options with the client after the denial was generated. **You were kept in the loop earlier on and the file notes reflect this. Please don't cast blame, especially when you do not know the details."**

Ex. 8 (0731 (emphasis added).

The Respondent's Credibility

112. The respondent sent many letters to bar counsel in the summer and fall of 2018, and gave a statement under oath on July 17, 2020. Ex. 9. Some of the statements in his letters are inaccurate. He wrote on June 29, 2018 that he was "surprised" McConaghy had complained about a lack of communication with him because "I contact every client and each client is provided my personal cell number." Ex. 6 (0527). As we have stated, we do not credit that he contacted McConaghy before January 22, 2018, which was significantly after she had retained him, and we find that he did not include his cell phone number in his Fee Agreement or anywhere else.

113. It was not accurate, as the respondent wrote on September 29, 2018, that ND's intake "was supervised by a lawyer from Friedman Law," or to say that "there was an attorney

specializing in loan modification working with the processing company in addition to me." Ex. 6 (0535).

114. In a January 8, 2020 email to bar counsel, the respondent wrote that McConaghy had "overstated her income"; that his office was "unaware of all the additional modification attempts by her previously"; and that she "lied in her complaint to the BBO where she said "she never spoke to me." Ex. 7 (0714).

115. All of these statements are reckless or false. We have already discussed McConaghy's income and the respondent's observation that her mistake was essentially harmless, since it was the supporting documents the lender would review. See supra, ¶ 89 and n.8.

116. McConaghy mentioned at least three of the modifications in her first phone call, and authorized the respondent to get information about them from the lender, which he did. Ex. 1 (0001); Ex. 2 (0109) (1/9/18 email copied to the respondent and noting: "Prior mods have been received in today's mail and are uploaded"); Ex. 2 (0098) (ND note 1/9/18 stating "Previous Modifications document uploaded by Jackie Pulcano"). Had the respondent reviewed the notes or McConaghy's package, he would have seen this information.

117. The loan documents themselves, which would have been part of McConaghy's package and which the respondent obviously failed to review, reflect modification documents dated December 7, 2016 (Ex. 2 (0058-0066)); July 1, 2013 (Ex. 2 (0067-0079)); June 28, 2010 (Ex. 2 (0080-0083)) and September 10, 2015 (Ex. 2 (0084-0088)).

118. The prior modifications were significant. The respondent admitted that "if someone had received a modification . . . plan very recently and they failed to pay on time during a trial, it could have an influence on whether they were approved or not for a

modification." Tr. 2:126 (Respondent). Pressed by bar counsel about the particular "influence" this might have, the respondent admitted that it would decrease the chances for approval. Id.

119. By the respondent's own logic, McConaghy's most recent modification dated December 7, 2016, with payments due commencing January 1, 2017 (Ex. 2 (0059)), and mentioned in ND's own notes (Ex. 2 (0027, 0099)), would have decreased McConaghy's chances of further relief.

120. To his credit, after some equivocation, the respondent admitted at the hearing that the three statements in his January 8, 2020 email to bar counsel, discussed above, were inaccurate. Tr. 2:146, 147, 152 (Respondent). However, this does not fully rectify the stain of giving bar counsel inaccurate information, at best recklessly and at worst intentionally.

The Reasonableness of the Respondent's Fees

121. We have discussed above, at ¶¶ 14-16, the work the respondent did for the Mortgage Law Group, including the fact that he was paid $40 to $50 per package, and that the loan package review took from three to twenty minutes. See Tr. 2:40-42 (Respondent); Ex. 9 (859-860) (review took five to ten minutes; pay was $40 per package).

122. In his statement under oath, taken July 17, 2020 before bar counsel, the respondent agreed that review of McConaghy's loan modification package should not have taken "much more than a few minutes." Tr. 2:44; (Respondent); Ex. 9 (0860). It should not have cost more than a "[c]ouple hundred dollars." Ex. 9 (0860-0861). He has admitted that someone could easily conclude he had not done $1200 worth of work. Tr. 3:228 (Respondent); Ex. 9 (0825).

123. At the hearing, the respondent contrasted the work he had done with the Mortgage Law Group (MLG) with the work he did for clients referred by NVA, classifying it as "very different." Tr. 3:102 (Respondent). He stated that with MLG, he was given identifying

information about the potential client's situation, and had to make a determination of whether the client could benefit from a loan modification. Additionally, he reviewed final loan modification packages for completeness. Id.

124. Unlike his work for the NVA clients, he never spoke to the MLG clients, and never did any research on whether there were active lawsuits. Tr. 3:103, 214-215 (Respondent). Third, he was not responsible for supervising any of the personnel who were gathering client information. Tr. 3:103-104 (Respondent).

125. We do not agree that there were significant differences between the MLG work and the matters before us here, that would justify the fees the respondent charged. Although the respondent testified that it was his standard practice to call each new client to discuss their "goals," see Tr. 2:181 (Respondent), as we have found above, we do not credit this.

126. Instead, we credit McConaghy's testimony, detailed above at ¶ 108, that the respondent did not speak to her for months after she had retained him; they spoke only after her package had been submitted and her request rejected. And we find that he called her only after attorney liaison Jay Krueger, of NVA, told him to reach out to her. Ex. 2 (0108). His failure to include his telephone number on his fee agreement means that she, and the other clients, could not easily have reached him for an early discussion of goals. We infer from this that he did not routinely speak with his NVA clients, and that he did not call each to discuss a goal.

127. The respondent testified that it was his standard practice to review court documents and title records for his NVA clients, explaining that the title search in Massachusetts is county-based, and town-based in Rhode Island. Tr. 2:180-181; Tr. 3:85-86, 87, 214-215 (Respondent).

128. He explained that in general in Massachusetts, there is no lawsuit for foreclosure, but a foreclosure must be preceded by the filing of a "Servicemember's Act" lawsuit; its absence would mean that a client is early on in the foreclosure process. Tr. 3:85-86 (Respondent).

129. However, the respondent was quite fuzzy on the details pertaining to his *actual* clients, testifying variously that maybe five, or six or four clients, or some number "in that range," had had this type of lawsuit filed against them. Tr. 3:207, 208 (Respondent).

130. Again, we turn to his specific treatment of McConaghy. The respondent admitted at the hearing that he had no specific memory of actually checking McConaghy's docket, although later on, he claimed that he had done so. Tr. 2:180, 182; Tr. 4:32-33 (Respondent).

131. We do not credit that the respondent reviewed McConaghy's docket. In his Answer, which was written closer in time to the relevant events, he admitted that he could not "say with certainty" that he had followed his usual practice of reviewing dockets in her case. Ans. ¶ 99.

132. The respondent made no mention of specific docket review in the several letters he sent to bar counsel after McConaghy filed her complaint. In a July 30, 2018 letter defending his billing rates and work, he said nothing about having checked the dockets on her behalf. Ex. 6 (0530). In his September 29, 2018 letter, he wrote generally about his typical activities, but made no mention of anything pertinent to McConaghy a docket search would have revealed, like, for instance, that foreclosure proceedings had been initiated before she became a client, or that she had had prior modifications Ex. 6 (0535-0536). As we discussed above, in a January 8, 2020 email, he complained that his office "was unaware of all the additional modification attempts by her previously." Ex. 7 (0714).

133. We do not credit the respondent's late attempt at the hearing to convince us that he had, in fact, timely checked McConaghy's dockets. We credit instead his admission and omissions, made significantly closer in time to the actual events. We infer from this that he did not routinely check the dockets of his other clients.

134. We do not credit that the respondent spent any appreciable time on ensuring that the applications, when submitted, were complete and error free. See Tr. 3:238, 239 (Respondent).

135. We find instead that he did not do a regular or careful review. As we discussed above, McConaghy's application had errors in it that the respondent would likely have caught had he actually reviewed it.

136. We do not credit the respondent's testimony about his supervision of his agents, or his claimed review of ND's file notes, namely, that "[e]very time there is a note placed in the file, I will review it," or that he was "regularly reviewing . . . as things were happening" the notes ND made on his clients' files. Tr. 3:60-61 (Respondent); see Ex. 6 (0536)). Had he truly and timely been reviewing the file notes, he would presumably have caught at least some of the problems in McConaghy's file, like the representation that no work would be done on a case until a retainer was paid in full, or Krueger's unilateral decision not to refund McConaghy the fees she had paid. See Ex. 2 (0106) (11/16/17 Rivera entry); (0095) (2/8/18 5:51 PM Krueger entry).

137. We infer from his approach to McConaghy's matter that the respondent did not do very much work or supervision as to his other clients' matters. We do not credit his testimony about the work he allegedly did. While our credibility determinations stand on their own, they are further supported by our assessment of the respondent's credibility as well as other evidence,

including his vague responses about what he actually did, and the fact that he appears to have missed many of the relevant and important notes in McConaghy's case. Indeed, he was not even copied on the critical email, from an ND employee, stating that McConaghy's application had been denied. See supra, ¶92.

138. This evidence supports a finding that the respondent was not regularly or significantly involved in his client matters. See Commonwealth v. Garvey, 99 Mass. App. Ct. 139, 145 (2021) (inferences drawn by fact finder "need not be 'necessary or inescapable,' but instead need only be 'reasonable and possible.'") (citation omitted). Cf. Matter of London, 427 Mass. 477, 482-483, 14 Mass. Att'y Disc. R. 431, 438 (1998) (Court rejects argument that burden of proof was shifted to lawyer, and upholds inference of intent based on false accountings and "other circumstantial evidence affecting the credibility of the respondent"); Matter of Macero, 27 Mass. Att'y Disc. R. 554, 561-562 (2011) (upholding inference of intent to deceive grounded in reliability of other evidence and "bolstered by the respondent's false explanations.").

139. We conclude from the respondent's treatment of McConaghy and his approach to her case, from his deference to Krueger and the ND staff and from the constraints and disincentives of his business model – low pay for high volume — that he performed very little actual work.

140. We find that the heavy lifting was done by the NVA and ND employees. They made all of the important decisions, among them when and whether to file, and whether a refund was in order. E.g., Ex. 2 (0110, 0111).

141. The respondent lent his name to NVA to aid it in circumventing the advance fee proscription. We find he had no incentive to do much work for the low pay he received. His business model depended on volume. He earned little per case, and it was not worth his while to

invest significant time. We conclude that the respondent's role in most of these fifteen cases was periodic and peripheral.

Whether the Respondent's Work Constituted the Practice of Law

142. The respondent argues that his activities constitute the practice of law because his fee agreement required him to provide two categories of services – foreclosure defense and loss mitigation services. Respondent's PHB, ¶ 42; see Tr. 2:46 (Respondent). Foreclosure defense would include consultation with the client, review of the complaint and preparation of an answer, communication with the court, and litigation-related activities, including court appearances. See Respondent's PHB, ¶ 42; Ex. 2 (0214). There was no additional fee for the foreclosure defense services. Respondent's PHB, ¶ 42.[9]

143. We received no evidence that the respondent actually provided foreclosure defense services for any of the fifteen NVA clients.

144. One of the respondent's fifteen NVA clients, Client F, had a lien on a property that needed significant repairs and was subject to a daily fine. Tr. 3:97 (Respondent). Because of the lien, the client could not get a loan modification. Id. The respondent defended this client in court, allowing time for the repairs to be made and for the lien to be removed. Once this was done, the client was able to file a Chapter 13 bankruptcy and save the house. Tr. 3:98 (Respondent).

[9] The Fee Agreement also appeared to promise "a loan modification offer, short sale, short refinance, suspension of a foreclosure sale date, deed in lieu of foreclosure, cash-for-keys, or loan forbearance offer." Ex. 10 (0939). However, the respondent distanced himself from these services in a September 29, 2018 letter to bar counsel, explaining that he did not "offer any type of cash for keys or short sale programs." Ex. 6 (0533-0534). The presence of these options in a Fee Agreement – options which may be illusory in light of the respondent's later claim that he did not offer actually offer them– does not foreclose our conclusion that the respondent was not, with few exceptions, engaged in the practice of law with reference to the NVA clients.

145. The respondent also had a particular memory of discussion with a Client P. Tr. 3:89, 91 (Respondent). This individual was very far behind in arrears, and wanted a loan modification. The respondent advised him not to move forward with a loan modification, but instead to consider bankruptcy and not retain the respondent's firm. Tr. 3:90 (Respondent). The client decided "to go in a different direction," whereupon the respondent refunded him his payment and closed his file. Tr. 3:91 (Respondent).

146. We agree that these activities – defending one client in court and counseling another on legal options — constitute the practice of law. However, they are not sufficient to prevent the conclusion that in general, and certainly as to the other NVA clients, the respondent's limited and discrete exertions did not constitute the practice of law. Cf. Consumer Financial Protection Bureau v. Consumer First Legal Group, LLC, 6 F.4th 694, 707 (7th Cir. 2021) (rejecting "practice of law" argument despite claim that attorneys sometimes provided foreclosure defense, and noting that "these services were performed for only a tiny number of customers. These isolated instances do not undermine the court's conclusion.")

Conclusions of Law[10]

147. Bar counsel charged that by entering into agreements for illegal, clearly excessive and/or unreasonable fees, by charging and collecting from clients illegal, clearly excessive and/or unreasonable fees, and by entering into agreements for, charging and collecting fees designated as non-refundable, the respondent violated Mass. R. Prof. C. 1.5(a) (do not agree to, charge or collect an illegal or clearly excessive fee) and 8.4(a) (do not violate or attempt to violate rules, knowingly assist/induce another to do so or do so through the acts of another), 8.4(c) (conduct

[10] With a few exceptions identified below, the Count 1 and Count 2 charges are identical. We discuss them together.

involving dishonesty, fraud, deceit, or misrepresentation) and 8.4(h) (any other conduct that adversely reflects on fitness to practice) and/or Rhode Island R. Prof. C. 1.5(a) (do not make agreement for, charge or collect an unreasonable fee) and 8.4(a) (same) and 8.4(c) (same).

The Respondent's Fees Were Illegal

148. We look first at illegality, which is proscribed explicitly by Mass. R. Prof. C. 1.5(a), but not by the Rhode Island counterpart. We are guided by the principle that "[f]ees charged or collected in violation of Federal or State statutes or regulations are prohibited under rule 1.5 (a)." Matter of Zak, 476 Mass. 1034, 1037, 33 Mass. Att'y Disc. R. 522, 525 (2017).

149. Turning first to federal law, 12 C.F.R. § 1015.5(a) prohibits the request or receipt of any fee until the consumer has executed with the loan holder a written agreement for mortgage assistance relief. Clearly, that did not happen here.

150. Nonetheless, the respondent resists, on several grounds, the application of this regulation to his activities, arguing that he fits within the regulation's exception, and that the regulation was recently held illegal in Consumer Financial Protection Bureau v. Consumer First Legal Group, LLC, supra. See Respondent's PHB, ¶¶ 146-148.

151. We do not agree that the respondent fits within the attorney exception to the advance fee prohibition. As indicated above, this exception is available only after the clearing of several hurdles. It applies to attorneys who, among other things, provide MARS as part of the practice of law, and comply with applicable state rules and regulations. 12 C.F.R. §1015.7(a). As to that subset of attorneys, the exemption is further limited to those who deposit advance fees in a trust account and comply with state laws and regulations as to the use of such account. 12 C.F.R. §1015.7(b).

152. We do not agree that the respondent's activities as to most of his fifteen NVA clients constituted the practice of law.[11] For one, most of what he claimed he did was actually work delegated to ND under the terms of his contract with it, including advising clients, assembling loan packages, assessing liens, and working to pay liens off. Ex. 5 (0524-0525, 0593).

153. As to the balance, "[w]hether a particular service or activity constitutes the practice of law remains a fact-specific inquiry." Real Estate Bar Association v. National Real Estate Information Services, 459 Mass. 512, 520 (2011). Title examinations "generally do not constitute the practice of law." Id. at 521.

154. The fact that the respondent's Fee Agreement held out the possibility of actual legal work does not alter our analysis. See ¶ 146, supra.

155. Turning to the second requirement, we find that the respondent did not comply with applicable state regulations. He has admitted, and we have found, that he shared fees with nonlawyers, and falsely advertised his firm name and particulars. Respondent's PHB, ¶¶ 60, 117 (fee-sharing); ¶ 118 (inaccurate description of law firm).

156. The respondent's failure to satisfy the § 1015.7(a) criteria necessarily disqualifies him from meeting the dependent section § 1015.7(b) exception. For the sake of completeness, we nonetheless address his arguments.

157. The respondent claims that he did not have to deposit his fees in a trust account for one of two reasons: they were already earned when received, because of the considerable legal work he had already done; or they were a classic retainer, making them earned upon receipt. Respondent's PHB, ¶¶ 135-139.

[11] The exceptions are Clients F and P. See above, ¶¶ 144, 145.

158. We reject both arguments. As stated above, we find that the respondent did very little legal work before the first retainer payment was received. His work, if indeed he did any before receiving the retainer, was of minimal value to his clients.

159. We inferred above from McConaghy's testimony that the respondent did not routinely make a welcome call. We draw an adverse inference from his failure to produce a single document or note about any of his fifteen clients. Bar counsel's inquiry began in the spring of 2018, close to the events at issue here; we would expect the respondent to have had, and to have maintained, some file notes or research, supporting his clients' stated goals or his alleged docket or registry searches. While he claimed that, before the hearing, he had gone through every file to review "everything on every case," (Tr. 3:208 (Respondent)), we were not shown any of these documents. See Matter of Zankowski, 487 Mass. 140, 148–49, 37 Mass. Att'y Disc. R. __ (2021) (adverse inference warranted "from the respondent's failure to offer materials, readily available to her, that would presumably support her version of the facts if true"); Mikkelson v. Connolly, 229 Mass. 360, 362 (1918) (failure of defendant to produce his ledger of account with plaintiff competent for jury's consideration; "[i]f it was within the power of the defendant to produce it and he failed to do so, it could have been inferred that, if produced, it would not have supported the claim of the defendant.").

160. Even if we believed that the respondent did some work in advance of receiving the initial $1250 retainer – and we do not – he did not even attempt to explain what he did to earn the subsequent $900 payments that were deducted automatically each month a file was open (and, at least on one occasion, taken after billing should have ceased). The case summary notes as to McConaghy's file, which we infer were representative of his activities for the other clients,

reflect virtually no activity by the respondent for months on end, and in her case, nothing in November or December, and nothing in January until the 22nd of the month.

161. The respondent is correct that a classic retainer is "considered earned by the attorney when paid." Matter of Sharif, 459 Mass. 558, 569, 27 Mass. Att'y Disc. R. 809, 822 (2011). But this is because the attorney "'gives up the possibility of being employed by [other parties] in the very matter to which the retainer relates.'" Sharif, id. (citation omitted). See also The Ethics of Charging & Collecting Fees (Nancy E. Kaufman and Constance V. Vecchione; updated 2015), p. 1 (classic retainer "binds the attorney to employment for ongoing services and to the exclusion of adverse parties. The retainer is seen as payment for the establishment of this exclusive relationship.").

162. Nothing in the Fee Agreement, and no testimony or evidence, supports the argument that the fees the respondent charged constituted a classic retainer, as that term is understood and used in our jurisprudence. There was no exclusivity about any of the fifteen representations. Nor was there any indication that any of the clients made these payments with exclusivity, or insuring the respondent's future services, or any other hallmark of a classic retainer, in mind. See Blair v. Columbian Fireproofing Co., 191 Mass. 333, 335 (1906) ("[t]he mere fact that the plaintiff [attorney] received and credited the several payments as retainers, does not show that the defendant [client] sent them as such. His acts, unknown to the defendant, are not evidence against the defendant.").

163. The respondent is correct that in Consumer Financial Protection Bureau v. Consumer First Legal Group, LLC, supra, the Seventh Circuit held that the CFPB had exceeded its authority in enacting 12 C.F.R. § 1015.7(a)(2), (a)(3), and (b). The Court concluded, in essence, that in direct contradiction of the federal statute giving the CFPB limited responsibility

and enforcement authority for certain consumer protection activities, the CFPB had "impermissibly broaden[ed] the class of attorneys who are subject to Regulation O." Id. at 706.

164. Nonetheless, the Court upheld the finding that the attorneys' activities about which the CFPB had brought suit– characterized by brief and perfunctory document reviews, with no or limited actual client contact—did not constitute the practice of law, and agreed that the attorneys had violated Regulation O. Id. at 706, 709-710.

165. We agree with bar counsel that the Seventh Circuit's decision is not controlling as to us. Even if it were, it is not clear whether or how it would apply to conduct that took place in 2017 and early 2018, well before it was issued. In any event, even if it were to apply, we have already concluded that the respondent's activities did not constitute the practice of law. This largely moots the rest of the analysis, as it might apply to the respondent, since our inquiry about exemption ends there.

166. Turning to the Massachusetts regulation, 940 C.M.R. § 25.02(2) describes, as an unfair or deceptive act, soliciting, arranging or accepting an advance fee in connection with foreclosure-related services. An advance fee is "any money or consideration paid in advance of actually receiving services." Id. Exception is made for a licensed attorney arranging or accepting an advance fee or retainer for legal services in connection with the preparation and filing of a bankruptcy petition, or court proceedings, to avoid a foreclosure. Any licensed attorney accepting an advance fee or legal retainer "must comply with all applicable laws and regulations pertaining to such fees, including the Massachusetts Rules of Professional Conduct." Id.

167. The respondent argues that this regulation does not apply to him since he did not charge an advance fee but, rather, collected fixed monthly payments for a predetermined set of

services, and did so only after they had been earned. He also notes that his Fee Agreement covered the provision of foreclosure defense services. Respondent's PHB, ¶¶ 143, 144.

168. For the reasons enumerated in detail above, we reject this argument. We find, instead, that the respondent was aware of the advance fee ban when he agreed to work with NVA, and tried to present as his own activities undertaken by NVA and ND.[12] We agree that bar counsel has proved, as to McConaghy and the other fourteen NVA clients, that the respondent charged an illegal fee.

The Respondent Made Agreements for, and Charged and Collected. Clearly Excessive and Unreasonable Fees

169. It is a violation of the Rules of Professional Conduct to charge a nonrefundable fee. Matter of Cammarano, supra, 29 Mass. Att'y Disc. R. at 105; Admonition 22-04, 38 Mass. Att'y Disc. R. __ (2022) (admonition for misconduct including providing a fee agreement with a non-refundable clause). See generally Mass. R. Prof. C. 1.5, comment [4]; Rhode Island R. Prof. C. 1.5, comment [4] ("[a] lawyer may require advance payment of a fee, but is obliged to return any unearned portion").

170. The respondent claims his fee agreement did not state that any fees paid were non-refundable. Respondent's PHB, ¶ 134. We disagree. See above, ¶¶ 50-53.

171. To allow a nonrefundable fee provision would chill the attorney-client relationship, and would pressure unhappy clients to remain in unsatisfying relationships. "There is no question that a client must have absolute trust in the integrity, the judgment, and the ability

[12] This is similar to the misconduct the respondent admitted to in the 2020 case brought by BCFP, described above. See Ex. 16, ¶ 5 (1186-1187) (admission to providing, from February 2018, substantial assistance or support to seller or telemarketer when he knew the entity had requested or received advance fees). Our record reflects that in February 2018 and beyond, the respondent was receiving fees from NVA clients, fees we determined above were illegal advance fees. Ex. 3 (0324-0330).

of his or her attorney. When a client, for whatever reason, loses faith in his or her attorney, the client has the unqualified right to change lawyers." Malonis v. Harrington, 442 Mass. 692, 700–01 (2004). "`But the right of a client so to do has not much value if the client is put at risk to pay the full contract price for services not rendered and to pay a second lawyer as well.'" Malonis, 442 Mass. at 701 (citation omitted). Cf. Matter of Murray, 24 Mass. Att'y Disc. R. 483, 491 (2008) (agreement providing for payment, if client discharged lawyer without cause, for all past services, with no requirement that client termination have been in bad faith, could obligate clients to keep lawyer they had lost faith in; this is a "severe and unfair burden on the client's unqualified right to choose and change his counsel.").

172. We agree that in their totality, the fees were clearly excessive in light of the minimal legal work the respondent performed. We did not need expert testimony to enable us to reach this conclusion.[13] We found above that the respondent did very little actual legal work. We did not credit that he did even the work he claimed to have done, like regularly making a welcome call, checking the dockets, reviewing ND's notes, and reviewing the loan application packages before submission. He was paying ND to do much of what he claimed to have done. We did not credit that his work for NVA was substantially different that the work he had done for MLG, where he was paid $40 or $50 per application. We note that even if we believed that the respondent had done the initial flurry of work he described, he offered no rationale for the subsequent monthly assessment of $900 as long as a file remained open. Bar counsel has proved,

[13] We do not need to review all eight of the Rule 1.5(a) factors to reach this conclusion. Matter of Barach, 22 Mass. Att'y Disc. R. 43, 52 (2006). Review of even a few, such as the time and labor required and the novelty or difficulty of the matter; the likelihood that acceptance of the client's matter will preclude other employment; and the amount involved and the results obtained, underscores the unreasonableness of the respondent's fees.

as to both McConaghy and the other fourteen NVA clients, that the respondent's fees were clearly excessive.

173. Bar counsel charged that by intentionally misleading clients as to the nature and scope of the services to be provided, the respondent violated Mass. R. Prof. C. 7.1 (no false or misleading communication about lawyer or lawyer's services), 8.4(a), (c) and (h), and/or Rhode Island R. Prof. C. 7.1 (same) and 8.4(a) and (c).

174. Bar counsel has proved these rule violations as to both McConaghy and the other fourteen NVA clients. The respondent, through NVA, made "deliberate falsehoods concerning [his] firm." Matter of Zak, supra, 476 Mass. at 1038, 33 Mass. Att'y Disc. R. at 528. He described himself as managing associate attorneys, creating the illusion of a substantial firm, and claimed repeatedly that he would negotiate on his clients' behalf. There were no other associates, and there was no negotiation involved.

175. Although the respondent's Fee Agreement does reflect that "[a] borrower is NOT required to engage the services of any person, entity, Attorney, accountant, etc., to apply for . . . a Loan Modification," (Ex. 10 (0944)) (emphasis in original), the Fee Agreement proceeds to explain why it is wise to engage the respondent to negotiate on a borrower's behalf, "based on [the respondent's] experience, resources and expertise." Id.

176. The respondent's pledge to "build a case," and his repeated promises of negotiation may well have convinced desperate homeowners that it was worth it to pay for his services. These representations were fraudulent. "There need not be evidence that a client was misled or deceived to establish a violation of the rules of professional conduct." Zak, id. Cf. Matter of Angwafo, 453 Mass. 28, 35, 25 Mass. Att'y Disc. R. 7, 20 (2009) (in rule 3.3 context, "[u]nlike common-law fraud, and similar to perjury, reliance and actual harm are not elements of

bar counsel's proof. It is not necessary to show that the statement of material fact did in fact influence a determination . . . ."); Matter of Hutton, 31 Mass. Att'y Disc. R. 313, 333 (2015) ("[o]ur cases have not construed rule 8.4(c) to require a showing of detrimental reliance.")

177. Bar counsel charged that by making false or misleading communications about his firm name, the respondent violated Mass. R. Prof. C. 7.1, 7.5(a) (do not use a firm name, letterhead or other professional designation that violates Rule 7.1) and 7.5(d) (only state or imply practice in a partnership or other organization when that is the fact), and 8.4(a) and/or Rhode Island R. Prof. C. 7.1, 7.5(a) (same) and 7.5(d) (same), and 8.4(a).

178. The respondent admits that his letterhead violated Rule 7.5(d) (Respondent's PHB, ¶ 174). He denies any other violation, arguing that bar counsel did not prove that the designation of the firm as "Daniel Ruggiero, Esq. & Associates" was a material misrepresentation or was relied on by any client in deciding to retain him. For the reasons stated above in ¶ 176, we do not agree that bar counsel had to prove a material misrepresentation or reliance. We conclude that bar counsel has proved these rule violations as to both McConaghy and the other fourteen NVA clients. See In the Matter of John B. Russell, Jr., 2019 WL 6695546, at *12 (VA State Bar Disc. Bd) (Rule 7.1(a) violation to for sole practitioner to use cover letter designating firm as "attorneys at law"; this conveyed "a false or misleading impression to the Complainants and the public that there was more than one attorney at the firm.")

179. Bar counsel charged that by sharing fees with NVA, the respondent violated Mass. R. Prof. C. 5.4(a) (do not share fees with nonlawyers; exceptions inapposite) and/or Rhode Island R. Prof. C. 5.4(a) (same).

180. The respondent concedes this rule violation as to both McConaghy and the other fourteen NVA clients. See Tr. 2:159-160 (Respondent); Respondent's PHB, ¶¶ 117, 174. We agree that this violation has been proved.

181. Bar counsel charged that by failing to make reasonable efforts to ensure that the conduct of the nonlawyers employed or retained by or associated with the respondent was compatible with his professional obligations, the respondent violated Mass. R. Prof. C. 5.3(b) (lawyer who employs, retains, or associates with nonlawyer, with direct supervisory authority over nonlawyer, shall make reasonable efforts to ensure conduct compatible with lawyer's professional obligations) and/or Rhode Island R. Prof. C. 5.3(b) (same).

182. The respondent admitted, in his Answer, that he failed to supervise the conduct of the nonlawyers involved in McConaghy's case. Ans. ¶ 106. He backed away from this admission at the hearing. Tr. 3:204, 206 (Respondent).

183. Bar counsel has proved this allegation as to both McConaghy and the other fourteen NVA clients. We heard detailed testimony about the respondent's relationship with and reliance on NVA and ND. He did not suggest he did anything different with the fourteen NVA clients than he did with McConaghy. See generally Matter of David Goldberg, 34 Mass. Att'y Disc. R. 135 (2018) (public reprimand for numerous rule violations in high-volume consumer debt collection practice, among them failure to supervise lawyers and nonlawyers).

184. Bar counsel charged that by ordering the nonlawyers employed or retained by or associated with the respondent to engage in misconduct and/or knowingly ratifying that misconduct and/or failing to take reasonable remedial action, the respondent was responsible for that misconduct pursuant to Mass. R. Prof. C. 5.3(c) (lawyer who employs, retains, or associates with nonlawyer shall be responsible for conduct that would violate rules if engaged in by lawyer

if lawyer orders or knowingly ratifies it or has direct supervisory authority over person, knows of conduct at a time when its consequences can be avoided or mitigated by fails to take reasonable remedial action) and/or Rhode Island R. Prof. C. 5.3(c) (same).

185. Bar counsel has proved this allegation as to both McConaghy and the other fourteen NVA clients. With all fifteen clients, the respondent had NVA send a Fee Agreement that was illegal, oppressive, inaccurate and fraudulent. While we do not have information about the other clients' specific matters, we do know that at least a third of them were charged nonrefundable fees despite the fact that their applications were never submitted. Tr. 3:91-92, 209-210 (Respondent). Further, as discussed below, bar counsel proved that McConaghy's loan application, which by the respondent's own analysis had virtually no chance of success, was nonetheless pushed through as the respondent remained silent. We infer that this fruitless exercise was to keep the file open as long as possible and continue to charge fees. Through his actions and inaction, the respondent ratified misconduct perpetuated by NVA and ND.

186. Bar counsel charged that by giving to McConaghy, directly or through his employees or agents, incompetent, deceptive and/or misleading information concerning the viability of her application for a mortgage loan modification, the respondent violated Rhode Island R. Prof. C. 1.1 (provide competent representation to a client), 1.4(a) (keep client informed and consult with client) and (b) (explain a matter to the extent reasonably necessary for client's informed decisions), and 8.4(a) and (c).

187. Bar counsel has proved these violations. It was important to McConaghy not to waste her money on an unproductive venture; she wanted sound legal advice about the viability of a loan application. She did not receive this.

188. The respondent knew that most of his loan applicants were not successful. See Tr. 3:92 (Respondent) ("not a huge number" of applications actually submitted were successful).

189. As to McConaghy, there was even more reason for doubt. The respondent knew, or should have known, that McConaghy had virtually no chance of getting a further loan modification. His own testimony underscored this, where he told us that a recent failure to pay a modification on time, within the past twelve months, decreased the chances of approval. Tr. 2:126 (Respondent). This was precisely McConaghy's situation.

190. Yet McConaghy was told on the telephone when she first called that NVA/the respondent could help her. This was clearly false, and became more obviously false as the process went on. Pulcano of ND – the individual who, according to the respondent was "incredibly knowledgeable" about the process of loan modifications (Tr. 3:115 (Respondent)) – found it "miraculous" that McConaghy had been approved for her last modification. Ex. 2 (0110). The denial in January 2018, when it came, was "expected . . . due to previous MODS." Ex. 2 (0109).

191. Bar counsel charged that by failing to consult with McConaghy about the means by which her objectives could be accomplished, by failing to explain to McConaghy her matter to the extent reasonably necessary to permit her to make informed decisions regarding the representation, and by failing to keep McConaghy reasonably informed about the status of her matter, the respondent violated Rhode Island R. Prof. C. 1.4(a) and (b), and 8.4(a).

192. We conclude that bar counsel has proved these violations. The respondent discussed nothing with McConaghy before her application was submitted. He and his agents failed to communicate with her, failed to update her as new information came to light, and misled her about her prospects of success, in violation of the charged rules. McConaghy was not

informed that ND learned on or about December 27, 2017, that her application had little chance of success, and was not advised about her options. The respondent never apprised her that foreclosure proceedings had already begun. Indeed, the respondent never spoke to her about her application, contacting her only after it had been denied, and after being told to do so by Krueger. We conclude that bar counsel has proved these violations.

Matters in Mitigation and Aggravation

Mitigation

193. Citing to Ex. 14, which is a Consent Order concerning McConaghy's lender, Seterus, the respondent argues in mitigation that at the time of his representation of McConaghy, Seterus was engaged in unfair and deceptive acts or practices regarding the processing of loan modification applications. Respondent's PHB, ¶ 170.

194. We do not find this to be mitigating. Seterus's conduct is not at issue. We agree with bar counsel that in the Consent Order, Seterus admits no misconduct. Ex. 14, ¶ 2 (1735). Further, nothing Seterus did or failed to do bore on the respondent's misconduct. Finally, our jurisprudence teaches that blaming others is not mitigating but, rather, can be found to be an aggravating factor. E.g., Matter of Lang, 31 Mass. Att'y Disc. R. 381, 382 (2015)

195. We do not agree that McConaghy did not suffer harm because she received a full refund and was able to stay in her home. She had to fight and wait to get her full refund. She also testified, credibly, that the withdrawal of the last $900 payment, after her case had been closed and at a time when no further funds should have been taken, wreaked havoc with her finances. Moreover, the refund of her $1250 was effected only after McConaghy contacted bar counsel.

196. Restitution after bar counsel's involvement is not mitigating. Matter of Lansky, 22 Mass. Att'y Disc. R. 443, 450 (2006) (restitution made after complaint to bar counsel does not

merit weight in mitigation). Further, "[t]he respondent confuses restitution, which in certain circumstances may be a factor in mitigation, with injury." Lansky, id. We conclude that McConaghy was harmed by the respondent's conduct.

197. The respondent cited certain changes he has made to his practice as mitigating factors. See Respondent's PHB, ¶ 172 (respondent ceased to use "& Associates" in his firm name; changed his engagement agreement to include his phone number, and terminated his fee arrangement with NVA). These are wise precautions, but they are not considered mitigating. See Matter of Goldberg, supra, 34 Mass. Att'y Disc. R. at 138.

Aggravation

198. The respondent has a disciplinary history – a Diversion Agreement, dated September 10, 2013. Bar Counsel's Proposed Findings of Fact, Conclusions of Law and Recommendation for Discipline (Bar Counsel's PFCs), Addendum A. It reflects, among other things, that for nearly three years, the respondent did not respond to a client's monthly requests for information. Add. A, ¶ 8e. During that time, he left his law firm, yet took no steps to protect her interests and did not inform her of this circumstance. Add. A, ¶ 8f. Bar counsel asserted that his misconduct included the failure to keep his client reasonably informed. Add. A, ¶ 9.

199. Although the Diversion Agreement was in effect only for one year from its effective date, the respondent agreed that it could be offered in evidence as to notice for disciplinary proceedings occurring after its one-year term. Add. A, ¶ 18. We conclude that the respondent knew, as of September 10, 2013, that a lack of competence and diligence, and a failure to keep a client reasonably informed, were discipline-worthy events. "Prior discipline, 'even if unrelated to the current charges,' is a significant aggravating factor." Matter of Gross,

435 Mass. 445, 453 (2001) (citation omitted); Matter of Carmel-Montes, 35 Mass. Att'y Disc. R. 35, 48-49 (2019).

200. We do not agree that the respondent took advantage of vulnerable clients. We have virtually no information about the fourteen Count 1 clients. We can infer or surmise that they had financial problems, and we are aware that the respondent answered "yes" when bar counsel asked if they were "in financial distress" and "vulnerable." But we reject this "gotcha" argument and instead conclude that there is not enough record evidence about the other clients for us to find them vulnerable for aggravation purposes, as that term is used in our jurisprudence.

201. We do not agree that McConaghy was vulnerable. She was an educated professional who had, by herself, secured at least three earlier mortgage loan modifications. She was desperate to save her house, and indisputably had financial problems, but was otherwise resourceful. We do not think her financial straits, alone, make her vulnerable for aggravation purposes.

202. One member of the hearing committee agrees that the respondent's conduct was intentional: he knew what he was doing, and his behavior was calculated. The other members disagree with using this as an aggravating factor, one member finding that since intentional acts are part of at least one of the disciplinary violations found, it would be double-counting to include it here. Our third member finds that the respondent's conduct in setting up a high volume, high risk practice was reckless, but falls short of intentional.

203. We agree with bar counsel that the respondent displayed a lack of candor. His hearing testimony was often vague and non-responsive, and at times differed sharply from his statement under oath or his Answer. We gave examples of this throughout our report concerning, among other things, his familiarity with the prohibition against advance fees; how many clients

he had; whether or not Pinnacle was a law firm; his response at the hearing when confronted with untrue statements he had given to bar counsel in January 2020; and whether or not he had failed to supervise nonlawyers. "While an attorney is entitled to defend against allegations of a petition for discipline, the hearing committee may determine whether to credit the testimony and evidence, and it may consider in aggravation any lack of candor it finds." Matter of Zankowski, supra, 487 Mass. at 153, 37 Mass. Att'y Disc. R. at __.

204. We agree that the respondent was an experienced attorney. This is an aggravating factor. Matter of Luongo, 416 Mass. 308, 311-312, 9 Mass. Att'y Disc. R. 199, 203 (1993).

205. We agree that the respondent caused harm to many clients. We have discussed above the harm to McConaghy. The finding as to the others derives from our conclusion that the fee agreement, used for all, was onerous and oppressive. This constitutes harm, even without a specific finding that particular clients were chilled in their ability to change counsel because of the fear of losing the monies they had pre-paid. It goes without saying that the clients who paid for services but never had their applications filed, and never received a refund, were harmed. See generally Matter of Foley, 439 Mass. 324, 337, 19 Mass. Att'y Disc. R. 141, 156 (2003) (finding harm from effect of lawyer's conduct "on the profession and the public's confidence in its integrity"); Matter of Goodman, 22 Mass. Att'y Disc. R. 352, 356 (2006) ("misconduct constitutes harm to the profession in the dishonor it brings to all of us in the eyes of the public.")

206. The respondent violated numerous disciplinary rules. This is a recognized factor in aggravation. E.g., Matter of Strauss, 479 Mass. 294, 302, 34 Mass. Att'y Disc. R. 522, 531 (2018); Matter of Saab, 406 Mass. 315, 326-327, 6 Mass. Att'y Disc. R. 278, 289-290 (1989).

207. A few days before the hearing, the respondent's attorney left McConaghy a voice mail message, stating that she represented the respondent and asking if they could speak before

the disciplinary hearing. Tr. 2:217. Counsel related that she had "a piece of personal information about [the respondent] that he wanted me to share with you before the hearing starts." Id. Counsel left her phone number and asked for a call back. Tr. 2:218. McConaghy retrieved the message but did not call the attorney back. Tr. 2:219-220 (McConaghy).

208. Bar counsel described this occurrence as a "perfidious ploy to prey on McConaghy's emotions," citing McConaghy's testimony that when she first heard the voicemail message – which was after she had begun to testify – she "felt really bad" for the respondent and was reluctant to testify. Bar Counsel's PFCs, ¶ 158; Tr. 2: 221-222, 282-283 (McConaghy).

209. We are concerned that counsel, acting as the respondent's agent, may have intended to reveal information about the respondent to garner sympathy from McConaghy and dissuade her from testifying. However, we have no evidence as to what counsel would have said, and we have observed that McConaghy did not get the message before testifying. We are troubled by what may have been an attempt to interfere with or influence testimony, but we cannot agree with bar counsel that counsel's actions, even if imputed to the respondent, were prejudicial to the administration of justice, in violation of Mass. R. Prof. C. 8.4(d) and as such constituted uncharged misconduct.

Recommended Disposition

Bar counsel recommends a year and a day suspension. The respondent recommends a public reprimand. We recommend a year and a day suspension.

In support of his request for a public reprimand, the respondent relies on his admission to two discrete areas of misconduct – sharing fees with a nonlawyer, and using an improper firm name. He argues that the typical sanction for each is an admonition. The cases he cites – Admonition 08-04, 24 Mass. Att'y Disc. R. 848 and Admonition 99-31, 15 Mass. Att'y Disc. R.

708, generally support his argument as to fee sharing, although we note that 08-04 featured a single instance of fee sharing, and Admonition 99-31 at most several instances. Admonition 11-22, 27 Mass. Att'y Disc. R. 974, also cited, described two payments, both made with the clients' knowledge. See Respondent's PHB, ¶175.

The respondent is also correct that the improper use of a firm name is, generally, sanctioned by an admonition. Respondent's PHB, ¶ 176. E.g., Admonition 18-02, 34 Mass. Att'y Disc. R. 579; Admonition 05-05, 21 Mass. Att'y Disc. R. 672. Cases featuring heavier sanctions typically include additional misconduct. E.g., Matter of Bazile, 33 Mass. Att'y Disc. R. 23 (2017) (stipulation to public reprimand for misconduct of sharing fees with nonlawyer for many years, in violation of rule 5.4(a), and for use of the name "Bazile & Associates," falsely implying the lawyer practiced in a partnership or other entity with other lawyers, in violation of rules 7.1, 7.5(a) and (d), plus other misconduct and aggravation); Matter of Miller, 28 Mass. Att'y Disc. R. 608 (2012) (stipulation to public reprimand with conditions for using law firm names that falsely implied lawyer practiced in a partnership or other organization of lawyers, in violation of rules 7.1, 7.5(a) and (d), with other misconduct, aggravated by earlier admonition); Matter of Godbout, 18 Mass. Att'y Disc. R. 254 (2002) (stipulation to public reprimand for misconduct including 7.5(d) violation for suggesting/implying partnership when there was none, with aggravation).

Had we found only fee sharing and a misleading firm name, we might well have recommended a public reprimand. However, as our findings make clear, we found substantial

other misconduct[14] and numerous aggravating factors. These findings and conclusions compel us to recommend a heavier sanction.

The respondent's failure to supervise the NVA and ND personnel was long-standing and pervasive. We gave numerous examples above of important decisions delegated to nonlawyer personnel, which were met with the respondent's total silence despite his claim that some of them, such as the policy that no work would begin until a retainer had been paid, or that any refund decision was Krueger's to make, were clearly inaccurate. While this type of misconduct is not, generally, sanctioned severely, it would likely warrant at least a public reprimand. E.g., Matter of David Goldberg, supra, 34 Mass. Att'y Disc. R. 135 (public reprimand for numerous rule violations in high-volume consumer debt collection practice, among them failure to supervise lawyers and nonlawyers); Matter of Hopper, 25 Mass. Att'y Disc. R. 259 (2009) (stipulation to public reprimand for IOLTA violations and failure to supervise bookkeeper, in violation of rules 5.3(a) and (b)); Matter of Levy, 25 Mass. Att'y Disc. R. 355 (2009) (stipulation

[14] Violations of rules 8.4(a), 8.4(c) or 8.4(h) often occur in combination with other misconduct. Not surprisingly, depending on the circumstances and context, the sanction can range from an admonition (Admonition No. 20-21, 36 Mass. Att'y Disc. R. 520 (admonition for assisting law partner to violate rule 4.3, in violation of rule 8.4(a)); Admonition No. 18-27, 34 Mass. Att'y Disc. R. 626 (admonition for signing client's name under oath on affidavit, in violation of rules 8.4(c), (d) and (h)); Admonition No. 12-17, 28 Mass. Att'y Disc. R. 940 (admonition for attempting to violate rule 1.5(a), in violation of rule 8.4(a)); to a public reprimand (Matter of Bettencourt, 35 Mass. Att'y Disc. R. 18 (2019) (stipulation to public reprimand for neglect of single matter, in violation of rules 1.3, 1.4(a)(3) and (4), and 8.4(c), with mitigation); Matter of Hutton, supra, 31 Mass. Att'y Disc. R. 313 (public reprimand for violation of rules including 8.4(a), 5.3(b) and 5.3(c)); to a term suspension (Matter of Hoffman, 35 Mass. Att'y Disc. R. 276 (2019) (stipulation to a year and a day suspension for neglect in three matters, including instances of 8.4(c) violations); Matter of Judd, 35 Mass. Att'y Disc. R. 315 (2019) (six-month suspension, with requirement to petition for reinstatement, after default, for misconduct in single litigation matter including 8.4(c) and (h) violations and failure to cooperate with bar counsel); Matter of Mattaliano, 35 Mass. Att'y Disc. R. 455 (2019) (three-month suspension by stipulation, stayed for a year, for 8.4(a) and 8.4(d) violations, aggravated by prior discipline and mitigated by health issues); Matter of Hammond, 34 Mass. Att'y Disc. R. 175 (2018) (two-month suspension, by stipulation, for unauthorized practice of law by court clerk, in violation of rules including 3.4(c), 5.5(a), 8.4(c), (d) and (h)); Matter of Goodman, supra, 22 Mass. Att'y Disc. R. 352 (one-year suspension, with requirement to petition for reinstatement, for misconduct in three matters, including multiple misrepresentations and violations of rules 5.3(a), (b) and (c), and 8.4(a), (c), (d) and (h), with aggravation).

to public reprimand for failure to supervise employees, in violation of rule 5.3(b), IOLTA violations, and other misconduct).[15,16]

The most troubling misconduct we found revolved around the respondent's failure adequately to represent his clients, conduct for which he had earlier been disciplined, and his misleading fee agreement and charge and collection of illegal and excessive fees,. We recognize that the presumptive sanction for charging excessive fees, without more, is a public reprimand. Matter of Fordham, 423 Mass. 481, 12 Mass. Att'y Disc. R. 161 (1996), cert. denied sub nom Fordham v. Massachusetts Bar Counsel, 519 U.S. 1149 (1997). However, Fordham did not feature the constellation of fraudulent factors we found here, among them using a misleading and oppressive fee agreement, and the respondent's routine practice of intentionally charging illegal advance fees and fees for work not actually performed. We also believe, based on his extensive industry experience, including his participation in earlier litigation involving advance fees, that the respondent knew precisely what he was doing, and knew that it was wrong. We are particularly struck by the respondent's failure even to try to explain his monthly fee of $900, other than to argue, with slim legal and no factual support, that it was a "classic retainer."

[15] The failure to supervise cases meriting suspensions or stayed suspensions all feature more extensive misconduct. E.g., Matter of Kendall, 33 Mass. Att'y Disc. R. 243 (2017) (stipulation to three-month suspension, stayed on conditions, for failure to supervise paralegal, resulting in neglect of client matter, with aggravation (earlier public reprimand), plus other misconduct); Matter of Perrault, 29 Mass. Att'y Disc. R. 531 (2013) (stipulation to three-month suspension, stayed for one year on conditions, for failure to supervise associate, leading to delays, increased cost to client, and excessive bills leading to clearly excessive fee, with aggravation (prior public reprimand)); Matter of Lawrence Goldberg, 23 Mass. Att'y Disc. R. 191 (2007) (stipulation to a year and a day suspension for numerous rule violations, among them 5.3(a) and (b), where lawyer's secretary embezzled funds, lawyer was on notice of IOLTA problems but did not act; lawyer also failed to safeguard client funds, and did not pay funds promptly).

[16] The 1.1 and 1.4 violations would likely merit a public reprimand. E.g., Matter of Zinni, 31 Mass. Att'y Disc. R. 722 (2015) (public reprimand for violations including 1.1, 1.3, 1.4 and 1.7); Matter of Morrow, 23 Mass. Att'y Disc. R. 486 (2007) (public reprimand for violations including 1.1, 1.3, 1.4 and 1.7).

Therefore our case is closer, conceptually, to Matter of Zak, supra. Zak was disbarred for varied misconduct, over a four-year period, in mortgage assistance relief scams, including charging for useless services, failure to return unearned fees, and significant misrepresentations in advertising. Zak, supra, 476 Mass. at 1035, 33 Mass. Att'y Disc. R. at 522-525. Zak's actions, and those of his nonlawyer agents, impacted "hundreds of economically, educationally, and linguistically disadvantaged clients in strained financial circumstances." Id. at 1039, 529. Although the respondent's conduct was not as audacious and venal as Zak's, at heart the two schemes bear a strong resemblance. Cf. Matter of Evan Greene, 476 Mass. 1006, 32 Mass. Att'y Disc. R. 254 (2016) (indefinite suspension for criminal convictions and other misconduct in connection with scheme involving residential mortgage foreclosure rescue transactions); Matter of Barry Greene, 477 Mass. 1019, 33 Mass. Att'y Disc. R. 163 (2017) (two-year suspension for participation in same scheme).

We also find relevant to our sanction recommendation the Court's analysis in Matter of Zankowski, supra, 487 Mass. 140, 37 Mass. Att'y Disc. R. __, and the dishonesty and overreach displayed there. Zankowski received a two-year suspension for dishonestly misrepresenting, on client bills, the legal work that had been done and who had performed it, and for collecting fees for hours not actually worked. As was true there, "it is the established dishonest nature of the respondent's billing that differentiates this case from cases involving charging 'excessive' fees." Id. at 150. "Attorneys must adhere to honesty in their billing practices. In a relationship premised on trust, clients are entitled to nothing else." Id. at 155. See also Matter of Goldstone, 445 Mass. 551, 566 (2005) (disbarment for intentional overbilling and collecting hundreds of thousands of dollars in fees and costs to which lawyer was not entitled; "[w]here an attorney lacks a good faith belief that he has earned and is entitled to the monies, such conduct constitutes

conversion and misappropriation of client funds"); Matter of Beaulieu, 29 Mass. Att'y Disc. R. 33 (2013) (stipulation to four-year suspension for charging and collecting clearly excessive fees, in violation of rule 1.5(a), and intentionally submitting to CPCS, under the pains and penalties of perjury, bills that were inaccurate, inflated and/or simply false, in violation of rules 8.4 (c), (d) and (h), with mitigation); Matter of Smith, 21 Mass. Att'y Disc. R. 609, 610-611 (2005) (resignation accepted as a disciplinary sanction for lawyer's conduct in charging a clearly excessive fee, to vulnerable elderly couple, in violation of Rules 1.5(a) and 8.4(c) and (h)).[17]

In recommending a sanction, we bear in mind that "'[e]ach case must be decided on its own merits and every offending attorney must receive the disposition most appropriate in the circumstances.'" Matter of Foley, supra, 439 Mass. at 333, 19 Mass. Att'y Disc. R. at 152 (citation omitted). "[T]he primary factor is the effect upon, and perception of, the public and the bar." Matter of Finnerty, 418 Mass. 821, 829, 10 Mass. Att'y Disc. R. 86, 95 (1994) (citation and internal quotations marks omitted). Taking advantage of distressed homeowners, especially by skirting laws deliberately enacted to protect them, is serious misconduct. In light of the respondent's considerable misconduct, and bearing in mind the numerous, serious aggravating factors we have found, we recommend a suspension of a year and a day.

[17] Cf. Matter of Hallal, 20 Mass. Att'y Disc. R. 207 (2004) (indefinite suspension, by stipulation, for billing personal expenses to clients, in violation of rules 8.4(c) and (h)); firm reimbursed clients and lawyer reached settlement with firm).

Respectfully submitted,

By the Hearing Committee,

/s/ *Elizabeth M. Brusie*
Elizabeth M. Brusie, Esq., Chair

/s/*Steven M. Genduso*
Steven M. Genduso, Member

/s/*Alisia E. St. Florian*
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