**NO. BD-2010-021**

**IN RE: TAMMY SHARIF**

**S.J.C. Order of Term Suspension entered by Justice Ireland on April 22, 2010, with an effective date of May 24, 2010.[1]**

**BOARD MEMORANDUM**

Based on its findings that the respondent had intentionally misused an advance fee payment, engaged in intentional misrepresentations, and committed other violations, a hearing committee recommended that the respondent receive a one-year suspension with six months stayed for two years on probationary terms. Bar counsel appeals from the recommended sanction, arguing primarily that the presumptive sanctions enunciated by the Court in Matter of the Discipline of an Attorney (and two companion cases) (Three Attorneys), 392 Mass. 827, 836-837, 4 Mass. Att'y Disc. R. 155, 166-167 (1984), and reaffirmed and clarified in Matter of Schoepfer, 426 Mass. 183, 187-188, 13 Mass. Att'y Disc. R. 679, 685-686 (1997), should be applied to the respondent's intentional misuse of advance fee payments, and that the committee erred by finding mitigation in the respondent's severe depression. Bar counsel recommends disbarment.

The board considered the matter at its meetings on December 14, 2009, February 8, 2001, and March 8, 2010. We adopt the committee's subsidiary findings of fact and its conclusions that the respondent violated the rules charged, but we reject some of its ultimate findings in mitigation and we modify the proposed sanction. We recommend that the respondent be suspended for three years.

**Findings and Conclusions**

**In January 2007, when the respondent had been in practice for little more than three years, she agreed to represent a client seeking relief from mortgage transactions that, according to the client, had been executed in the client's name by an identity thief. The client's interest in one of his properties was scheduled to be foreclosed in about a week. The respondent accepted a $10,000 fee advance without advising the client that she lacked competence and experience in the relevant fields of law. She and the client entered into a written fee agreement that set the respondent's hourly rate at $155 and obliged her to deposit the fee advance into her IOLTA account and to send the client itemized statements two days before drawing against the advance. The respondent deliberately deposited the advance into her business account in violation of the fee agreement, and she did not send out the required advance notices before drawing on it. In less than a month, the respondent had exhausted the advance by expending the funds on matters unrelated to the client and without having earned it.**

**The respondent also neglected the client's case. The January foreclosure went forward without opposition. The respondent ignored the client's subsequent calls. The client went to the respondent's office to discuss the matter. About four weeks after the client's office visit and approximately three months after the foreclosure, the respondent filed a complaint in the federal district court. The complaint failed to request complete relief, failed to name the third party who had bought the real estate at foreclosure auction, failed to allege fraud with the required particularity, alleged a cause of action that had already been barred by the statute of limitations, and alleged a violation of the consumer protection laws of a state that had nothing to do with the transactions.**

**The client later discharged the respondent and filed a complaint with bar counsel. In replying to bar counsel's inquiries, the respondent sent bar counsel a bill that multiplied the time claimed for exaggerated or non-existent work by a higher billing rate than the fee agreement permitted, and the respondent falsely claimed she was still owed more than $10,000 in fees and expenses.**

**Although the client had twice demanded an accounting for the retainer, the respondent made no reply. In April 2008, after the client had sued her, the respondent refunded the entire $10,000. The respondent eventually used personal funds to make restitution. The committee found that bar counsel had not proved that the respondent intended to deprive the client at the time of the misuse because there was no evidence the respondent did not intend to earn the money. Still, the committee found, the client was actually deprived of the funds when the respondent failed to return the fee on discharge.**

**The committee found that the respondent's conduct violated Mass. R. Prof. C. 1.1 (competence); 1.2(a) (pursue client's lawful objectives through reasonably available means); 1.3 (diligence); 1.4(a) (communicate with client and respond to reasonable inquiry); 1.4(b) (failure to explain matters to client for informed decision); 1.15(b)(1) (hold trust funds in trust account); 1.15(d)(1) (render full accounting on final distribution of trust funds); 1.15(d)(2) (billing, notice of withdrawal from trust account, statement of balance on withdrawal); 1.5(a) (clearly excessive fees); 8.1(a) (making knowingly false statement of material fact in connection with a disciplinary matter); 8.4(c) (conduct involving fraud, deceit, misrepresentation, or dishonesty); 8.4(d) (conduct prejudicial to the administration of justice); and 8.4(h) (conduct reflecting adversely on fitness to practice).**

**In another matter, the respondent neglected a client's personal injury claims. Retained on the first of two matters in 2004, the respondent sent letters of representation, obtained medical records and police reports, and assisted the client in applying for PIP benefits, but she did little else to advance either claim. The limitations period on the earlier of the two expired in March 2007. The respondent did not return the client's calls or send a copy of the case files in response to demands in February and June 2007. In June 2007, the client complained to bar counsel, and bar counsel asked the respondent to reply.**

**In reply, the respondent drafted a letter to the client announcing her withdrawal and backdated it to October 2006. The respondent presented the backdated letter to bar counsel and intentionally misrepresented that she had enclosed the client's files when she sent the client the withdrawal letter in 2006. When computer evidence undermined this claim, the respondent intentionally misrepresented, during a sworn interview with bar counsel in 2008, that she found the letter in her office unsent and that she wrote the letter in 2007 to re-create one she believed she had sent in 2006. In January 2009, the client received $9,000 in settlement from the respondent's malpractice insurer.**

**The committee found that this conduct violated Mass. R. Prof. C. 1.1; 1.2(a); 1.3; 1.4(a); 8.1(a); 8.4(c), (d), and (h); and 1.16(d) (duties on withdrawal, including returning files).**

**In her answer to the petition for discipline, and by written stipulation, the respondent admitted nearly all of the allegations and charges of the petition. The hearings focused on the intentionality of the respondent's misconduct and on evidence proffered in mitigation, principally to the effect that the respondent suffered from severe depression. The committee credited testimony from the respondent and her therapist that the respondent had suffered from depression most of her life, stemming from sexual and psychological abuse as a child. That depression deepened in late 2006, when the respondent suffered the sudden disappearance and death of her boyfriend, and in 2007 with the severe illness of a beloved grandmother in January and the deaths of that grandmother and an aunt in May. The committee also credited the respondent's testimony that she was overwhelmed**

**by depression when she misused fee advances in early 2007. Crediting testimony from the respondent's therapist, the committee found that the respondent's depression "interfered with her performance as a lawyer …, and it interfered with her thinking and her judgment," and that the depression "impaired her judgment, and contributed to her violations, without excusing them." The committee also found that an ongoing course of therapy and anti-depressant medication has allowed the respondent to resume her professional life successfully.[2]**

**As mentioned, the committee recommended a one-year suspension with six months stayed for two years on condition that she undergo continued therapy and professional mentoring, with a concurrent limitation of her practice to criminal and delinquency matters in the Massachusetts district and juvenile court system, where the respondent has both experience and a favorable reputation.**

## Discussion

**We agree with the hearing committee that it would not be appropriate to discipline the misuse of fee advances by rigidly applying the presumptive sanctions that apply to the misuse of classic client funds like escrow deposits and estate proceeds. While the Court has yet to address this issue directly, it apparently has never invoked those sanctions in disciplining lawyers whose misuse of retainers would have warranted much more substantial sanctions under the presumptive sanctions set out in Three Attorneys or Schoepfer. See Matter of Owens, 19 Mass. Att'y Disc. R. 351, 353 (2003) (Greaney, J.) (two-year suspension for lawyer whose misconduct included, among other serious delicts, the immediate use of an unearned fee advance); Matter of Garabedian, 415 Mass. 77, 84, 9 Mass. Att'y Disc. R. 121, 129 (1993) (three-month suspension for multiple acts of misconduct including "brief misappropriation" of fee advance). The board has consistently taken the position that Schoepfer should not be slavishly applied to cases involving the misuse of retainers. See Matter of Hopwood, 24 Mass. Att'y Disc. R. 354, 361-363 (2008); Matter of Shea, 14 Mass. Att'y Disc. R. 708, 724 (1998) (dictum), citing In re Lochow, 469 N.W.2d 91, 97 (Minn. 1991); Matter of Stern, 458 A.2d 1279, 1282 (N.J. 1983) (per curiam).**

**We take this position not because the misuse of retainers is any less serious, but because the potential for misunderstanding is substantially greater for several reasons. First, unlike fee advances, traditional client trust funds are not intended to become the lawyer's property. It is the expectation of both the client and the lawyer that some or all of a fee advance will become attorney income at some point.**

**Second, there can be any number of appropriate agreements as to how and when fees can be deemed earned, including hourly billing on account, a flat fee for a particular project, or a "classic" retainer that secures a lawyer's availability to the client for a period of time. The considerable variations in fee arrangements create substantial potential for confusion and ambiguity.**

**Third, there is the potential for confusion respecting the difference between advances paid by clients for attorney's fees as opposed to advances paid by clients for costs and other expenditures to third parties such as experts. Unlike a fee advance, advances made for costs and expenses are not intended ever to become the lawyer's property because costs are meant to be paid to third parties on the client's behalf. Somewhat anomalously, rule 1.15(b)(1) nonetheless permits a lawyer to commingle with her own funds cost advances that will never be hers, but she may not commingle fee advances that are intended to become hers. We are not suggesting that there is anything wrong with the rule as written; we wish only to point out that the anomaly fosters understandable confusion over the handling of both kinds of advances.**

**Fourth, while it is intuitively understood that classic client funds like real estate deposits,**

**settlement proceeds, and estate assets are client funds, the same cannot be said for advanced fees. In fact, some states – notably including New York – do not require lawyers to treat advanced fees as client funds, and as a consequence advances may not be placed in a trust account. See ABA/BNA Lawyers' Manual on Professional Responsibility 45:110 (discussing "minority view" on treatment of advanced fees). See also New York State Ethics Op. 570 (1985). In other words, the commingling and premature taking of advanced fees are better understood as malum prohibitum, not malum in se.**

**To be sure, Massachusetts follows the majority view in requiring that advanced fees be treated as client funds, and it is the lawyer's responsibility to minimize any such confusion and to resolve any ambiguities in the client's favor. See Mass. R. Prof. C. 1.5(b). The required and simplest practice is to maintain advanced fees in a trust account, to inform the client in writing in advance of, or simultaneously with, any transfer from trust to lawyer, and to defer or reverse any transfer if it is questioned by the client. Because premature and unearned transfers inhibit the client's right to terminate the relationship and expose the client's assets to the creditors of the attorney, they are very serious violations of the rules. Given the ambiguities previously mentioned, however, it does not seem fair to follow the bright-line sanctions set out in Schoepfer when imposing sanctions for misuse of advanced fees. If the Court nonetheless determines that the Schoepfer standards should be applied to advanced fees, we recommend that it do so only prospectively. See Three Attorneys, 392 Mass. at 835-837, 4 Mass. Att'y Disc. R. at 164-166 (imposing lesser sanctions for misappropriating client funds where the "court ha[d] never spoken to the seriousness of these rules dealing with client funds," but warning that more stringent sanctions would be applied to conduct occurring "after the date of this opinion"). We take the same position in We take the same position in Bar Counsel v. William J. Pudlo, BBO File No. C6-05-0046, also decided this day.**

## The Appropriate Sanction

**In Pudlo we recommended a year's suspension, with six months stayed for two years on the condition that the respondent provide audited reports for his all of his trust accounts on a quarterly basis during that two-year period. Because we find the respondent's conduct here more troubling and knowingly wrongful, we feel constrained to recommend a three-year suspension.**

**However much confusion there may be among members of the bar about the handling of retainers and fee advances, it is clear that the respondent herself was on actual notice that this particular fee advance had to be segregated and drawn on only when earned. Under her fee agreement with the client, she expressly undertook to hold all advances in a trust account and not to make withdrawals from the account until two days after submitting a bill to the client for fees and expenses. See Ex. 2, ¶ 5. To be sure, the form of her fee agreement appears to have been clumsily adapted from one used by a large law firm – it set out, for example, differing billing rates for senior partners, partners, associates, paralegals, and law clerks (see Ex. 2, ¶ 7) – and an indulgent fact-finder might question the extent to which she understood its application to her solo practice. But the respondent's use of it and her unequivocal undertaking, in accordance with the plain wording of the agreement, to segregate the fee advance undercut efforts to discount her misconduct on account of ignorance or confusion over the nature and handling of fee advances. In fact, she attested in her own handwriting on the last page of the fee agreement that she had received the $10,000 advance, and she then proceeded to deposit the funds directly into her operating account. The entire advance had been spent within three weeks of the deposit to pay her business and personal expenses, much of it obtained by cash withdrawals from her ATM. This was intentional misuse of a fee advance with actual deprivation resulting.**

**Further, the respondent did more than lose track of the fee advance she had received and then cobble together a recklessly inaccurate accounting to justify her use of the funds she**

**received, as Pudlo had done. Her first response to bar counsel's inquiries was intentionally to misrepresent the work she had performed and the hours spent on the case. She even inflated her hourly rate above that set out in the fee agreement.**

**Similarly, in the motor vehicle tort actions she undertook on behalf of the second client, the respondent did more than neglect them and allow the statute of limitations to run on one of the claims. When the client complained to bar counsel, the respondent confected a backdated letter in which she purportedly advised the client that she had withdrawn from the tort matters. She intentionally misrepresented to bar counsel that she had sent the client a copy of her files with the fake letter. When bar counsel's examination of the hard drive on her computer undermined her claims about the ersatz disengagement letter, she changed her story: in a sworn statement to bar counsel, she falsely claimed to have written the letter on the date indicated on the face of the letter but, when informed that the client had never received it, she came upon it in a pile of papers in her office. The hearing committee found that she knew these representations were false, deceptive, and misleading when she made them.**

**We also agree with bar counsel that it is difficult to view the respondent's depression as having any causal nexus to her deliberate and studied efforts to avoid responsibility for her misconduct by making intentional misrepresentations about work performed and billing rates, by fabricating an exculpatory document, and by giving false testimony under oath to explain away the fabrication. Accordingly, while we accept the committee's credibility determinations regarding the evidence offered in mitigation, we reject its ultimate finding and legal inference that her intentional misrepresentations (as distinct from other misconduct) are mitigated by her mental condition.**

**If the standards set out in Three Attorneys and Schoepfer were applicable to fee advances, bar counsel would be right that disbarment is warranted. The respondent's intentional misappropriation of client funds is exacerbated by actual deprivation, the mishandling of two matters, intentional misrepresentations to the client and bar counsel, the fabrication of an exculpatory document, and her false statement under oath to bar counsel. Because we believe sanctions for the misuse of fee advances should not be rigidly governed by Three Attorneys and its progeny, a lesser sanction is appropriate. The respondent's cumulative misconduct is far more knowing and blameworthy than that at issue in Pudlo, supra, or in any of the other cases we have cited that involved the misuse of fee advances and retainers. Given all the circumstances, we believe the appropriate balance would be struck by an order suspending the respondent for three years.**

## Conclusion

**For all of the foregoing reasons and except to the extent specifically stated above, we adopt the hearing committee's subsidiary findings of fact and conclusions of law, but modify its proposed disposition. An Information shall be filed with the Supreme Judicial Court recommending that the respondent, Tammy Sharif, be suspended from the practice of law for three years.**

## FOOTNOTES:

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

**[2] The committee also gave some limited weight to the respondent's restitution and the respondent's favorable reputation.**

**Please direct all questions to webmaster@massbbo.org.**