IN RE: EWUNIKI DAMALI SANDERS

NO. BD-2010-122

S.J.C. Order of Term Suspension entered by Justice Botsford on June 17, 2011.[1]

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

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
DOCKET NO. BD-2010-122

IN THE MATTER OF EWUNIKI DAMALI SANDERS

MEMORANDUM OF DECISION

The Board of Bar Overseers (board) has filed an information recommending that the respondent Ewuniki Damali Sanders be suspended from the practice of law for two years, based primarily on the board's determination that the respondent intentionally misused a client's retainer funds and made material misrepresentations to two courts. The respondent opposes the board's recommendation, arguing that a public reprimand or, at most suspension for up to one year, is the appropriate discipline. For the reasons that follow, I agree with the board that the respondent should be suspended, but conclude that the suspension should be for three years, with the final year stayed for a period of two years on probationary conditions discussed below.

Background. The respondent was admitted to the Massachusetts bar on January 25, 2002. She opened her solo practice shortly thereafter, and was engaged in that practice at all relevant times. In 2009, bar counsel commenced this matter by filing a petition for discipline containing allegations of misconduct in relation to two separate clients. A hearing on the petition was held before a hearing committee of the board over several days in January and February of 2010. The two clients, the respondent, opposing counsel in one of the matters, and an attorney from the Massachusetts Commission Against Discrimination (MCAD), testified. The hearing committee

issued its report on June 14, 2010, setting out very extensive findings of fact and concluding that the respondent had violated a number of separate disciplinary rules. The hearing committee recommended a suspension of three years, with certain conditions to be imposed if and when the respondent were reinstated. Both bar counsel and the respondent appealed to the board. The board thereafter issued a memorandum of decision in which it rejected both appeals, adopted the hearing committee's findings of fact, and recommended a two-year suspension without any conditions.[1] The board then filed this information.

The facts, as found by the hearing committee and adopted by the board, are set out to correspond to the two counts of the petition for discipline, and may be summarized as follows.

Count 1. The first count concerns the respondent's representation of a client who engaged the respondent beginning in October, 2002. The client had left his job because, in his view, his employer had refused to take remedial or disciplinary actions against several employees who had subjected the client to sexual harassment and a hostile work environment because of his sexual orientation. After having filed a complaint on the client's behalf with the MCAD, the respondent waited approximately ninety days and then removed the case from the agency, filing a sixteen-count civil complaint in the Middlesex Superior Court. The defendants moved to dismiss a majority of the counts under Mass. R. Civ. P. 12 (b) (6). A Superior Court judge dismissed many

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[1] Bar counsel argued before the board that disbarment of the respondent was the appropriate discipline, seeking to apply the presumptive sanctions set forth in Matter of the Discipline of an Attorney (Three Attorneys), 392 Mass. 827, 836-837 (1984), and reaffirmed in Matter of Schoepfer, 426 Mass. 183, 187-188 (1997). However, the board, following its decision in Matter of Sharif, B.B.O. File Nos. C6-07-0028 and C6-07-0035 (2010), rejected that position. Since the board's memorandum of decision in this case, this court has decided Matter of Sharif, and agreed with the board that no presumptive sanction of disbarment or indefinite suspension should apply to cases involving the intentional misuse of funds advanced by a client as a retainer for the payment of legal fees. Matter of Sharif, 459 Mass. 558, 565-566 (2011).

of the counts, but several counts alleging unlawful discrimination and tortious conduct remained.[2] No motion for summary judgment ever was filed. The board found, however, that the respondent mischaracterized this result on four separate occasions and before two different courts (the Middlesex Superior Court and a Delaware Bankruptcy Court) as the client having "won" a motion for summary judgment on the claims the Superior Court did not dismiss. She declined to retract or alter this position even after opposing counsel twice informed her that this was a mischaracterization of the Superior Court's order.

Thereafter, the employer filed for bankruptcy, resulting in an automatic stay of the Superior Court action against the employer. Some time later, as a result of her mischaracterization of the gist of the Superior Court order, the respondent obtained from the Bankruptcy Court an order lifting the automatic stay in a limited way. The respondent also misrepresented information to the Superior Court about discovery matters, and, through neglect, failed adequately to document for the Superior Court the Bankruptcy Court's order lifting the stay with the result that the Superior Court judge denied the respondent's motion to proceed with the case. That neglect continued for some nine months, during which time the respondent compounded the problem by failing to file in the Superior Court the periodic status reports, ordered by that court to be filed every six months, concerning the status of the bankruptcy proceeding. When the respondent finally filed a motion for reconsideration of the Superior Court's denial of the motion to proceed, she intentionally misrepresented to the Superior Court that the status reports had been filed properly, and continued the misrepresentation discussed

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[2] The board adopted the hearing committee's findings of fact, but in this paragraph did not appear to summarize them correctly. I therefore recite the hearing committee's findings as to which claims remained.

above that the court's initial order had been one for summary judgment. The Superior Court judge denied the respondent's motion for reconsideration, and final judgment entered in the case.

During the course of these proceedings, the respondent failed to keep her client apprised of the progress of the case in the Superior Court, and indeed made several misrepresentations to the client about the reasons for the delays and for the case's ultimate dismissal.

The board found the respondent's conduct in mischaracterizing the Superior Court's order violated Mass. R. Prof. C. 1.1 (competence), 3.1 (frivolous claims), 3.3 (a) (1) (knowingly false statement of material facts of law to tribunal), 8.4 (c) (fraud, deceit, misrepresentation, or dishonesty), and 8.4 (d) (conduct prejudicial to administration of justice). Her misrepresentations to the court with respect to discovery violated Mass. R. Prof. C. 1.1 , and her neglect with respect to the Bankruptcy Court order violated the same rule as well as Mass. R. Prof. C. 1.2 (a) (lawyer's duty to seek lawful objectives of client) and 1.3 (diligence). The respondent's conduct with respect to her client violated Mass. R. Prof. C. 1.4 (a) and (b) (communication with client), and 8.4.

Count 2. A physician engaged the respondent to represent her on a claim that she, the doctor, had been discharged from her employment by a hospital in 2003 because of her religion and national origin. The respondent first conferred with the doctor in 2005, without charging any fee, and it appears contact between the two then ceased for some time. Thereafter, in 2008, the doctor filed on her own a complaint of discrimination with the MCAD. The doctor then approached the respondent again, and the two entered into what appears to be a modified contingent fee agreement, according to which the doctor agreed to provide the respondent a $10,000 advance or retainer fee. The respondent improperly deposited the retainer directly into

her operating account in violation of Mass. R. Prof. C. 1.15 (b) (1) (hold trust funds in trust account). By the time that the respondent had spent the entire amount of the retainer, she had earned only $4,250 in fees, thereby knowingly misappropriating the balance of her client's funds in violation of Mass. R. Prof. C. 1.15 (b) (hold trust funds in trust account) and 8.4 (c) and (h) (fraud, deceit, misrepresentation, or dishonesty and engaging in conduct that adversely reflects on lawyer's fitness). The respondent then aggravated the difficulty by failing to account for the retainer, presenting the client with billing statements in which she misrepresented the amount of time spent on the client's case, thereby charging a clearly excessive fee, and failing to return the unearned portion of the advance fee. The board concluded the respondent's conduct in this regard to have violated Mass. R. Prof. C. 1.5 (a) (charging excessive fees), 1.16 (e) (items to be made available to client on request for his or her file), and 8.4 (c).

When the hospital argued to the MCAD that the doctor's discrimination complaint was stale and should be dismissed, the respondent, notwithstanding her client's specific request to investigate a particular avenue that might indicate evidence of ongoing retaliation, merely reiterated, in her opposition, the same allegations she had already made. She further failed to comply with MCAD regulations for filing and serving pleadings, and failed to allege substantively the conduct required for an MCAD complaint. Finally, the respondent included, in an amended complaint she filed on behalf of her client, twenty-one additional defendants whose conduct did not fall within the jurisdiction of the MCAD, rendering the complaint frivolous. She also failed to keep her client reasonably informed about the status of the case, and misrepresented that status. The board found these actions to be in violation of Mass. R. Prof. C. 1.1 (competence), 1.3 (diligence), 1.4 (communication with client), 3.1 (frivolous claims), 3.4 (c)

(disobey obligation under rules of tribunal) and 8.4 (c) (fraud, deceit, misrepresentation, or dishonesty).

In mitigation of the respondent's conduct, the board, consistent with the approach adopted by the hearing committee, gave little weight to the fact that the respondent became pregnant during the matter described in Count 2 and was hospitalized during the pregnancy. There was evidence that the respondent worked from her hospital bed and was able to communicate with her client weekly by telephone, electronic mail, and facsimile. The board, as had the hearing committee, gave some weight to the respondent's inexperience, but found the wrongfulness of her conduct should have been evident even to a new attorney.

In aggravation, the hearing committee found the respondent had "presented false and fabricated evidence concerning her conduct . . . [had] misrepresented to the clients the status of their cases to conceal her own neglect . . . [had] failed to acknowledge, or display understanding of the nature and effect of, her wrongdoing . . . [had] committed multiple independent ethical violations . . . [and] [u]nder Count Two, . . . took advantage of a vulnerable client." Based on these facts, the hearing committee recommended a three-year suspension, with reinstatement conditioned, if and when the respondent is reinstated, on (1) the respondent's agreement to submit any fee disputes with her client to fee arbitration and to be bound by and comply with any award; and (2) her agreement to an audit by the Law Office Management Assistance Program (LOMAP), to comply with any recommendations by LOMAP, and to agree that LOMAP may communicate with bar counsel to ensure compliance. The respondent appealed to the board, which adopted the hearing panel's subsidiary findings of fact and conclusions of law, but modified the hearing panel's proposed disposition. Comparing this case to the single justice's

decision in Matter of Sharif, S.J.C. No. BD-2010-021 (2010), in which the attorney received a three-year suspension, the board concluded the conduct in Matter of Sharif "sprang from a more culpable state of mind," and was therefore inclined to recommend a one-year suspension in the instant case. Because the respondent's conduct, however, in addition to the "ignorant taking of advanced fees" also included intentional misrepresentations, which itself merits a one-year suspension, the board determined the appropriate disposition in this case is a two-year suspension.

In accordance with S.J.C. Rule 4:01, § 8 (4), as appearing in 425 Mass. 1309 (1997), the board caused an information to be filed in the county court on December 6, 2010. On March 14, 2011, following a hearing, I deferred full consideration of this matter pending the release of two cases, Matter of Pudlo, SJC No. 10707, and Matter of Sharif, SJC No. 10708, which bear on some of the issues raised in this matter. No order of temporary suspension entered. On April 27, 2011, the court decided Matter of Sharif, 459 Mass. 558 (2011) (Sharif). A hearing was then held to determine the applicability of Sharif to the respondent's case.[3]

Discussion. The recommendation of the board with respect to bar disciplinary sanctions "is entitled to substantial deference." Matter of Tobin, 417 Mass. at 81, 88 (1994). In considering the appropriate sanction in the present case, the board began with a comparison to the single justice's decision in Matter of Sharif, S.J.C. No. BD 2010-021 (2010), noting that a full bench appeal was pending. After the board's memorandum of decision issued in November 2010, as discussed, this court decided Matter of Sharif, 459 Mass. 558 (2011). In Sharif, the

[3] Although Matter of Pudlo, SJC No. 10707, has not yet been decided, at the hearing in this case, bar counsel agreed that the decision in Matter of Sharif was sufficient to allow the respondent's case to be decided, and the respondent did not disagree.

respondent, in violation of both of an express fee agreement to the contrary and of the Massachusetts Rules of Professional Conduct, took a $10,000 advance fee, deposited it directly into her operating account, and then spent the entire amount on personal and business expenses unrelated to the client's case. Matter of Sharif, 459 Mass. at 559. This court declined, however, to apply "the presumptive sanctions of indefinite suspension or disbarment from [Matter of Schoepfer, 426 Mass. 183, 187-188 (1997)], and [Matter of the Discipline of an Attorney, 392 Mass. 827, 835-837 (1984)], to all cases involving intentional use of funds advanced for the payment of services with either intent to deprive the client of funds or actual deprivation," concluding instead that the appropriate sanction – disbarment, indefinite suspension, or a term suspension – will depend on the particular facts of each case. Id. at 570. In Sharif itself, the court affirmed the sanction imposed by the single justice, which was a three-year suspension with the third year stayed for a two-year probationary period, and clarified the probationary conditions. Id. at 571.

In the present case, bar counsel seeks imposition of the original disposition recommended by the hearing committee, arguing that the conduct at issue in this case is in fact more egregious than that at issue in Sharif. The respondent, however, urges that the case instead be compared to Matter of Garabedian, 415 Mass. 77, 79-81, 84-85 (1993), in which a three-month suspension was issued for the repeated neglect of client claims, the brief misappropriation and commingling of client funds, and dishonesty and misrepresentation to the client. Notably absent from the Garabedian case, however, are repeated, intentional misrepresentations to two separate courts – facts that are very much present here. Further, although the respondent in Garabedian did deposit improperly an advance fee into his personal checking account, and did then spend it on personal

expenses unrelated to the client's case, he ultimately returned the full amount to the client, despite his claim that he had earned at least one-half that amount. Id. at 81. The respondent here, in contrast, retained the full $10,000 paid to her by her client, never returning any portion of the funds. Cf. Matter of Shea, 14 Mass. Att'y Discipline Rep. 708, 724 (1998) ("When accompanied by actual deprivation, negligent takings [of client funds] have generally resulted in term suspensions much more lengthy than the one . . . imposed in Garabedian").

Rather, I agree with bar counsel and with the board that the Sharif matter is the appropriate starting point. The board concluded Sharif's misuse of advance funds was more reprehensible than the respondent's because Sharif was "indisputably on actual notice that her fee advances had to be segregated and drawn on only when earned" in light of express language in the fee agreement to that effect. In the present case, the hearing committee and the board both concluded that under the decisions of this court and of the board, the respondent's intentional misuse of the client's advance fee and concomitant failure to render accountings, as found in connection with Count Two, warrant suspension of one year. Both the committee and the board also concluded the respondent's intentional and repeated misrepresentations to both the Superior Court and to the Bankruptcy Court regarding summary judgment merit the presumptive sanction of a one year suspension. See, *e.g.*, Matter of McCarthy, 416 Mass. 423, 431, 9 Mass. Att'y Discipline Rep. 225, 231 (1993). The board combined these two sanctions and concluded that a two-year suspension was sufficient. The hearing committee, however, found that once the respondent's "neglect under Count One, her charging excessive fees for incompetent work and her misrepresentations to and failure with both clients to conceal her neglect . . . [and] her callous disregard to the committee and the disciplinary process by her intentional false testimony" are

taken into consideration, a greater sanction is warranted. I agree, particularly in light of the respondent's failure, as the committee explained, to "recognize[] the nature and effects of her violations."

"The board's conclusions and recommendations are entitled to substantial deference, but in the end, are not binding." Matter of O'Leary, 25 Mass. Att'y Discipline Rep. 461, 471 (2009). In light of the aggregate misconduct present in this case, the three-year suspension recommended by the hearing committee is not "markedly disparate" from other similar disciplinary cases, and is sufficiently severe to "protect the integrity of the bar and to deter future misconduct." Matter of Sharif, supra. at 566 n.8, 571. See Matter of Shea, 14 Mass. Att'y Discipline Rep. 708, 708, 711-713, 723-726 (1998) (three-year suspension for neglecting client matters, charging excessive fee, commingling, misuse, and failure to maintain adequate records of advance fees, misappropriating other client funds, making false representations, and failing to cooperate with bar counsel); Matter of Barnes, 8 Mass. Att'y Discipline Rep. 8 (1992) (three-year suspension with third year suspended and respondent placed on probation for commingling personal and business funds with client funds, violating terms of escrow agreement, failing to notify client promptly of receipt of funds on client's behalf, misrepresenting status of funds to client, depriving client of funds, failing to safeguard and keep adequate records as to receipt, and signing client's name to check without authority). See also Matter of Barach, 22 Mass. Att'y Discipline Rep. 36, 44-48, 55-57 (2006) (two-year suspension for failing to keep adequate records, charging excessive fees, failing to return unearned client advance fees, charging for work not performed, falsifying time records,

and making intentional misrepresentations to bar counsel).[4]

That said, I further conclude that it would be appropriate to stay the third year of the suspension being ordered. See Sharif, 459 Mass. at 571. The stay is to be for a two-year probationary period with the conditions recommended by the hearing committee, as set forth in the order below.

Margot Botsford
Associate Justice

DATED: June 17, 2011

[4] Although it is true that "in a majority of cases that have resulted in three-year suspensions, the respondent had been convicted of a crime from which discipline proceedings arose," Matter of Tobin, 417 Mass. 81, 90 n.8 (1994), this court has determined it appropriate to increase a two-year suspension recommended by the board to a three-year suspension where the respondent engages in behavior that demonstrates "a pattern of neglect and deceit." Matter of Kerlinsky, 428 Mass. 656, 665 (1999), quoting Matter of Tobin, supra. The respondent in the instant case has, in my view, and in the view of the hearing committee, demonstrated such a pattern.