

**STATE BAR COURT OF CALIFORNIA**  
**HEARING DEPARTMENT – LOS ANGELES**

In the Matter of	)	Case Nos. <b>08-O-14008-RAH</b>
	)	(08-O-14372)
<b>DRAGO CHARLES BARIC,</b>	)	
	)	<b>DECISION</b>
<b>Member No. 105383,</b>	)	
	)	
<u>A Member of the State Bar.</u>	)	

**Introduction**

In this original disciplinary proceeding, which proceeded by default, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) charged respondent Drago Charles Baric<sup>1</sup> with three counts of professional misconduct. Deputy Trial Counsel (DTC) Kevin B. Taylor appeared on behalf of the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent initially participated in the proceedings, but ultimately failed to appear at trial.

The court finds respondent culpable, by clear and convincing evidence, of each of the alleged charges. In light of his misconduct, the aggravating circumstances, and the lack of any mitigating circumstances, the court recommends, among other things, that respondent be

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<sup>1</sup> Respondent was admitted to the practice of law in California on December 3, 1982, and has been a member of the State Bar of California at all times since that date.

suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be suspended from the practice of law for a minimum of eighteen months and must remain suspended until respondent makes restitution and the State Bar Court grants a motion to terminate his suspension. (Former Rules Proc. of State Bar, rule 205.)<sup>2</sup>

### **Significant Procedural History**

The State Bar filed a Notice of Disciplinary Charges (NDC) against respondent in case nos. 08-O-14008 (08-O-14372) on May 13, 2010. That same day, a copy of the NDC was properly served on respondent in the manner set forth in rule 60 of the Former Rules of Procedure of the State Bar of California (Former Rules of Procedure).

Respondent filed a response to the NDC on June 23, 2010.

On October 15, 2010, the State Bar and respondent filed pretrial statements. Both parties entered into a stipulation as to facts, conclusions of law and dismissal of charges, and admission of documents on October 27, 2010. The parties stipulated that another action was pending before the review department and that it would be appropriate to abate this matter pending resolution of that case. On November 1, 2010, the court ordered this matter abated, effective October 27, 2010, and until further order of the court.

On May 24, 2011, the court held a status conference. At this status conference, the court calendared a pretrial conference and trial dates. The court further ordered the parties to

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<sup>2</sup> Effective January 1, 2011, the Rules of Procedure of the State Bar of California were amended. The court, however, orders the application of the Former Rules of Procedure in this hearing department matter based on its determination that injustice would otherwise result. (See Rules Proc. of State Bar (eff. January 1, 2011), Preface.)

participate in a settlement conference. The State Bar and respondent were present at the May 24, 2011 status conference.<sup>3</sup>

Respondent failed to appear at the trial in this proceeding, held on July 12, 2011. Accordingly, on July 12, 2011, the court entered respondent's default (Former Rules Proc. Of State Bar, rule 201) and ordered his involuntary inactive enrollment.

### **Findings of Fact and Conclusions of Law**<sup>4</sup>

All factual allegations of the stipulation as to facts, conclusions of law and dismissal of charges, are deemed admitted unless otherwise ordered by the court based on contrary evidence.

#### **A. Case No. 08-O-14008 – The Orozco Matter**

##### **Facts**

On March 25, 2008, Hector Orozco (Orozco) employed respondent to represent him in an appeal in the matter entitled *People v. Orozco*, case no. B207039.

On April 15, 2008, Orozco's mother, Marie Orozco, paid respondent \$5,000 in advanced attorney fees for respondent's representation of Orozco.

Respondent contends that he read the transcript of Orozco's underlying criminal proceeding in preparation for drafting an opening brief, but never actually drafted the brief. On August 7, 2008, respondent was served notice that no opening brief had been filed on Orozco's behalf and that Orozco's appeal would be dismissed if the opening brief was not filed within 30 days.

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<sup>3</sup> On July 7, 2011, the court filed an order terminating the November 1, 2010 abatement of this matter, effective May 24, 2011.

<sup>4</sup> Unless otherwise indicated, all references to rules refer to the California Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

Respondent received this notice and on September 11, 2008, he filed an application with the Court of Appeal seeking an extension of time to file Orozco's opening brief. On that same day, Orozco notified respondent that his employment was terminated.

On September 22, 2008, respondent filed a motion with the Court of Appeal seeking to be relieved as Hector's counsel. The court granted the motion and appointed counsel to represent Orozco in his appeal.

On October 4, 2008, Marie Orozco mailed respondent a letter in which she expressed her dissatisfaction with respondent and requested that he refund the \$5,000 she had paid him. Respondent received that letter shortly after October 4, 2008. Respondent has yet to refund the \$5,000 in unearned fees.

### **Conclusions of Law**

#### ***1. Count One – (Rule 4-100(B)(3) [Failure to Maintain Records of Client Funds])***

Rule 4-100(B)(3) provides that an attorney must maintain records of all funds of a client in his or her possession and render appropriate accounts to the client. By failing, upon termination, to provide Hector or Marie Orozco an accounting of the \$5,000.00 he was paid to represent Hector, respondent failed to render appropriate accounts to a client regarding all funds coming into respondent's possession, in willful violation of rule 4-100(B)(3).

#### ***2. Count Two – (Rule 3-700(D)(2) [Failure to Return Unearned Fees])***

Rule 3-700(D)(2) requires an attorney, upon termination of employment, to promptly refund any part of a fee paid in advance that has not been earned. By not refunding the \$5,000.00 to Orozco, respondent failed to refund unearned fees, in willful violation of rule 3-700(D)(2).

## **B. Case No. 08-O-14372**

### **Facts**

From August 1, 2008, through December 31, 2008, respondent maintained a client trust account (CTA) at Bank of America. During this time period, respondent issued 31 checks drawn upon his CTA to pay for personal expenses. On 15 occasions, respondent also deposited personal funds into his CTA.

### **Conclusions of Law**

#### ***1. Count Three – (Rule 4-100(A) [Failure to Maintain Client Funds in Trust])***

Rule 4-100(A) provides that all funds received for the benefit of clients must be deposited in a client trust account and that no funds belonging to the attorney must be deposited therein or otherwise commingled therewith. By paying personal expenses directly from his CTA and depositing personal funds into his CTA, respondent misused, deposited and commingled funds belonging to himself in a client trust account in wilful violation of rule 4-100(A).

## **C. Aggravation<sup>5</sup>**

### **Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent's prior record of discipline is a factor in aggravation. (Std. 1.2(b)(i).) On June 15, 2011, the Supreme Court filed an order in case no. S190894 (State Bar Court case no. 07-O-13120) suspending respondent from the practice of law for two years, stayed, with a three-year period of probation, including a one-year actual suspension. In this proceeding, respondent was found culpable of sixteen counts of misconduct in five separate matters. Respondent's misconduct included failing to perform with competence, failing to communicate, failing to notify his client of the receipt of client funds, commingling personal funds in his client trust

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<sup>5</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

account, paying personal expenses out of his client trust account, failing to return unearned fees, failing to account, and failing to cooperate in a State Bar investigation. In mitigation, respondent had no prior record of discipline and cooperated with the State Bar in the proceeding. In aggravation, respondent demonstrated indifference towards rectification and caused significant harm to his clients.

**Multiple Acts/Pattern of Misconduct (Std. 1.2(b)(ii).)**

Respondent was found culpable of three acts of misconduct in two client matters.

Multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

**Bad Faith, Dishonesty, Concealment, and Overreaching (Std. 1.2(b)(iii).)**

As the review department found in *In the Matter of Nees* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 459, 465, an attorney's wrongful retention of an unearned fee for an extended period of time may be considered as a factor in aggravation when it constitutes a practical appropriation of the client's property. Accordingly, respondent's unexplained failure to refund Marie Orozco's \$5,000 unearned fee for three years warrants consideration as an aggravating circumstance.

**Failure to Cooperate (Std. 1.2(b)(vi).)**

The court finds, by clear and convincing evidence, that respondent failed to cooperate in this matter. (See Std. 1.2(b)(vi).) Respondent's failure to participate in the present proceedings prior to the entry of his default warrants consideration in aggravation.

**D. Mitigation**

Respondent bears the burden of providing mitigating circumstances by clear and convincing evidence. (Std. 1.2(e).) There is no evidence of any mitigating circumstances; nor is there any mitigation otherwise apparent in the record.

## **Discussion**

The primary purposes of attorney disciplinary proceedings are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Respondent is culpable in this case of failing to maintain records of client funds (rule 4-100(B)(3)), failing to refund unearned fees (rule 3-700(D)(2)), and failing to maintain client funds in a trust account (rule 4-100(A)). The standards applicable to this misconduct include 1.6, 1.7(a), and 2.2(b).

Standard 1.6 provides that the appropriate sanction for the misconduct must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) “[E]ach case must be resolved on its own particular facts and not by application of rigid standards.” (*Id.* at p. 251.)

Standard 2.2(b) provides that commingling or another violation of rule 4-100 must result in at least a three-month actual suspension, irrespective of mitigating circumstances. However, in light of respondent’s prior record of discipline, the most severe sanction for respondent’s misconduct is found in standard 1.7(a), which provides that the degree of discipline in the current proceeding shall be greater than that imposed in respondent’s prior disciplinary proceeding unless the prior discipline imposed was so remote in time and the offense so minimally severe that imposing greater discipline in this current proceeding would be “manifestly unjust.”

The court must also consider the balance of aggravating and mitigating circumstances. Prior discipline is always a proper factor in aggravation. The rationale for considering a prior record is that it is indicative of a recidivist attorney's inability to conform to ethical norms. (*In the Matter of Sklar* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 618-619.) The aggravating force of prior discipline is generally diminished when the current misconduct has occurred during the same time period as the misconduct in the prior matter. *Sklar* is not applicable here, because the conduct was not contemporaneous. Respondent's prior misconduct occurred between May 2006 and November 2007, whereas the current misconduct occurred between August 2008 and December 2008.

Respondent's prior discipline is a true prior because the misconduct charged in this case continued to occur even after the NDC for the prior misconduct was filed on November 6, 2008. Respondent continued to commingle funds into December 2008. Such notification proved inadequate to ensure that respondent's misconduct would not recur.

In addition, respondent's failure to participate in this case shows that he does not appreciate the seriousness of the charges or comprehend the importance of participating in the disciplinary proceedings. (*Conroy v. State Bar* (1990) 51 Cal.3d 799, 805) These factors cause additional concern that the risk of respondent committing future misconduct is high.

A disciplinary recommendation must be consistent with the discipline in similar proceedings. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, the attorney repeatedly misused his client trust account as a personal account, twice failed to refund unearned advanced costs promptly on request, and failed to competently perform legal services. In aggravation, the attorney had been privately reprimanded in 1977 for misconduct, had committed multiple acts of



wrongdoing in the current proceeding, and had committed an uncharged act of moral turpitude. In mitigation, the attorney acted in good faith with his payment of taxes, was candid and cooperative with the State Bar, and had done pro bono work. The discipline was three years stayed suspension and five years probation, conditioned on six months actual suspension.

Respondent's misconduct is more serious than the misconduct found in *Koehler*. Respondent misused his client trust account as a personal account and failed to return the \$5,000 in unearned fees, depriving his client of a significant amount of money for three years. In *Koehler*, the prior discipline was a private reproof, which was remote in time, whereas respondent's prior record of discipline consisted of a one-year actual suspension for misconduct that occurred about a year prior and in which respondent has yet to repay \$6,000 in unearned fees. In addition, respondent failed to participate in the present proceedings prior to the entry of his default, whereas the attorney in *Koehler* was candid and cooperative with the State Bar. *Koehler* also involved other significant factors in mitigation; while respondent, on the other hand, did not present any evidence in mitigation.

Accordingly, the court recommends, among other things, that respondent be suspended for a minimum of 18 months.<sup>6</sup>

### **Recommendations**

Accordingly, the court recommends that respondent **Drago Charles Baric** be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be actually suspended from the practice of law for 18 months and until:

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<sup>6</sup> The State Bar requested that the present period of actual suspension run consecutive to the suspension imposed in case no. S190894 (State Bar Court case no. 07-O-13120). The court declines to make such a recommendation on the basis that it would result in excessive discipline. (See *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1129.)

(1) He makes restitution to Marie Orozco in the amount of \$5,000 plus 10% interest per annum from October 4, 2008 (or to the Client Security Fund to the extent of any payment from the fund to Marie Orozco, plus interest and costs, in accordance with Business and Professions Code section 6140.5), and furnishes satisfactory proof thereof to the State Bar's Office of Probation;<sup>7</sup> and

(2) The court grants a motion to terminate his actual suspension pursuant to rule 205 of the Former Rules of Procedure of the State Bar of California.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, present fitness to practice, and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See Rules Proc. of State Bar, rules 5.400-5.411.)

It is also recommended that respondent be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination since he was previously ordered to do so in Supreme Court Case No. S190894.

#### **A. California Rules of Court, Rule 9.20**

The court also recommends that respondent be ordered to comply with California Rules of Court, rule 9.20 and to perform the acts specified in subdivisions (a) and (c) of that rule within

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<sup>7</sup> Any restitution owed to the Client Security Fund is enforceable as provided in Business and Professions Code section 6140.5, subdivisions (c) and (d).

30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.<sup>8</sup>

**B. Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: August \_\_\_\_, 2011

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RICHARD A. HONN  
Judge of the State Bar Court

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<sup>8</sup> Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify on the date the Supreme Court files its order in this proceeding. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)