

**STATE BAR COURT
REVIEW DEPARTMENT**

In the Matter of

BERT B. BABERO

A Member of the State Bar

Nos. 91-N-00909, 90-C-17834

Filed March 16, 1993

SUMMARY

Respondent was charged with failure to obey the Supreme Court's order in his prior disciplinary case requiring him to comply with rule 955 of the California Rules of Court. This charge was consolidated with a conviction referral matter arising from respondent's 1987 conviction for driving under the influence of alcohol and fighting in public. The hearing judge dismissed the conviction matter, concluding that the facts and circumstances surrounding the conviction did not involve moral turpitude or conduct warranting discipline. As to respondent's failure to comply with rule 955, the hearing judge concluded that the failure was wilful, and, balancing the mitigating and aggravating circumstances and reviewing the Supreme Court case law, concluded that disbarment was appropriate. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review, admitting his culpability on the rule 955 charge but contending that disbarment was too harsh in light of mitigating evidence in the record. The review department affirmed the dismissal of the conviction referral matter, which neither party contested. On the rule 955 matter, the review department found that respondent's efforts at compliance were inadequate, and that his failure to comply was aggravated by his transfer of cases to successor counsel in an irresponsible manner and by his submission of an inaccurate declaration regarding his efforts to comply. Concluding that respondent's mitigation evidence was not equal to that presented in the rare Supreme Court cases in which rule 955 violations have not led to disbarment, the review department recommended that respondent be disbarred.

COUNSEL FOR PARTIES

For Office of Trials: Billy R. Wedgeworth

For Respondent: Bert B. Babero, in pro. per.

HEADNOTES

- [1] **110 Procedure—Consolidation/Severance**
 130 Procedure—Procedure on Review
 166 Independent Review of Record
Where two unrelated matters were consolidated in the hearing department, and a party requested review in order to challenge the result in one of the matters, the entire matter was placed before the review department and reviewed by it even though in the other matter neither party challenged the findings and conclusions of the hearing judge.
- [2] **1511 Conviction Matters—Nature of Conviction—Driving Under the Influence**
 1513.90 Conviction Matters—Nature of Conviction—Violent Crimes
 1519 Conviction Matters—Nature of Conviction—Other
 1527 Conviction Matters—Moral Turpitude—Not Found
 1535 Conviction Matters—Other Misconduct Warranting Discipline—Not Found
Convictions combining concealed firearms and driving offenses can result in lawyer discipline. However, no moral turpitude or misconduct warranting discipline occurred where respondent's conviction for driving under the influence and fighting in public, under circumstances involving a concealed weapon, was found by the hearing judge to have been a singular instance, and did not involve disrespect for the law, dangerous or violent criminal behavior, or an alcohol dependency problem, and respondent's possession of the weapon was understandable because of recent threats to his life.
- [3 a, b] **161 Duty to Present Evidence**
 162.20 Proof—Respondent's Burden
 715.50 Mitigation—Good Faith—Declined to Find
 795 Mitigation—Other—Declined to Find
 1913.19 Rule 955—Wilfulness—Other Issues
Respondent's contention that he detrimentally relied on advice from his probation monitor and counsel regarding compliance with rule 955 might have been persuasive as mitigation if respondent had raised it at the hearing level and produced supporting evidence. However, where record did not support and even contradicted such contention, review department rejected respondent's attempt to argue it as mitigation.
- [4] **715.50 Mitigation—Good Faith—Declined to Find**
 1913.42 Rule 955—Compliance—Notice
Respondent's failure to notify a client of respondent's disciplinary suspension was not justified by respondent's belief that he had been retained only for limited services, where respondent had accepted a retainer fee and filed a civil complaint listing himself as the plaintiff's attorney. There was no legal support for the distinction respondent attempted to draw between being attorney of record and "attorney in fact."
- [5] **715.50 Mitigation—Good Faith—Declined to Find**
 1913.42 Rule 955—Compliance—Notice
Where respondent in a rule 955 matter gave different explanations at the hearing and on review for his failure to advise eight clients of his disciplinary suspension, and had not taken responsibility for making sure that substitutions of counsel he executed in the clients' cases had been filed, his attempted explanations constituted questionable mitigation.

- [6] **561 Aggravation—Uncharged Violations—Found**
1911.30 Rule 955—Record
Fact that respondent's failure to take responsibility for substituting out of two cases properly had not been the subject of respondent's prior disciplinary matter did not preclude Office of Trials from raising such incidents in subsequent proceeding against respondent for failure to comply with rule 955.
- [7 a-c] **582.10 Aggravation—Harm to Client—Found**
584.10 Aggravation—Harm to Public—Found
715.50 Mitigation—Good Faith—Declined to Find
795 Mitigation—Other—Declined to Find
1913.49 Rule 955—Compliance—Generally
In rule 955 proceeding, respondent's claim that his failure to withdraw from one matter after suspension resulted from an oversight in transferring over 200 files to successor counsel was not a factor in mitigation. Respondent's conduct in connection with such transfer constituted evidence in aggravation, because respondent irresponsibly executed in blank hundreds of substitution association or substitution of counsel forms and relinquished of the client files to successor counsel without obtaining the clients' consent, safeguarding their interests, or even keeping a list of the clients or case names transferred. This conduct posed a significant potential harm to the clients and to the public interest generally.
- [8 a, b] **611 Aggravation—Lack of Candor—Bar—Found**
745.52 Mitigation—Remorse/Restitution—Declined to Find
1913.24 Rule 955—Delay—Filing Affidavit
1913.44 Rule 955—Compliance—Affidavit
Respondent's declaration presented in an attempt to comply with rule 955 bore little mitigating weight when it was submitted almost two months after respondent's rule 955 affidavit was due to be filed with the Supreme Court, contained inaccurate information and misrepresented a hearing date in one case. The inaccurate declaration raised serious doubts as to respondent's credibility and was an aggravating circumstance.
- [9] **1913.29 Rule 955—Delay—Generally**
1913.49 Rule 955—Compliance—Generally
Respondent's miscalculation of the time deadlines for compliance with rule 955 and failure to file his affidavit for other reasons were neither reasonable nor mitigating given respondent's failure to consult the applicable court rules or contact his former counsel, the Supreme Court's clerk's office, or the State Bar for clarification in a timely fashion.
- [10] **720.50 Mitigation—Lack of Harm—Declined to Find**
1913.60 Rule 955—Not in Active Practice
1913.90 Rule 955—Other Substantive Issues
Respondent's claim of lack of harm to his clients in mitigation of rule 955 violation overlooked fact that parties protected by rule 955 include not only clients, but co-counsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending. Moreover, nothing in rule 955 or case law distinguishes between a substantial or insubstantial violation of the rule, and respondent would have been required to comply with rule 955 whether or not he had any clients.

- [11] **795 Mitigation—Other—Declined to Find**
 1913.19 Rule 955—Wilfulness—Other Issues
 1913.90 Rule 955—Other Substantive Issues
Respondent's failure to comply with rule 955 was not excused by criticism of its wording as complex. The mandate of rule 955 is clear and requires little if any assistance to fulfill its requirements.
- [12] **515 Aggravation—Prior Record—Declined to Find**
 691 Aggravation—Other—Found
 802.21 Standards—Definitions—Prior Record
Suspension resulting from respondent's failure to pass professional responsibility examination as ordered by Supreme Court did not constitute prior discipline, but was relevant to determination of appropriate discipline for failure to comply with rule 955 as required by same Supreme Court order.
- [13] **591 Aggravation—Indifference—Found**
 1913.49 Rule 955—Compliance—Generally
In rule 955 matter, where respondent did not present any evidence of remedial steps to assist clients in four cases in which he had failed to substitute out when suspended, and remained attorney of record in three of such cases in which litigation was still pending, respondent's inaction indicated indifference to the consequences of his misconduct and was an aggravating circumstance, as was his continued failure to file an affidavit conforming to the requirements of rule 955.
- [14] **565 Aggravation—Uncharged Violations—Declined to Find**
 695 Aggravation—Other—Declined to Find
A respondent's criminal conduct might well be relevant as an aggravating factor in a different case, but where respondent's criminal conviction had been found not to constitute a basis for discipline and State Bar had not challenged that conclusion, it was not appropriate to consider such conviction as a factor in aggravation of other misconduct.
- [15 a, b] **531 Aggravation—Pattern—Found**
 586.11 Aggravation—Harm to Administration of Justice—Found
 591 Aggravation—Indifference—Found
 691 Aggravation—Other—Found
 745.52 Mitigation—Remorse/Restitution—Declined to Find
 801.20 Standards—Purpose
 801.47 Standards—Deviation From—Necessity to Explain
 861.40 Standards—Standard 2.6—Disbarment
 1091 Substantive Issues re Discipline—Proportionality
 1913.49 Rule 955—Compliance—Generally
Recent Supreme Court decisions reflect the view that disbarment is generally the appropriate sanction for a willful violation of rule 955. One of the primary reasons for the adoption of the Standards for Attorney Sanctions for Professional Misconduct was to achieve greater consistency in disciplinary sanctions for similar offenses. Any reason for deviating from the standards or established case law must be clearly stated. Accordingly, where respondent participated in the rule 955 proceeding, but did not present a convincing case of mitigation, diligence, and rectification of misconduct, and instead demonstrated a pattern of inattention to important duties, an inability to conform to professional norms, and a lack of concern for potential harm to his clients and the public, the public interest and the administration of justice would be served by respondent's disbarment.

**[16] 863.30 Standards—Standard 2.6—Suspension
1913.49 Rule 955—Compliance—Generally**

Wilful breach of a Supreme Court order is by definition deserving of strong disciplinary measures, and the sanction generally imposed for wilful violation of rule 955 is disbarment. When disbarment has not been imposed, the attorneys involved had complied with the notification requirement, orally or in writing, to all their clients, participated in the disciplinary process, and presented substantial mitigating evidence regarding the noncompliance and their present good character.

ADDITIONAL ANALYSIS

Aggravation

Found

511 Prior Record

Mitigation

Declined to Find

710.53 No Prior Record

710.55 No Prior Record

740.53 Good Character

Discipline

1921 Disbarment

Other

175 Discipline—Rule 955

1913.13 Rule 955—Wilfulness—Timeliness of Notice

1913.14 Rule 955—Wilfulness—Inability to Comply

1915.10 Rule 955—Violation Found

OPINION

STOVITZ, J.:

Respondent, Bert B. Babero, has requested our review of a decision of the hearing department in this consolidated matter, recommending that he be disbarred from the practice of law in California based on his failure to obey the Supreme Court's order in his prior disciplinary case, which required him to comply with subdivisions (a) and (c) of rule 955 of the California Rules of Court.¹ Respondent concedes his disciplinable failure to comply with rule 955, but contends that disbarment is too harsh in light of mitigating evidence. The Office of Trials disputes the claims of mitigating evidence, and asserts that the recommended discipline is consistent with past Supreme Court decisions in rule 955 cases.

After reviewing the record and considering guiding decisions of the Supreme Court which have imposed disbarment except in rare cases presenting more mitigation than present here, we agree with the hearing judge that disbarment is the appropriate discipline to recommend.

I. CONVICTION REFERRAL MATTER

[1] The rule 955 matter was consolidated in the hearing department with an unrelated proceeding resulting from respondent's criminal conviction for violating Vehicle Code section 23152, subdivision (b) (driving under the influence of alcohol) and Penal Code section 415, subdivision (1) (fighting in public). Because respondent's request for review places the entire matter before us (Trans. Rules Proc. of State Bar, rule 453), we have reviewed the conviction matter even though neither the Office of Trials nor respondent has challenged the findings and conclusions of the hearing judge.

Respondent acknowledged at the disciplinary hearing that he was in possession of a concealed, loaded firearm on the night of May 2, 1987, when he was stopped for a broken taillight and expired license

plate tab on his motorcycle and thereafter arrested on alcohol-related charges (Veh. Code, § 23152, subs. (a) & (b)); for carrying a concealed weapon without a license (Pen. Code, § 12025, subd. (b)), and for carrying a loaded weapon on a public street (Pen. Code, § 12031, subd. (a)). Respondent was carrying the registered weapon because earlier in the year, he had been threatened at gunpoint in his office by persons attempting to extort the proceeds of an insurance settlement from him. He reported the threat to the police, and to protect himself, respondent began carrying a gun. At the time of his own arrest, the persons who had threatened him were still at large. One of the principal extortionists was later tried and convicted of charges stemming from the threat to respondent.

After respondent pled no contest to two amended charges, the remaining charges were dismissed, and he was sentenced to three years on summary probation, on terms including fines and assessments totaling \$663 and attendance at drunk driver and Alcoholics Anonymous programs. Respondent completed these programs. In October 1990, he was later found in violation of his probation as a result of a May 1990 arrest on charges that were later dismissed. The record contains little about the nature of this probation violation beyond that respondent was fined but the original probation was reinstated.

[2] To determine if the facts and circumstances of respondent's conviction constitute other conduct warranting discipline, we assess them in light of the mandate to protect "the public, the courts and the integrity of the legal profession." (*In re Kelley* (1990) 52 Cal.3d 487, 497.) We note that a conviction which combines concealed firearms and driving offenses has resulted in lawyer discipline in the past. (*In re Titus* (1989) 47 Cal.3d 1105 [public reproof].) However, as we recounted recently in *In the Matter of Respondent I* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 260, not every conviction such as that suffered by respondent warrants discipline. Here, the hearing judge found understandable reasons for respondent to be carrying a weapon and that his

1. For convenience, we refer to this California Rule of Court hereafter as "rule 955." As pertinent, rule 955 required respondent to notify clients, courts and opposing counsel of his earlier disciplinary suspension by registered or certified letter,

to deliver to all clients in pending matters their papers or property and to file an affidavit with the Supreme Court showing he complied with this rule.

conviction was of a "singular instance." Clear and convincing evidence in the record that respondent has an alcohol dependency problem would raise the concern of public protection articulated in *Kelley, supra*. No evidence on this issue was introduced. Although respondent pled no contest to the charge of fighting in public, the arresting officer testified that respondent was not combative when arrested and did not have to be restrained by the arresting officers. There was no evidence that respondent resorted to the firearm when arrested. Given the lack of any clear evidence of disrespect for the law or dangerous or violent criminal behavior or other aggravating circumstances, and noting that neither side has challenged the conclusions of the hearing judge, we adopt the judge's ultimate determination that respondent's conviction did not involve either moral turpitude or other conduct warranting discipline, on the minimal evidence contained in the record. (See *In the Matter of Respondent I, supra*, 2 Cal. State Bar Ct. Rptr. at pp. 271 - 272.)

II. RULE 955 MATTER

A. Background Facts

As a result of a prior disciplinary matter, the Supreme Court suspended respondent for three years, stayed that suspension, and placed him on a three-year probationary term. One of the conditions of his probation was a six-month actual suspension. The Supreme Court also ordered respondent to pass the Professional Responsibility Examination within one year, and to fulfill the requirements of subdivisions (a) and (c) of rule 955 within 30 and 40 days, respectively, of the effective date of the order. The order also noted that it was effective upon finality, citing California Rule of Court 24(a), which provides that a Supreme Court order, unless it otherwise specifies, becomes final 30 days after filing. The order was filed on August 22, 1990, and became effective September 21, 1990.

Under the order, respondent was required by October 21, 1990, to advise in writing those involved

in pending matters of his suspension, specifically all clients, co-counsel, opposing counsel or, in their absence, parties, and the court or tribunal where the litigation was pending. Notice was to be given by registered or certified mail, return receipt requested, and was to include an address where respondent could thereafter be reached. Clients were to be advised that after the date of his suspension, respondent could not act as their attorney. All client papers were to be returned or arrangements made for their return, all unearned fees were to be returned, and the clients told to seek other counsel. By October 31, 1990, respondent was to have filed with the Supreme Court, pursuant to rule 955(c), an affidavit attesting that he had fully complied with the dictates of subdivision (a) and providing an address to which any further communications could be sent.

Respondent did not receive from the Supreme Court its August 22, 1990 order; the correspondence was returned by the U.S. Postal Service, marked "forwarding order expired." It had been sent to respondent's official State Bar membership address, which was in fact respondent's office at the time of service. The first notice respondent had of the Supreme Court's suspension and rule 955 orders was a September 24, 1990, letter from the State Bar Court's probation department, reminding respondent of the conditions of his probation and enclosing a copy of the Supreme Court's order. It is unknown why respondent received the State Bar Court's letter but not the Supreme Court's service of its order sent to the same address.

On or about December 28, 1990, respondent sent to the State Bar Court clerk's office a document entitled "Declaration Re: Apparent Default." In it, respondent stated that he had not been served with a copy of the Supreme Court's order and had only received notice of the Court's order in the State Bar Court probation department's letter on September 26, 1990. Respondent stated (incorrectly) that as of the receipt of the letter, he was already in default of the rule 955 notice requirements.² He averred that prior to September 26, he had substituted other

2. As noted *ante*, respondent had until October 21, 1990, to give the notices required by rule 955.

counsel for the bulk of his client caseload and had given written notice to the opposing counsel in those matters. Declaring that as of September 26 he had only two outstanding cases, with hearing dates scheduled in both matters within a few days, respondent found substitute counsel for the clients, advised them orally of his suspension and secured their consent to the new counsel, met with one of the clients, and waived any fees earned but not yet paid by the clients to compensate them for any inconvenience. Respondent also described additional problems he faced with two former employees who had engaged in the unauthorized practice of law, using respondent's name to secure clients, circumstances which led to respondent's underlying discipline. Respondent declared that there might be persons who dealt with these employees and believed that respondent was their attorney, but respondent did not know their identities and had not been able to discover their files or the whereabouts of his former employees. He outlined his legal efforts to curtail any additional damage from his prior association with these individuals.

Respondent was advised by the State Bar's probation department by letter dated January 22, 1991, that the then recent amendments to the court rules effective December 1, 1990, delegating the power to extend time to comply with rule 955 orders to the State Bar Court, did not apply because his compliance was due to be filed with the Supreme Court on October 31, 1990.

Because respondent did not timely file his affidavit under rule 955(c) with the Supreme Court, that Court referred the matter to the State Bar Court by order dated February 11, 1991, for hearing and, if his violations were found to be wilful, for recommended discipline.

At the hearing below, the parties submitted a lengthy stipulation of facts and held two days of hearings. The Office of Trials established that at the time respondent received a copy of the Supreme Court's order, respondent had six cases involving a total of twelve clients whom he had a duty under rule 955 to notify of his suspension. Although respondent did not receive the Supreme Court's order through no fault of his own and miscalculated the time within which he had to satisfy rule 955, the hearing judge

found respondent had sufficient time after receiving his copy of the order to comply. Respondent did not check the court rules to determine the effective date of the order or his required duties under rule 955. Nor did he contact his own counsel from his disciplinary case, the Supreme Court, or the State Bar to seek clarification of his compliance responsibilities. Only two clients were contacted by respondent and verbally advised of his suspension and the need to retain new counsel. As respondent stipulated, none were provided with written notice, nor were opposing counsel or the courts involved in the cases given any notice of respondent's suspension. Respondent concedes before us that his actions did not comply with the requirements of rule 955 and his violation was wilful. The hearing judge so found and we agree.

B. Discussion of Mitigating and Aggravating Evidence

Respondent argues that his efforts at compliance, while far from sterling, were substantial and taken in good faith. [3a] Upon review, respondent avers that he relied on advice from his probation monitor and his counsel concerning his efforts to comply with rule 955 to his own detriment. This argument might have been persuasive as evidence of mitigation (see *Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259) had respondent raised it at the hearing below and produced evidence in support. However, at the hearing, in response to a question from his attorney regarding whether his former counsel had given him any advice regarding compliance with rule 955, respondent answered "No, regretfully not." (R.T. January 15, 1992, p. 85.) As to respondent's contact with his probation monitor, the record shows only that during this time period, respondent attempted to reach him. (*Id.* at pp. 123-124.) It does not, as respondent contends, establish that the probation monitor corroborated respondent's mistaken calculation of the deadline to comply with rule 955 and led respondent to believe that respondent's failure to comply fully with the rule's requirements would be excused.

Respondent's other excuses are questionable as well. In his December 1990 declaration, respondent averred that in the two client matters of which he was aware (Collins and Johnson), each had hearings

within a few days of his receiving notice of the order. While this may have been true in one case (Collins), the family law case cited by respondent (Johnson) had its next hearing date on October 25, 1990, just short of a month from the date respondent received the order. Respondent admitted as much in the disciplinary hearing.

[4] In another matter (Powell), respondent did not think of himself as the attorney of record in the case because he believed he had been retained for limited services. Respondent accepted a retainer fee and filed a civil complaint on the client's behalf in August 1989, listing himself in the complaint and on the summons as the plaintiff's attorney. In his view, he did not think to notify the client of his suspension because respondent was the attorney of record but not the attorney in fact. Respondent has not advanced any legal support for this distinction.

[5] Respondent claimed that two of the cases (Ruiz and Corona), involving a total of eight clients, had been removed from the office by his former employees and to hold him culpable for misconduct regarding these files would be unfair. This was not the explanation offered by respondent in the hearing below. There, he similarly maintained that he was retained in these two cases for limited purposes only, and, in one case, the file lay dormant for more than two years in his file cabinet. Later he claimed that after the problems with the former employees surfaced, he executed substitution of attorney forms, turning the cases over to another attorney. However, he did not take responsibility for filing the forms with the court and serving them on opposing counsel, or at least verifying whether filed copies of the substitution form were returned to him by new counsel. [6] The Office of Trials is not precluded from raising these incidents because these two files were not the subject of the prior disciplinary case against respondent.

[7a] The remaining case (Craft) was, in respondent's view, a result of an oversight concerning another substitution of attorney form. This case,

along with over 200 other workers' compensation files, was transferred en masse by respondent to new counsel in anticipation of respondent's suspension. To effect the transfer, respondent photocopied hundreds of blank "notice of association of counsel" and "substitution of counsel" forms and signed them, undated and without captions, client names or case numbers on them. He left it to successor counsel to take all remaining steps to effect the transfer of responsibility, including communicating with the clients. Respondent did not keep a copy of the files or even a list of the clients or case names handed over to the new attorney.³ Respondent was aware that client consent (which he had not obtained) was necessary for a substitution of attorney to be effective. (Code Civ. Proc., § 284, subd. (1).)⁴

[8a] Respondent contends that he submitted his December 1990 declaration in an attempt to comply with his duty under rule 955(c). Initially, respondent's rule 955 affidavit was to be filed with the Supreme Court by October 31, 1990; respondent sent his declaration to the State Bar almost two months later. The hearing judge noted that the declaration contained a number of contradictory statements. In our analysis, the statements are more inaccurate than contradictory: for example, none of the opposing counsel in respondent's cases had been advised, in writing or otherwise, of respondent's suspension, contrary to respondent's declaration that written notice of the substitution of counsel had been sent. He misrepresented in the declaration the hearing date in one case, so that it appeared "extreme time limitations" prevented him from providing written notice and a proper substitution of counsel in compliance with rule 955 prior to the hearing date. Respondent also claims mitigating credit because of "his refusal to file a false declaration re: compliance out of respect for his legal mandate for honesty." (Resp. brief, p. 18.)

[9] We do not find respondent's miscalculation of the time deadlines for compliance or failure to file for other reasons to be reasonable or mitigating given

3. Since the transfer was in anticipation of respondent's suspension, it could be argued that he was required to retain records of the steps he took under his suspension order, in accordance with then rule 955(d).

4. If client consent cannot be obtained, an attorney may, after notice to the client, seek a court order to be relieved as counsel. (Code Civ. Proc., § 284, subd. (2).)

his failure to consult the court rules or contact his former counsel, the Supreme Court's clerk's office, or the State Bar for clarification in a timely fashion. [7b] Of particular concern was his careless method of transferring a large number of cases in anticipation of the Supreme Court order with blank substitution of counsel forms in such a manner that he had no idea whether the substitutions were completed or his clients protected.

[10] As further mitigating evidence, respondent argues the lack of harm to his clients, citing to the language in the Supreme Court's decision in *Durbin v. State Bar* (1979) 23 Cal.3d 461, 467-468, that the primary purpose of rule 955's reporting requirements is to "insure the protection of concerned parties." However, as the Court noted in a more recent opinion, the concerned parties include not only clients, but co-counsel, opposing counsel or adverse parties, and any tribunal in which litigation is pending. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1187.) In *Lydon*, the Court rejected an attorney's claim that his failure to comply with rule 955 was "insubstantial" because none of his clients were harmed, stating that there is nothing in the rule or prior decisions to distinguish between a substantial or insubstantial violation. (*Id.* at pp. 1186-1187.) Whether or not respondent had any clients, he would have been required to comply with rule 955. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

[11] Respondent criticizes the wording of the rule, implying that his compliance would have been assured had the language been simpler. As the Court has remarked, the mandate of the rule is clear and requires little if any assistance to fulfil its requirements. (*Durbin v. State Bar, supra*, 23 Cal.3d at p. 468; see also *Dahlman v. State Bar* (1990) 50 Cal.3d 1088, 1094.)

The examiner highlights several pieces of evidence which, in his view, constitute aggravating circumstances. We agree with all of his arguments save one. Respondent does have a prior record of discipline, involving misconduct which began just over two years after he had been admitted to practice, an aggravating circumstance under standard 1.2(b)(i), Standards for Attorney Sanctions for Professional Misconduct (Trans. Rules Proc. of State Bar, div. V)

("standards"). He was found culpable of abandoning clients in two instances, failing to return unearned fees to the abandoned clients, failing to return client documents to one of the abandoned clients, and, in a third matter, failing to promptly return client funds upon request. As respondent has noted, this misconduct arose from respondent's questionable association with two individuals which resulted, in the view of the hearing panel in his disciplinary case, in "fertile ground for mismanagement of cases and abuse of his name and status as an attorney." The hearing panel found that respondent had essentially rented out his name and status to these non-attorneys to increase his income in two areas of the law with which he was unfamiliar. Thereafter, he made no effort to monitor these individuals' activities and showed a lack of concern for any potential harm resulting to the public. The serious nature of the misconduct, the potential for massive fraud, and respondent's irresponsible attitude prompted the hearing panel's recommended discipline of a three-year stayed suspension, a three-year probationary term, an actual suspension for six months and successful passage of the professional responsibility examination within one year. With minor modifications to the culpability findings, which did not alter the underlying findings and conclusions of the hearing panel, this department affirmed the recommended discipline in an unpublished decision, and that decision was adopted by the Supreme Court.

[12] Respondent did not pass the professional responsibility examination within one year as ordered and was suspended from practice from October 7, 1991, until January 10, 1992, during the pendency of this matter. Although the examiner does not characterize this suspension as prior discipline, which it is not, he argues that it indicates that respondent is unable to act responsibly or obey the Supreme Court's order regarding his professional conduct. We deem it relevant to our determination of the appropriate discipline. (See *Barnum v. State Bar* (1990) 52 Cal.3d 104, 113.)

[13] The examiner also argues that respondent did not present any evidence of remedial steps to assist the clients in four of the six cases involved in this matter. Respondent remains the attorney of record in three of these cases and litigation is still pending in them. This inaction indicates an indiffer-

ence to the consequences of his misconduct and is an aggravating circumstance. (Std. 1.2(b)(v).) We note as well that respondent has yet to file an affidavit with the Supreme Court which conforms to the requirements of rule 955(c).

[14] We disagree with the examiner's use of respondent's criminal conviction as additional, aggravating evidence of respondent's inability to conform his conduct to the requirements of the law. The hearing judge found that the conduct did not constitute a basis for discipline. The Office of Trials has not challenged that conclusion before this court. We have adopted the hearing judge's decision on this point. While a respondent's criminal conduct might well be relevant as an aggravating circumstance in a different case, we deem it inappropriate under these circumstances to consider respondent's criminal conviction as an aggravating factor.

There is other evidence we find aggravating which has been identified earlier in this opinion. [8b] We agree with the hearing judge that respondent's inaccurate declaration raises a serious doubt as to his credibility. (Std. 1.2(b)(vi).) [7c] Further, his irresponsible acts in executing in blank hundreds of substitution of attorney and association of attorney forms and turning them over to successor counsel, without any safeguards for his clients' interests, posed a significant potential harm to his clients and to the public interest generally. (Std. 1.2(b)(iv).)

C. Degree of Discipline

Respondent seeks review because he contends that the disbarment recommendation is unwarranted under the mitigating facts of the case and the applicable case law. He asserts that the facts here most closely resemble those in *Durbin v. State Bar, supra*, 23 Cal.3d 461, in which the attorney received a minimum six-month actual suspension, and finds distinguishable or inapposite the cases the hearing judge relied upon in his analysis: *Shapiro v. State Bar, supra*, 51 Cal.3d 251; *Bercovich v. State Bar* (1990) 50 Cal.3d 116; *Lydon v. State Bar, supra*, 45 Cal.3d 1181, and *Powers v. State Bar, supra*, 44 Cal.3d 337. The examiner contrasts the diligence and ultimate compliance of the attorney with rule 955 in the *Shapiro* case with respondent's conduct. He

argues that the degree of discipline imposed in the *Durbin* case would be inadequate under the facts and that the trend of recent Supreme Court decisions has been to impose disbarment as the discipline for wilful noncompliance with rule 955.

[15a] The Supreme Court announced its current benchmark for considering rule 955 matters in *Bercovich v. State Bar, supra*, 50 Cal.3d 116. "We believe the more recent decisions by this court reflect the view that disbarment is generally the appropriate sanction for a willful violation of rule 955. [Citations.] The introduction to the Standards states that one of the primary reasons for their adoption was 'to achieve greater consistency in disciplinary sanctions for similar offenses.' We see no reason to depart from what appears to be the most consistently imposed sanction in recent cases under rule 955." (*Id.* at p. 131, citing *Powers v. State Bar, supra*, 44 Cal.3d at p. 342; *Lydon v. State Bar, supra*, 45 Cal.3d 1181.) Similarly, when we deviate from the standards or established case law, we must make clear the reasons for such a departure. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5.) Therefore, it is instructive for us to review the two cases discussed by the parties and the hearing judge that impose a sanction other than disbarment to determine the reasons, if articulated, for not imposing disbarment.

In *Durbin v. State Bar, supra*, 23 Cal.3d 461, the attorney was actually suspended from practice for two years, but did not learn of the Supreme Court's order of suspension until two weeks after the suspension went into effect. He complied with rule 955(a) within the time period, but did not file the required affidavit with the Supreme Court. The Court rejected as unpersuasive the attorney's proffered excuse that he could not remember the names of all the clients whom he had notified and did not keep records of their names. Finding that the attorney did timely comply with all of the provisions of rule 955 *except* for the filing of the affidavit with the Supreme Court, the Court suspended the attorney for six months or until he filed the required affidavit with the Court, whichever was longer. As noted by the Court in its later opinion in *Bercovich*, the *Durbin* opinion does not discuss any factors which might be considered aggravating or weighing in favor of disbarment. (*Bercovich, supra*, 50 Cal.3d at p. 132.)

Soon after the *Bercovich* opinion was issued, the Court decided *Shapiro v. State Bar*, *supra*, 51 Cal.3d 251. In that case, the attorney was actually suspended for one year for abandoning two clients, failing to return their unearned advanced fees, and practicing while suspended for nonpayment of dues. In anticipation of his suspension, the attorney met with his remaining clients and successor counsel to inform them that he could not longer represent them. The successor counsel offered to substitute as counsel or assist the clients in securing other representation. Shortly after respondent received the Supreme Court's order, he sought the advice of his probation monitor concerning the notification requirement in rule 955(a). The monitor provided inadequate guidance and misinformed respondent concerning the format and time limitations for filing his rule 955(c) affidavit. When respondent learned his affidavit was insufficient, he contacted his probation monitor and retained a law firm to assist him in complying with the rule. His affidavit was filed six months late, delayed in part by physical injuries suffered by the attorney. The Court found substantial mitigating factors in that record, including the diligent, if unsuccessful effort of the attorney to comply with the rule timely; the affirmative misdirection by the probation monitor; the attorney's lack of a disciplinary record over 16 years prior to his misconduct, which occurred within a very narrow time frame⁵; the attorney's recovery from debilitating physical and psychological problems, established by his medical records, and the character testimony of practicing attorneys from his community. Shapiro received a two-year stayed suspension and a two-year probationary term on conditions including an actual suspension of one year.

In both *Durbin* and *Shapiro*, the attorneys notified their clients of their suspension in a timely manner, as required by rule 955(a), and their failure to comply was primarily limited to failing to submit proper proof of their compliance. There was substantial mitigating evidence presented in *Shapiro* and the lack of any aggravating circumstances in *Durbin*.

Both attorneys participated in the disciplinary proceedings. The actual suspensions ordered in the prior matters (one year actual in *Shapiro* and two years actual in *Durbin*) which triggered the 955 requirement were lengthier than that ordered in the present case (six months).

The hearing judge, in distinguishing this case from the *Durbin* and *Shapiro* cases, noted that respondent failed to notify all his clients, any of his opposing counsel, or any of the tribunals in his cases, and failed to execute proper substitution of counsel forms. Where the attorney in *Shapiro* had withdrawn from all his cases, the hearing judge noted that respondent remained the counsel of record in three cases as of the date of the parties' stipulation. Shapiro showed diligence in attempting to comply with the rule and belatedly provided the requisite notice to all concerned parties and filed the proper affidavit with the Court. Respondent, in the view of the hearing judge, demonstrated little if any interest in ascertaining his responsibilities under the court rules and did not contact the State Bar until the Supreme Court was advised that he had not filed the appropriate affidavit.

While we agree with the hearing judge's analysis of the instant facts in contrast with the *Shapiro* and *Durbin* cases, respondent has not been accorded full credit for what steps he did attempt prior to the imposition of his suspension. When he learned of the filing of the Supreme Court's order, respondent acted quickly in two cases to contact the clients with the news of his suspension, got their permission to substitute counsel of his suggestion, and adjusted any financial obligation in favor of the clients. Prior to the issuance of the order, respondent recognized that he had an obligation to his clients to refer them to new counsel in anticipation of his six-month suspension. However, executing hundreds of substitution of counsel and association of counsel forms in blank and handing the cases over to another attorney without notice to or consent of his clients placed those clients' causes in possible jeopardy. His actions are not comparable to those taken by Shapiro in

5. The Court found that an additional incident of client abandonment, consolidated with the rule 955 case, occurred in the same short time period as the two incidents in the prior

discipline case. (*Shapiro v. State Bar*, *supra*, 51 Cal.3d at pp. 258-259, 260.)

meeting with his clients together with possible new counsel.

Further, respondent has not come forth with mitigating evidence comparable to that shown in the *Shapiro* case. [3b] We reject respondent's attempt to argue any misdirection by his probation monitor and former counsel which is unsupported and even contradicted by the evidence. Respondent does not have a long, unblemished record prior to his misconduct. There has been no character evidence offered and no showing of diligent efforts to comply, however belatedly, with the Supreme Court's order. The one declaration respondent filed, with its inaccuracies, undercuts rather than bolsters his case for good faith compliance.

Admittedly, the remaining recent Supreme Court cases, all of which disbarred the attorneys for wilful 955 violations, showed serious breaches of professional conduct. None of these attorneys in these cases (*Dahlman*, *Bercovich*, *Lydon*, and *Powers*) appeared in the disciplinary proceedings in the 955 matters or presented credible explanations why they did not participate in a timely fashion. Claims of physical and emotional problems in two cases which the attorneys asserted prevented their participation were rejected as belated and unsupported. The Court was concerned in both *Lydon* and *Bercovich* with the absence of any evidence that the attorney's misconduct would not recur in the near future. (*Bercovich v. State Bar*, *supra*, 50 Cal.3d at p. 132; *Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1188.) The underlying discipline in the prior misconduct matters in these cases was not any more serious than in *Shapiro* or as represented in the two-year actual suspension in *Durbin*,⁶ but the Court found in each instance that, as a result of the 955 proceeding, public protection required disbarment.

[16] Wilful breach of a Supreme Court order is by definition "deserving of strong disciplinary mea-

asures." (*Lydon v. State Bar*, *supra*, 45 Cal.3d at p. 1187.) The sanction recognized and generally imposed by the Supreme Court in rule 955 wilful violation cases is disbarment. (*Bercovich v. State Bar*, *supra*, 50 Cal.3d at p. 131.) When it has not been imposed, the attorneys had complied with the notification requirement, orally or in writing, to all their clients, participated in the disciplinary process, and presented substantial mitigating evidence regarding the noncompliance and their present good character.

[15b] Although respondent has participated in the disciplinary process, he has not presented a convincing case of mitigation, diligence, and rectification of his misconduct. He has demonstrated a pattern of inattention to important duties to his clients, the courts and the public; an inability to conform to professional norms, and a lack of concern for the potential harm to his clients and the public resulting from his misconduct. With the Supreme Court's directive in cases of a wilful violation of rule 955 under circumstances as presented here, the public interest and the administration of justice are appropriately served by the disbarment of respondent.

III. FORMAL RECOMMENDATION

Accordingly, we affirm the findings of the hearing judge in this matter, as modified herein, and recommend that respondent, Bert B. Babero, be disbarred from the practice of law in the state of California. Since, at the time of filing this opinion, respondent is entitled to practice law, we recommend that he be required to comply with rule 955 within the same time limits as customarily imposed by the Supreme Court. We also recommend that eligible costs of this proceeding be awarded the State Bar.

We concur:

PEARLMAN, P.J.
NORIAN, J.

6. The underlying misconduct warranting a two-year actual suspension was not discussed by the Court in *Durbin v. State Bar*, *supra*, 23 Cal.3d 461.