

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

SUZANNE L. HARRIS

A Member of the State Bar

No. 89-O-10503

Filed October 22, 1992

SUMMARY

Respondent accepted fees to represent a corporate client in an unfair competition matter, failed to perform the required services, failed to return unearned fees, converted personal property of the client's president loaned to her in order to perform services, and failed to participate in the State Bar's investigation of the resulting complaint against her. Based on this misconduct, and on aggravating factors including respondent's prior discipline record and tardy and intermittent participation in the disciplinary proceedings, the hearing judge recommended that respondent be disbarred. (Richard D. Burstein, Judge Pro Tempore.)

Respondent sought review, contending that the hearing judge committed procedural errors and was biased against her. The review department upheld the hearing judge's findings and conclusions as to culpability. It rejected respondent's claim that she did not receive adequate notice of certain hearings, noting, *inter alia*, that respondent had been advised that it was her duty to keep the State Bar informed of her address and had been given an opportunity to correct her official address if the State Bar's records were incorrect. The review department also held that respondent had failed to show that she was prejudiced by a brief allusion in the examiner's pre-trial statement to respondent's prior discipline record, and that respondent had failed to establish bias or unfair treatment by the hearing judge.

On the question of discipline, the review department held that past Supreme Court cases involving similar offenses indicated that disbarment was not appropriate. Although her retention of her client's property was serious, respondent had committed misconduct in only two matters in 23 years of practice. Accordingly, the review department recommended a five-year stayed suspension, actual suspension for two years and until respondent established rehabilitation and fitness to practice under standard 1.4(c)(ii), and five years probation on conditions including restitution of the unearned fees and return of the client's property.

COUNSEL FOR PARTIES

For Office of Trials: Lawrence J. Dal Cerro

For Respondent: Suzanne L. Harris, in pro. per., Arthur L. Margolis

HEADNOTES

- [1] **105 Procedure—Service of Process**
108 Procedure—Failure to Appear at Trial
119 Procedure—Other Pretrial Matters
211.00 State Bar Act—Section 6002.1
 Respondent's highly generalized argument regarding inadequate notice of certain hearings warranted no relief, where respondent had been made aware of duty to keep State Bar informed of current address and given opportunity to correct the official State Bar record thereof, and notices had been served on respondent at another address in addition to the address of record.
- [2] **108 Procedure—Failure to Appear at Trial**
119 Procedure—Other Pretrial Matters
162.20 Proof—Respondent's Burden
 Medical emergency might have excused respondent's failure to attend pre-trial conference, but did not excuse respondent's failure to file pre-trial statement which would have better preserved respondent's posture at trial.
- [3] **108 Procedure—Failure to Appear at Trial**
130 Procedure—Procedure on Review
139 Procedure—Miscellaneous
 Where respondent sought no relief from hearing judge on account of respondent's inability to attend pre-trial conference, which respondent contended was excusable due to medical emergency, respondent could not be heard to complain for the first time on review.
- [4] **102.30 Procedure—Improper Prosecutorial Conduct—Pretrial**
119 Procedure—Other Pretrial Matters
135 Procedure—Rules of Procedure
159 Evidence—Miscellaneous
 Where examiner's pre-trial statement listed respondent's prior record of discipline among exhibits to be offered at trial, but did not detail or characterize such prior record in any way, and copy of prior record was not considered by hearing judge until after determination of culpability, and respondent demonstrated no prejudice from reference in pre-trial statement and had failed to raise issue before hearing judge, respondent was not entitled to any relief based on asserted violation of rule 571, Trans. Rules Proc. of State Bar.
- [5 a, b] **103 Procedure—Disqualification/Bias of Judge**
 Claim of unfairness on part of hearing judge was not meritorious, and did not entitle respondent to new hearing, where such claim was very generalized, concerned some matters peripheral to charges, showed no example of specific prejudice, and was rooted in unproven charge of conspiracy, and where record showed that hearing judges acted fairly and took many steps to accommodate respondent, who had ample opportunity to present evidence.
- [6] **108 Procedure—Failure to Appear at Trial**
161 Duty to Present Evidence
162.20 Proof—Respondent's Burden
 While disciplinary hearings can be stressful for accused attorneys to attend, Supreme Court has made clear that accused attorneys must avail themselves of opportunity to participate and present all favorable evidence. Failing that opportunity, the accused may not demand a new hearing to present evidence belatedly.

- [7] **130 Procedure—Procedure on Review**
 166 Independent Review of Record
Review by review department is not the same as civil or criminal appeal. Even where neither party addressed issue of culpability on review, review department was not limited by issues raised by parties, and was required to analyze record independently, to determine whether clear and convincing evidence supported hearing judge's findings and conclusions regarding culpability, and to determine appropriate degree of discipline to recommend.
- [8] **221.00 State Bar Act—Section 6106**
Where respondent had retained personal property given to respondent by client, claiming it was for legal fees owed, but respondent had no writing to support such claim and hearing judge rejected it based on client's testimony, respondent's retention of property was not reasonable or honest, and was in the nature of conversion, in violation of statute prohibiting acts of moral turpitude or dishonesty.
- [9] **108 Procedure—Failure to Appear at Trial**
 611 Aggravation—Lack of Candor—Bar—Found
Respondent's tardy and intermittent participation in disciplinary proceedings was an aggravating circumstance, where respondent gave no excuse for failure to appear on last day of hearing, was not represented by counsel, and displayed several failures to participate or tardiness in participating.
- [10 a, b] **822.39 Standards—Misappropriation—One Year Minimum**
 833.90 Standards—Moral Turpitude—Suspension
 844.13 Standards—Failure to Communicate/Perform—No Pattern—Suspension
 1091 Substantive Issues re Discipline—Proportionality
 1092 Substantive Issues re Discipline—Excessiveness
Where respondent had been inattentive to a client's legal needs and had wrongfully retained the client's personal property, but respondent had only committed misconduct in two matters in 23 years of practice, disbarment was not appropriate under guiding Supreme Court opinions. Instead, review department recommended five years stayed suspension, five years probation, restitution, and actual suspension for two years and until respondent proved her rehabilitation, fitness to practice, and legal ability.
- [11] **171 Discipline—Restitution**
 277.50 Rule 3-700(D)(1) [former 2-111(A)(2)]
Where respondent had wrongfully retained client's personal property, review department recommended condition of probation requiring respondent to provide proof of return of such property to client.
- [12] **171 Discipline—Restitution**
 277.60 Rule 3-700(D)(2) [former 2-111(A)(3)]
It is common in State Bar matters involving failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. It is also common to recommend the payment of interest incident to such restitution.
- [13] **171 Discipline—Restitution**
If identity of party entitled to restitution of unearned attorney fees proved not to be ascertainable with reasonable diligence, review department recommended that, upon approval of probation monitor, such restitution be paid to Client Security Fund.

ADDITIONAL ANALYSIS

Culpability**Found**

- 213.91 Section 6068(i)
- 214.31 Section 6068(m)
- 221.11 Section 6106—Deliberate Dishonesty/Fraud
- 270.31 Rule 3-110(A) [former 6-101(A)(2)/(B)]
- 277.21 Rule 3-700(A)(2) [former 2-111(A)(2)]
- 277.51 Rule 3-700(D)(1) [former 2-111(A)(2)]
- 277.61 Rule 3-700(D)(2) [former 2-111(A)(3)]
- 280.51 Rule 4-100(B)(4) [former 8-101(B)(4)]

Aggravation**Found**

- 511 Prior Record
- 582.10 Harm to Client

Standards

- 801.41 Deviation From—Justified
- 805.10 Effect of Prior Discipline

Discipline

- 1013.11 Stayed Suspension—5 Years
- 1015.08 Actual Suspension—2 Years
- 1017.11 Probation—5 Years

Probation Conditions

- 1021 Restitution
- 1022.10 Probation Monitor Appointed
- 1030 Standard 1.4(c)(ii)

OPINION

STOVITZ, Acting P.J.*:

Respondent, Suzanne L. Harris, was admitted to practice law in California in 1965. In 1990 the Supreme Court suspended her for three years, stayed execution of the suspension and placed her on probation on conditions including ninety days actual suspension. (*Harris v. State Bar* (1990) 51 Cal.3d 1082.) The Supreme Court imposed this suspension for respondent's misconduct between 1980 and 1984 in failing to communicate with her client, failing to perform services for him and ultimately abandoning his interests.

The record we now review at respondent's request includes findings that in 1988 respondent accepted fees to represent a corporate client in an unfair competition matter, failed to perform the required services, failed to return unearned fees, converted property of the client's president loaned to her in order to perform services and failed to participate in a later State Bar investigation.

Respondent's request for review is limited to an attack on the procedures followed in this disciplinary matter. She claims that the hearing judge was biased against her and that other errors were committed. As we shall discuss, respondent's claims do not warrant any relief.

We have independently reviewed the record and found the hearing judge's findings supported by clear and convincing evidence. After considering the circumstances of respondent's misconduct and consulting guiding decisions of the Supreme Court regarding the degree of discipline, we shall recommend that respondent be suspended for five years, that that suspension be stayed and that respondent be placed on probation for five years on conditions including restitution to her client and actual suspension for two years and until she establishes her rehabilitation, fitness to practice and learning and

ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (Trans. Rules Proc. of State Bar, div. V.)

I. SUMMARY OF PROCEEDINGS

Since respondent's contentions are all procedural in nature, we summarize the proceedings in this case. This summary will show that the State Bar Court Hearing Department afforded respondent ample opportunities to be heard on the charges before and during trial.

A. Pre-trial Proceedings.

In January 1990, the Office of Trial Counsel filed a three-count notice to show cause ("notice"). The first count charged respondent with accepting employment in 1988 from a corporation in a civil matter, but thereafter failing to communicate with the client, failing to perform services and failing to return unearned fees or give an accounting. The next count charged respondent with converting property of her client's principal, which she had borrowed while acting as the client's attorney. The last count of the notice charged her with failing to participate in the 1989 State Bar investigation of her client's complaint. (See Bus. & Prof. Code, §§ 6002.1 and 6068 (i).)¹ As required by section 6002.1, the notice was served on respondent's State Bar member records address in Glendale, California. In February 1990, respondent answered the notice, denying its charges. Respondent used her Glendale address in the answer's caption.

Judge Jennifer Gee, the hearing judge then assigned to the case, set a status conference for March 23, 1990. Due to respondent's illness, Judge Gee continued the conference to March 30, 1990, with an alternate date of April 6, 1990. When granting the continuance, Judge Gee directed respondent to inform the court and opposing counsel if she could not proceed on March 30.

* Pursuant to rule 453(c), Trans. Rules Proc. of State Bar.

1. Unless noted otherwise, all references to sections are to the provisions of the Business and Professions Code.

Respondent was unable to participate in the March 30 conference because of a criminal trial jury selection and she was also unavailable for status conference on April 6. On April 9, Judge Gee directed respondent to file a list of dates on which she would be available for a status conference. The judge's April 9 order also notified respondent that failure to designate available conference dates would result in a conference being scheduled without respondent's input. Respondent failed to reply to the judge's request and the judge filed a written order setting the status conference for May 23, 1990. In her order, the judge warned respondent that if she did not participate in the status conference, the trial date would be set without her input and any motion for continuance of trial would be closely scrutinized.

At both parties' request, the May 23, 1990, status conference was advanced to May 22. Respondent participated and Judge Gee set a schedule for an additional status conference, the completion of discovery, the filing of pre-trial briefs, a pre-trial conference and the start of trial on September 17, 1990. Respondent participated in the next two status conferences in June and July 1990 and obtained additional time for discovery. The pre-trial conference and trial dates were each extended about one month.

On August 14, 1990, after experiencing difficulty effecting service by mail of a discovery request on respondent at her Glendale address, the examiner filed a motion to require that respondent provide an official address of record to the State Bar.

The examiner served this motion by mail on respondent at the Glendale address (which had been her State Bar address of record to that time) as well as on a Pasadena address to which respondent referred during her June 7, 1990 deposition, as a home address at which she said she was doing most of her work.

On August 29, 1990, Judge Gee granted the examiner's request and directed respondent to designate a current address for State Bar purposes. In so ruling, the judge noted that State Bar Court correspondence mailed to respondent had also been returned and respondent had failed to reply to the

examiner's August 14 motion. The judge also granted a separate request of the examiner to require respondent to produce certain documents for inspection. Also, on August 29, the judge vacated a voluntary settlement conference requested by respondent for that date, as respondent had contacted the court earlier that day to inform of her unavailability. In vacating the conference, Judge Gee noted that there had been earlier problems with respondent's availability for conferences due to a variety of reasons.

On September 11, 1990, the case was re-assigned for trial to Judge Pro Tem. Richard Burstein due to Judge Gee's unavailability to conduct the trial without unreasonable delay. The court notified the parties that the pre-trial conference earlier scheduled for October 4, 1990, was advanced from 11:00 a.m. to 9:30 a.m. and confirmed the earlier order for filing of the parties' pre-trial statement by September 25, 1990.

A few days later, on September 20, 1990, the examiner moved for issue and evidence sanctions for respondent's failure to produce documents. The examiner served this motion on respondent in care of the address of a different Suzanne Harris, at a downtown Los Angeles location. The next day, the examiner re-served the motion and accompanying papers on respondent at her Glendale and Pasadena addresses.

The examiner filed her pre-trial statement on September 26, 1990. She outlined her case, set forth a number of undisputed facts based on respondent's earlier deposition testimony, set forth the issues remaining in dispute, discussed briefly the legal points involved, including that the examiner believed that disbarment was warranted under case law which the examiner cited; and also listed the witnesses whom she planned to call to testify and the exhibits planned to be introduced. With regard to exhibits, the examiner stated that they would include, "Prior record of discipline in Case Number 84-O-14558." The examiner made no other reference in this statement to a prior record of discipline and respondent did not file a pre-trial statement.

On October 1, 1990, the State Bar Court clerk's office filed and served on respondent at her Glendale

address a notice that the pre-trial conference and the examiner's motion for sanctions would each be heard on October 4. This notice was served on respondent's Glendale address of State Bar record. Also, on October 1, respondent filed an opposition to the sanctions motion.

Respondent did not attend the motion or pre-trial hearing on October 4. After hearing the examiner's argument for sanctions and reviewing the examiner's pre-trial statement, Judge Burstein ordered the undisputed facts and disputed facts, respectively, to be those identified as such in the examiner's pre-trial statement, directed that trial was to start October 22, 1990, at 9:30 a.m. and directed that the State Bar Court clerk serve respondent at her Pasadena address as well as her current address of State Bar record. The judge also granted the State Bar's discovery motion and ordered respondent precluded from offering any documentary proof not previously disclosed to the examiner.

B. Trial Proceedings.

Trial commenced on October 22, 1990. Respondent did not appear at the scheduled time of 9:30 a.m. An unidentified caller on her behalf telephoned the State Bar Court clerk's office to report that respondent would be late but would arrive by 10:00. At 10:08 a.m., the trial started but respondent had still not arrived. One or two more messages were received later that morning by the State Bar Court that respondent had car trouble. She did not arrive until about 12:25 p.m. Upon her arrival, she levied an oral challenge to the hearing judge on grounds of bias. She also claimed that due to an eye malady, she was unable to see. The judge continued the hearing until November 26, 1990, at 9:30 a.m. in order to have respondent examined by an ophthalmologist at State Bar expense.² The only witness to testify against respondent in her absence on the first day of trial was a State Bar investigator who was later recalled at the November 26, 1990, continued trial date.

Trial resumed on November 26, 1990, at 9:35 a.m. Respondent was not present but the resumption of trial was delayed due to the tardiness of a State Bar witness. Respondent was present when the trial resumed at 10:20 a.m. At that time, the hearing judge stated that at the end of the trial session that day, "we will address scheduling additional days of hearing." (R.T. p. 60.) The State Bar investigator who was recalled was examined anew on the subjects of testimony she had earlier given when respondent was absent on October 20, 1990, and respondent cross-examined her extensively. The State Bar next called Keith M. Berman, president of the company that had hired respondent in 1988 to perform legal services for it. During cross-examination, respondent raised a documentary evidence issue which was the subject of some colloquy between counsel and the court.

As the ending time for this trial session was approaching, the judge held a conference with the parties off the record to pick another trial date. The judge stated on the record that trial would resume on December 18, 1990, at 9:30 a.m. Respondent waived notice of the continued trial date. The judge concluded his remarks as follows: "All right. We will see you at 9:30 at that time. And, at that time, I would expect that counsel would be able to address the evidence issue that we just touched upon a few minutes ago, *and that we will proceed on the 18th*. At that point, if additional time is needed after the 18th, I will expect to set dates for further hearings, probably right after the first of the year. . . ." (R.T. pp. 183-184, emphasis added.)

On December 18, 1990, trial resumed at 9:46 a.m. Respondent was not present. The hearing judge stated that a call had been received by State Bar Court staff earlier that respondent was "five minutes away." The judge waited to allow her to arrive; but as she was not present, he proceeded. At 9:53 a.m., 23 minutes after the scheduled start of the trial day, the judge asked the examiner if he had any other wit-

2. The examining ophthalmologist opined that although respondent may have suffered "an acute toxic keratitis and conjunctivitis from some particulate matter in the air," she did

not have any significant organic eye condition precluding her from using her eyes or functioning in a "relatively normal manner."

nesses to call. When the examiner stated that he did not and rested the State Bar's case, the judge invited closing argument on culpability. Upon the examiner's submission of the matter to the court's discretion, the judge announced his tentative inclination to find culpability. He invited the examiner to address the issue of degree of discipline. Brief proceedings followed at which the examiner offered respondent's prior disciplinary record and argued that the judge should recommend disbarment, and, at a minimum, that the State Bar Court should "increase significantly" the suspension previously ordered by the Supreme Court in 1990. Subject to the examiner furnishing a certified copy of the Supreme Court's recently-filed suspension order, the hearing judge took the matter under submission.

II. THE EVIDENCE ON THE CHARGES

A. Representation of SDI, Inc. and Retention of its President's Property.

The principal charges alleged respondent's misconduct while representing a corporate client, Sys Dev, Inc. ("SDI"). In 1988, SDI was a small business developing health care computer software. As noted *ante*, the examiner called its then president, Keith Berman, who testified extensively to the relevant events and who was cross-examined by respondent. One Bigelow, an officer of SDI, attempted a hostile takeover of SDI. Moreover, he took control over most of SDI's computers, its spare parts bank, its customer lists and the "source code" for its software program. He also sought to have SDI customers make payments directly to him. In Berman's words, Bigelow's actions "shut down" SDI operations.

By referral from an SDI director, SDI hired respondent in June 1988. In a strategy session, respondent outlined an injunction as the best way to get back SDI assets, given its limited resources. On June 17, 1988, respondent and Berman signed respondent's fee agreement calling for respondent to prepare an "injunctive relief package" for a retainer fee of \$2,000 and a set hourly fee. SDI wired \$2,700 in cash to respondent's bank account.

Berman had one meeting with respondent in June. At that time, they planned for respondent to

obtain declarations of witnesses friendly to SDI in order to support the injunction. However, by about mid-July, 1988 SDI was still being harmed by Bigelow and the SDI directors and creditors were clamoring for action. After being unable to contact respondent for five days, and fearing an imminent suit by irate SDI customers, Berman sent respondent a letter by telefacsimile, pleading for some word as to what was happening and what could be done to stop Bigelow.

Within a week of this letter, respondent met with Berman to get the injunction work moving. Respondent started preparing supporting declarations and Berman placed SDI secretarial resources at respondent's disposal so that she could prepare these quickly. At respondent's request, Berman loaned her his own personal computer, printer and some software so that she could prepare the legal papers for SDI. At the end of July 1988, respondent left for a trip to Kansas and Kentucky. She wanted to keep in touch with SDI to oversee document preparation. At her request, Berman loaned her his personal cellular car telephone. There is no evidence in the record of the value of these loaned items.

By late July or early August 1988, contact had been made with all six or seven witnesses who would be preparing declarations supporting SDI. Drafts of or requests for declarations had been sent to each witness and two or three completed ones had been returned. After this time, Berman was unable to speak with respondent again although he was able to get through to respondent's legal assistant. Respondent never prepared any injunction application or underlying lawsuit and never filed any court papers seeking relief for SDI. She never returned any of SDI's advance fees. Despite a letter from Berman in December 1988 and numerous prior phone calls, respondent never returned his computer or cellular phone nor did she return original SDI documents, including corporate minutes.

The only evidence of respondent's position on the charges came from portions of her deposition, parts of which were offered by the examiner and read into the record at trial. Respondent agreed that she accepted employment from SDI to prepare an injunctive relief package, expressed concern to SDI that maybe it should seek bankruptcy court protec-

tion as she was concerned about its ability to raise funds for a bond, if needed, and cautioned SDI that a lot of effort would be required to assemble a successful effort to gain injunctive relief. Respondent contended that SDI owed her about \$15,000 in fees for all the work she did and that Berman's computer and cellular phone were given her in payment of legal fees.

B. Failure to Participate in State Bar Investigation.

In March and April 1989, a State Bar investigator sent letters to respondent outlining Berman's complaint, calling respondent's attention to section 6068 (i) and inviting respondent's reply. The investigator testified that respondent's assistant telephoned in reply to one letter and promised that respondent would reply by early May. The investigator testified that she waited until the promised date but never received a reply. In the portion of respondent's deposition offered in evidence at trial by the examiner, respondent stated that she did not reply in writing to the State Bar investigator but believed that she or her paralegal must have spoken to an investigator, or after the notice issued, to a State Bar examiner.

III. RESPONDENT'S PRIOR SUSPENSION

The record of respondent's prior suspension was the only evidence introduced by the examiner specifically on the issue of degree of discipline. Respondent was not present at the last day of hearing and submitted no evidence in mitigation. Effective January 5, 1991, the Supreme Court suspended respondent for three years, stayed that suspension and placed respondent on conditions of probation including 90 days actual suspension, compliance with rule 955, and passage of the professional responsibility examination within a year. (*Harris v. State Bar, supra*, 51 Cal.3d 1082.)

Respondent's previous suspension was based on her failure to communicate with, failure to perform services for and ultimate abandonment of a client between 1980 and 1984. The client's wife had fallen in a restaurant parking lot and later died while hospitalized. Respondent represented the client in seeking damages on account of his wife's injury and

ultimate death. In imposing the greater discipline recommended by the former volunteer review department, the Supreme Court noted the lack of services performed by respondent over a four-year period, coupled with her repeated failure to communicate with her client or his personal attorney, respondent's lack of remorse and the prejudice to her client whose case was sharply devalued by respondent's inaction. Although the Supreme Court did consider as mitigating, evidence of an illness respondent suffered during the early stages of her client's dissatisfaction, the Court concluded that it did not "excuse four years of neglect and failure to communicate." (*Harris v. State Bar, supra*, 51 Cal.3d at p. 1088.)

IV. DISCUSSION

A. Procedural Points.

We address first the several procedural points which have been the sole focus of the parties' briefs.

1. Adequacy of notice.

[1] Respondent offers a highly generalized argument that she did not receive adequate notice of certain hearings. Her claim warrants no relief. The Supreme Court has held that service on the respondent's State Bar address of record (Bus. & Prof. Code, § 6002.1) is sufficient and that the member of the State Bar has a duty to keep the State Bar informed of a current address. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The record shows that this requirement was made abundantly clear to respondent; that she was given special opportunity to correct her official address if it was not correct as it existed on State Bar records; and that many of the notices of hearings and conferences were served on respondent at another address she had used from time to time in addition to being served on her address of record. Although it does appear that the examiner's September 20, 1990, motion for issue and evidence sanctions was served on another member of the State Bar with the same name as respondent, that error was corrected one day later. Moreover, many of the notices of pre-trial or trial hearing dates were given repeatedly and notice of the last day of trial was given respondent verbally in her physical presence, upon her waiver of written notice.

2. Failure to attend pre-trial conference.

[2, 3] Respondent urges before us, for the first time, that her failure to attend the pre-trial conference was excusable due to a medical emergency. While a medical emergency might explain her inability to attend the conference, it did not explain her failure to have filed a required pre-trial statement, which might have better preserved her posture at trial. Moreover, respondent sought no relief from the hearing judge on account of her inability to attend the pre-trial conference and she cannot now be heard to complain. (Cf. *Blair v. State Bar* (1989) 49 Cal.3d 762, 774.)

3. Pre-trial reference to respondent's prior record.

[4] Respondent complains that rule 571, Transitional Rules of Procedure of the State Bar, was violated by the examiner's citing to respondent's prior record of discipline in the pre-trial statement. Respondent's claim does not warrant relief. The only such reference to respondent's prior record of discipline was the briefest statement on page 8 of the examiner's pre-trial statement that, among the exhibits the examiner would offer at trial was, "f) Prior record of discipline in Case Number 84-O-14558."³ The examiner's pre-trial statement did not detail or characterize the prior record in any way and there is no evidence that the hearing judge considered any papers concerning it until, as prescribed by rule 571, a certified copy of the prior record was introduced after the judge had announced that he had determined culpability. (R.T. pp. 189-191.) Respondent has cited no authority that she was deprived of a fair hearing by this briefest pre-trial allusion to a "prior record of discipline" and the authority on the subject, *Stuart v. State Bar* (1985) 40 Cal.3d 838, 844-845, requires specific prejudice before relief will be granted. In that case, the Court rejected Stuart's position that the premature disclosure to the hearing panel of the prior record warranted dismissal of the proceedings, finding no specific prejudice. As in *Stuart*, where the disclosure occurred after a "clear case for culpability

had been made," here the brief reference occurred in a pre-trial statement carrying undisputed facts themselves warranting a finding of culpability. Further, we note, identical to respondent's last claim arising out of the pre-trial phase, she failed to present it to the hearing judge at any time during the trial. Finally, to the extent that any reference to a prior record of discipline—albeit brief—somehow affected, *arguendo*, the hearing judge's recommendation, we exercise our independent power of intermediate review to determine culpability and to recommend the appropriate level of discipline based on the evidence and guiding factors.

4. Overall fairness of the hearing judge.

[5a] Respondent paints broadly diffuse strokes of unfairness charges on the part of the hearing judge. Her claims are not meritorious. Not only are her claims very generalized, they concern some matters peripheral to the charges, they are rooted in an unproven charge of conspiracy and they show no example of specific prejudice. [6] At oral argument before us, respondent's counsel suggested that respondent was not able, because of stress or other related difficulty, to be able to attend all hearing sessions. While we understand that any State Bar disciplinary hearing can be uncomfortable, even stressful for an attorney accused of charges of professional misconduct to attend, the Supreme Court has made it clear over the years that an accused attorney must avail herself or himself of the opportunity presented to participate and present all favorable evidence. Failing that opportunity, the accused may not demand a new hearing to present evidence belatedly. (See *Palomo v. State Bar* (1984) 36 Cal.3d 785, 792; *Warner v. State Bar* (1983) 34 Cal.3d 36, 42; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436, 447; *Wilson v. State Bar* (1958) 50 Cal.2d 509, 510-511.) [5b] Our review of the record shows that despite respondent's many excuses for not participating or for her tardiness, the hearing judges at pre-trial and trial, respectively, acted fairly throughout and took many steps to accommodate her. She had ample

3. Rule 1222(h), Provisional Rules of Practice of the State Bar Court, prescribing the contents of a pre-trial statement, requires that it contain a list of all exhibits to be offered at trial.

opportunities to present whatever evidence she desired and she is not now entitled to a new hearing as she requested at oral argument before us.

B. Culpability.

[7] Neither party has addressed the issue of culpability. Yet this review of the hearing judge's decision is not the same as a civil or criminal appeal. (See *Bernstein v. State Bar* (1972) 6 Cal.3d 909, 916.) We are required to analyze the record independently and we are not limited by the issues raised by the parties. (See *In the Matter of Heiser* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 47, 53; rule 453(a), Trans. Rules Proc. of State Bar.) Accordingly, we must determine whether clear and convincing evidence supports the hearing judge's findings and conclusions of respondent's culpability. If so, we must determine the appropriate degree of discipline to recommend.

In brief, the judge found that after September 1988, respondent failed to communicate with her client; and that, although she drafted some declarations, she did not prepare the needed documents for injunctive relief, she did not return any of the \$2,700 in fees she received which she did not earn nor did she return requested client documents. The hearing judge concluded that respondent's misconduct violated section 6068 (m) and rules 2-111(A)(2) and (A)(3), 6-101(A)(2) and 8-101 (B)(4), former Rules of Professional Conduct. The judge also found that respondent failed to return both a computer and cellular telephone her client's president had given her to work on its injunctive relief matter. The judge concluded that this misconduct violated section 6106. Finally, the judge found that respondent had failed to participate in the State Bar investigation by failing to respond to two letters of a State Bar investigator. As a result, the judge concluded that respondent violated section 6068 (i).

The State Bar introduced abundant evidence to support each of the charges. SDI's president, Berman, testified in detail about the hiring of respondent, the advance payment of her legal fees, the critical need for legal services to be rendered SDI over a short time to ease the harm caused by another who had taken over SDI's assets, the loan to respondent of the

cellular phone and computer and respondent's performance of initial services followed by her failure to communicate, to complete the services required to apply for injunctive relief or to return the unearned fees or corporate property. The State Bar investigator testified as to her unsuccessful efforts to secure an answer from respondent as to Berman's complaint. Documentary evidence was also introduced on the charges. Respondent presented no defense and the only evidence of her point of view came from the State Bar's offer in evidence of a brief excerpt from her pre-trial deposition. Given the state of the record, the hearing judge was in a well-suited position to weigh this evidence and decide that it supported the charges. (See *Harris v. State Bar, supra*, 51 Cal.3d at p. 1087.) Our independent review of the record leads us to adopt the hearing judge's findings and conclusions.

It is settled beyond doubt that the type of offenses found to have been committed by respondent are a clear basis for attorney discipline. As the Supreme Court said in *Harris*, "Failure to communicate with, and inattention to the needs of, a client may, standing alone, constitute grounds for discipline." [Citation.] (*Id.* at p. 1088.) The Supreme Court's opinion in *Harris* also dealt with abandonment of a client, which we have here. Respondent also failed to return SDI records and unearned fees.

[8] As to respondent's retention of Berman's computer and telephone equipment, the hearing judge concluded that this conduct was in the nature of conversion, in violation of section 6106. Respondent was charged in the notice with such conduct; and, on this record, we find support for the hearing judge's conclusion. In *Martin v. State Bar* (1991) 52 Cal.3d 1055, a client gave Martin his slightly damaged Rolex watch to use as evidence in the client's case and Martin never acceded to the client's request to return it. While the specific violation found by the Court as to this conduct of Martin is unclear, the Court did find Martin culpable of professional misconduct. In *Martin*, the attorney urged the same claim that respondent urges to us: that the property was retained as part of the lawyer's fees. Yet one member of the Supreme Court, who wrote on this aspect in some detail, noted that Martin had no writing to support his view, the matter was resolved

against him by the State Bar Court and he did not contest the support for those findings. (*Martin v. State Bar*, *supra*, 52 Cal.3d at pp. 1065-1066 (dis. opn. of Arabian, J.)) We have the identical factors present here and we cannot conclude that respondent's retention of Berman's property was either reasonable or honest. (Compare *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1099-1100; *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 332-333.)

Finally, we agree with the hearing judge that respondent's ignoring letters sent by the State Bar investigator violated her duty under section 6068 (i). (See *Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.)

C. Degree of Discipline.

The hearing judge found no mitigating circumstances but found several aggravating circumstances as a result of: respondent's suspension for misconduct arising prior to her hiring by SDI, significant harm caused to SDI by respondent's inaction, her failure to file a pre-trial statement as ordered, her tardy appearances and her "unexcused and unexplained" failure to appear on the last day of hearing.

The judge looked solely to the Standards for Attorney Sanctions for Professional Misconduct and, on that basis and considering the prior discipline, recommended disbarment. He noted that although respondent's dishonesty toward Berman (property retention) would not by itself justify disbarment, that sanction appeared to be the only one which would fulfill the goals of attorney discipline, given the similarity of the current matter with the prior one, the application of the other standards and the other bases of culpability found. The judge cited no Supreme Court decisions he had considered for guidance and neither party cites us to any, focusing instead on procedural points.

There can be little question as to the seriousness of respondent's misconduct toward SDI and Berman. [9] We also believe that her tardy and intermittent participation in these disciplinary proceedings is also aggravating. In contrast to *Calvert v. State Bar* (1991) 54 Cal.3d 765, 784, where the attorney's failure to appear on the last day of trial was held not

to be aggravating, here respondent gave no excuse for her similar failure to appear; and, unlike Calvert, respondent was in propria persona so that there was no one else to present evidence or speak for her. Also, unlike Calvert, the hearing judge noted that respondent displayed several failures to participate or tardiness in participating.

[10a] Despite the aggravating circumstances in the record, we believe that past Supreme Court decisions involving similar offenses lead us to conclude that a recommendation of a lengthy suspension and until respondent presents proof under standard 1.4(c)(ii) is more appropriate than disbarment. Despite the severity of respondent's inattention to clients, we note that in her 23 years of practice up through the SDI matter, her failure to perform services extended to only two matters. We interpret guiding Supreme Court opinions as not calling for disbarment in such circumstances.

Calvert v. State Bar, *supra*, 54 Cal.3d 765 involved a single case of failure to communicate and to perform services. However, the significant harm which occurred to that client was not attributable to Calvert and she had given impressive evidence in mitigation as to substantial pro bono activities and community service. Her one prior discipline occurred at the same time as the later matter; thus it was not deemed aggravating. The Supreme Court imposed a 90-day actual suspension in the prior case and a 60-day actual suspension in the later one. However, unlike the present matter, there was no evidence of dishonesty or misappropriation in Calvert's case.

In *Bledsoe v. State Bar* (1991) 52 Cal.3d 1074, the attorney had no prior discipline in 17 years of practice but had been found culpable of four matters of failing to perform services and a fifth matter of failing to participate in the State Bar investigation. There appeared to be no dishonest conduct by Bledsoe but he had failed to refund unearned fees or costs in several of the matters. He also defaulted in the State Bar proceedings. Finding no pattern of misconduct justifying disbarment, the Court imposed a five-year stayed suspension, with two years actual suspension and until standard 1.4(c)(ii) was met. Two justices would have disbarred.

Finally, we also believe *Martin v. State Bar, supra*, 52 Cal.3d 1055, is instructive. There the attorney had no prior record of discipline but had mishandled five matters over a four-year period only several years after admission to practice law. In one matter, he made false statements during civil settlement negotiations. As we discussed, *ante*, in another, he had kept his client's slightly damaged Rolex watch to use as evidence despite his client's request to return the watch. He had also falsely stated to two of his clients the status of their cases. Martin defaulted in the State Bar proceedings and there was almost no evidence in mitigation. The Supreme Court majority adopted the volunteer review department's recommendation for a five-year suspension, stayed on conditions including two years of actual suspension.⁴

[10b] Unquestionably, respondent's retention of her client's property, found to be wrongful under abundant evidence, was very serious. One troubling factor is that the record discloses no evidence of its value. We also note that while the examiner advocated disbarment to the hearing judge, he stated, at the minimum, that respondent should be suspended for a much greater period than her prior suspension. Considering all relevant factors, we believe that the discipline we recommend, a five-year suspension stayed on conditions of a five-year probation, restitution as specified, and a two-year actual suspension and until respondent proves her rehabilitation, fitness to practice and learning and ability in the general law pursuant to the provisions of standard 1.4(c)(ii) is appropriate to protect the public and to maintain the integrity of the courts and legal profession.

[11] With regard to restitution, our recommended conditions of probation will require respondent to provide proof of return to Berman of the computer and telephone equipment he loaned respondent and will also require that respondent return \$2,700 as unearned fees, together with interest at 10 percent per year until paid. We read the hearing judge's decision as concluding that the entire sum (\$2,700) respondent received as advance fees was unearned.

[12] It is common in State Bar matters involving the failure to perform services to require as a rehabilitative condition, restitution of unearned fees kept by the attorney and to deem as unearned the entire fee when only preliminary services were performed which did not result in benefit to the client. (See *Gadda v. State Bar* (1990) 50 Cal.3d 344, 348, 350, 357; *Bernstein v. State Bar* (1990) 50 Cal.3d 221, 232-234.) It is also common to recommend the payment of interest incident to such restitution. (*Martin v. State Bar, supra*, 52 Cal.3d at p. 1064.) [13] We shall recommend that the restitution of unearned fees be paid to SDI, or its successors or those determined, with approval of the probation monitor referee, to be entitled to receive this sum. In the event that the recipient(s) entitled to the \$2,700 in restitution cannot be ascertained with reasonable diligence, in view of the rehabilitative nature of restitution, we shall recommend, upon approval of respondent's probation monitor referee, that this sum be paid to the State Bar's Client Security Fund.

V. FORMAL RECOMMENDATION

For the foregoing reasons, we recommend that respondent, Suzanne L. Harris, be suspended from the practice of law in this state for a period of five years, that execution of the suspension be stayed and that respondent be placed on probation for a period of five years on the following conditions:

1. That during the first two years of said period of probation and until respondent has shown proof satisfactory to the State Bar Court of her rehabilitation, fitness to practice and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct, she shall be suspended from the practice of law in the state of California;

2. Within sixty (60) days of the effective date of the Supreme Court's order herein respondent shall present proof satisfactory to her probation monitor referee:

4. Chief Justice Lucas would have disbarred based on the magnitude of the unexplained misconduct. Justice Arabian,

who agreed with the Chief Justice, wrote separately to point out the egregiousness of Martin keeping his former client's watch.

(a) that she has returned to Keith Berman all computer and cellular telephone equipment loaned to her by Berman in 1988, including any loaned software, peripherals and hardware; and

(b) that she has returned to Berman all SDI corporate minutes and any other SDI records in her possession;

3. Within one (1) year of the effective date of the Supreme Court's order herein, respondent shall make restitution of \$2,700 plus interest at ten (10) percent per year from September 1, 1988, until the principal sum is paid in full. Restitution shall be made to SDI, its successors in interest; or, with the approval of the probation monitor referee, to those others entitled to receive such payment. In the event that authorized recipients of this restitution cannot be ascertained with reasonable diligence; then with approval of the probation monitor referee, restitution shall be paid to the State Bar's Client Security Fund.

4. That during the period of probation, respondent shall comply with the provisions of the State Bar Act and Rules of Professional Conduct of the State Bar of California;

5. That during the period of probation, she shall report not later than January 10, April 10, July 10 and October 10 of each year or part thereof during which the probation is in effect, in writing, to the Probation Department, State Bar Court, Los Angeles, which report shall state that it covers the preceding calendar quarter or applicable portion thereof, certifying by affidavit or under penalty of perjury (provided, however, that if the effective date of probation is less than 30 days preceding any of said dates, she shall file said report on the due date next following the due date after said effective date):

(a) in her first report, that she has complied with all provisions of the State Bar Act, and Rules of Professional Conduct since the effective date of said probation;

(b) in each subsequent report, that she has complied with all provision of the State Bar Act and Rules of Professional Conduct during said period;

(c) provided, however, that a final report shall be filed covering the remaining portion of the period of probation following the last report required by the foregoing provisions of this paragraph certifying to the matters set forth in subparagraph (b) thereof;

6. That respondent shall be referred to the Department of Probation, State Bar Court, for assignment of a probation monitor referee. Respondent shall promptly review the terms and conditions of her probation with the probation monitor referee to establish a manner and schedule of compliance consistent with these terms of probation. During the period of probation, respondent shall furnish such reports concerning her compliance as may be requested by the probation monitor referee. Respondent shall cooperate fully with the probation monitor to enable him or her to discharge the duties of rule 611, Transitional Rules of Procedure of the State Bar.

7. That subject to assertion of applicable privileges, respondent shall answer fully, promptly and truthfully any inquiries of the Probation Department of the State Bar Court and any probation monitor referee assigned under these conditions of probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with these terms of probation;

8. That the period of probation shall commence as of the date on which the order of the Supreme Court in this matter becomes effective;

9. That at the expiration of the period of this probation if respondent has complied with the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for a period of five years shall be satisfied and the suspension shall be terminated.

We also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within thirty (30) calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within forty (40) days of the effective date of the order showing her compliance with said order.

Since respondent was required to pass the professional responsibility examination by order of the Supreme Court in *Harris v. State Bar, supra*, 51 Cal.3d 1082, we do not recommend that she be required to pass that examination again.

We recommended that costs incurred by the State Bar in the investigation, hearing and review of this matter be awarded to the State Bar pursuant to section 6086.10.

We concur:

NORIAN, J.
VELARDE, J.*

* By appointment of the Acting Presiding Judge pursuant to rule 435(c), Trans. Rules Proc. of State Bar.