IN THE MATTER OF LEONARD A. BAUN,
A Member of the State Bar of Michigan,
Appellant.
No. 32207-A

Decided: April 12, 1979

OPINION

The Attorney Discipline Board has reviewed this matter pursuant to an Order of the Michigan Supreme Court remanding the case to the former State Bar Grievance Board for rehearing and report and recommendation.

This matter had been remanded to the State Bar Grievance Board on September 28, 1975, State Bar Grievance Administrator v Baun 395 Mich 28, 232 NW2d 621 (1975). The former Grievance Board was required to state its reasons why the two year suspension ordered by the original hearing panel was extended to a disbarment by that Board. State Board Grievance Administrator v Gillette, 393 Mich 26, 222 NW2d 513 (1974).

The original hearing panel was unanimous in its findings of fact and conclusions of law; however, two of those panel members voted for a two year suspension and the other member for disbarment. The former Grievance Board voted unanimously for disbarment and was upheld by the Supreme Court, Opinion filed April 21, 1976. Respondent filed a Motion for Special Relief on March 22, 1978, on the basis that new evidence relevant to the proceedings had been discovered since the time of disbarment, to wit: Respondent suffered from the growth of a massive brain tumor pressing upon both frontal lobes of his brain during the period of the misconduct in question. The Affidavit of Dr. Robert S. Knighton, Chief of the Department of Neurology and Neurological Surgery at Henry Ford Hospital, Detroit, was attached to Respondent's Motion for Special Relief for the purpose of corroborating Respondent's allegation of relevant, newly-discovered evidence.

The Wayne County Hearing Panel 112 has considered the new evidence presented after receiving the testimony of Respondent’s wife, Dr. Knighton, Respondent's son and Harry Okrent, former law partner of Respondent, Deborah Baun, Respondent's daughter and Respondent himself (who was called as a witness by the Grievance Administrator.) The hearing panel consisted of Acting Chairman Addison D. Connor, Panel Member Forrest A. Hainline, Jr., both of whom were on the original hearing panel which considered the matter prior to disbarment, and new Member John F. Vos, III. Panel Chairman Connor issued a report highlighting testimony relating to the newly discovered evidence taken before the new panel and recommended affirmation of the discipline of disbarment.

Panel Members Hainline and Vos submitted a separate report and recommendation including a synopsis of portions of the new evidence and concluded with a recommendation that Respondent be permitted to petition for reinstatement immediately. However, although this majority report noted that Respondent has been under a final order of disbarment since April, 1976, and that the decision of the original hearing panel was for a suspension of two years, the panel did not express a factual

basis for a reduction in discipline.

The Discipline Board has reviewed the Report and Order of the original hearing panel, the Order of the Supreme Court, and the pleadings and transcript of proceedings taken before the second hearing panel and has considered the outstanding oral presentations of the Grievance Administrator and counsel for Respondent. It is the unanimous conclusion of the Board that the decision of the former Grievance Board as affirmed by the Supreme Court requiring disbarment should be affirmed.

The procedural issues perceived by the Board included the question of whether the evidence presented was, in fact, “new evidence”, and, if so, whether such evidence was of such nature and substance as to overcome the findings of the former Grievance Board. We agree with the hearing panel that the evidence presented was newly discovered and relevant to the proceedings; however, we do not feel that the Respondent has overcome his burden of establishing proof that there existed a causal relationship between the brain tumor and the misconduct which occurred.

The Board believes that in view of Respondent’s contention that the brain tumor caused aberrant behavior, it is particularly crucial that Respondent demonstrate a difference in his conduct before and during the existence of the tumor. Such a change was simply not reflected in the record. Vague references were made by Respondent’s wife to a change in their personal relations. Likewise, Respondent’s son testified regarding what appeared to be an isolated instance of a lapse of memory on the part of the Respondent in regard to money deposited in the son’s checking account for his support while a student attending the University. Although Respondent’s 24 year old daughter was called to the witness stand at the hearing, she did not relate any personal observations which would corroborate the position that Respondent displayed unusual or bizarre behavior during the time he suffered from the growth of the tumor. Rather, the daughter merely testified in regard to a surgical procedure performed upon Respondent's wife. Also noted is the testimony of Mr. Harry Okrent, Respondent’s former law partner, who testified regarding certain subtle changes which precipitated the dissolution of his partnership with Respondent. Mr. Okrent testified as follows:

> Q. [Counsel for Respondent] “Did you notice any change in his [Respondent's] attitude, his behavior, his appearance, anything of that nature?”
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> A. “Very sudden change.”
>
> Q. “Sudden?”
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> A. “Very sudden, I can almost pinpoint the day, it would have been either December of 1968 or January of 1969.”
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> Q. “What brings you to that date?”
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> A. “Because all of the sudden the big, friendly, puppy dog became a surly dog. He didn't seem to enjoy anything. He had a sort of crazy almost immediate big shot complex.

He became enamored in trying [to be] a talent seller of people that have artistic talent of one sort or another.

Show business intrigued him. The law business he worked at it, but it was obviously work, it wasn't play anymore.

And out of the clear blue sky, at about the same time, in a very short space of time he came to me with an absurd conclusion, he had always talked things over with me . . .

All of a sudden Leonard, who had always looked at me, I think, as a sort of a father; and who would always talk over any problems that he had with me, came to me . . . and says 'I'm moving out to the suburbs, are you going to come with me out there or are you going to stay in the downtown hole?'

So I said, 'Well Leonard, it isn't a hole, but let's talk about it.'

I tried to point out that our practice wouldn't benefit by going to the suburbs . . .

It was a sudden decision that he made and he said, 'That is the way I want it. Do you want to come with me? You're welcome. If you don't want to come with me, you stay. I'm going.'" Panel tr. at 123-26.

The testimony cited above, and other testimony in support of Respondent's argument, taken in the context of the whole record, is not sufficient to meet Respondent's burden, The changes in personality and behavior which are attributed to an intervening biochemical factor beyond the control of the Respondent, although alleged as dramatic and shocking, are not reflected as such in the testimony of any witness.

Both of the expert witnesses [Dr. Knighton and Dr. Irving I. Edgar] tend to corroborate the position that a tumor of such size and position as was present could affect the patient's moral judgment and behavior. Dr. Edgar was not present at the hearing or subject to examination before the panel. However, he did indicate, in his written report, as follows:

" . . . it is my opinion that Leonard Baun's changes . . . his aberrant behavior, could be, and most likely was influenced by the tumor on his brain, and this includes his behavior resulting in his disbarment." (From Exhibit No. 3, proceedings before second hearing panel.)

It is duly noted that Dr. Edgar was consulted by the Grievance Administrator in this matter; however, the probative weight of Dr. Edgar's written statement is of questionable weight in light of the testimony of Dr. Knighton, expert witness for Respondent:

Q. [Counsel for Respondent] "Do you have any inference that you draw

from any medical inferences as to the condition [of] his frontal lobes now as opposed to before the surgery?"

A. [By Dr. Knighton] "Well, I think that he is probably functioning fairly normally at what he used to be. But I don't know how he used to be . . ."

Q. [Grievance Administrator] "Now, it's quite possible, doctor, during the time this mass was growing in Mr. Baun's brain that he acted normally so far as his appearance in court [was] concerned, his handling of clients?"

A. "Well, he could have acted what appeared to be normal for a considerable period of time, but I think some where along the line it would have become obvious to him, those around him, about him; he wasn't quite what he used to be . . ."

Q. [By Grievance Administrator] "But is also could - lack of honesty could have been caused by ordinary, normal circumstances?"

A. "Well, I don't know because I didn't know Mr. Baun before I saw him." (Panel tr. at 59; Emphasis added)

The above statement of Dr. Knighton was carefully considered in connection with the statement of Dr. Edgar. Dr. Edgar's history and diagnosis do not include information regarding prior behavioral or attitudinal patterns of the Respondent. In other words, although the existence of the tumor might clinically be considered the cause of aberrant behavior including dishonesty, there was no testimony that it was in the case of Mr. Baun.

The Board was provided with insufficient or vague information regarding Respondent's behavior during the growth of the tumor and prior to the growth of the tumor, The record has been carefully examined to disclose the existence of possible gross or obviously inappropriate behavior during the time the tumor may have had some effect on judgment. Again, we are not convinced that the tumor had a profound effect upon Respondent's ability to make a proper Judgment at the time that the commingling and conversion of funds occurred. In fact, in those years during which the tumor could have been expanding, Respondent achieved increasing financial success and Respondent appeared to have no demonstrable difficulty in attending to the demands of a growing practice or of making sound decisions requiring mental clarity and Judgmental discernment. It would appear that Respondent's decision to dissolve his prior law partnership could have been well reasoned and not the result of sudden changes in mentality.

The Discipline Board shares the concern expressed by the Supreme Court, State Bar Grievance Administrator v Estes, 392 Mich 645 at page 653 (1974), that the public is particularly vulnerable to persons placed in a position of trust held by a fiduciary. Whether the commingling and conversion of funds was done as a result of some planned, conscious scheme or was a result of careless bookkeeping (the latter claim is Respondent's position), the evidence remains uncontroverted that Respondent knew, or very certainly should have known, that he was failing to

carry out his duties as fiduciary in the handling of four separate estates and in the misappropriation of more than $140,000..

The Board concurs that a void remains with regard to some appreciation on Respondent's part of the seriousness of his breach of duty or damage done to the legal profession and to the parties involved. Although a showing a remorse is no longer a prerequisite to reinstatement, State Bar Grievance Administrator v Albert, 390 Mich 234 (1978), the lack of remorse is relevant in the case at bar in assessing whether the misconduct involved was characteristic of Respondent rather than being merely a symptom of the temporary medical problem. In this regard the Board notes the following testimony of Respondent before the second hearing panel and after the removal of the tumor:

> Q. [Counsel for Grievance Administrator] "How much was the amount you failed to account for?"
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> A. [Mr. Baun] "I think it was a little over -- a little over $100,000 as I recall. I'm not sure of the exact sum; but in that area."
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> Q. "More nearly $140,000?"
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> A. "I said over $100,000. You have the record in front of you . . ." (Transcript, before second Hearing Panel, Page 157-158).
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> Q. [Counsel for Grievance Administrator] "You were familiar with the statute relating to the segregation of trust funds as a public-administrator?"
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> A. Mr. Baun] "I was."
>
> Q. "And you were also familiar with the fact that you were required to file accounts?"
>
> A. "Very specifically, yes . . ." (Transcript, before second Hearing Panel, page 165)
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> Q [Counsel for Grievance Administrator] "Did [the State Public Administrator] finally have to file a Petition for Contempt for your failure to file a Final Account?"
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> A. [Mr. Baun] "Well, whether he had to or not, he did." (Transcript, before second Hearing Panel, page 166)

By his testimony, Respondent acknowledged some responsibility, but only for "sloppiness" in bookkeeping. He offers no satisfactory explanation for his failure to keep separate accounts and to otherwise comply with the statutory provisions applicable to public administrators. [MCLA 720.219; MSA 27.2754(19)]. Absent intent by Respondent Baun to defraud, there may have been some defense or argument in mitigation for a single offense of failure to account for funds. 7 Am Jur 2d Attorneys at Law Sec. 35, at p. 64. However, even if an employee of Baun embezzled the funds (suggested as a possibility by Baun) and regardless of the presence of fraud by the fiduciary himself, failure to keep and monitor separate accounts violates both the aforementioned statutory and the disciplinary rules.

Regardless of whether a conscious, specific intent to convert the funds or mere sloppiness and carelessness is the true explanation, there remains a very serious breach of the fiduciary duty and the Canons of Ethics.

In summary, Respondent's defense that he was deprived of his ability to make proper moral Judgments by some intervening cause beyond his control is not sufficiently supported by evidence, and is inconsistent with other behavior occurring during the time of the growth of the tumor and subsequent to its removal.