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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-343

IN THE MATTER OF

HAROLD V. O'GRADY,

AN ATTORNEY AT LAW

Decision

Argued: November 19, 1998

Decided: May 13, 1999

Nitza I. Blasini appeared on behalf of the Office of Attorney Ethics.

Respondent, through counsel John A. Young, Jr., waived appearance before the Board.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before the Board based on a recommendation for discipline filed by Special Master Terry Paul Bottinelli. The complaint charged respondent with knowing misappropriation of client trust funds, in violation of RPC 1.15 (failure to safeguard client funds) and RPC 8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Respondent admitted his misappropriation of client funds, but denied that the conduct was knowing. The hearing before the special master focused on whether respondent's psychiatric condition was such that he could not have known the wrongfulness of his actions.

Respondent was admitted to the New Jersey bar in 1974. At the time of the

transactions in question, he maintained an office in Jersey City, Hudson County.

Respondent was temporarily suspended from the practice of law on May 9, 1995, after he failed to cooperate with the Office of Attorney Ethics' (OAE) investigation of this matter. Respondent's suspension remains in effect.

As noted above, respondent's misappropriation of client funds is not in dispute. Respondent's actions, as summarized by the special master, were as follows:

> In September of 1993 Respondent represented Vidal and Elvira Ledda (hereinafter 'Buyers') in the purchase of a home sold by the Estate of Anselmo Brach[e] (hereinafter 'Seller').
>
> On September 14, 1993 Respondent deposited $70,000.00 into his attorney trust account at Hudson City Savings Bank on behalf of Buyers. On September 15, 1993, Respondent deposited a second check in the amount of $29,126.19 into his trust account on behalf of Buyers. Respondent had a prior balance of $129.08 in his trust account and was to be paid $850.00 for his professional services.
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> On October 8, 1993, however, Respondent disbursed check number 1266 from his trust account to himself in the amount of $3,725.26. Of the total amount respondent deposited from Buyers, $10,000.00 was to be held in escrow until Seller obtained an inheritance tax waiver. The trust account, however, only had a balance of $6,403. 82 from October 18, 1993 to October 29, 1993. Additional funds were placed into the trust account on October 29, 1993.
>
> Thomas Panepinto, Esq., attorney for Seller, repeatedly requested that the $9,991.00 ($9.00 for filing fee) be returned to his client. Respondent then issued check number 1269 dated October 29, 1993 in the amount of $9,991.00 to Attorney Panepinto. Due to error, an attempt to deposit said check was not made until August, 1994.
>
> Respondent had issued a stop payment order in April of 1994,[1] and continually withdrew client funds from the account between March 3, 1994

[1]Respondent pointed out in his answer that the stop-payment order was put in place after conferring with Panepinto, who had misplaced the check for eleven months.

and December 20, 1994.[2] An examination of the checks written during this period reveals that seven (7) checks were written worth over $4,000.00 in total. This money was used for personal expenses of Respondent.

[Special master's report at 2-3]

As noted above, respondent admitted the allegations against him, except for those concerning his knowledge and intent surrounding his actions. Respondent asserted that he was mentally incapacitated during the time in question due to mental and physical illness.

Testimony was taken during the hearing from Daniel P. Greenfield, M.D., a psychiatrist who examined respondent at the request of the OAE, Rafael Tortosa, M.D., respondent's former psychiatrist and William A. Miller, respondent's friend. Respondent also testified.

As stated above, at the request of the OAE, Dr. Greenfield examined respondent to evaluate his claim of mental incapacity when he took the Leddas' funds. After extensive examination, testing and discussion, Dr. Greenfield determined that respondent did suffer from periods of mental incapacity as a result of serious illness. Dr. Greenfield testified that, on October 8, 1993, the date that respondent issued the trust account check for $3,725.26 to himself, he "probably was to some degree" mentally incapacitated from his illness, adding, however, that respondent knew right from wrong on that date. With regard to respondent's state of mind at the time of the transactions in question, Dr. Greenfield stressed that

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[2]Although the record mentions several times that respondent's acts of misappropriation extended through December 1994, the OAE's analysis of respondent's trust account activity shows that respondent wrote the last of the seven checks in question six months earlier, in June 1994. December 1994 is the date of the last trust account record reviewed by the OAE.

respondent's actions took place over a prolonged period, spanning times when he was in relatively good health and other times when he was not. Dr. Greenfield described respondent's actions as "goal-directed" and pointed out respondent's need for money, during the times in question, to pay personal expenses. The following are excerpts from Dr. Greenfield's testimony about respondent's mental capacity before May or June 1994:

> He made it clear that he was taking the money, that he was not optimistic about the idea that there was a psychiatric defense, and he was saying, speaking as an attorney, a psychiatric defense that would help him. And he also made it clear that what [sic] he was aware that what he was doing was not appropriate.
>
> [T39][3]

> Q: You said he had awareness of whether or not his defense would be viable?
>
> A: Well, viability was my word, okay. These were his words from the very beginning when I asked him what his understanding of the purpose of what his evaluation was. He said, 'The OAE wants an examination because a complaint of the OAE is misappropriation of funds, which I cannot contest. I did it, I'm embarrassed, I don't deny it, I did it, I was wrong, but I'm in much better condition now. I know that I screwed up. I want to get a chance to make right, a chance to practice again.'
>
> That was a comment that he made at the very beginning of the interview. And there was a comment that he made later on. He said toward the end of the interview, 'I know I wasn't like McNaughton [sic] insane when I did what I did. I took the money. It's a weak defense that I have. I had to try. It won't work. It shouldn't work.'
>
> [T40-41]

> Q: So in sum, Dr. Greenfield, did Mr. O'Grady know right from wrong at the time he misappropriated the Leddas' funds?
>
> A: I believe he did, yes, that's my opinion, during the times that he did.

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[3]T represents the transcript of the hearing before the DEC on April 13, 1998.

Again, I emphasize this isn't like a single episode, you know, where an individual loses control and does something inappropriate. This is over a recurrent and prolonged period of time. And I believe that he was definitely aware that what he was doing was wrong because he told me it was.

[T42]

. . . by Mr. O'Grady's account himself, it was when he was lucid enough to be able to know he needed the money that was available inappropriately through the Ledda account, it was at those times that he made the transfer, that he engaged in the paperwork that he needed to engage in in order to divert the funds.

So I guess the bottom line is, and it's not easy to answer your question with a simple straight yes or no, but I think the bottom line is that when he made the transfers, he was lucid enough to have done so.

Q: Lucid enough to write the check or lucid enough to appreciate the right and wrong of his conduct and its consequence?

A: Lucid enough to have written the check, and lucid enough to believe , when I spoke with him many months later, that at the same time he did it he was doing the wrong thing.

[T58]

A: . . . But the only point I'm trying to make is we're talking about long protracted periods of time during which he functioned as a municipal prosecutor and a chief municipal prosecutor for the City of Jersey City, which takes some mental ability. . . . and, you know, all of this was after 1992, as I understand.

And certainly he had the condition that later resulted in some very, very bizarre psychotic acts as a blip, as a peak on his graph, if you want to put it that way, but that during the prolonged periods of time where he didn't have those peaks, he was able to function. That's all I'm saying.

[T60-61]

Q: Dr. Greenfield, when Mr. O'Grady wrote out the checks in question, depleted the Ledda funds in October of '93 and then March, do you have an opinion as to whether or not he was McNaughton [sic] insane?

A: Well, as I said before, I think he had sufficient cognitive ability to write out the checks, to know why he was writing out the checks, to know that he needed the money. And in that respect, I think he felt, when I spoke with him, that he at the time felt he was McNaughton [sic] insane. And as I said before, I agree with him, I think he was - he was not. I'm getting double negatives here.

He felt when I spoke with him in November of '97 that when he engaged in the behaviors that he did during the time periods that he did, that he knew that it was wrong. He made that clear to me.

Going back, so that his opinion, if you were to ask him the same question, I imagine he will say, yes, I was not McNaughton [sic] insane. And based on what I know and based on the complexity involved in what he allegedly did, as I understand, what he did in writing out the checks and appreciating and understanding he needed money and all that, it may have been bad judgment, but I will have to agree with him, that he was not McNaughton [sic] insane.

[T68-69]

In addition to his testimony, Dr. Greenfield offered an extensive report setting out his evaluation of respondent's psychological state during the time that he misappropriated the Leddas' funds. In his concluding statement, Dr. Greenfield remarked as follows:

> . . . Mr. O'Grady's mental state and psychiatric condition during that period of time [October 1993] were <u>not</u> so impaired (by [illness] or other factors) as to have prevented him from effectively carrying out the work of a competent attorney during that period of time: Such work included his acting according to the rules and guidelines of his profession, which prohibit misappropriation of clients' funds, to my knowledge.
>
> During that period of time, Mr. O'Grady was admittedly under a good deal of stress from a variety of sources; had [illness]; and was well aware of financial problems (described above, for example) which he had during that period of time. Nevertheless, Mr. O'Grady was also able during that period of time to engage in other activities as an attorney, and was also able to engage in other responsible activities requiring decision-making ability and competency (such as paying bills, managing his affairs and relationships with others, shopping and taking care of himself, and dealing with the stresses and strains of life, in a general sense).

To my understanding, it was not until the following spring (March - April, 1994) that Mr. O'Grady's serious psychiatric/neuropsychiatric and medical problems began, and it was not until the following fall (October-November, 1994) that these problems reached serious and psychotic proportions manifested by bizarre behaviors, psychiatric hospitalizations, and so forth . . . .

Taking all of these points together, and summarizing them, it is again my psychiatric/neuropsychiatric opinion -- held with a degree of reasonable medical probability -- that during the period of time in question when Mr. Harold Vincent O'Grady reportedly misappropriated his client's funds in connection with a real estate transaction, his mental state and psychiatric/neuropsychiatric condition were not so impaired or debilitated as to have left him in the position of not having known the nature and purpose of what he was doing when he misappropriated those funds; that he did not know that what he was doing was wrong; or that he was not able to have acted in a knowing and purposeful way during the extended period of time in which he reportedly did misappropriate those finds [sic].

[Exhibit 2 at 24-25]

In Dr. Greenfield's opinion, in May/June 1994, however, respondent became unable to tell the difference between right and wrong;

Special Master: When was it that he was unable to differentiate between right and wrong?

A: Well, there was no question in my mind he had reached that point at the time of his hospitalization at St. Mary's, the first one in mid July of 1994. The rate at which his encephalopathy increased prior to that point is hard to ferret out , but as a practical matter I would say perhaps a month, four to six weeks or so before his encephalopathy had reached that point would have been a period when he would have been, had it been possible to see him at that point, where it would have been likely that he would not have been able to understand what he was doing was wrong.

Special Master: So that would take us back to May or June of 1994?

A: Give or take, yes.

[T64]

* * *

Dr. Tortosa, respondent's former psychiatrist, who began treating him in April 1994, testified that he found respondent's behavior to change from visit to visit from extremely emotional to articulate and clear-minded. Dr. Tortosa opined that, on the days that respondent appeared to lack control, it was "possible" that he was unable to differentiate right from wrong. Dr. Tortosa added that, when respondent presented himself as being in control, he was able to know right from wrong. Specifically, Dr. Tortosa testified as follows:

> Special Master: First of all, are you able to form an opinion as to whether or not on the dates that those checks were written whether or not Mr. O'Grady knew right from wrong?
>
> A: It's difficult to say. It's a possibility probably some days he would, probably other times not. It's difficult to say, but -
>
> Special Master: Do you know?
>
> A: This is quite a few checks, not one or two. It's a possibility he would realize he was doing something wrong at certain times.
>
> Special Master: Are you able to say within a reasonable degree of medical probability or certainty?
>
> A: It's a possibility he had to realize something. I don't know what degree, but-
>
> Special Master: Okay. The question, though, excuse me for interrupting. The question is: Do you have an opinion based on a reasonable degree of medical probability as to whether or not on the dates of each one of those checks, that have been referred to as Items 13 through 17, whether or not Mr. O'Grady knew right from wrong? If you don't, just say I don't know.
>
> A: Well, you know, my knowledge is not mathematics. It's difficult to say.

But, you know, there are a few checks here. I would kind of assume maybe one day he'll bump into these checks and maybe he was aware. Maybe, I don't know, there were days that he wrote them I don't know. But these checks he had to have some recollection of what happened. He could bring his abilities and question that . . . .

Special Master: Thank you. There's a second part of that question which I didn't ask.
Q. Dr. Tortosa, on the day that Mr. O'Grady wrote those checks, would it be fair to say that he was oriented as to time, place, because he had to date a check, fill out an amount sign the check. Would that be fair to say?

A: Absolutely. I also seems [sic] it's consistent to the same institution, which I don't know what kind of relationship he had with the institution. I would have to ask him that. Do you -

Special Master: No, no. Dr. Tortosa, at the time that Mr. O'Grady wrote these checks, would it be fair to say that he knew what he was doing? And by that I mean, he knew he was dealing with money.

A: Could be some years or not. It's difficult to say because I didn't know anything about it when I was seeing him. . . .

Special Master: So at the time, the times you saw him in your office that he was not doing well, that he was crying and angry and hostile, you know, did he not know right from wrong? Did you think he would be able to write a check, date a check, sign a check, put an amount?

A: No, in these instances, no. It [sic] say that the days that he was there, that he didn't know what he wanted to say or wasn't able to finish it. I doubt it.

Special Master: Would it be fair that in order to write out a check, an amount, a date and a payee and sign it, that it requires thought process?

A: Yes.

Special Master: Would an insane person be able to have those thought processes?

A: I think the most important thing is the purpose for these checks. I think one can write a check and put a date and make an effort to cash it. He is quite intelligent and he tried to do something. Now, the purpose for these checks, you have to be very - you have to know what you are doing.

Special Master: If the purpose is to pay his son's tuition, would you have to know what you're doing, your son's school tuition, would you have to know what you're doing?

A: Most likely, yes.

* * *

REDIRECT EXAMINATION

Respondent's Counsel: Doctor, in terms of writing the checks, an insane person can engage in behavior that is appropriate. Isn't that true?

A: Oh, sure.

Respondent's Counsel: But when they engage in that behavior, they may not be able to, due to mental illness, to appreciate the difference between right and wrong. Isn't that true?

A: Yeah. Well, the mental illness and his physical condition may kind of blur. You know, these - you know, you can change standards of what is right or wrong.

Respondent's Counsel: So simply doing an activity doesn't necessarily mean that his cognitive functions were such that he was able to judge the difference between right and wrong?

A: Well, I think at this time where he had, you know, a very serious, you know, case of advancing of the medications, the powerful medications we have today, I think maybe the standards of right and wrong were different in the state of mind for him probably now.

Respondent's Counsel: I just wanted to ask: The medication that he was taking you just mentioned was very strong.

A: They were strong psychotropic medications, yes, but they were monitored.

Respondent's Counsel: Right.

A: I doubt the medication will, you know, blur his mind in any way. If anything, it would help him to focus.

[T91-96]

* * *

Also offering testimony was William A. Miller, who has known respondent since 1989 or 1990 and at one time lived with him. Miller testified that he saw a marked change in respondent's behavior in the summer of 1993, explaining that respondent's logic was "skewed" and citing an incident where respondent intentionally drove into a light post and jumped out of his car. Miller added that respondent " had a hard time even paying his bills, not because he didn't have the money for it, but he just didn't seem to be aware of them or something." Miller testified that respondent's condition continued to worsen after the summer of 1993, recounting a later incident when respondent walked naked in the street.

As noted above, respondent admitted that he misappropriated the Leddas' funds, but denied that his conduct was knowing. According to respondent, he could not state if, at the time of his actions, he knew that his conduct was wrong because he did not remember issuing the checks. He added that he did not know whether he thought he was writing checks from his business account or his trust account. He also did not recall having received authorization to use the Leddas' funds. Respondent claimed that, from September 1993 to the summer of 1994, there were periods of time and entire months when he had no recollection of his

actions.

Significant to the OAE's case was respondent's statement to Dr. Greenfield that he knew that he was not "McNaughton [sic] insane." When asked about that statement, respondent testified as follows:

> Now, when I say I know I was not McNaughton [sic] insane, I suppose my pride is getting in the way there; that I think only madmen are insane and I'm not a madman. So I'm not quite sure when I say I know it wasn't like McNaughton [sic] insane, I'm not qualified to make that judgment. But did I know right from wrong at that time, obviously I wrote the checks. Counsel is right when she says I was oriented to time and place. I mean that's my signature. I dated the checks. I signed it, I endorsed it, I filled them out. This is an act of a - of a rational functioning person.
>
> Did I know what I was doing? I mean I don't remember what I was doing. I couldn't tell you. Do I think - I mean it's a weak defense here, I say it won't work, it shouldn't work. I know it shouldn't work, but in my analysis it's a questionable defense. I don't know, you know. That's again not for me to decide.
>
> Respondent's Counsel: What's your characterization of McNaughton [sic] insane? You have to be a madman? Is that what you're saying?
>
> A: . . . But my concept of it is that you're kind of a raving madman. You know, you're Hannibal Lechter or something of that kind.
>
> And I don't believe - I don't view myself as that kind of - suffering from that kind of mental defect. But it seems to me that my medical condition, the diagnosis . . . my behavior, it seems that might be something to explain what I did.
>
> Respondent's Counsel: Was the taking of these checks done by you out of greed?
>
> A: No.
>
> Respondent's Counsel: And to this day you don't have any specific recollection as to issuing the checks, understanding the checks were issued?

A: The checks were issued, sure, but I don't recall issuing.
[T130-131]

* * *

The special master determined that respondent was guilty of knowing misappropriation, noting the following:

> . . . Dr. Greenfield testified that it was at the times that Respondent was lucid and knew he was indebted to certain individuals when he engaged in this misconduct. William Miller testified that Respondent was neglecting to pay bills; however, Respondent was of clear enough mind to realize his son's tuition was due and owing and pay said tuition with the funds from his trust account. Respondent also transferred funds from the trust account to himself as payee.
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> [Special master's report at 6]

The special master determined that respondent violated RPC 1.15 and RPC 8.4(c) and should be disbarred.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the special master that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Knowing misappropriation of client funds will almost invariably result in disbarment. In re Wilson, 81 N.J. 451 (1979). In this case, because the funds in question were being held in escrow, In re Hollendonner, 102 N.J. 21 (1985), (knowing misuse of escrow funds will

result in disbarment) controls. The only issue to be determined is whether respondent's acts of misappropriation were committed knowingly. The essential question is whether respondent was McNaughten insane at the time he committed these acts, that is, whether he was able to distinguish between right and wrong and to appreciate the nature of his actions.

The Court has consistently stated that an attorney is not responsible for his or her actions if he or she demonstrates "by competent medical proofs that [he or she] suffered a loss of competency, comprehension or will of a magnitude that could excuse egregious misconduct that was clearly knowing, volitional and purposeful." In re Jacob, 95 N.J. 132, 137 (1984). The Jacob standard, however, is extremely difficult to satisfy. Since Jacob, the Supreme Court has never found such loss of comprehension sufficient to excuse knowing conduct in cases dealing with misappropriation of trust funds.

In a long line of attorney discipline cases, many of which involved misappropriation of funds, the defenses presented have fallen short of the Jacob standard. For example, in In re Gipson, 103 N.J. 75 (1986), the attorney pleaded guilty to three charges of theft by failure to make required disposition of property, namely, client funds. The attorney presented evidence of severe psychological strain and alcohol dependency. The Court ruled that the defense did not meet the Jacob standard of loss of competency, comprehension or will. Similarly, in In re Hein, 104 N.J. 297 (1986), the attorney submitted alcoholism as a defense to charges of misappropriation of client funds. He presented evidence of a direct causal connection between the alcoholism and the loss of judgment in his actions. The Court found

that the attorney had nonetheless failed to demonstrate the loss of competency, comprehension or will under Jacob that would excuse such misconduct. In In re Hahm, 120 N.J. 691 (1990), the attorney misappropriated client funds and advanced alcoholism as a defense. The Court found the case indistinguishable from Hein, ruling that the attorney was responsible for his actions. See also In re Gilliam, 106 N.J. 537 (1987) (attorney disbarred where record did not establish impairment of attorney's comprehension, competency, or will sufficient to excuse the misconduct under standards of Hein) and In re Ryle, 105 N.J. 10 (1987) (attorney's alcoholism was not a mitigating factor sufficient to overcome presumption of disbarment in misappropriation case).

Mental illness has also been advanced as a defense under Jacob. In In re Baker, 120 N.J. 496 (1990), the attorney misappropriated client funds when he invaded his trust account to, among other things, pay the mortgage payments for his wife's parents, who were in danger of losing their home. He also used trust funds to buy his wife expensive gifts in an unsuccessful effort to save his marriage. The attorney admitted the acts of misappropriation and argued that he was suffering from major depression, primarily due to his marital difficulties. A psychiatrist testifying for the attorney stated that, while the depression resulted in strong self-destructive impulses, including misappropriation of client funds, it only contributed to, but did not cause, the attorney to invade trust account funds. The Court discussed the attorney's mental disease argument:

> We also have considered the Jacob exculpatory standard in determining the appropriate discipline for respondents who offered evidence of alcohol or drug dependency as mitigating factors for their admitted misappropriation of funds. To date, we have found the medical evidence of such dependency to be insufficient to satisfy the high Jacob standard . . . .
>
> Our review of the proofs in this case lead us to the same conclusion . . . . All three psychiatrists concluded that respondent was suffering from a depression resulting from the break-up of his marriage.
>
> Neither of respondent's experts found that his depression had led to the loss of competency, comprehension, or will sufficient to excuse his knowing misappropriation of client funds.
>
> [Id. at 503-04]

In a later case, In re Roth, 140 N.J. 430 (1995), the attorney was charged with four counts of knowing misappropriation of client funds, as well as other rule violations. In defense of the charges, the attorney asserted that he was suffering from depression brought on by the dissolution of his marriage and the death of his mother. The Court, noting that it had not created any exceptions to the Wilson rule, held that respondent failed to meet either the Jacob standard or the McNaughten definition of insanity. To the contrary, the Court concluded, the evidence showed that respondent knew he was taking funds that were not his.

More recently, the Court considered In re Greenberg, 155 N.J. 138 (1998), where an attorney misappropriated funds belonging to his law firm. The attorney argued that his mental illness prevented him from having the requisite intent to knowingly misappropriate funds. The Court agreed with the Board's majority and disbarred the attorney. The Court was unable to conclude that the attorney had suffered from such a loss of competency,

comprehension or will that rendered him unable to comply with the rules of ethics.

As mentioned above, respondent admitted the allegations of the complaint, but denied that his misappropriation was "knowing." He blamed his physical and mental illness for his actions. Indeed, there appears to be no question but that respondent was mentally ill. At the hearing before the special master, Miller testified that respondent's behavior became noticeably worse in the summer of 1993, several months before respondent's first act of misappropriation (October 1993).[4] In addition, respondent pointed out in his answer that an MRI conducted in October 1994 confirmed the existence of brain lesions.[5] The same test had been negative in 1992. In the months preceding the second MRI respondent had been hospitalized on more than one occasion. Prior to that time, however, in September 1993, the time of the Ledda closing, respondent, then a municipal prosecutor, had been maintaining a part-time private practice. He was subsequently named chief municipal prosecutor in or about January 1994.

Although it is clear that respondent was ill, it is not so clear, throughout the time in question, that he was sufficiently impaired to overcome a charge of knowing misappropriation. There is some evidence that respondent was somewhat impaired in the last

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[4]Although not discussed during the hearing, Dr. Greenfield's report, exhibit 2, revealed that respondent had drug and alcohol problems, psychiatric problems and suffered a very troubled childhood, spent in part in an orphanage. There was no evidence, however, that these circumstances were responsible for respondent's misconduct here.

[5]At the DEC hearing, respondent testified that the test was performed in 1995.

months of his misappropriation (mid-1994). The psychiatrist hired by the OAE, Dr. Greenfield, opined that "[t]o [his] understanding, it was not until the following spring (March-April, 1994) that Mr. O'Grady's serious psychiatric/neuropsychiatric and medical problems began...." However, to meet the Jacob test, respondent had to show that he had suffered a loss of competency of such magnitude as to excuse his purposeful misconduct in connection with each of his eight acts of misappropriation.

As noted above, respondent stated to Dr. Greenfield that he was not "McNaughton [sic] insane." Respondent testified, however, that in his mind, McNaughten insanity is equated with being a "madman", a "Hannibal Lechter." In other words, if respondent is to be believed, at the time that he was interviewed by Dr. Greenfield he had a misunderstanding of what is required to satisfy the McNaughten test. The Board is willing to give respondent the benefit of the doubt in this regard. His statement to Dr. Greenfield that he was not McNaughten insane is not taken against him. Regrettably, however, there is ample additional evidence that respondent knew that he was misappropriating the funds. As seen in Dr. Greenfield's testimony, his unwavering opinion was that in October 1993, the date of respondent's first act of misappropriation, respondent knew the difference between right and wrong. Although Dr. Greenfield allowed that respondent might not have known the difference between right and wrong in May/June 1994, seven of respondent's acts of knowing misappropriation occurred before May 1994. Only the last check was written in June 1994.

Respondent's own psychiatrist, Dr. Tortosa, although opining that there might have been times when respondent did not know right from wrong, was unable to say that, on the dates that respondent wrote the eight checks, respondent did not know that his conduct was wrong.

The remaining proofs offered at the hearing on respondent's side of the "insanity" issue may be summarized as follows:

1. Respondent suffered from brain lesions, proven by MRI to exist, according to respondent's answer, at least as of October 1994. As noted above, according to respondent's testimony, the test was performed in 1995 (the second round of misappropriation took place between March and December 1994).

2. Respondent's behavior changed markedly during the summer of 1993 and grew progressively worse, according to Miller's testimony.

3. Dr. Tortosa testified about the wide variations in respondent's behavior from one visit to the next and opined that, when respondent was not in control, he may not have known right from wrong.

4. Dr. Greenfield testified that, in or about the spring of 1994, respondent was unable to distinguish right from wrong. But even if the doctor is correct, then only the last act of knowing misappropriation would be excused.

5. Miller asserted that respondent did not need money to pay his bills.

Clearly, respondent was physically and mentally ill. The Board cannot conclude, however, that his illness was such that it overcame his ability to know the difference between right and wrong and to appreciate the nature of his actions. Specifically, the following factors figured into the Board's determination:

1. In early 1994 respondent was named chief municipal prosecutor for Jersey City. He had

also been maintaining a part-time private practice. He was, therefore, able to function in his work environment.

2. The checks that did not name respondent as payee were not made out to random payees, but to legitimate creditors, such as, for instance, his son's school. Respondent knew that he was paying some of his outstanding bills, which demonstrates some rational thought on his part.

3. According to Dr. Greenfield, respondent's personal expenses had gone up considerably prior to his misconduct. Although respondent disputed the amount of the increase, he conceded that his expenses had gone up.

4. Respondent's misconduct was not an isolated incident but, rather, a repeated course of conduct.

In sum, although it is clear that respondent was mentally ill, the evidence is not sufficient to conclude that he was so impaired as to satisfy the Jacob test. As noted above, significant in this regard is respondent's appointment as chief municipal prosecutor in January 1994, several months after he first invaded the Ledda funds, his ability to function as an assistant prosecutor prior to that time and his ability to handle his private clients' affairs. Indeed, although both Dr. Greenfield and Dr. Tortosa opined that there could have been days when respondent did not know the difference between right and wrong, these opinions lose considerable strength when it is considered that respondent's misconduct was not confined to one or even two incidents. Respondent's first misappropriation took place in October 1993. The misappropriations reoccurred beginning in March 1994, spanning at least a three-month period. The evidence, thus, does not support a finding that respondent was unable to know right from wrong, when he knew, for instance, that his son's school

tuition was due and also was able to continue to function in a high-pressure position.

Accordingly, because the Board has determined that respondent was able to appreciate the nature of his actions, under Wilson and Hollendonner he must be disbarred. The Board unanimously so recommends. Three members did not participate.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 5/13/99

By: _____
LEE M. HYMERLING
CHAIR
DISCIPLINARY REVIEW BOARD