SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. 17-329
District Docket Nos. XIV-2014-0074E
and XIV-2014-0075E

IN THE MATTER OF	
FRANK N. TOBOLSKY	
AN ATTORNEY AT LAW	

Decision

Argued: November 16, 2017

Decided: March 12, 2018

HoeChin Kim appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance for oral argument.

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

This matter was before us on a recommendation for disbarment, filed by the District IV Ethics Committee (DEC), based on respondent's knowing misappropriation of $32,500 in escrow funds, a violation of the principle established in In re

Hollendonner, 102 N.J. 21 (1985).[1] The DEC rejected respondent's defense, under In re Jacob, 95 N.J. 132 (1984), based on his gambling addiction and depression.

For the reasons set forth below, we adopt the DEC's finding on the Jacob defense and, thus, recommend respondent's disbarment.

Respondent was admitted to the New Jersey and Pennsylvania bars in 1987. He was admitted to the Florida bar in 1988. At the relevant times, he maintained an office for the practice of law in Merchantville and Philadelphia.

Although respondent has no disciplinary history, he is ineligible to practice law in all three states due to his failure to comply with mandatory continuing legal education requirements. In New Jersey, respondent also has been ineligible to practice since September 2016, based on his failure to pay his annual registration fee to the Lawyers' Fund for Client Protection.

In a single-count formal ethics complaint, dated July 22, 2014, the Office of Attorney Ethics (OAE) charged respondent

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[1] In In re Wilson, 81 N.J. 451, 453 (1979), the Court declared that, "generally," when an attorney "knowingly use[s] his clients' money as if it were his own," disbarment is "the only appropriate discipline." In Hollendonner, 102 N.J. at 28-29, the Court extended the Wilson principle to escrow funds.

with knowing misappropriation of $32,500 in escrow funds. In his answer, respondent admitted every factual allegation.

On February 16, 2006, grievants (siblings Andrew Ross, Jr. and Zulaikha Nelson) entered into an agreement of sale with Taylor Woods, LLC, regarding the latter's purchase of the formers' Winslow Township property. The agreement is not a part of the record.

After several amendments, the closing date was extended to October 31, 2012. Respondent had undertaken the representation of Ross and Nelson in the summer of 2011 and negotiated the final two amendments to the agreement of sale.

The closing did not take place until November 7, 2012. A few days earlier, respondent learned that his clients might have owed a brokerage commission to Candid Realty, Inc. (Candid Realty). Consequently, the parties and the title company agreed that respondent would hold $32,500 of the proceeds in escrow, in his trust account, pending resolution of the brokerage commission issue.

On November 7, 2012, the title company issued a $32,500 check to "Frank N. Tobolsky, Esquire Attorney Trust Account," containing the notation "Escrow of Real Estate Commission." Respondent deposited the check in his attorney trust account the next day.

By March 1, 2013, respondent's trust account balance was $5. A March 29, 2013 maintenance fee zeroed out the trust account. Respondent had depleted the $32,500 in escrow funds by removing $45,580 from the trust account between November 30, 2012 and January 10, 2013.

Respondent expended the escrow funds by transferring $10,000 from his trust account to his business account, on November 30, 2012; $34,500 in December 2012 (via eleven transfers in even dollar amounts); and $700 in January 2013 (plus a $380 cash withdrawal). Prior to each disbursement, respondent neither requested or obtained permission from Candid Realty or his clients to use the $32,500 in escrow funds.

On March 15, 2013, the parties to the real estate transaction authorized the disbursement of $12,333.33 in escrow funds to Candid Realty, in satisfaction of the commission dispute. The remaining $21,166.67 was to be disbursed as follows: $5,839.52 each to Ross and Nelson (for a total of $11,679.04), representing their shares of the proceeds, and $8,487.63 to respondent, representing his fees and expenses. By this point, however, the trust account balance was $5.

Respondent did not disburse any funds until April 30, 2013, when he issued a $12,333.33 personal bank account check to Candid Realty's attorney's trust account. On May 7, 2013, he

issued separate personal bank account checks to Ross and Nelson, each in the amount of $5,839.41.

Based on the above facts, the OAE charged respondent with knowingly misappropriating "funds entrusted to his care" (RPC 1.15(a) and Wilson and Hollendonner), failing to keep separate funds in his possession that both he, as lawyer, and another person claim interests (RPC 1.15(c)), and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation (RPC 8.4(c)). Despite respondent's admission of the factual allegations in the complaint, he denied the specific RPC charges.

In his answer, respondent asserted that he is a compulsive gambler, who also suffers from depression and anxiety, all causing him to be "literally . . . 'out of [his] mind.'" Consequently, he "often did not know or appreciate the consequences of [his] actions." He described his mental illness as "crippling" and "debilitating" and asserted that the allegations against him were "inextricably linked" to his "diminished capacity," stress, duress, and "mental defects and incapacities."

In addition to respondent's gambling addiction, depression, and anxiety, the answer identified eleven mitigating factors, including, but not limited to, his admission of guilt and

rehabilitation. Based on these factors, respondent seeks discipline "less punitive" than disbarment, such as a censure. Alternatively, he "beg[s]" permission to resign from the bar.

In light of respondent's admission to the facts alleged in the ethics complaint, the hearing was limited to the issue of respondent's assertion of the Jacob defense. Only respondent testified. Neither the OAE's expert, Daniel P. Greenfield, M.D., M.P.H., M.S., nor respondent's expert, Frank M. Dattilio, Ph.D., testified. Rather, counsel for the parties agreed that their reports "could be considered by the hearing panel without the need for testimony."

Respondent, who was born in October 1961, testified that his introduction to gambling occurred at age six, when his father took him to the race track. At age nine or ten, respondent's father introduced him to football pools. Respondent invariably lost each week, resulting in "an awful feeling," which he now recognizes was depression. At age eleven, respondent attended overnight camp where he and other campers played poker after "lights out."

In middle school, respondent was stripped of an unidentified award when the school administration learned that he had been distributing football pools. In high school, he and his father attended horse races all along the east coast.

Respondent even gambled in Puerto Rico casinos, despite being underage, because his grandfather was able to gain him entry.

Respondent funded his gambling with his allowance and earnings from his newspaper route.

When respondent began dating, he took his dates to the race track, describing the experience as "the best of both worlds." His senior paper was on the subject of compulsive gambling.

Respondent's gambling continued through college. He worked with a "dormitory bookie," gambling his earnings from a campus job. By this point, respondent was subject to "awful mood swings" due to his gambling. When two of his girlfriends demanded that he choose between them or gambling, respondent chose gambling.

Despite the time and energy that respondent devoted to gambling, he managed to do well academically. In the fall of 1984, respondent entered the University of Pennsylvania Law School, where he found a professional bookie. He was now gambling "very large amounts" and still losing. Respondent considered suicide, but called Gamblers Anonymous (GA) instead, in November 1984. He described GA as "a lifeline."

Respondent spent the next twenty-two years free of gambling and living a healthy lifestyle. He attended GA meetings

regularly, had a sponsor and sponsored other GA members, held offices, and worked on his defects.

Upon graduation from law school, in 1987, respondent became an associate attorney at a large national law firm, where he worked in the field of commercial real estate. In 1988, respondent was married for six months. In 1992, he re-married and, ultimately, had two children.

Between marriages, respondent suffered from depression, but did not seek medical treatment. He did, however, attend GA meetings regularly. Sometime in 1996 or 1997, respondent was "physically and emotionally exhausted." He had started his own law practice and was the sole financial support for his family. He received "little affection" and "felt like . . . an ATM and gerbil on the wheel, just work, work, work, work." The obsessive thoughts returned, as did "some" suicidal ideation.

Upon the recommendation of a GA fellow, respondent sought treatment with psychiatrist Michael Shore, M.D., who prescribed an antidepressant, which he continued to take for two or three years. Although the drug helped respondent's depression, he felt lethargic and lacked ambition. Thus, respondent found another doctor, Edwin Castillo, M.D., who treated him for the next six or seven years.

While under Dr. Castillo's care, respondent was prescribed a number of different drugs to treat depression and anxiety. Yet, respondent testified, he "never felt good." He was "down" and "flat," and the anti-anxiety medication either did not help or, if the dosage were increased, rendered him "almost catatonic." Similarly, his depression "never went away."

Respondent continued to maintain his law practice while under Dr. Castillo's care. By 2005 or 2006, however, respondent sensed that the real estate economy was declining. His marriage ended in the winter of 2006. He also felt overwhelmed by the knowledge that he would not be able to pay for his children's college education. He decided to invest in a few stocks to raise the funds, and the stocks did well. His gambling compulsion resurfaced, and he became involved in day trading. During this time, respondent's former wife was denying him visitation with their children.

In 2006 or 2007, respondent returned to GA, saw a therapist, and had his medication changed. He was able to maintain a ninety-day period of abstinence, but he could not fight the urge to gamble.

Sometime in 2007, respondent affiliated with a mid-size Philadelphia law firm. Because he did not generate sufficient business, his salary was reduced, leaving him unable to meet his

alimony and child support obligations. At the same time, he was distracted by continuing animosity with his former wife. He described gambling as his "refuge."

At some point, respondent left that firm and went to another. He turned to payday loans to fund some casino gambling. In the fall of 2010, he lost all of it, felt hopeless, and "overdosed massively." A few days later, his parents found him, unconscious, in a dilapidated house. Respondent spent the night in an emergency room, followed by a week in a mental health facility. Because he had been missing from the law firm for ten days, he was fired.

By this point, respondent, who was now treating with Medford psychiatrist John Wilkins, D.O., returned to the solo practice of law. He also returned to GA, but did not "get clean" until January 2011. Respondent returned to gambling on Thanksgiving Eve 2012.

In respect of the November 7, 2012 real estate closing, respondent testified that he suggested that the $32,500 potential commission be escrowed by the title company. The parties, however, wanted him to hold the funds because he was "more knowledgeable of the factual background [so] that if anybody was going to be able to solve it [he] would." Respondent knew that the $32,500 was to remain intact because it was escrow

monies held in a trust account. Thus, respondent did not want to hold the monies because he did not want to tempt or test himself. Yet, despite his reservations, he agreed to do so.

The $32,500 remained intact until November 30, 2012. According to respondent, on Thanksgiving Eve, he left a GA meeting "feeling itchy, restless, and wanting to bet." At that time, respondent had been clean for nearly two years.

Respondent testified that, initially, he did not remember withdrawing $10,000 from his trust account on November 30, 2012, and did not know what he did with the money. Later, he stated that the money "would have been" sent to "different bookmaking sites," as he had returned to gambling. When asked if he knew that it was wrong to take the monies, respondent replied:

> I – I don't know if I know it was wrong. I don't know. It didn't matter. It was an account that had money in it. I – I don't remember.
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> [T60-4 to 6.][2]

He explained the continued withdrawal of funds as follows:

> I was gambling. I was compulsively gambling and it was there. And once I had – once I had – once I – once I took some and was losing and would chase and chase and chase or just it reached a point where I crossed over again and it was just wanting to escape.

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[2] "T" refers to the transcript of the June 12, 2017 hearing.

> A lot — you know, this is — this is what happened to me. This is what happens when you have an addiction.
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> [T60-15 to 22.]

Respondent used personal funds to make the clients and Candid Realty whole. Thereafter, however, he continued gambling.

In August 2014, respondent's gambling "reached a crescendo." He had been gambling at Delaware Park for three-to-four consecutive days, without food and sleep. His losses were "just astronomical, more than [he] had ever gambled before." At one point, a pit boss told him to take a break.

When respondent left the park, he was overcome with remorse. He became suicidal, stopped his car on a bridge, and planned to jump. His plan was thwarted by a fellow GA member, whom respondent had called and who talked him out of committing suicide. That same person took respondent to the crisis unit at Our Lady of Lourdes in Willingboro. From there, he was transferred to Hampton Behavioral Health Center in Westampton, where he remained for five or six days.

In late February/early March 2017, respondent contemplated suicide once again, by going to a riverbank and taking pills. Again, his plan was interrupted by someone who called the police. He spent a week at the crisis center at Kennedy University Hospital in Cherry Hill.

As of respondent's June 12, 2017 testimony, he was no longer gambling, was in treatment, and was taking medication. It is not clear when he placed his last bet. Respondent claimed that, despite his history, if he were returned to the practice of law, his clients would be protected because he will not hold money in escrow. He also would consent to supervision and a mentor.

On cross-examination, respondent testified that, prior to taking the monies from his trust account, he had asked his clients if he could borrow the funds. They refused. Thus, he knew "[c]ognitively" that he was not authorized to transfer that first $10,000 transaction. His answer was the same for the remainder of the withdrawals. That notwithstanding, he explained, "it didn't even occur [to him that he was not authorized to use the monies]." Rather, in his words, "[i]t was a bank account that had money in it."

Later, respondent simply stated "I couldn't help myself" and "I didn't have any volition." He explained that it was like brushing his teeth. He knew that he did it, but he did not remember doing so. In other words, he had no "conscious awareness" of what he was doing.

In respect of respondent's defenses to the knowing misappropriation charge, he testified that, cognitively, he knew

that the funds were in the trust account, but he "didn't appreciate the difference." He was "so overwhelmed and so in the throes" that all he wanted to do was bet. He conceded, however, that, between November 2012 and March 1, 2013, he was driving a car and that he appreciated the motor vehicle laws. During the same period, he had open client matters and continued to maintain his law office, although he went there sporadically.

As of the date of his testimony, respondent had been working "in house" for a real estate developer for the past two years. He described the work as "quasi business and law."

In a fourteen-page report, dated March 20, 2015, respondent's expert, Dr. Dattilio, observed that respondent "clearly has a long history of Obsessive/Compulsive Disorder, Major Depressive Disorder, recurrent, and addictive behavior which manifested in the form of gambling." Moreover, his "very serious gambling addiction and a conjoining Obsessive/Compulsive Disorder and major depressive illness which have been ongoing during his lifetime . . . unfortunately exacerbated seriously during the time in which he engaged in unethical behavior." Dr. Dattilio concluded:

> It is my opinion to a reasonable degree of psychological certainty that [respondent's] actions during his unethical behavior was [sic] the direct result of a diminished level of responsibility due to his severe addiction, as well as his Major Depressive

> Disorder and crisis state at the time. His need for stimulation due to his addiction is so great that it overrode his use of reason and judgment. [Respondent] is clearly repentant for his behaviors and demonstrates the appropriate level of remorse of one who is genuinely contrite over his actions. This suggests that his behaviors involving his unethical activity was [sic] clearly an aberration and not the norm for this man.
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> [Ex.R2p.14.][3]

In mitigation, Dr. Dattilio identified respondent's gambling addiction, which developed in "his early youth" but "was not recognized until it had pinnacled during his college years," and which "was fueled by his severe Obsessive/Compulsive Disorder which eventually manifested into Major Depressive Disorder recurrent," and which "may have" also been fueled by "some component that qualifies for a hypomanic condition."

Dr. Greenfield, the OAE's expert, described respondent as "an individual with a seriously symptomatic history of gambling disorder for most of his life." He agreed that respondent suffered from a persistent depressive disorder and a gambling disorder, among other mental maladies. Yet, in Dr. Greenfield's opinion, respondent did not establish a Jacob defense. In reaching that conclusion, Dr. Greenfield considered whether

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[3] "Ex.R2" refers to the March 20, 2015 report of Frank M. Dattilio, Ph.D.

respondent had experienced diminished capacity, involuntary intoxication, or legal insanity.

In respect of diminished capacity, Dr. Greenfield wrote:

> Mr. Tobolsky engaged in purposeful, knowing, goal-directed, sophisticated, and complex behaviors and thought processes which – although showing poor judgment and driven by his need to "fuel" (my word) his gambling habit – did not support in my view this specific potential psychiatric defense.
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> [Ex.P20p.31.][4]

In respect of involuntary intoxication, Dr. Greenfield wrote:

> [A]lthough gambling disorder may be (and is, in Mr. Tobolsky's case, in my view) an extremely powerful driver of compulsive behaviors, the observation that Mr. Tobolsky chose during all of the relevant periods of time in this matter to do other than gamble in areas of his personal and professional life not affected by his gambling indicates that he did not engage in his gambling compulsion and behaviors in those other areas of his life and that he had voluntary control over those potential gambling behaviors. Therefore, in terms of purpose, all-encompassing behavior, involuntary compulsive gambling is not in my view a viable psychiatric defense. . . .
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> [Ex.P20p.31.]

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[4] "Ex.P20" refers to the report of Daniel P. Greenfield, M.D., M.P.H., M.S.

In respect of the final defense, legal insanity, Dr. Greenfield stated:

> [A]lthough Mr. Tobolsky (1) does warrant an underlying "mental disease or defect" (gambling disorder) in the context of this matter, he (2) well understand [sic] ". . . the nature and quality of his acts" . . . in having been able to have carried them out, and (3) knew ". . . that they were wrong" (in acknowledging that to me and in applicable records and materials, described above, as noted by Dr. Dattilio in his reference to Mr. Tobolsky's "unethical behavior," noted above). Therefore, the necessary requirements for "Legal Insanity" ("M'Naghten Insanity") in New Jersey are not satisfied and "Legal Insanity" is not, in my view, a viable psychiatric defense for Mr. Tobolsky in this matter.
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> [Ex.P20p.31-Ex.P20p.32.]

Dr. Greenfield concluded that respondent's "underlying mental state and psychiatric/neuropsychiatric/addiction medicine condition" do not support a criminal responsibility-reducing and/or a criminal responsibility-eliminating psychiatric defense."

By letter dated October 17, 2017, respondent's counsel notified Office of Board Counsel that, pursuant to respondent's direction, neither he nor his client would appear at oral argument before us and, further, that counsel would not be submitting a brief.

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Following a de novo review of the record, we are satisfied that the DEC's finding that respondent's conduct was unethical is fully supported by clear and convincing evidence.

The admitted facts clearly and convincingly establish that respondent knowingly misappropriated $32,500 in escrow funds. He agreed, albeit reluctantly, to hold the funds, in escrow, in his trust account. He knew that trust account monies were required to remain intact until the parties interested in the funds authorized their disbursement. Moreover, his clients had denied his request to borrow the monies. Yet, despite respondent's knowledge that the funds were off limits, he took them and used them to gamble because he "couldn't help [him]self." Indeed, respondent anticipated his potential misuse of such funds, expressing, in the first instance, his reluctance to take control of them for fear that he might be tempted.

Respondent's claim that Jacob absolves him of misappropriating the $32,500 knowingly is without merit. In Jacob, the Court held that, to negate the "knowing" element of knowing misappropriation, an attorney must prove 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, at 137. Recently, the Court restated the Jacob standard as follows:

> The Jacob standard may not be a model of clarity, but the point to Jacob is that it expressed the Court's willingness to consider defenses that would negate the mental state to act purposely. A mental illness that impairs the mind and deprives the attorney of the ability to act purposely or knowingly, or to appreciate the nature and quality of the act he was doing, or to distinguish between right and wrong, will serve as a defense to attorney misconduct. The aforesaid defenses are ones that can and should be considered in connection with excusing wrongful conduct by an attorney, or when mitigation of the disciplinary penalty is appropriate to consider under our disciplinary jurisprudence addressing the quantum of punishment.
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> [In re Cozzarelli, 225 N.J. 16, 31-32 (2016).]

To date, no attorney who has misappropriated trust funds has satisfied the Jacob standard.

Respondent's Jacob defense is based on the combination of his gambling addiction and depression. The Court has considered both conditions many times over the years, but neither has convinced the Court to refrain from disbarring an attorney who knowingly misappropriated client, escrow, or other trust funds. See, e.g., In re Cozzarelli, 225 N.J. 16 (major or severe depression); In re Needle, 208 N.J. 180 (2011) (ADHD and depression); In re Kaplan, 193 N.J. 301 (2007) (serious depression); In re Greenberg, 155 N.J. 138 (1998) (depressive disorder); In re Nitti, 110 N.J. 321, 326 (1988) (compulsive

gambling); In re Lobbe, 110 N.J. 59, 61 (1988) (compulsive gambling); and In re Goldberg, 109 N.J. 163 (1988) (compulsive gambling).

Because respondent's Jacob defense is based primarily on his compulsive gambling disorder, we examine those cases first. As noted, no attorney has succeeded on a Jacob defense based on a compulsive gambling disorder.

The first compulsive gambling case, In re Goldberg, 109 N.J. at 165, was before us and the Court on a motion for final discipline (MFD), filed by the OAE following respondent's conviction of one count of forgery and twenty-three counts each of misapplication of entrusted property and theft by failing to make required disposition of property received. At the criminal trial, the jury rejected respondent's insanity defense for a portion of the time frame encompassed by the MFD. Id. at 165.

In essence, Goldberg, a real estate attorney who had gambled every day since the early years of his career, turned to client trust funds to support his addiction – after he already had used his earnings, all family savings, and bank loans. Id. at 167. Goldberg's use of client funds went undetected for years because he covered his withdrawals of trust account funds by depositing his winnings or using funds from new clients to

reimburse existing clients. Ibid. Over the years, Goldberg had gambled and lost more than $1 million. Ibid.

Goldberg argued that his theft of client funds "unquestionably resulted from his compulsive gambling." Id. at 169. Thus, the Court was required to determine whether Goldberg had "'suffered a loss of competency, comprehension or will of a magnitude' sufficient to meet the exculpatory standard set forth in Jacob." Id. at 169. To do so, the Court considered the testimony of the experts in the criminal trial. Id. at 170.

Of note to the Court was the testimony of Goldberg's own experts, who posited that his gambling had progressed to the point where it came first, thus precluding Goldberg from making "good decisions about his family, his work, and his social activities." Id. at 170. The Court summarized the crux of their testimony as follows:

> [O]ne of respondent's own experts testified that during the relevant period of time, respondent was aware of both the nature and quality of his acts. It is also clear that respondent comprehended what he was doing with his clients' trust funds. He knew he was using clients' funds for his own purposes. Respondent's experts contended that respondent did not think this conduct was improper because he believed he was going to replace what he took with the winnings he believed he would generate from his gambling. Indeed, even at the very end, when respondent could no longer stay ahead of himself in the manipulation of his client trust funds, he was attempting to restore

> money to the depleted accounts. Considered in light of the three characteristics emphasized in Jacob -- competency, comprehension, and will -- the thrust of respondent's expert testimony was that respondent's will was overborne by his compulsion to gamble. However, we note that respondent's experts could not and did not contend that respondent's compulsion to gamble created an uncontrollable urge to misappropriate his clients' funds.
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> [Id. at 170-71.]

"[M]ost significant" to the Court was "the degree of control he exercised over his personal and professional finances" during the relevant period. Id. at 171. He manipulated client accounts in a way that demonstrated "a high degree of competency and comprehension." Ibid. He did not "indiscriminately devote all of his personal assets to his gambling compulsion." Ibid.

The Court concluded:

> It is extremely difficult to understand the psychological condition of a compulsive gambler. We do not hold here that compulsive gambling can never impair an individual's state of mind to such an extent that he or she is incapable of understanding the nature of his or her actions or lacks the capacity to form the intent requisite for a "knowing misappropriation" of a client's funds. Indeed, the jury in respondent's criminal case found that respondent did in fact suffer a deficiency of similar magnitude for at least part of the time period relevant to this matter. Nor do we hold that the compulsive gambling condition in its most extreme form could result in sufficient

> impairment of an attorney's will to constitute a defense to a charge of knowing misappropriation. Our holding in this case is that this record does not reflect an impairment of respondent's will sufficient to excuse or mitigate the knowing misappropriation of clients' funds.
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> [Id. at 171-72.]

Goldberg was disbarred. Id. at 172.

The attorney in In re Lobbe, 110 N.J. at 61, fared no better than Goldberg, as the Court held that Lobbe's compulsive gambling disorder "did not result in a 'loss of competency, comprehension, or will * * * of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful.'" In so holding, the Court characterized its conclusion in Goldberg as follows:

> We concluded . . . that the evidence in that case did not demonstrate a loss of competency, comprehension, or will, such that otherwise knowing and purposeful conduct would be excused or mitigated. We also held that there was no evidence that respondent's compulsion to gamble created an uncontrollable urge to misappropriate his clients' funds. We said in Goldberg that there is a difference between a "compulsion to gamble [and] an uncontrollable urge to misappropriate * * * clients' funds."
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> [Id. at 64 (citations omitted).]

The attorney in Lobbe did not prevail on the Jacob defense. His expert stated that compulsive gamblers know, "'in a very glib, shallow way [that they misappropriate clients' funds] but

they really don't know.'" Ibid. He claimed that, if they "truly knew the consequences and comprehended the larger overall meaning of what they were doing, they wouldn't do it." Id. at 64-65.

For his part, Lobbe testified that he understood that it was wrong to take clients' funds, that he knew the nature and quality of his acts, that he had simply viewed his use of the funds as loans, and were it not for his gambling disorder, he probably never would have taken the monies. Id. at 60.

Despite Lobbe's long history of compulsive gambling, the testimony of his secretary and wife regarding his swift decline, and his "excellent effort to overcome his affliction," Lobbe was disbarred. Id. at 61-63, 66. In so doing, the Court noted that, like the attorney in In re Hein, 104 N.J. 297 (1986), who was an alcoholic, Lobbe "recognized that he was dealing with clients' money, but it was simply a not-caring attitude that led to the use of funds." Id. at 65.

In In re Nitti, 110 N.J. at 326, the Court concluded that a compulsive gambling disorder "by no means rendered [the attorney] incapable of controlling his conduct." In that case, the attorney drew gambling markers against his law firm's trust account to cover advances made to him by an Atlantic City

casino. Id. at 322.[5] He paid the markers by manipulating trust account records and carefully timing legitimate disbursements. Id. at 322-23. Nitti's misconduct was discovered by a certified public accountant hired by the firm to audit the trust account. Id. at 322.

Like respondent, Nitti acknowledged that he had knowingly misappropriated trust funds. Id. at 324. He argued, however, that his compulsive gambling disorder should mitigate the discipline to something less than disbarment. Ibid. Nitti's expert, however, offered nothing new on the issue of the effect that compulsive gambling has on an attorney's ability, or lack thereof, to hold trust funds intact.

According to Nitti's expert, a compulsive gambler has the ability to distinguish between right and wrong, in addition to understanding the character and quality of his acts. Id. at 325. Yet, even though a compulsive gambler attorney knows that, in taking monies from the trust account, he or she is "doing something wrong," the attorney "cannot control it because of the anxiety which is so intense, the need for this anesthetic of gambling is so strong that a person will drive 125 miles an hour

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[5] The trust account established a line of credit, and the marker functioned as a promissory note or check. Id. at 322. If a marker were not paid on time, the casino was authorized to take the funds owed from the trust account. Ibid.

down the Parkway to get there, he realizes he's going to get a ticket for speeding, he cannot stop it." Ibid.

In disbarring Nitti, the Court reiterated that "'there may be circumstances in which an attorney's loss of competency, comprehension, or will may be of such a magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful.'" Id. at 325. Yet, the Court concluded, "[t]his is not such the case, any more than was Goldberg or Lobbe." Ibid.

Like the attorneys in Goldberg, Lobbe, and Nitti, respondent's compulsive gambling defense fails. Like those attorneys, respondent was a long-time compulsive gambler who took trust account funds to finance his need to gamble. Like those attorneys, respondent knew that he could not use monies in the trust account for his personal benefit. Specifically, he knew that he was not authorized to take the $32,500 in escrow monies for his personal benefit because the clients had refused his request for permission to do so.[6] Yet, like those attorneys, respondent took the funds anyway and gambled them away.

According to respondent's expert, Dr. Dattilio, respondent's "very serious gambling addiction" and co-occurring illnesses

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[6] Parenthetically, even if respondent's clients had granted his request to borrow the funds, respondent still would not have been authorized to use them because he also needed the consent of all other parties who had an interest in those escrow funds.

"exacerbated seriously during the time in which he engaged in unethical behavior," and, his knowing misappropriation of the $32,500 was "the direct result of a diminished level of responsibility" due to the addiction, which is so great that it "overrode his use of reason and judgment." This opinion is not enough to satisfy the Jacob standard.

Dr. Dattilio's conclusion is a longer version of the opinion offered by one of the experts in Goldberg, that is, the attorney's "'will was overborne by his compulsion to gamble.'" 109 N.J. at 171. Yet, although it is obvious that a compulsive gambling addiction may create an uncontrollable urge to gamble, Dr. Dattilio did not contend that respondent's addiction created an uncontrollable urge to steal the $32,500 in escrow funds. This omission is fatal, under Goldberg and Lobbe.

Respondent admitted that he knowingly misappropriated the $32,500 in escrow funds. In his words, "it didn't matter" that he knew it was wrong: "I was compulsively gambling and it was there." Thus, nothing in respondent's testimony or Dr. Dattilio's report established that, on those occasions when respondent used the escrow monies to gamble, he was driven by a compulsion to misappropriate trust funds. Rather, he was driven by a compulsion to gamble. The trust account funds were merely the means by which to do so.

Moreover, respondent introduced no evidence that he was, as he said, "out of [his] mind" when he removed the funds from the trust account. Although he certainly was struggling financially at the time, respondent had a roof over his head; an active, albeit minimal, law practice in a building; and a car, which he drove within the bounds of the law. These facts hardly suggest that respondent was "out of his mind." In this regard, we are reminded of the actions of the attorney in In re Cozzarelli, 225 N.J. at 27, who, similar to respondent, claimed that, at the time of his defalcations, he was "'in such a deep depression that [he] couldn't figure out what was going on.'"

In rejecting Cozzarelli's Jacob defense, we noted that "the inability to figure out 'what is going on' is a far cry from not being able to distinguish between right and wrong." Ibid. Moreover, despite his claim, the evidence established that, during the time that he was stealing trust account monies, Cozzarelli was able to handle a number of personal and professional matters, among other things. Ibid.

Here, respondent offered is no evidence that he dipped into the trust account during singular episodes of psychosis on each of the fourteen occasions that he took money from the trust account. Rather, he transferred monies from the trust account to the business account during the same period that he was

otherwise able to function as an independent, self-sufficient, law-abiding citizen. In short, his removal of funds from the trust account, on all occasions, was with full knowledge and awareness that he was unauthorized to do so. No evidence supports a contrary position.

Respondent knowingly misappropriated $32,500 in escrow funds. He failed to establish, by clear and convincing evidence, that his compulsive gambling (and depression) impaired his mind and deprived him of "the ability to act purposely or knowingly, or to appreciate the nature and quality of the act he was doing, or to distinguish between right and wrong." Cozzarelli, 225 N.J. at 31.

Hollendonner requires the disbarment of attorneys who knowingly misappropriate or borrow escrow funds, either for their own benefit or for the benefit of another, for a good purpose or for a bad purpose, with or without the intent to defraud, and with or without the intent to make restitution. In re Hollendonner, 102 N.J. 21; In re Noonan, 102 N.J. 157 (1986). Thus, respondent must be disbarred.

Vice-Chair Baugh and Member Zmirich did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Bonnie C. Frost, Chair

By: Ellen A. Brodsky
Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frank N. Tobolsky
Docket No. DRB 17-329

Argued: November 16, 2017

Decided: March 12, 2018

Disposition: Disbar

Members	*Disbar*	*Did not participate*
Frost	X	
Baugh		X
Boyer	X	
Clark	X	
Gallipoli	X	
Hoberman	X	
Rivera	X	
Singer	X	
Zmirich		X
Total:	7	2

Ellen A. Brodsky
Chief Counsel