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## Compulsive Gambling and the Expert Witness

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**ABSTRACT:** Compulsive gambling is a mental disorder which affects an estimated 3% of the adult population of the United States. This psychological addiction is often associated with other addictive behaviors and with criminal activities.

Attorneys and judges have only minimal training in understanding mental disorders. Few know the differences in types of gamblers, understand the nature and progression of the disorder, or know the types of crimes committed by compulsive gamblers; nor are they aware of treatment options.

The expert witness must not only evaluate the defendant, but must also educate the defense and prosecuting attorneys, probation and parole officers, and the judge. In this regard, the expert must consider factors binding upon the legal and judicial systems, the potential for restitution for the victims, and treatment options for the compulsive gambler.

Guidelines and frequent problems encountered by the compulsive gambling expert witness are included.

**KEYWORDS:** jurisprudence, psychiatry, gambling, witnesses, expert witnesses

Compulsive gambling was first defined as "pathological gambling" by the American Psychiatric Association in its third edition of the *Diagnostic and Statistical Manual of Mental Disorders* in 1980 (DSM III, Section 312.31) [1]. When additional research data and knowledge of this disorder were obtained, the definition was revised somewhat in the DSM III-R [2]. It reads, in part [2]:

The essential features of this disorder are a chronic and progressive failure to resist impulses to gamble, and gambling behavior that compromises, disrupts, or damages personal, family, or vocational pursuits . . .

Characteristic problems include extensive indebtedness and consequent default on debts and other financial responsibilities, disrupted family relationships, inattention to work, and financially motivated illegal activities to pay for gambling (p. 324).

In short, compulsive gambling is an addiction in which the substance abused is money. When the compulsive gambler no longer has legal access to funds, he or she will resort to illegal means of obtaining money with which to "stay in action" or feed the addiction, to pay overdue bills, or to satisfy the demands of bookies or loansharks [3].

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### Types of Crimes Committed by Compulsive Gamblers

Sociologist Lesieur [4] compared several studies on crimes and found that various types of bad checks (against insufficient funds, closed account, forged signature, kiting, floating) were the most frequent form of illegal acts (34%) committed by compulsive gamblers. This was followed by loan fraud (31%), embezzlement and employee theft (30%), hustling at pool, golf, cards, or other games of skill (29%), bookmaking, numbers or swindles (21%), tax evasion (19%), tax fraud (12%), and to a lesser degree robbery, pimping, and prostitution.

Similarly, in a study of compulsive gamblers in England and Scotland who had committed crimes, Brown [5] found that these crimes typically consisted of fraud, forgery, embezzlement, or petty theft. Further, the crimes were committed after the gambling addiction had become fully developed for a number of years.

It appears, then, that compulsive gamblers most typically commit crimes of a financial, nonviolent nature. It is the rare exception when the compulsive gambler commits a crime using a weapon. This is not to say that this does not happen—there have been cases in which compulsive gamblers attempted or in fact committed armed bank robbery. Most often the weapons used in these cases were a wooden or plastic gun or a weapon without a trigger, bullet, or firing pin.

A bicycle was the get-away vehicle in one Maryland bank robbery by a compulsive gambler. In other instances involving armed bank robbery, the compulsive gambler either supplied or drove the get-away car. Thus, the current evidence is that on the rare occasions when a weapon is used in the robbery, the compulsive gambler's participation is neither well-planned nor life-threatening or physically harmful. Of course, the emotional trauma of the crime upon the victims is not to be denied or ignored, nor is the potential danger of cross-fire to be taken lightly.

The compulsive gambling population is constantly changing in makeup and in size, increasing from 0.77% of the adult population in the United States in 1976 [6] to over 3% ten years later [7,8]. This change in the compulsive gambling population is reflected in the types of crimes committed by compulsive gamblers.

In the past, most compulsive gamblers seen in meetings of Gamblers Anonymous or in professional therapy were white, middle-aged businessmen who typically committed crimes such as fraud, forgery, or embezzlement. As the compulsive gambling population became more democratic, with gamblers coming from all socio-economic levels, educational backgrounds, and ethnic and religious groups, with more females, and of all ages, from early teens on to the elderly, so did the crimes committed by these people begin to change. Thefts from families and friends have become more frequent, muggings are more common among youthful compulsive gamblers, and others are resorting to shoplifting, bookmaking, or hustling.

And yet compulsive gamblers typically are described as intelligent, competitive, energetic, hardworking people—people who prided themselves on their integrity, honesty, and law-abiding behavior prior to succumbing to this psychiatric disorder.

Another factor relative to crimes committed by compulsive gamblers is that of frequency. Case histories of patients and anecdotal accounts by this population indicate that compulsive gamblers may resort to illegal activities for many months or years, accumulating hundreds of thousands of dollars, even millions of dollars, to support their gambling addiction [9].

During this period when the compulsive gambler is in a state of denial, is completely out of control, and should be hospitalized, the gambler may also resort to heavy use of alcohol. This further distorts the gambler's already very confused and delusional thought processes, which then results in further denial, heavier gambling, and more illegal activities to support the gambling addiction.

Case histories also indicate that the gambler may experience various forms of dissociative

states during this period. Almost all suffer from severe depression and generalized anxiety states, and approximately 25% attempt suicide [10].

Should compulsive gamblers be punished by incarceration for their acts of crime committed while they are seriously disturbed and out of control? Should they be sent to psychiatric hospitals until they recover and then face legal charges? Is treatment available and is it effective? These are difficult questions for attorneys, probation and parole officers, and judges to answer, especially if they have little understanding of mental illness.

What, then, can the expert witness do to render the best possible service to the defendant, to the legal and judicial systems, to the local community, and to society at large? How does the expert witness help others to understand different types of gamblers and the nature of the illness? Perhaps the most critical issue is that of definition and general consensus of types of gamblers.

### **Types of Gamblers**

Compulsive gamblers are different from other types of gamblers [11]. The most frequent type of gambler is the *social gambler*, who gambles for recreation or diversion from everyday stresses. Losses are considered the cost of entertainment, and gambling does not interfere with normal family, social, or vocational interests. Should gambling interfere, the social gambler will set limits on the amount of money, frequency, and time spent on gambling.

The *professional gambler* views gambling as a business. The gambling is disciplined and controlled, with outcomes being carefully studied to minimize losses while maximizing profits. The professional gambler earns his livelihood from gambling, and does not let the gambling become an obsessive, full-time undertaking, interfering with personal, family, or other pursuits.

The *criminal gambler* gambles out of greed, to make money even if this includes cheating or swindling, alone or in conspiracy with others. Losses are blamed on others and cheating is justified. The criminal gambler generally has a history of anti-social behavior since early childhood on, and is generally well-known to the law-enforcement community as a recidivist.

The *pathological gambler* can be described as an individual who is above average in intelligence and is competitive, energetic, hardworking, and highly motivated to achieve. He or she has a solid set of values concerning law and order, family, health, job, community and country. He or she (the ratio is approximately seven males to three females) is often a workaholic.

Typically, the pathological gambler was reared in a family environment of strict but inconsistent discipline, with a strong emphasis on money or materialistic possessions. There is virtually always a history of parental absence or emotional deprivation, and a familial history of compulsive gambling, alcoholism, or other serious psychiatric disorder. The compulsive gambler is the victim of verbal, physical, or sexual abuse, or some combination of these [10-12].

The compulsive gambler is emotionally immature, a "loner" with low frustration tolerance who is easily bored, fears criticism and rejection, and whose self-image and self-esteem border on the zero level. Psychosocial histories also indicate that the compulsive gambler has experienced several psychological or physical traumas which have not been resolved. Compulsive gamblers are dysphoric people constantly seeking acceptance and approval from others [13].

Gambling gives them a sense of action and excitement, an escape from the pain in their lives. Winning gives them a sense of confidence and accomplishment, attention, and acceptance from others. Wins encourage irrational thinking that somehow they have superior gambling skills and luck. As the delusional thinking becomes more fully developed with

increased gambling, the thought processes become marked by denial, self-deceptions, and obsessive thoughts of gambling [14].

Note that the type of gambling in which the gambler indulges does not differentiate in terms of the illness. Lottery or bingo players can become compulsive gamblers just as readily as racetrack or casino gamblers. Some patterns are developing, though. It appears that people who gamble on poker machines or slot machines, lotteries, numbers, or bingo are more apt to be less educated and from a lower socio-economic level than casino, race-track, or sports bettors. They also appear to "bottom out" sooner. The type of crimes they commit may be similar, but the total dollar amount lost or stolen is generally considerably lower, in terms of percentages, but fairly equal with all types of gamblers when viewed in proportion to income.

### Theories of Compulsive Gambling Etiology

Not any single theory developed so far accounts for all compulsive gambling. A sociological theory developed by Lesieur [3] explains that the gambler "hits bottom" when there is no more access to funds or when the gambler is about to be arrested for crimes committed to support the gambling addiction.

Jacobs [15] developed a theory of the addictive personality syndrome. "Addiction is seen as a dependent state acquired over time by a predisposed person in an attempt to correct a chronic pre-existing stress condition" (p. 20). This syndrome is developed by an essential pre-condition—"a childhood and adolescence marked by deep feelings of inadequacy, inferiority, and a sense of rejection by parents and significant others" (p. 21).

Fuller et al. [16] espouse a similar theory, that of a dysphoric childhood and adolescence which contributes to the vulnerability of individuals prone to addictive behaviors. They speak to the irrelevance of whether a substance is ingested or whether the addiction is manifested in behavior, such as compulsive gambling, sexual addiction, or workaholism.

The possibility of biochemical imbalance among compulsive gamblers was explored at the National Institutes of Health; Roy et al. [17] found that serotonin levels differed significantly between normals and compulsive gamblers.

There is evidence, in short, to support theories that compulsive gambling may be the result of genetic transmission, due to biochemical imbalance, a function of learning, a consequence of personality characteristics, or a function of inadequate development of social skills and coping skills, or some combination of these.

### Compulsive Gambling and the Law

Defense attorneys have a number of options in pleading their clients. These options may be limited by federal or state law, the mental state of the defendant, the extent of the criminal behavior, and by societal attitudes. (The defendant's ability to pay also is a factor in the attorney's handling of the case, although for purposes of this paper this shall not be addressed.)

One option available in the past was that of using the insanity defense, that is, pleading innocent by reason of insanity. English law, based on early Roman and Canon law, referred to insanity with a variety of definitions [18, 19] up until 1843, when the modern definition was established by the House of Lords in the famous *M'Naghten Rule*:

[T]o establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that he was doing what was wrong" [20].

More than a hundred years later, the legal terms for psychiatric disorders are still unclear

[21–23]. The *M'Naghten* definition refers to “defect” or “disease,” yet courts are hesitant to accept these terms in relationship to pathological gambling.<sup>2</sup>

*Parsons v. State of Alabama* [21] added the “irresistible impulse” doctrine, which stated that the accused is able to understand the nature and consequences of his act and knows it is wrong, but his mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act.

This defense would have been quite appropriate with compulsive gamblers; however, this definition has been diluted over the years, so that it is virtually impossible to prove. It is used today only in the most severe cases of mental disorders.

In *Durham v. United States* [22], the court ruled that an accused “is not criminally responsible if his unlawful act was the product of disease or mental defect.” Theoretically, this should have resolved many difficulties for the courts: an expert could evaluate the accused, and the court could rule accordingly. However, this met with strong opposition from the legal profession on the basis that it took from the judicial system the right to determine guilt or innocence and gave that power to the psychiatric profession [24].

Subsequently, most jurisdictions now apply the American Law Institute test (ALI) [25], under which a person “is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” This defense has been used in a number of cases involving compulsive gamblers, with mixed results.

The Insanity Defense Reform Act of 1984 generally preserved the wording of the ALI test, while changing its application. It now falls upon the defense to prove insanity. The Reform Act also removed the volitional prong of the ALI test, through which a compulsive gambler might exculpate himself through evidence that he knew the act was wrong, but was unable to conform to the requirements of the law [26].

Military courts continued to follow the ALI test standard until the adoption of an amendment to the Uniform Code of Military Justice in 1986 [27]. The new military standards are now more similar to the standards of the Insanity Defense Reform Act, thus placing a greater burden of proof on the defense.

In addition, since compulsive gambling has been classified by the American Psychiatric Association as a psychiatric disorder only since 1980, the courts have placed the burden on the defense to prove that compulsive gambling is recognized as a disorder by the mental-health community. This is known as the *Frye* test [28]. Whereas prosecution had raised this issue fairly frequently, today defense should have no difficulty proving the general acceptance of compulsive gambling as a psychiatric disorder by the mental-health community, especially in view of two recent cases involving compulsive gamblers who had been dismissed from their jobs. In *U.S. Postal Service v. National Association of Letter Carriers* (27 April 1988) [29], the U.S. Supreme Court, after hearing oral arguments, dismissed the petition for review—in effect refusing to disturb an arbitrator’s order to reinstate the letter carrier; while in *Rezza v. Department of Justice* (19 May 1988), the Federal District Court for the Eastern District of Pennsylvania rejected the Merit System’s Protection Board’s conclusion that compulsive gambling is not a handicapping condition under the Rehabilitation Act of 1978 [30].

New federal sentencing guidelines have complicated matters further; however, even under these standards departure is possible with expert witness testimony, when diminished capacity was accepted under extenuation and mitigating circumstances [31].

When using the insanity defense, the question regarding the planfulness and intent of the act arises [18, 19, 32–40]. This issue is true also in defending compulsive gamblers, particularly if the crime is off-repeated, which is the norm rather than the exception with this population during this period of impairment.

<sup>2</sup>“Insanity” is a term used by the legal profession; psychiatry uses the word “psychosis.” “Disease” is a medical term; psychiatry uses the phrase “psychiatric disorder.”

State courts offer a greater variety in pleas. In New Jersey and Connecticut, several compulsive gamblers have been found *not guilty by reason of insanity*. In the Commonwealth of Pennsylvania the defense of *guilty but mentally ill* was upheld. This plea generally determines that the defendant is, beyond a reasonable doubt, found to be guilty, not insane, and mentally ill [41]. According to Roberts et al. [42], the legislative intent of these laws was to "provide punishment, increased social control, and treatment for mentally ill criminal defendants" (p. 209).

In considering any form of the insanity defense, then, it becomes incumbent upon the expert witness to know the laws of the jurisdiction in which the case is being heard. It is also important to keep abreast of landmark cases, to consider public sentiment regarding mental illness, and to know public sentiment of the locale regarding the particular crime and attitudes toward the defendant, so that lack of balance between appropriate treatment and punishment for defendants who suffer from pathological gambling may diminish in the future [43,44].

Currently, with the increase of knowledge on pathological gambling as a treatable, psychiatric disorder, and with the greater general acceptance of this illness among the mental-health profession, it is anticipated that laws and sentencing patterns will continue to change in the future, in favor of treatment and restitution, rather than incarceration.

### Some Case Histories

In a review of the last 20 cases involving compulsive gamblers in which this author served as expert witness in state, federal, and military court, some statistics are offered:

Charges: 16 bad checks, mail fraud, or embezzlement

2 slot machine cheating

2 bookmaking

Amount of money involved:

1—over \$3 000 000

3—between \$200 000 and \$1 000 000

7—between \$10 000 and \$50 000

4—less than \$10 000

5—no dollar amounts given:

1—misconduct in office

2—bookmaking

2—slot machine cheating

Range of Sentencing:

4—4 to 7 years incarceration, restitution

2—revocation of probation, and incarceration for 2 to 5 years, restitution, treatment

4—dishonorable discharges or dismissal, 6 months to 36 months confinement, restitution

3—4 years or less, with all but 6 months suspended, restitution, treatment

2—\$1000 fine, probation, treatment

4—probation, restitution, treatment

1—case was steted for 1 year, restitution

The harshest sentences (that is, with incarceration) were given when defense strategy was minimal, when it was clear neither the probation officer nor the judge accepted or understood mental illnesses in general or compulsive gambling in particular, or when the defendant was serving in the military. Five of these cases are on appeal.

In one of these cases, in which a sentence of seven years of incarceration was imposed, the defendant himself was a judge who had embezzled almost \$140 000. In more typical in-

stances, the defendant would have been sentenced to incarceration for two to three years, with a major portion of that suspended, if there had been no prior difficulty with the law. However, in this case the defendant was a criminal lawyer who had served four terms as District Court magistrate and two terms as a Circuit Court judge. The harsh sentence was based on public sentiment and the "embarrassment to the profession."

Of those defendants not actually in confinement now (16), all have undergone treatment, all remain abstinent from gambling, all have returned to their families, and all are gainfully employed. In those cases in which restitution was ordered, payments have been made on a regular basis or have been completed.

### **Some Notes on Forensic Reports**

In sentencing offenders, judges must consider four factors: punishment for the offense; restitution for the victim; safety of the community; and rehabilitation of the offender. Since it has been the experience of this author that judges, lawyers, and probation officers often do not understand mental illness as a rule and they understand compulsive gambling even less, it has become standard procedure to submit a forensic report which is not only evaluative, but also didactic. This invariably has been appreciated by the officers of the court.

The psychological evaluation is usually 15 pages or more in length. It consists of an in-depth psycho-social history and findings of test results from a battery of psychological and gambling-specific tests. Emphasis is on a description of the development and progression of the illness impact on job and physical health, indebtedness, and associated criminal acts. Information from significant others is sought to corroborate details of life histories given by the compulsive gambler. This is done to avoid as much as possible the potential for conflicting or confusing testimony during the actual trial or hearing.

Recommendations regarding treatment for the compulsive gambler and prognosis for recovery if treatment recommendations are complied with are always included in the first section of the forensic report, namely the psychological evaluation. Recommendations for sentencing are not included in the evaluation, unless specifically requested by counsel, and would consist of treatment, restitution, and possibly community service.

The psychological evaluation includes actual test results, graphs, and always a discussion of findings on each test. This is written in simple English to minimize the potential for misinterpretation.

The forensic report includes a list of references of current and the most important writings on compulsive gambling. In addition, it includes a comprehensive overview of gambling in general, as well as compulsive gambling in some detail. This overview discusses the impact of legalization of gambling across the country, changing societal attitudes towards gambling, increase in pathological gambling, crime and suicide attempts, treatment options, and legislative efforts in addressing the problems associated with compulsive gambling.

Also included in the forensic report is a position statement discussing all forms of sentencing options that a judge may have in ruling on a case involving a defendant facing criminal charges as a result of crimes committed to support the gambling addiction, and the outcome of such sentencing. These sentencing options include everything from incarceration to alternative sentencing (such as work-release, electronic jail, community service, fine, probation), treatment options, and restitution.

This position statement stresses that the defense of compulsive gambling is intended not to exculpate the gambler from the blame or responsibility of the misconduct, but rather to indicate what led to the misconduct and how future acts of misconduct may be avoided.

As in all forensic reports, a final inclusion is that of a current vita. The entire report by this author, when serving as an expert witness in a court case involving a compulsive gambler, usually consists of 50 pages, single-spaced.

### **Personal Responsibilities of the Expert Witness**

The courts have some very specific guidelines in qualifying someone as an expert witness. The most important of these is that the witness have expertise in a special area. This expertise is deemed to have been gained after many years of experience as a practitioner, and preferably also as researcher and author. A general practitioner, such as a forensic psychiatrist, would not qualify as an expert witness on compulsive gambling.

Consequently, there are very few court-qualified expert witnesses on compulsive gambling in the United States at this time. This places additional burdens on these experts. Nevertheless, there are certain standards to which the qualified or potential expert witness on compulsive gambling might wish to adhere:

1. Continuing study of the literature and field of compulsive gambling, thereby keeping current with research findings, new treatment programs, patterns, and trends.
2. Continuing education in the broader field of mental illness, particularly with respect to other addictions and treatment outcomes.
3. Keeping abreast of changes in the law and of court cases involving compulsive gamblers.
4. Analyzing patterns and trends with respect to the legalization of gambling and the creation of new gambling devices.
5. Observing personal integrity at all times, keeping the report and testimony as bias-free as possible.
6. Maintaining the standards and ethics of the profession, striving for excellence and thoroughness, as well as professional appearance in the performance of duties.

### **Some Frequent Difficulties Encountered as Expert Witness**

Perhaps the most frequent and critical error that this author has encountered when called upon to testify on a case in which the compulsive gambler is accused of criminal conduct is that the defendant has already pleaded guilty. This can be done for a number of reasons, but most often it is done in the belief that incarceration is inevitable and that cooperation or plea-bargaining will result in a more lenient sentence.

Unfortunately, with an early guilty plea, parole officers tend to spend less time in getting to know the client and in trying to understand what led to the criminal misconduct. The result is that invariably there will be a recommendation for incarceration. Research data indicate that there is approximately 80% agreement between these recommendations and the judge's final decision [45,46].

Defense counsels frequently underuse the expert's skills. Often in cases such as these, the defense attorney has not called upon the expert witness for input into the defense strategy, thereby not using the expert's experience and contacts with potential witnesses, such as recovering compulsive gamblers.

Furthermore, defense attorneys tend to call at the last minute, often within days or two to three weeks before the case goes to trial or comes up for sentencing. This does not leave adequate time for scoring of psychological tests, to call in consultants, such as an art therapist or neuropsychologist, to spend time with the parole officer, or to write the best possible forensic report.

Although in some states it is mandatory that legal counsel reimburse the expert witness, this is the rare exception rather than the rule. It is more common for defense counsels to divorce themselves from any financial issues regarding the expert witness's fees when dealing with compulsive gamblers. Defense counsels themselves generally accept less than their standard fees, knowing the defendant is deeply in debt and does not have funds to pay the standard fee.

In addition, many federal and state public defenders and military area defense counselors are not aware that their agencies may provide some funds for expert witness services. Need-



less to say, the expert witness for compulsive gamblers frequently provides a good deal of *pro bono* services.

To date, most expert witnesses on compulsive gambling have been called by defense counsel. In the few instances of criminal cases when prosecution called upon mental health professionals to testify, these professionals were forensic psychiatrists who had very little if any experience with compulsive gambling, in any capacity, whether in research or as clinicians. This invariably leads to conflicting evidence and lengthy appeals by either or both parties, and possible charges of ethical misconduct on the part of the forensic psychiatrist.

It is anticipated that in the future, the expert witness on compulsive gambling will continue to be called on primarily by defense counsel. If called upon by prosecution, then the expert witness more logically would testify to the absence of compulsive gambling. Any testimony to the effect that illicit acquisition of funds to support a gambling addiction is not a means resorted to by the compulsive gambler while out of control would be inconsistent with current knowledge and understanding of pathological gambling, its consequences, and its treatment.

In civil cases involving compulsive gamblers, the expert witness may be called by either side. In recent years involving lawsuits against casinos, the expert witness was hired by the plaintiffs, who were compulsive gamblers or their employers. These cases tend to be settled out of court.

In summary, serving in court as expert witness on compulsive gambling is always challenging, often very time-consuming, many times under trying conditions, but almost always emotionally rewarding.

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