

## LARCENY BY EMBEZZLEMENT

The defendant is charged with larceny by embezzlement. Section 30 of chapter 266 of our General Laws provides as follows:

“[W]hoever unlawfully,  
and with intent to steal or embezzle,  
converts, or secretes with intent to convert,  
the property of another . . . ,  
whether such property is or is not in his possession at the time  
of such conversion or secreting,  
shall be guilty of larceny . . . .”

In order to prove the defendant guilty of embezzlement, the Commonwealth must prove three things beyond a reasonable doubt:

*First:* That the defendant, while in a position of trust or confidence, was entrusted with possession of personal property belonging to another person or entity;

*Second:* That the defendant took that property, or hid it, or converted it to his (her) own use, without the consent of the owner; and

*Third:* That the defendant did so with the intent to deprive the owner

## of the property permanently.

See the definitions of “property,” “of another,” and “intent to deprive permanently,” and the instructions on larceny over \$250, single scheme and claim of right that may be found in the supplemental instructions to Instruction 8.520 (Larceny by Stealing). See also Instruction 3.120 (Intent).

*Third Nat'l Bank of Hampden County v. Continental Ins. Co.*, 388 Mass. 240, 244, 446 N.E.2d 380, 383 (1983) (definition of “conversion”); *Seelig v. Harvard Coop. Soc.*, 355 Mass. 532, 543, 246 N.E.2d 642, 649 (1969) (demand and refusal is evidence, but not an element, of larceny); *Commonwealth v. Carson*, 349 Mass. 430, 437, 208 N.E.2d 792, 796 (1965) (honest and reasonable claim of right negates criminal intent); *Commonwealth v. Anthony*, 306 Mass. 470, 475-477, 28 N.E.2d 542, 545 (1940) (comingling of clients' and own funds so as to incur risk of loss to former is embezzlement if done with criminal intent); *Commonwealth v. Hull*, 296 Mass. 327, 330, 5 N.E.2d 565, 567 (1937) (not necessary that defendant personally benefitted); *Commonwealth v. Snow*, 284 Mass. 426, 430-437, 187 N.E. 852, 853-856 (1933) (embezzlement requires trust, as distinguished from debtor-creditor, relationship; diversion of funds received for collection on another's behalf is embezzlement); *Commonwealth v. O'Connell*, 274 Mass. 315, 319-320, 174 N.E. 665, 667 (1931) (not a defense that defendant intended to repay misappropriated money); *Commonwealth v. Tuckerman*, 76 Mass. 173, 187, 205-207 (1857) (same); *Commonwealth v. Este*, 140 Mass. 279, 284, 2 N.E. 769, 770 (1886) (offense requires adverse holding or use of property); *Commonwealth v. Cooper*, 130 Mass. 285, 288 (1881) (not a defense that money was entrusted to defendant for illegal purpose); *Commonwealth v. Barry*, 124 Mass. 325, 327 (1878) (embezzlement involves honest receipt of funds later fraudulently converted); *Commonwealth v. Hays*, 80 Mass. 62, 64-65 (1859) (unlike larceny, embezzlement does not require asportation, but does require that property be received in relationship of trust or confidence); *Commonwealth v. Kenneally*, 10 Mass. App. Ct. 162, 176-177, 406 N.E.2d 714, 724-725 (1980) (defendant who obtains money legally and then forms intent to keep it is embezzler), *aff'd* on other grounds, 383 Mass. 269, 418 N.E.2d 1224, cert. denied, 454 U.S. 849 (1981); *Slater v. United States Fidelity & Guar. Co.*, 7 Mass. App. Ct. 281, 285, 386 N.E.2d 1058, 1061 (systematic course of embezzlement by single scheme constitutes one offense), S.C., 379 Mass. 801, 400 N.E.2d 1256 (1979).

### NOTES:

1. **Merger of offenses of stealing, false pretenses, and embezzlement.** See note to Larceny by Stealing (Instruction 8.520).
2. **Embezzlement by fiduciary.** Fiduciary embezzlement requires a showing that the defendant: (1) was a fiduciary during the relevant time period; (2) had in his possession money, goods, or property for the use or benefit either in whole or in part of some other person; (3) converted or appropriated the money or property to his own use or benefit or the benefit of a third person without the consent of the beneficiaries and without the legal right or legal authority to do so; and (4) took such action with fraudulent intent. *Commonwealth v. Garrity*, 43 Mass. App. Ct. 349, 353-354, 682 N.E.2d 937, 941 (1997).
3. **Embezzlement by municipal official.** Embezzlement by a municipal or county officer (G.L. c. 266, § 51) has the same essential elements as embezzlement under G.L. c. 266, § 30, with two additional elements: (1) the status of the perpetrator (i.e., a municipal or county officer) and (2) the identity of the owner whose property is embezzled (i.e., the municipality or county). *Commonwealth v. Mahoney*, 68 Mass. App. Ct. 561, 564, 863 N.E.2d 951, 955 (2007).