

ADA ELLIOTT - EMBEZZLEMENT OR FRAUD?

The following is a good case to show the difference between embezzlement and fraud and how to prove these offenses. Defendant, a lawyer in Albuquerque, worked as legal counsel for victim's company. They had differences and it was agreed that Defendant would return \$5700 to victim. Defendant wrote a check for \$5700 to the victim. When delivering the check, Defendant asked victim for \$1000 to pay Defendant's employees. Victim, relying upon the assertion that the \$5700 check was good, wrote Defendant a check for \$1000. The \$5700 check was returned for insufficient funds. Defendant cashed the \$1000 check at a casino. What charges?

To prove third degree **embezzlement**, the state must show: (1) Defendant was entrusted with over \$2500, (2) Defendant converted the property to his own use, and (3) at the time Defendant converted the property, Defendant fraudulently intended to deprive the owner of the owner's property. NMSA 1978, Section 30-16-8. Now to look at some of these terms:

"Entrustment" occurs when the property is committed to another with a certain confidence regarding the care, use, or disposal of that property. Victim had given Defendant \$5700 in previous years to hold for victim and Defendant agreed to return that amount. The second element is that he "converted" the money to his own use. Conversion occurs when a person who has been entrusted with another's property treats the property as his own and uses it for his own purposes. The check was returned insufficient funds which indicates Defendant converted the funds. The third element is fraudulent intent to deprive the owner of his property which can be inferred from the check returned for insufficient funds.

To convict Defendant of **fraud**, NMSA 1978, Section 30-16-6, the State must prove Defendant misappropriated or took something of value belonging to another by means of fraudulent conduct, practices, or representations. Defendant represented the \$5700 check was good and he would use the \$1000 to pay his employees. These were fraudulent representations and it can be inferred that Defendant intended to defraud victim. Court of Appeals affirmed convictions for embezzlement (\$5700) and fraud (\$1000). State v. Curry (2002).

