## MISAPPLICATION OF ENTRUSTED PROPERTY (FIDUCIARY DUTY) (N.J.S.A. 2C:21-15)

Count(s) \_\_\_\_\_ charge(s) defendant with Misapplication of Entrusted Property.

## [READ COUNT OF INDICTMENT]

The pertinent part of the statute on which the indictment is based reads as follows:

A person commits a crime if he applies or disposes of property that has been entrusted to him as a fiduciary \* \* \* in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted whether or not the actor has derived a pecuniary benefit.

The State must prove the following five elements of the crime beyond a reasonable doubt:

- 1. Defendant knowingly applied or disposed of property;
- 2. The property at issue was entrusted to defendant as a fiduciary;
- 3. Defendant's application or disposition of the property was unlawful;
- Defendant's application or disposition involved substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted;
- 5. Defendant knew that his/her conduct was unlawful; and
- Defendant knew that his/her conduct involved a substantial risk of loss or detriment to the owner of the property or to the person for whose benefit the property was entrusted.

Matter of Iulo, 115 N.J. 498, 502 (1989); State v. Manthey, 295 N.J. Super. 26, 30-31 (App. Div. 1996); N.J.S.A. 2C:2-2c(3).

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The first element the State must prove beyond a reasonable doubt is that defendant

knowingly applied or disposed of property. Here the State asserts that the property was [describe

property].

The term "property" means anything of value, 2 even though it may be impossible to

identify particular property as belonging to the victim at the time defendant allegedly misapplied

the property because the victim's property may have been mixed with or joined with other

property.

Defendant must have applied or disposed of the property knowingly. A person acts

knowingly as to the nature of his/her conduct or the attendant circumstances if he/she is aware

that his/her conduct is of that nature, or that such circumstances exist, or he/she is aware of a

high probability of their existence. One acts knowingly as to a result of his/her conduct if he/she

is aware that it is practically certain that his/her conduct will cause such a result. One acts

knowingly if one acts with knowledge, if one acts consciously, if one comprehends his/her acts.

Knowledge is a condition of the mind. It is rarely susceptible of direct proof, but must

ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce

witnesses to testify that an accused said that he/she had a certain state of mind when he/she

engaged in a particular act. It is within your power to find that such proof has been furnished

beyond a reasonable doubt by inference which may arise from the nature of his/her acts and

his/her conduct, and from all he/she said and did at the particular time and place, and from all the

surrounding circumstances.

N.J.S.A. 2C:20-1g. The statutory definition gives examples of various types of property as being included in the definition, such as trade secrets and choses in action. Reference should be made to the statutory definition in

particular cases to determine whether additional language should be charged.

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The second element the State must prove beyond a reasonable doubt is that the property at issue was entrusted to defendant as a fiduciary. A fiduciary includes a trustee, guardian, executor, administrator, receiver, and any person carrying on fiduciary functions on behalf of a corporation or other organization which is itself a fiduciary.<sup>3</sup>

A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. The fiduciary's obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care.<sup>4</sup>

## [CHARGE WHERE DEFENDANT'S FIDUCIARY DUTY OF CARE DOES NOT DERIVE FROM DEFENDANT'S PROFESSION

The third element that the State must prove beyond a reasonable doubt is that defendant's application or disposition of the property was unlawful, that is, he/she applied or disposed of the property in a manner contrary to his/her responsibility as a fiduciary.

In this case, the State asserts that defendant's responsibility was: [describe specific obligations arising from fiduciary duty.<sup>5</sup>]

As I have already explained, the State bears the burden of proving defendant guilty beyond a reasonable doubt as to each and every element of the crime. The State's burden is not reduced or shifted to defendant because he/she may have violated a fiduciary duty. The fiduciary duty of care is relevant to determining defendant's state of mind, because it may have placed

N.J.S.A. 2C:25-15.

F.G. v. MacDonell, 150 N.J. 550, 563-564 (1997).

Fiduciary duties may be based upon statutory or common law and vary depending on the industry and relationship at issue. See e.g., N.J.S.A. 3B:1-6 et seq. (administration of estates); N.J.S.A. 3B:11-4.1 (defining fiduciary duties in the setting of trusts); N.J.S.A. 3B:20-11.2 (Prudent Investor Act); N.J.S.A. 42:1A-24 (Fiduciary Duties of Partners); N.J.S.A. 46:2B-8.13 (attorney-in-fact); F.G. v. MacDonell, 150 N.J. 550, 564-65 (1997) (fiduciary duty owed to parishioner by clergyman acting as counselor). The particular fiduciary duties owed in a given legal setting must be determined by the judge as a matter of law during the charge conference. R. 1:8-7.

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defendant on notice as to what was expected of him/her when he/she became the custodian of the

property.

A violation of a fiduciary duty, in and of itself, is insufficient, as a matter of law, to

sustain a finding of criminal culpability. However, together with any other evidence in the case,

you may consider defendant's breach of his/her fiduciary duty as evidence of defendant's state of

mind. The more egregious the violation, the more likely defendant acted knowingly. For

example, an extended pattern of conduct, displaying an utter disregard for his/her fiduciary duty

would have more probative value than an isolated incident of bad recordkeeping or accounting. <sup>6</sup>

OR

[CHARGE WHERE DEFENDANT'S DUTY IS ESTABLISHED BY REFERENCE TO AN ETHICAL RULE, OR

A PROFESSIONAL PRINCIPLE, RULE, OR STANDARD]

The third element that the State must prove beyond a reasonable doubt is that defendant's

application or disposition of the property was unlawful, that is, he/she applied or disposed of the

property in a manner contrary to the regulations and laws defining his/her duty as a [specify

position or profession]. In this case, the State asserts that defendant's responsibility was

[describe source of duty].

As I have already explained, the State bears the burden of proving defendant guilty

beyond a reasonable doubt as to each and every element of the crime. The State's burden is not

reduced or shifted to defendant because he/she may have violated a/an (ethical rule)

(professional principle) (professional rule) and/or (professional standard). The standards of

(recordkeeping) (accounting practices) delineated in the (ethical rule) (professional principle)

See generally State v. Mahoney, 188 N.J. 359, 379 (2006), cert. denied, 549 U.S. 995, 127 S. Ct. 507, 166

L. Ed. 2d 368 (2006).

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(professional rule) and/or (professional standard) are relevant to determining defendant's state of

mind, because they placed defendant on notice as to what was expected of him/her when he/she

became the custodian of the property.

A violation of a/an (ethical rule) (professional principle) (professional rule) (professional

standard), in and of itself, is insufficient, as a matter of law, to sustain a finding of criminal

culpability. However, together with any other evidence in the case, you may consider a violation

of the (ethical rule) (professional principle) (professional rule) (professional standard) as

evidence of defendant's state of mind. The more egregious the violation, the more likely

defendant acted knowingly. For example, an extended pattern of conduct, displaying an utter

disregard for his/her fiduciary duty would have more probative value than an isolated incident of

bad recordkeeping or accounting.<sup>7</sup>

[RESUME CHARGE IN ALL CASES]

Fourth, the State must prove beyond a reasonable doubt that defendant's application or

disposition of the property involved substantial risk of loss or detriment to the owner of the

property or to a person for whose benefit the property was entrusted.

Fifth, the State must prove beyond a reasonable doubt that defendant knew that his/her

conduct was unlawful. I have already defined knowingly for you.

Sixth, the State must prove beyond a reasonable doubt that defendant knew that his/her

application or disposition of the property involved a substantial risk of loss or detriment to the

owner of the property or to a person for whose benefit the property was entrusted. A substantial

The preceding two paragraphs describing the significance to be attributed to professional standards, regulations, and duties is required by <u>State v. Mahoney</u>, 188 <u>N.J.</u> 359, 379 (2006), <u>cert. denied</u>, 549 <u>U.S.</u> 995, 127 <u>S.</u>

Ct. 507, 166 L. Ed. 2d 368 (2006), in which the Court addressed an attorney's violation of R.P.C. 1:21-6.

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risk is one that is of such a nature and degree that, considering the nature and purpose of

defendant's conduct and the circumstances known to him/her, its disregard involves a gross

deviation from the standard of conduct that a reasonable person would observe in defendant's

situation. In other words, the State must prove beyond a reasonable doubt that defendant knew

that it was very likely that his/her treatment of the property would create a risk of loss or

detriment to the owner or person for whose benefit the property was entrusted, and that

defendant went ahead anyway, where a reasonable person would not. I have already defined

knowing for you. It is not necessary for the State to prove that defendant himself/herself derived

a benefit during his/her application or disposition of the property. <sup>8</sup>

If the State has proven each of the six elements of this crime beyond a reasonable doubt,

then you must find defendant guilty of misapplication of entrusted property. On the other hand,

if the State has failed to prove any element beyond a reasonable doubt, you must find him/her not

guilty. If you find defendant not guilty, your consideration of the misapplication of entrusted

property charge should end here.

However, if you find defendant guilty beyond a reasonable doubt, you must then proceed

to make two additional factual findings. Specifically, you must indicate whether defendant

derived a benefit from his misapplication of entrusted property, and, if so, the benefit he/she

derived.

First, you must determine whether the State has proven beyond a reasonable doubt that

defendant derived a benefit as a result of his/her misapplication of entrusted property. Benefit

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If defendant derived no pecuniary benefit from his misapplication, he is guilty of a fourth-degree crime under this section. See Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. 2C:21-15 (2008); American Law Institute, Model Penal Code and Commentaries, § 224.13, comments 1 and 3 at pp. 358-60, 363

(1980) (distinguishing this crime from embezzlement and theft).

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means a gain or advantage, or anything regarded by the beneficiary as a gain or advantage,

including but not limited to a pecuniary benefit or a benefit to any person or entity in whose

welfare he/she is interested. Please indicate whether the State has proven that defendant derived

a benefit from the alleged misapplication beyond a reasonable doubt by marking "yes" or "no"

on your verdict sheet.

If you have both determined that defendant is guilty of misapplication of entrusted

property, and indicated that "yes," that defendant did derive a pecuniary benefit from the

misapplication, then you must go on to determine the amount of that pecuniary benefit.

Specifically, you should indicate on the verdict sheet if the benefit that defendant derived has a

value that:

[CHOOSE APPROPRIATE SECTIONS]

(1) is \$75,000.00 or more;

(2) exceeds \$1,000.00, but is less than \$75,000.00;

(3) is \$1,000.00 or less.

The "benefit derived" includes the value of all funds or property misapplied by

defendant. That is, the value of the property misapplied is not simply the value of its use during

the period in which defendant exercised control over the property. For example, if a defendant

applies or disposes of \$5,000, but later reimburses the victim, the value of the "benefit derived"

is the full \$5,000. It is not merely the amount of interest that a bank might have charged for the

use of a \$5,000 loan during the period in which defendant made use of the money. Similarly, if a

defendant applies or disposes of \$5,000, but reimburses the victim for all but \$200 of the

State v. Modell, 260 N.J. Super. 227, 250-51 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993); see also

State v. Cetnar, 341 N.J. Super. 257, 263-64 (App. Div.), certif. denied, 170 N.J. 89 (2001).

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amount, the benefit derived is still \$5,000, the entire amount involved. In calculating the

"benefit derived," you must include but are not limited to, the amount of any tax avoided,

evaded, unpaid, improperly retained, or improperly disposed of.

[CHARGE WHEN PROPERTY AT ISSUE IS SOMETHING OTHER THAN MONEY]

In this case, the State alleges that the benefit derived was something other than money.

You must determine the value of that benefit. Value means the fair market value of the property

at the time and place of the alleged misapplication. <sup>10</sup> Fair market value is the price that a buyer

would be willing to pay and a seller would be willing to accept if both parties were aware of all

the relevant surrounding circumstances and neither party were under any compulsion to buy or

sell.

Here, the State has provided you with evidence of the value of the property by [describe

testimony or other evidence used to establish value]. The State has the burden of proving the fair

market value of the property involved. This means that you must be satisfied beyond a

reasonable doubt that the property is worth what the State claims.

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