

Embezzlement and Other Criminal Acts by County Personnel

Mississippi has had its own experience with large-scale sting operations involving elected officials. There are many instances in which appointed officers, employees and other County personnel may face criminal liability, and in many of these situations there may also be civil liability ramifications that impact the County treasury. Chief among the situations in which the County Board attorney may be called upon for legal guidance are cases involving embezzlement of public funds, theft of County property and other criminal acts. Not every clerical misstep constitutes a crime, but often the commission of certain acts in conjunction with violation of certain ministerial duties relating to public money or public property can open the door to criminal prosecution.

Embezzlement

The term “embezzlement” is defined in the Columbia Encyclopedia (6th ed. 2001) as:

wrongful use, for one’s selfish ends, of the property of another when that property has been legally entrusted to one. The key to embezzlement lies in the fact that the wrongdoer is initially in lawful possession of the property, and then wrongfully misappropriates that property to his or her own use. Embezzlement should be distinguished from larceny, which is defined as the unlawful taking and carrying away of another person’s property, with the intent to deprive the owner of its use or to appropriate the property to the use of another.

Under Mississippi law, when embezzlement takes place in a public office, more is at stake than the violator and the embezzled property. The public trust is injured, sometimes irreparably. When a public officer or employee is entrusted with public money or property by virtue of his or her office and either attempts to defraud or actually defrauds the government of which he or she is a trusted employee or official, the crime of embezzlement has been committed. As you will in the jury instructions defining the offense of embezzlement by a public official (Model Jury Instruction 120.04, at page 11), a public official or employee is guilty of embezzlement if:

1. he was an employee or office holder of a governmental body or governmental entity;
2. he received into his hands or was entrusted with money or other valuables belonging to the governmental entity, legally entitled to possession, in his official capacity;
3. he was under a legal duty to pay over or deliver the money or other valuable things; and,
4. failed or refused to pay over or deliver the money or valuable things without a reasonable explanation, or without the authority and consent of the governmental owner converted the money or valuable things to his own use.

Embezzlement can also occur when a public official or employee makes a false entry in official public records with the intent to defraud (see MJI 120.06, at page 17). Embezzlement can also occur when a public official or employee endorses or certifies as genuine a state or local government warrant, when the official or employee knows that it in fact is not genuine and makes the certification or endorsement with the intent to defraud the governmental entity (MJI 120.07, at 20-21).

Statutory Provisions Relating to Embezzlement, Fraud and Other Criminal Acts

Several Mississippi statutes have direct application to employees of a County. Miss. Code Ann. §97-7-10(1) (1988) makes it a felony to knowingly and wilfully falsify, conceal or cover up by a trick, scheme or device a material fact, or to make any false, fictitious or fraudulent statements or representations, or any false writing or document knowing it to contain such statements, if done with the intent to defraud.

Miss. Code Ann. §97-7-11 (1972) makes it a felony for any person to enter into any agreement or conspiracy to defraud a political subdivision by obtaining or helping obtain the payment or allowance from public funds of any false or fraudulent claim.

Mississippi's criminal statutes also speak directly to criminal acts and omissions by clerks. Miss. Code Ann. §97-11-1 (1972) provides for a maximum of ten years imprisonment if "any clerk of any court" wittingly makes any false entry or erases any work or letter or changes any record belonging to any court or public office, whether in his keeping or not.

Miss. Code Ann. §97-7-17 (1972) makes it a misdemeanor for "any clerk" to neglect or refuse to make out and deliver within a reasonable time to the person having demanded and paid in advance the statutory charge for a certified copy of any paper, record, judgment, decree or entry on file, which is lodged or remaining in his office.

Miss. Code Ann. §97-11-25 (1979) provides up to twenty years imprisonment and a fine of up to \$5,000 for any County officer or "any other person holding any public office or employment" or "other person engaged in like public employment" who unlawfully converts to his own use any money or other valuable thing which comes to his hands or possession by virtue of his office or employment, or who, when lawfully required to turn over the money or deliver such thing, does not immediately do so according to his legal obligation.

Miss. Code Ann. §97-11-27 (1972) provides for up to ten years imprisonment for the crime of embezzlement by officers and public agents who wilfully and not in good faith refuse or neglect, on demand, to deliver money, books, records, papers or anything else required by law to be delivered to his successor in office or other person authorized by law to receive or have charge of it, if not so delivered on demand.

Miss. Code Ann. §97-11-29 (1979) provides for up to ten years imprisonment as well as a fine of not less than double the amount of money or property embezzled, for any County officer, including "either municipal, County or state, or a clerk, agent or employee of such officers," if he or she wilfully and fraudulently makes any false entry of public monies received, transferred or disbursed, or makes any certificate or endorsement of any warrant on the treasury that it is genuine when in fact it is not a genuine warrant, or loans any portion of the public monies entrusted to him for any purpose whatsoever, or wilfully acts or omits to perform any duty whatever, or defrauds or attempts to defraud any state or local government entity.

Violation of Trust in Handling Public Monies

A conviction was upheld under §97-11-29 in *Schilling v. State*, 473 So. 2d 975 (Miss. 1985), where a Chancery Clerk used County funds, rather than the Chancery Clerk's monies, to pay the Chancery Clerk employees' contributions and the matching employer contributions to the state retirement fund. The Mississippi Supreme Court found it significant that once the State Department of Audit gave notice to the Chancery Clerk regarding this improper payment, the Chancery Clerk began paying the employee withholdings and employer matching portions of the state retirement and social security, the Court finding that this evidence of late payment was of probative value to show that the Clerk knew the portions should be paid by him to reimburse the County for the funds. Although the Clerk admitted that he knew he had to pay the portions, his explanation was that personal reasons were the cause of the non-payment, to which the Supreme Court responded:

This action by [the Chancery Clerk] was a clear violation of trust and evidenced fraud in his handling of public monies. *Id.* at 977.

In upholding the embezzlement conviction, the Court concluded that under these circumstances intent to defraud will be presumed in the absence of evidence to the contrary, and that "herein we have an admission and an act of repayment." *Id.*

General Statute on Embezzlement

Mississippi also has a general statute that covers cases of embezzlement that are not specifically provided for in other Code sections. That general statute is Miss. Code Ann. §97-11-31 (1979). Under that statute's predecessor, a Circuit Clerk was held to be guilty of embezzlement when he issued a false and fraudulent witness pay-certificate, which on its face was good in substance, but defective in form. Upholding the conviction, the Mississippi Supreme Court in *Bracey v. State*, 8 So. 163 (Miss. 1886), held that "it is a plain violation of the statute for a public officer, who has authority to act with reference to the subject matter, to knowingly issue and put in circulation a false and fraudulent claim against a County, which is afterwards allowed or collected out of the County treasury." The Court emphasized that it was not necessary to prove that the public officer corruptly did an act in regard to which he had no lawful authority or that he acted in such a manner as would be likely to deceive and mislead others. In this case it was the duty of the Circuit Clerk to issue and deliver to witnesses, after their claims for attendance had been allowed in the Circuit Court, certificates upon which they were to be paid by the County. The certificate actually issued by the Clerk in this case was different in some respects from what the law required and thus defective in form, but not in substance, since it was issued under the seal and sanction of the Clerk's office, it appeared that it was intended to defraud, it was well calculated to defraud, and the County was in fact defrauded by it. *Id.* at 164.

The Cigar Box Case

In *Murphree v. State*, 28 So. 2d 238 (Miss. 1946), the Chief Clerk in the license tag division of the State Motor Vehicle Commission came into possession of public money which he failed to pay over to the Motor Vehicle Commissioner. There were numerous field men with equal access to the cigar box in which

duplicate permits, cash and checks were kept, and the proof showed that at times up to \$100,000 per day was collected in the office. On the date when the crime was allegedly committed, duplicate permits, checks and cash were removed by someone from the cigar box in which they had been placed and were spread out on a table to be counted by several persons to ascertain whether or not the amount of the checks and cash was in balance with the amount of the duplicate permits issued that day. Even though the Defendant was not a bookkeeper and was not shown to have been assigned such duty, he entered on the books of the office kept by him the numbers of the permits and the corresponding amount of money collected for each. The entries that he made were often made from data called off or furnished to him by other persons in the office who had counted and balanced the permits with the amount of the checks and cash, either at the close of the day's business or on the next day. Entries on the duplicate permit and cash books which were ordinarily kept by the Defendant were made by an assistant clerk while the Defendant was absent from the office for a few days from time to time. Duplicate permits, checks and cash were then carried sometimes by one person and then another person in this office to the general bookkeeper, who in turn made the necessary entries on her books as to the numbers of permits and the amount of the collections, and then returned the duplicates to the license tag, before she deposited the money in the bank to the credit of the Motor Vehicle Commission. It was discovered that the original of three permits were held by one company, and a search of the books kept by the Defendant and those kept by the general bookkeeper revealed that the numbers of those permits had not been entered on any of the books. A further search showed that the field man's permit book from which these three permits had been issued could not be found in the office, but by that time the Defendant had been in the Army for at least two years. The Defendant testified without contradiction that this permit book was left in the office as far as he was concerned when he entered the Armed Forces. The Mississippi Supreme Court reversed the Defendant's conviction, emphasizing that the proof was entirely based on circumstantial evidence as to who may have removed the duplicates of these permits and the equivalent amounts of cash from the cigar box. In this case the Court held that a reasonable hypothesis consistent with the Defendant's innocence had been shown, "in that it is undisputed as aforesaid that any one of the several employees having access to the cigar box were afforded the same opportunity for removing the duplicates, and the equivalent thereof in cash, on each of the days when these duplicates, respectively, disappeared. Unless the proof is otherwise sufficient to show that the accused got the \$356, the fact that he is designated "Chief Clerk" will not suffice to justify a verdict of guilty. *Id.* at 241. In finding that the evidence was insufficient to warrant a conviction, the Mississippi Supreme Court emphasized finally that the Defendant was merely a "strawboss" used in this collection and permitting system and that "the several employees engaged in issuing permits and collecting money therefor were using the cigar box as a receptacle for pooling their collections. Under this system, these funds were no more in the possession of the Defendant Murphree than they were in the possession of several other bonded collectors, until after an opportunity had been afforded to each and all of them throughout the day to remove a duplicate and its equivalent in cash therefrom. The same duty rested upon the other employees to leave these duplicates and the cash in the cigar box until the same could be counted and entered upon the book as rested on the Defendant. *Id.* at 242.

Miss. Code Ann. §97-11-33 (1997) makes it a felony punishable by up to five years imprisonment and a \$5,000 fine for any "clerk" and "any other officer" to knowingly demand, take or collect, under color of his office, any money fee or reward whatever, not authorized by the law, or to demand and receive, knowingly, any fee for a service not actually performed.

Miss. Code Ann. §97-11-37 (1986) provides for imprisonment of up to six months in the County jail and a fine of up to \$1,000, upon conviction, if any “clerk of any court” knowingly or wilfully fails, neglects or refuses to perform any of the duties required of him by law, or fails or refuses to keep any record required to be kept by law, or secretes the same, or violates his duty.

Aside from the crime of embezzlement, Mississippi law exacts severe penalties for forgery of account books kept in public offices. Miss. Code Ann. §97-21-1 (1972) includes in the crime of forgery the making of any false entry or false alteration of any entry made in any book of account kept “in the office of any County treasurer or in any other public office” where that person with the intent to defraud discharges, diminishes, increases, creates or in any manner affects a demand or obligation, claim, right or interest, either against or in favor of the state or any County, city, town or village or any individual.

The Mississippi Legislature in 1985 enacted statutes providing for punishment of computer crimes. One of those crimes, computer fraud, is defined in Miss. Code Ann. §97-45-3 (1985) as “the accessing or causing to be accessed of any computer, computer system, computer network, or any part thereof with the intent to defraud, or to obtain money, property or services by means of false or fraudulent conduct, practices or representations, or through the false or fraudulent alteration, deletion or insertion of programs or data.

Miss. Code Ann. §97-45-5 (1985) also provides criminal penalties for offenses against computer users. Those offenses include the intentional “denial to an authorized user, without consent, of the full and effective use of or access to a computer, a computer system, a computer network or computer services.” The offense against computer users also includes the intentional “use or disclosure to another, without consent, of the numbers, codes, passwords, or other means of access to a computer, a computer system, a computer network or computer services”.

Statutes Applicable to Justice Courts, Justice Court Clerks and Their Deputies

The statutory provision governing the operation of Justice Courts and specifying the duties and responsibilities of Justice Court Clerks and Deputy Clerks are set forth in Miss. Code Ann. §§9-11-2 (1983) through 9-11-33 (1984). Two of the statutes contained in this chapter of the Code of most interest to our discussion here are Miss. Code Ann. §9-11-18 (1991) providing for the establishment and operation of the Justice Court Clerk’s clearing account, and Miss. Code Ann. §9-11-19 (1984), relative to the collection and reporting of fines and penalties.

These two statutes concern the areas in which the office of the Justice Court Clerk is perhaps most vulnerable to potential abuse or misuse. Into the Justice Court Clerk clearing account the following must be deposited:

1. All monies that the Justice Court Clerk receives from any person complying with any Writ of Garnishment, attachment, execution or other like process.
2. All monies received in criminal cases in Justice Court pursuant to any Order requiring payment as restitution to the victims of criminal offenses.

3. All cash bonds deposited with the Court.
4. Any portion of fees required by law to be collected in civil cases which are to pay for service of process or writs in another County.
5. Any other money deposited with the Court, except fees paid for the services of a constable, which by its nature is not at the time of its deposit public monies, but which is to be held by the Clerk in a trust or custodial capacity in a case or proceeding before the Court.

The mandatory duty is placed upon the Justice Court Clerk to “account for all monies deposited in and disbursed from such account,” and the Clerk is authorized and empowered to draw and issue checks on the account at such time, in such amounts and to such persons as shall be proper and in accordance with law. Those monies that forfeited in criminal cases are required to be paid by the Justice Court Clerk to the Clerk of the Board of Supervisors for deposit in the general County fund.

Under §9-11-19, the Justice Court clerk is under a duty to provide a monthly report to the County Board of Supervisors relating to the receipt, account and collection of fees, costs, fines and penalties charged and collected in the Justice Court. That report is to be given on or before the 25th day of each month in writing and under oath to the Clerk of the Board of Supervisors. It must include cash bonds and other monies which have been forfeited in criminal cases since the 20th day of the preceding month, and must set out the date, amount and names of persons from whom those monies were received. Section 9-11-19(1) provides in its final sentence that “any clerk of the Justice Court who shall fail to make such report or to pay the money so received shall, in addition to any other fine or punishment provided by law for such conduct, not be entitled to compensation for the period of time during which such report or money is outstanding.”

Another important provision relating to potential liability of the Justice Court Clerk is Miss. Code Ann. §9-11-23 (1985), which makes the Clerk liable on his or her official bond on five days notice “when any clerk of the Justice Court shall have collected in his official capacity any money, fines or penalties and shall fail to pay or account for the same to the person or official entitled to receive the same”.

The broad statutory provision setting forth the duties and powers of the Justice Court Clerk and the Deputy Clerks is Miss. Code Ann. §9-11-27 (1991). By statute, the Board of Supervisors appoints the Clerk of the Justice Court and “may appoint such other employees for the Justice Court of the County as it deems necessary, including a person or persons to serve as Deputy Clerk or Deputy Clerks” (page 68). This same statute further authorizes the Justice Court Clerk and Deputy Clerks to

- ! file and record actions and pleadings
- ! receive and receipt for monies
- ! acknowledge affidavits
- ! issue warrants in criminal cases upon direction by a Justice Court Judge
- ! approve the sufficiency of bonds in civil and criminal cases
- ! certify and issue copies of all records, documents and pleadings filed
- ! issue all process necessary for the operation of the Justice Court.

Miss. Code Ann. §9-11-29(2) (1989) requires every person appointed as Clerk and Deputy Clerk of the Justice Court to give a bond before entering into the duties of that position, in a penalty amount of \$50,000, with the cost of the bond to be paid by the County. Since the civil jurisdictional limit for Justice Court was increased in 1995 to \$2,500, Miss. Code Ann. §9-11-9 (1995), it is clear that the amount of money flowing into and out of most Justice Courts is substantial. Whether in a County which has hundreds of Justice Court cases or a County that has thousands of Justice Court cases each year, there are tremendous opportunities for outstanding public service to be performed in this area of local government, just as there are, unfortunately, tremendous opportunities for neglect, disregard of duty, and criminal activity. The increasing pressure that is being brought to bear upon our Justice Court system in Mississippi has been enhanced by the adoption of the Uniform Rules of Procedure for Justice Courts, which were made effective May 1, 1995. In most counties, the justice court caseload has done nothing but expand during the past decade.

Problems Experienced by Justice Court Clerks' Offices

It is difficult to understand and identify the causes, let alone the warning signs, of embezzlement in the public sector. Sometimes this type of criminal activity is the natural result of a volatile combination of low morale, job dissatisfaction and an aloof employer, and sometimes it is simply a matter of “the spirit is willing, but the flesh is weak.” Lack of loyalty, a perception of unfair treatment, and a belief that prosecution of a victimless crime is unlikely are also significant factors that may lead to the commission of such crimes. Add to these factors the presence of legalized casino gambling, with most non-casino counties either adjacent to or within an hour’s drive from a gambling establishment, and then add to that the identified problems that have been related to me by almost all of the Justice Court Clerks’ offices in this state, and you have a recipe for financial disaster. Just take a look at some of the “danger signs” and “warning signs” of embezzlement, and then look at the specific problems that have been described by our Justice Court Clerks. We are not talking rocket science here, but we are talking human nature and accountability. Several years ago, a questionnaire was sent out to every Justice Court Clerk in the State of Mississippi prior to their annual training seminar. With three exceptions, every Justice Court Clerk and/or his or her designee provided a response. Specifically, each Justice Court Clerk was asked to indicate which of the following problems his or her office had experienced during the past five years, indicating whether those problems involved a clerk, deputy clerk, other staff or judge. While each individual responding remained anonymous without any identification of County or person involved, the results were fairly predictable, very troubling and not a cause for great optimism.

<u>Problem Involved:</u>	<u>No. of Responses</u>	<u>Official/Employee Involved:</u>
(a) Insubordination	6	Clerk, Deputy Clerk, Other Staff
(b) Embezzlement	7	Judge, Clerk, Deputy Clerk, Constable, Other Staff
(c) Missing Funds	8	Judge, Clerk, Deputy Clerk, Other Staff
(d) Sexual Harassment/Sex Discrimination	3	Judge, Clerk, Constable
(e) Race Discrimination	2	Judge, Clerk, Deputy Clerk
(f) Age Discrimination	0	
(g) Incompetence	12	Judge, Deputy Clerk, Other Staff
(h) Conflicts or Disagreements		

with Judges	13	Judge, Clerk, Deputy Clerk, Other Staff
(i) Tardiness or Absenteeism	18	Deputy Clerk, Other Staff
(j) Failure to Perform Job Duties	13	Clerk, Deputy Clerk, Other Staff
(k) Scheduling Trials& Hearings	4	County Prosecutor/Officer, Judge,
(l) Access to Justice Court Building/Facilities	2	Board of Supervisors
(m) Access to Court Records	5	Deputy Clerk, Circuit Clerk

<u>Problem Involved:</u>	<u>No. of Responses</u>	<u>Official/Employee Involved:</u>
(n) Audit Department Investigation	4	Judge, Deputy Clerk
(o) Low Morale	4	Clerk, Deputy Clerk
(p) Inadequate Staff Support	4	Supervisors, Judge, Clerk, Deputy Clerk, Other Staff
(q) Inadequate Funding by County	9	Supervisors, Judge, Clerk, Deputy Clerk, Other Staff
(r) Inadequate	25	Supervisors, Judge, Clerk, Deputy Clerk, Other Staff
(s) Other	4	Prosecuting Attorney

Also requested in this survey was a description “in your own words” of the most serious problem facing the Justice Court Clerk in the operation and conduct of the Justice Court of each County. The responses were predictable and troublesome, and indicated that our state legislature in tandem with local government is going to have to address some of these problems not only through financial support, salary increases and bringing fees and fines into the 21st Century, but is also going to have to develop a systematic and comprehensive approach to a very broad-based and prevalent feeling of disrespect, inadequacy, and isolation. The following are some of the specific problems that were described by our Justice Court Clerks:

1. Having a judge who abuses his position; says/does things that spark low morale; and interferes with the Clerk/Deputy Clerk’s duties;
2. Entry level clerks are paid such a low salary, it is very difficult to keep them once they are trained. It’s like a revolving door. As soon as they become proficient, they normally leave for another job;
3. There is no training available to Deputy Clerks from the Mississippi Judicial College;
4. Not getting returns on warrants by the Sheriff’s Department;
5. The biggest problem in Justice Court in our County is salary, even though we are not the lowest paid County. We think if the state set the salary, we would have an adequate salary;
6. Poor pay for Clerk and Deputy Clerks, poor facilities showing lack of respect for Justice Court by members of Board of Supervisors by not providing such;

7. The most serious problem in our County is due to the Supervisors hiring deputy clerks because they are friends of theirs (politics). They don't have to have an I.Q., they just have to be a friend of the Supervisors;
8. The failure of the Board of Supervisors to recognize the work load of the office and the importance of training and an adequate staff to carry out the duties of the office;
9. The biggest problem is "politics" and the Board of Supervisors in hiring personnel;
10. Both judges using the same courtroom at the same time for call dates;
11. Opposition from Judges. Judges encourage Deputy Clerks to go against directions of Clerk;
12. Deputy Clerk rude to law enforcement and to the public;
13. Security monitoring device needed for off-site offices;
14. Deputy clerk not entering tickets in computer on family and/or friends; missing funds or embezzlement;
15. No cooperation with County Attorney and Judges not understanding and not wanting to understand the laws. Judge trying to blame Clerks for their mistakes;
16. Deputy clerk is late for work everyday and on arrival does very little work;
17. Work load, lack of deputies, low pay, Supervisors not knowing what it takes to operate Justice Court;
18. Not enough deputy clerks for the size and volume of work of office and the refusal of the Board of Supervisors to hire another employee;
19. Board of Supervisors being in charge and having no idea what the entire court's needs are and not caring to learn;
20. Public relations;
21. Inadequate funding for office equipment; not letting Justice Court office know of change of some court dates and the witnesses not being present for the hearing causing the case to be dismissed;
22. Office is too small and handles too much money for so many non-Justice Court employees to be hanging out in the office waiting for Court to begin;
23. No control over who is hired even though Clerk has to train and be responsible for employees; therefore, employees have no respect for Clerk;

24. No recognition by Board of Supervisors of the importance of the work that the Justice Court does;
25. The most serious problem that one clerk and deputy clerk had to face was a mean, power hungry, vindictive Judge.

Many of the above problems, but certainly not all of them, can lead to an atmosphere of dissatisfaction, low morale, feelings of inadequacy and hopelessness, and job frustration that in a very negative way can enhance the environment and potential for embezzlement and other “financial crimes” to occur. As noted in the article “Tips for Spotting and Stopping Embezzlement,” embezzlement often occurs at the hands of an essentially honest employee who has turned to crime as a desperation move, and often takes place at the hands of an employee who has served for many years as a trustworthy and dependable “right hand” to his or her employer. Unlike embezzlement in a private sector commercial establishment, however, an employee who gives in to the temptation to embezzle public funds does not cause damage and injury just to that particular public office, but, given the extraordinary publicity accorded crimes when they are found to have been committed by public officials or employees, the damage to the public trust in general can be overwhelming. And the answer is not necessarily to convert a Justice Court office into “an armed camp”. If a Justice Court has in place a built-in control system, administers it tightly, and audits it frequently, such measures may prevent attempts of embezzlement, but in any event will provide the County with the means to collect evidence exposing a crime.

In addition to the pattern of problems and the most difficult issues identified by the Justice Court Clerks throughout this state, some of the key issues raised by one Justice Court Clerk are the following:

1. How can we better our relationship with our County Board of Supervisors?
2. What are our responsibilities to the County Prosecutor?
3. In cases where embezzlement is proven and the deputy clerk is the person taking the money, whose bond is called, hers or the clerk’s?
4. What are the consequences of embezzlement?
5. When insubordination is a problem and the Board refuses to understand, what can we do to convince them that the problems does exist?

As County Board attorney, you will be looked to for guidance in answering these and similar questions that go to the core of effective, accountable local government.

Embezzlement Decisions in Mississippi and Other States

At least a portion of the answer to some of these issues can be found in an evaluation and analysis of embezzlement decisions handed down by our own Mississippi Supreme Court as well as by courts in other states. Many of these decisions involve public employees and public officials, in some cases County supervisors, district attorneys, justice court judges, city clerks, deputy clerks, County court clerks, district

court clerks, deputy circuit clerks, state agency personnel and deputy city clerks, while other decisions involve private sector employees, secretaries, contractors and the like. Collectively, these decisions can give you at least a good starting point for understanding not only the underlying causes but also the long-term consequences of embezzlement and other criminal activity in the workplace, be it public or private.

Corruption of Power

In *Gerrard v. State*, 619 So. 2d 212 (Miss. 1993)(pages 134-142), a County Supervisor was convicted of embezzlement by a public official under §§97-11-25. The charges against the supervisor were that he had caused pay warrants to be issued to four different individuals for County labor, that he had represented these individuals to have been employed by the County during the periods of time when they were paid, when in fact the individuals had either not worked for the County or had only worked on fewer occasions than claimed by the supervisor. The Chancery Clerk was charged with management of County payroll funds, and in this case required members of the Board of Supervisors or the County's road foreman to bring him a payroll listing the names of those to be paid from the County's funds, following which the Chancery Clerk would calculate the amount due each employee and would then issue a pay warrant for the amount due. One of the individuals who had been paid for 64 hours of County labor testified that with the exception of one day, he had not worked for the County or for the defendant supervisor, but he signed a time sheet because the supervisor had "never led him wrong before." The employee acknowledged endorsing only one of the several warrants that were issued in his name, and described a visit to the supervisor's store in which the supervisor approached him and asked him to sign a folded piece of paper in exchange for which the individual received \$400. The piece of paper turned out to be a County warrant for \$714.18. The other individuals testified similarly about the manner in which they were given funds by the supervisor after signing the back of checks. At the heart of this case was whether the supervisor had violated §97-11-25, which prohibits a County officer from unlawfully converting "to his own use any money or other valuable thing which comes to his hands or possession by virtue of his office or employment." After the jury returned a guilty verdict following twenty minutes of deliberation, the supervisor appealed, arguing that he did not procure the funds "by virtue of" his office as supervisor but only "under the color or" his office. Rejecting this fine distinction and overruling a 1989 case that had created it, the Mississippi Supreme Court affirmed the conviction, holding:

If a state official uses a power given to him/her by law to obtain monies wrongfully, it is the corruption of power that causes those monies to be obtained "by virtue of office." The state official would never have had the means to misallocate funds had he/she not held an office which conferred that power upon him/her. *Id.* at 216.

Money Earmarked for Specific Purpose

In *Hale v. State* (Miss. App. 1996)(pages 143-145), a self-employed carpenter contracted to construct a driveway and garage for \$8,000, was paid \$4,000 in advance with the balance due on completion, and after the slab was poured, was paid an additional \$2,900 for the concrete foundation. The contractor and the owner of the driveway and garage then got into a dispute about the work that was expected of the contractor, and then the owner demanded that the contractor perform additional work beyond that contracted for, but refused to pay additional compensation for it, whereupon the contractor refused to do work and the owner demanded that the funds that he had paid be returned. When the contractor refused to return the money,

the owner filed a civil suit and then a complaint with the police department leading to the arrest and conviction of the contractor for embezzlement under §97-23-19. The conviction of the contractor was reversed by the Mississippi Supreme Court, which focused on the common law requirement that the item embezzled be the property of another. Citing the fundamental premise that one cannot be guilty of embezzlement of his own property, the Court reasoned that a building contractor who receives from a landowner an advance payment on a contract and then spends the money for his own purposes and does not fulfill the contract, is not guilty of embezzlement unless the money is earmarked to be used only for a construction purpose. Here the contract between the contractor and the owner did not earmark any of the proceeds for construction purposes only, and the contractor retained no proceeds of the contract earmarked for construction purposes, and thus his actions fell within the general rule that advance money on a construction contract is his property, not the property of another. “Because the proceeds of the contract were Hale’s property, Hale could not have committed embezzlement”.

The Trusted Bookkeeper

In *Hartley v. State* (Miss. App. 1998), a doctor was the victim of embezzlement when his trusted receptionist/bookkeeper was called away for jury duty and was temporarily replaced at the front desk by another employee. “It was soon discovered the cash payments were recorded on the daily record but not recorded on the deposit slips, and check payments were found recorded on the deposit slips, but not recorded in the daily record. In this way the totals for the daily record and deposit slips remained equal”. One thing that tipped the doctor off was that during the absence of his trusted receptionist/bookkeeper, the doctor and his wife prepared the deposit slip and noted that the deposit for that day contained about \$600 in cash, considerably more cash than was going to the bank on the days when the trusted receptionist/ bookkeeper was preparing the deposit slip. Also, during the two days when the trusted receptionist/ bookkeeper was gone for jury duty, she returned on the first day “to make sure the handling of the payments was properly done”. After discovering the discrepancy in the record keeping on the deposit slips and recording of check payments in the daily record, the doctor, after reviewing the office deposit books and account ledgers, determined that the trusted receptionist/bookkeeper had embezzled payments of over \$11,500, had her arrested and thereafter indicted on 14 counts of embezzlement under §97-23-19. The defendant sought to have the indictment quashed because it failed to properly charge her for the crime of embezzlement “because it does not charge her with converting the money allegedly taken for her own use.”

The Mississippi Supreme Court concluded that although the statute is “repetitive, confusing and disjunctive, it nonetheless specifies that fraudulent concealment of money entrusted to one’s care constitutes embezzlement,” and here the defendant was charged and convicted under the fraudulent concealment part of the statute. The Mississippi Supreme Court concluded that embezzlement is the wrongful conversion of property lawfully possessed by the person charged, and that the act of fraudulently concealing money of another is the equivalent of converting the money to one’s own use, and that “when one so interferes with the property of another through dominion and control so as to be inconsistent with the rights of the owner, one has committed conversion”. The Court concluded that the evidence was sufficient to properly convict this trusted employee of embezzlement by fraudulently concealing money. Finally, the Court found that when the trusted employee took the stand in her own defense, her testimony constituted direct proof of every element of the crime except for the element of intent, since she admitted that she received the checks which were not recorded

on the daily record but were included on the deposit slips, she admitted to taking from the cash payments received the cash equivalent of the checks, and she testified that this was done at the behest of the doctor and that she would give the cash to him.

Disrespect for Legal System

In *Ex Parte Jones County v. Pacific*, 705 So. 2d 1308 (Miss. 1997)(pages 159-169), a grand jury sought to subpoena financial records from a district attorney over a disputed \$35,000 in expenditures from the County's worthless check unit to the district attorney and her staff as "salary supplements" and to various local businesses for the entertainment of the district attorney and her staff. The district attorney moved before a special judge for a stay in the proceedings of the grand jury, and the special judge issued an injunction, holding that the grand jury had been unduly influenced. The case and its complex web of events spawned a number of investigations by the State Auditor's office, the Attorney General's office, special grand jury, and the local newspaper. The Mississippi Supreme Court concluded that the injunction of the grand jury was improper, stating:

This court is concerned that a district attorney would demonstrate such disrespect for the legal system. Pacific's behavior, as presented in the record of this case, raises serious ethical questions. These actions include her comments about a circuit judge and her subsequent criminal contempt conviction, her questionable expenditure of public funds; her public disclosure of matters to be presented to the grand jury; and her apparent interference with the proceedings of a duly empaneled grand jury.

Possession of Fines By Virtue of Office

In *Lambert v. State*, 518 So. 2d 621 (Miss. 1987), a justice court judge was indicted and convicted of embezzlement. Traffic violators would mail in their fines to the judge, who would then dismiss the citations and convert the funds to his own use. The Court held that the judge came into possession of these fines "by virtue of his office" and could be convicted under the embezzlement statute, §97-11-25. The sequence of events describing the method by which the justice court judge obtained the cashier's checks which he then converted for his own gain was described as follows by the Supreme Court:

The sequence would begin with the driver of an automobile, usually from out of state, receiving a speeding citation in Lambert's district. The motorist would then, following directions provided in the citation, telephone the Justice Court Clerk to obtain the amount of the fine owed so that they could simply plead guilty to the charge by paying the fine, and in the process avoid appearing in court. The Clerk would direct the person to obtain a cashier's check in the proper amount and mail it to her. Upon receipt of the check, the clerk would attach all copies of the citation to the check, and evenly distribute such among the four Justice Court Judges, including Lambert, in the district. Upon receipt of his portion of the "mailed-in" guilt pleas, with cashier's checks attached, Lambert would proceed to write "not guilty," "dismissed," or some similar notation on the ticket, usually accrediting such to the request of a state trooper, by signifying a particular officer's badge number. After dismissing the charge, leaving, at least on paper, no fine to be paid, Lambert would then take the money orders and endorse them. He proceeded to cash such at a local liquor or grocery store, effectively converting to his own use state

funds. *Id.* at 622.

The trial included testimony from motorists who received citations, highway patrolmen, justice court clerks, grocery and liquor store cashiers and a handwriting expert. The overwhelming proof led to a conviction which was affirmed by the Mississippi Supreme Court. On appeal, the Justice Court Judge argued that the money, if it came into his possession at all, came into his possession “by color of office,” and not “by virtue of his office,” so that any breach of trust occurred only between the judge and the makers of the money orders and not between the judge and the state and the County. The Mississippi Supreme Court concluded that since the funds in this case represented payments of fines, the Justice Court Judge’s “color of office” reasoning was unsound.

It is well settled in Mississippi that embezzlement is the wrongful conversion of property lawfully possessed by the person charged.... Thus, as Lambert lawfully came into possession of the mailed in money orders/guilty pleas by “virtue of his office,” ..., and as he converted such to his own use, he could be charged and convicted of embezzlement pursuant to §97-11-25. Affirming the conviction, the Mississippi Supreme Court concluded that the evidence presented against the judge meticulously developed a scheme by which he converted to his own personal use money orders that came into his possession by virtue of his office of Justice Court Judge. *Id.* at 625.

Larceny vs. Embezzlement

In *Mahfouz v. State*, 363 So. 2d 461 (Miss. 1974), the case concerned the theft of goods from a freight line truck resulting from a conspiracy to steal property before it came into the hands of the truck driver for the freight line. Distinguishing larceny from embezzlement, the Supreme Court stated:

When a person—even an agent of the owner—takes possession of property with the unlawful intent to feloniously convert the property to his own use at the time he acquires possession, he is guilty of larceny and not embezzlement.... Moreover, where one has mere custody of another’s property rather than legal possession and he converts the property to his own use, he is guilty of larceny. *Id.* at 463-64.

In *Medley v. State*, 600 So. 2d 957 (Miss. 1992), a former law firm associate was convicted of embezzlement where he was constructively in possession of a check for \$16,000 contained in a client’s file by virtue of his employment, and thus he was validly indicted for embezzlement despite his claim that he did not lawfully possess the check. The associate had access to the files in the office and could lawfully inspect them in the course of his work. In upholding the conviction under §97-11-25, the Mississippi Supreme Court addressed the technicality raised by the associate in arguing for his acquittal:

The principle is well settled in this state that embezzlement is the wrongful conversion of property lawfully possessed by the person charged.... The question is raised and the appellant argues that he is not guilty of embezzlement for the reason that he did not lawfully possess the check. *Id.* at 960.

The Court noted that embezzlement is different from larceny in that embezzlement is “the wrongful appropriation or conversion of property where the original taking was lawful or with the consent of the owner,”

whereas larceny “involves trespass and the felonious intent must exist at the time of such taking.” *Id.* at 960. Since the associate had access to the files in the office and could lawfully inspect those files in the course of his work on that and on other cases in the office, and since that right to lawful access of files and other property in the office constructively put him into possession of the check in question, even though the case bordered on embezzlement and on larceny, under the facts of the case the associate was constructively in possession of the check by virtue of his employment and his indictment for embezzlement was *valid*. *Id.* at 960.

Missing Case Files and Receipt Books

In *People v. Griffin*, 338 P.2d 949 (Cal. App. 1959), a deputy clerk of the municipal court was convicted of embezzlement of public money. The proof showed that her duties included keeping books for the court and receiving and handling money records and the monies themselves for the court. The deputy clerk signed official receipts for some but not all of the money, and all of the official receipt books of her court were under her control. According to the court, “she designated the receipt book to be used each day, she kept account of the sequence of receipt and recorded the receipt numbers on the “analysis of cash receipts” and “cash collection report.”

The facts of the case further reveal that several of the official receipt books under her control were discovered on an audit to be missing, and that the individual deposit receipts missing out of these missing receipt books totaled 272. One hundred forty-seven (147) case files were missing and all of the missing case files were within the numbers encompassed by the missing receipt books. In each of the 147 missing case files, the docket entries reflected no money was received. The analysis of cash receipts and the cash collection report kept by the deputy clerk also failed to reflect the receipt of any money in any of the 147 missing case files. The facts also revealed that no case files had been lost prior to her employment, and none were lost after her retirement. Contrary to orders, moreover, the deputy clerk often arrived at the court early and opened the mail without the presence of the other deputy clerk, and through a surprise audit of her accounts a cash shortage was discovered. In her attempt to explain the shortage, the deputy clerk made material conflicting and untrue statements, and was also shown to have received bail deposits that were never recorded or accounted for, among the 147 missing case files. The testimony at trial came from other officials the Court, from auditors and also from lay persons who had paid the deputy clerk monies on traffic cases. In appealing from her conviction, the deputy clerk argued that the monies involved were not public monies. The Court concluded that public monies included bonds and evidence of indebtedness, all monies belonging to the state, any city, County, town or district, and all monies, bonds and evidence of indebtedness received or held by the state, County, district, city or town officers in their official capacity. Upholding the conviction, the Court concluded that “the defendant in this case was, as a clerk of the municipal court, a public officer...and the money, subject of the charges in this case, was received by her in her official capacity. The official character in which monies are received or held is the proper criterion of whether or not they are “public monies,” citing the applicable California statute.

Series of Takings Constituting One Embezzlement Offense

In *State v. Gordon*, 68 P.2d 635 (Kan. 1937), a court clerk was indicted and convicted for embezzlement of funds coming into his hands in his official capacity. The clerk argued that money paid into the court by judgment debtors for the benefit of judgment creditors came into his hands, but also money in the form

of costs came into his hands, some of which would go to witnesses or jurors, or to the County, and that he needed a bill of particulars in order to be sufficiently advised of whose money he was charged with taking. The Court rejected his Motion for a Bill of Particulars, in which he sought more specific information regarding the ownership of the monies embezzled, whether they were taken at one time or over a period of time. The Court noted that the public at large could not exercise constant supervision over an official's acts, nor could it, like a private individual assume the direct custody of the funds at any moment. Continuing, the Court stated:

The proper authorities may require him to account, may examine the funds in his possession, but in the next hour all these funds may be changed, long before the act of embezzlement is done, or the intent is formed. To suppose that the legislature, when they added the large class of public officers to those who might be amenable to the law for the offense of embezzlement, intended to require proof of the identity of the money embezzled, or a description of it, and from whom it was received, is to infer that they intended to enact a law the enforcement of which would be impossible. It will not do to permit an artificial rule of pleading, having a doubtful foundation in reason, to lead to such a disastrous result.

The Court in *Gordon* concluded that the defendant clerk was not entitled to have his Motion for a Bill of Particulars sustained, and then the defendant clerk attacked the evidence supporting his conviction. The clerk argued that the evidence did not prove that he had embezzled money belonging to the County. Rejecting this argument, the Court stated:

The question whether each taking constituted a separate offense, or whether the series of takings constituted one offense, could not be raised by demurrer as we here attempted, for it was undisputed that Defendant had committed embezzlement. Whether the offense was a felony or a misdemeanor was dependent on whether each taking constituted a separate offense, or whether the series of takings constituted one offense, for in one of the two ways the amount taken was to be determined; but in either view of the matter, defendant's guilt was not determined, but only the degree of the offense committed. The evidence was undisputed that at various times the Clerk appropriate amounts of from \$10 to \$15, and within the last ten months took over \$2,200. While the Clerk may have conceived that separate takings of less than \$20 each subjected him only to punishment for misdemeanors, "the evidence also warrants the conclusion the series of takings was the result of a plan or scheme, and each separate taking was but a step in the consummation of the whole scheme".

The "Someone Else Did It" Defense

In *State of Minnesota v. Garceau*, 370 N.W.2d 34 (Minn. 1985), a deputy clerk in the office of the County Clerk of Court was primarily responsible for district court matters and was responsible for a checking account for her particular court division. A routine audit revealed that over \$2,800 was missing from the Clerk of Court's funds for the calendar year, and the auditors were able to attribute the shortage to five deposits that were never deposited in the Clerk of Court's account in a specific bank. The Clerk of the Court and each of the deputy clerks testified about the accounting procedures used in the clerk's office. Some of the deputy clerks had vinyl bags containing a book of deposit slips with carbon copies and a deposit ledger. The defendant deputy clerk had a tin box with the same contents, and when she made a deposit at the bank, she used a vinyl bag. When the deputies received funds from the public, they would issue the payer a receipt, accumulate the

funds, prepare a deposit slip to deposit the funds in their particular account at the bank, and the deputies made the deposits whenever it was necessary. When the deputies took a deposit to the bank, they would give the bank teller the vinyl bag with the deposit, the teller would then verify that the amount of cash and checks received matched the amount indicated on the deposit slip, and would then credit the appropriate account, initial the deposit slip, retain the original of the deposit slip and enter the deposit in the ledger. When the teller was finished, the teller would return to the deputy clerk the deposit slip book containing the carbon copy of the deposit ticket, the deposit ledge and the vinyl bag. Each deputy clerk was responsible for reconciling her account with the monthly bank statement. The defendant deputy clerk, Garceau, prepared the deposit slips for all five of the missing deposits. With one exception, all of the deposits were deposits for the district court account, the account controlled by this deputy clerk. The elaborate procedure used by the deputy clerk with reference to these missing deposits was described in detail by the court.

Upon conviction, the deputy clerk claimed on appeal that circumstantial evidence did not establish her guilt beyond a reasonable doubt, but the Court disagreed, finding that there was sufficient evidence to support all of the charged offenses. The deputy clerk had admitted that she prepared all of the deposits, none of which was ever received at the bank, and she was the only clerk who was working each and every day that a deposit disappeared. A handwriting expert identified the deputy clerk's handwriting characteristics on a deposit slip which had contained the initials of a teller at the bank, and the teller testified that she had not in fact made those initials on the carbon copy of a deposit slip.

Notwithstanding this and other overwhelming evidence of guilt, the deputy clerk argued that a reasonable inference could be made that the deposits were lost. The Court disagreed, finding that this inference was entirely inconsistent with the evidence, and that "it seems inconceivable that the bank would only lose deposits which Garceau prepared. In any event, bank employees testified that the bank has never lost deposits. There was also overwhelming evidence indicating that the deposits never reached the bank". The Court also found that the deposits could not have been lost in the Clerk of Court's office either, and that any inference that the missing deposits were stolen by bank employees was inconsistent with the evidence. "If the bank was involved in the thefts, many employees would necessarily have been involved. It is highly unlikely that such a conspiracy would go undiscovered. Excluding the problem with the one deposit to the County court account, the district court account is the only account with which the bank had problems. It seems implausible that bank employees would only embezzle from the account that Garceau controlled."

Finally, the deputy clerk claimed that the evidence was consistent with the inference that the district court clerk had stolen the deposits. Rejecting this final claim, the Court noted that it was obvious from the evidence that the deputy clerk and the clerk of the court "had seriously personality conflicts. There is, however, no evidence that would connect (the clerk of the district court) with the missing deposits. He rarely took deposits to Citizens Bank. He was not involved at all in that part of the office's procedures."

Deputy Clerk in Charge of Cash, Deposits and Records

In *State of Nebraska v. Fields*, 169 N.W.2d 437 (Neb. 1969), an employee of the Clerk of the District Court was responsible for accounts receivable and the ledger, including money due the clerk for filings and services for which fees had not been paid. *Id.* When the term of the clerk ended, an audit of the clerk's

office disclosed a deficiency of over \$85,000, which was assumed to be accounts receivable due the clerk. When an attempt was made to verify the accounts, it was discovered that they were overstated by approximately \$46,000. The incoming clerk received a summary when his term began, showing that the cash on hand was over \$37,500. The incoming clerk inquired of the defendant deputy clerk and learned that there was \$11,000 cash on hand that she had not deposited. A special audit was then made which disclosed that about \$26,000 had been deposited the day before the incoming clerk's term began and on the date the term actually began, but had not been entered on the fee book until the day the term began and the day after the term began, which had the effect of shifting liability for this amount from the previous clerk to the incoming clerk. On the day the incoming clerk took office, the defendant deputy clerk gave another employee in the clerk's office a deposit to be made to the former clerk's bank account after there had been instructions to make no further deposits to the former clerk's account, and the defendant deputy clerk told this employee not to tell the incoming clerk about the deposit.

According to the Court, the evidence justified the jury in finding that the shortage had been created by depositing checks received in payment of accounts receivable without crediting the accounts and by withdrawing an equivalent amount of cash from the office, and that as long as the accounts remained unverified, the shortage was not apparent. The defendant deputy clerk denied she had taken any money from the clerk's office, and there was also evidence that other persons had access to the cash and handled transactions in the office. Finding that the evidence was sufficient to permit the jury to find the defendant deputy clerk had embezzled, the Court stated:

The evidence clearly established that a substantial amount of money had been embezzled from the clerk's office. The defendant was the head cashier during the time that the shortage occurred. She had charge of the cash, the bank deposits, and the records of cash received.

Prison Term vs. Probation

In *State of Nebraska v. Henn*, 388 N.W.2d 846 (Neb. 1986), the Clerk of the District Court while facing severe financial difficulties as a result of debts he incurred to pay his gambling losses, endorsed a check received in the clerk's office which was a payment of child support, presented it to a bank and obtained \$2,000 in cash for his personal use. Later on, in anticipation of a routine audit of his office in which he knew the theft of funds would be discovered, he contacted his attorney and confessed to the theft. The defendant clerk made full restitution, showed remorse, acted in a cooperative manner, had stopped gambling, had secured employment and was generally conducting himself as a good citizen. He was nonetheless given a prison term rather than probation at the sentencing, and the Court upheld the trial court's sentencing.

In *State of Tennessee v. Bishop* (Tenn. Crim. App. 1991), a deputy circuit clerk was indicted and convicted of embezzlement and making false entries. In reviewing the sentence and whether the defendant was entitled to probation, the Court found that the following factors favored granting her probation:

1. She had immediately confessed to the crimes upon being questioned about them;
2. She had been diligent in making restitution in full;
3. She had assisted in revealing and correcting most, if not all, of the false entries;
4. She had pled guilty;

5. She had indicated her remorse rather strongly.

Other factors which were against granting probation included the following:

1. She was not truthful with the probation officer during the preparation of the pre-sentence report;
2. She was previously convicted of the crime of shoplifting, a crime involving moral turpitude and similar in nature to the present case;
3. She continued the commission of these crimes over a two or three month period of time;
4. She not only falsified records, but she also destroyed court records;
5. She previously was granted probation on the shoplifting case, but apparently did not learn much from that conviction and probation; and,
6. The experience of the trial judge stated in the record indicated that there was a need for deterrence concerning this type of crime in the public offices of this state.

Affirming the judgment and sentence as well as the denial of probation, the Court in Bishop concluded that there was substantial evidence to support the trial judge's decision and that "after a period of incarceration, the trial court may consider a work program, community service, or other conditions incident to early release".

Pennock v. State, 550 So. 2d 410 (Miss. 1989), was handed down in 1989 and was later reversed by the Mississippi Supreme Court in *Gerrard v. State*, *supra*. In *Pennock*, the Court held that an employee, a secretary of the Division of Vocational Rehabilitation who repeatedly forged the name of her blind, peer counselor, co-worker to bogus vouchers and illegally procured from the State Auditor checks payable to fictitious or ineligible vocational rehabilitation clients, netting about \$10,000 of public monies set aside to aid the handicapped, did not act "by virtue of office" when she signed those bogus account statements for fictitious or ineligible clients without authority, and thus could not be convicted under the particular embezzlement statute which applied to public employees, §97-11-25. The conviction was overturned because the accused never had lawful possession or custody of the monies, and because of this "she has not offended the statute, which thus exalts arid legal logic and unmistakably claims that a person cannot embezzle what she has stolen." *Id.* at 411. The dissenting opinion, which later became the majority opinion in *Gerrard*, pointed out that the facts of the case unquestionably established that this public employee's actions constituted the crime of embezzlement, stating:

Today's opinion only serves to create a gap, rather than a "slip corner," through which lower-level state employees who misappropriate state funds may waltz, confident that, whatever their position and authority, they will escape prosecution because their actions were not done "by virtue of office or employment." *Id.* at 416.

Distinct Amounts Taken on Different Dates

In *Taylor v. State*, 754 So. 2d 598 (Miss. App. 2000), a Deputy City Clerk who also served as secretary for the Mayor had responsibilities which included requiring her to account for the payroll, oversee disbursement of city funds and supervise the City Court Clerk's fund. When city funds were discovered missing, auditors and thereafter the State Auditor's office looked into the irregularities surrounding funds handled by the Deputy City Clerk. In one of those funds, the account held money placed there by a defendant

in a pending action until such time as the Court disposed of the case, and if the defendant was found not guilty, the defendant's money was returned. If the defendant was found guilty, the fine was forfeited to the city and placed in the municipal general fund. Depending on the type of offense, a check was then written out of the municipal general fund to the State of Mississippi. Regarding the payment of fines, if a person owed a fine for speeding, DUI or a similar matter, came to the police department and paid the fine in cash or by bond to a police dispatcher on duty, the dispatcher took the payment, wrote a receipt for the amount received and placed the money in an envelope identified with the person's name and the amount of money contained in the envelope. The dispatcher would periodically bring the brown envelopes containing the money and the receipt book upstairs to a Deputy City Clerk, primarily the defendant Deputy City Clerk in this case, but other Deputy City Clerks accepted the envelopes and receipts on occasion. The Deputy City Clerk would then count the money contained in the envelope, check it against the information on the envelope, check it against the receipt book itself, prepare a deposit slip for the required amount and then deposit the city funds in the bank. A separate ledger book was also kept in the City Clerk's office, and the Deputy City Clerk took the information from the brown envelopes and the receipt book, which then had to be returned to the dispatcher's office as soon as possible to accommodate members of the public arriving to pay their fines, and then made entries into the ledger book regarding the transactions before the bank deposit was made. The ledger recorded the name of the Defendant, case number, receipt number and amount of money received from the person paying the fine. There was a "regular fine" book and a "state bond fee" book where fines paid or forfeited by a defendant and state bond fees, the greater of \$20 or 2 percent of the fine, were recorded.

A state audit department investigator found 17 instances where the entire deposits of fine money had failed to make it to the bank. He also found 26 instances of deposits deficient in regard to the deposited amount and the corresponding receipts representing fines covered by the deposit. He reviewed the police receipt books, the City Court Clerk's ledger, deposit slips, bank statements and the remaining envelopes which had been used to transport the money, and all but three of the envelopes used to transport the money during the period that he audited were missing. Without the envelopes, the state audit investigator used the receipt books, as they were initialed by the receiving Deputy Clerk, and the ledger book to reconstruct the trail the money took from the police dispatcher through the Clerk's office into the bank. He found that the deficiencies were attributable to a time frame that coincided with the Defendant Deputy City Clerk's shared control over the fund. He also found that the Defendant Deputy City Clerk signed off on the receipt books for money received that never made it to the bank.

The Defendant Deputy City Clerk testified that without the brown envelope sent up from the police dispatcher to reconcile against her entries in the Deputy Clerk's ledger, she would be unable to reconstruct the exact chain of custody of the funds in question. According to the Court,

Evidence was presented at trial that all but three of the brown envelopes used to transport the funds from the police dispatcher to the clerk's office during the time in question were missing as well as some ledger entries. Taylor testified that initialing the receipt book as having received the amount of money listed on the receipts and the envelopes did not, in fact, mean that she actually received the exact amount of money. She testified that she did not normally follow proper procedure by counting the funds and balancing them with the ledger upon signing for the funds because she was busy with other responsibilities, such as getting the payroll completed .

She was indicted and convicted with regard to three blocks of receipts and journal entries, and all of these amounts were signed as received by the Defendant Deputy City Clerk, and none were deposited into the City's bank account. The Mississippi Supreme Court concluded that the Defendant Deputy City Clerk was convicted of embezzling money from the same fund, in the same manner, on separate occasions while serving as Deputy City Clerk over a specified period of time, and the prosecution was not obligated to combine a series of acts into one account where there was proof that distinct amounts were taken on different dates.

Quasi-Judicial Immunity

“Absolute immunity can extend to government officials who perform quasi-judicial functions.” *In Re Faust*, 310 F. 3d 849 (5th Cir. 2002), citing *Thomas v. City of Dallas*, 175 F. 3d 358, 362 (5th Cir. 1999). Courts employ a “functional approach” that focuses on the nature of the function performed, rather than the identity of the actor who performed it, in determining whether to extend quasi-judicial immunity to a person. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976); *Kalina v. Fletcher*, 533 U.S. 118 (1997). State and federal courts are divided on the question of whether a court clerk should be granted absolute judicial immunity for actions undertaken in good faith and either at the express direction of a judge or consistent with quasi-judicial duties. Officers who are acting pursuant to a facially valid court order have been held clothed with the same absolute judicial immunity enjoyed by the judge issuing the order. *See May v. Sudderth*, 97 F. 3d 107 (5th Cir. 1996). The following cases are illustrative of the manner in which the Courts deal with the immunity issue with regard to Court Clerks.

In *Vinson v. Collums*, 2000 U.S. Dist. LEXIS 1059 (N. D. Miss. 2000), state court clerks who were at all times acting within their official capacities as Chancery Court Clerks and pursuant to court order enjoyed quasi-judicial immunity and were immune from suit for actions taken pursuant to their official positions in refusing to record plaintiffs' deeds which were deemed invalid by reason a previous state court order. The district court concluded that it was not obliged to suffer in silence the filing of baseless insupportable appeals containing “irrelevant platitudes and legalistic gibberish” presenting no colorable claims of error.

In *Boston v. Lafayette County, Mississippi*, 744 F. Supp. 746, 750 (N.D. Miss. 1990), *aff'd.*, 933 F.2d 1003 (5th Cir. 1991), the court recognized that "quasi-judicial immunity shields lower officials, such as clerks, who implement judicial orders."

In *Johnson v. Craft*, 673 F. Supp. 191, 193 (S. D. Miss), the court stated that "Court clerks are immune from liability when performing official acts."

In *LeGrand v. Evan*, 702 F.2d 415 (2nd Cir. 1983), an inmate filed suit against the Clerks of the Supreme Court of the State of New York for refusing to accept an application for writ of habeas corpus, for a restraining order and for an order to show cause and to proceed in forma pauperis. The inmate was seeking to compel various state officials to disclose the whereabouts of his children and to allow them to visit him in prison. In his suit he charged that the clerks had acted in bad faith and in malice because the knew the inmate was a convicted murderer and had filed other pro se applications in both state and federal court. The Second Circuit Court of Appeals held that the refusal of a clerk of a court to accept the papers of a litigant seeking to commence an action under a state statute may deprive that litigant of federal constitutional rights, and while

many courts have given clerks a qualified “good faith immunity” from liability arising from ministerial acts, the Court concluded that it did not need to resolve the matter of the immunity of the clerks at this stage in the proceedings, and only determined that the allegations by the inmate were not frivolous and that his pro se complaint should not have been dismissed.

In *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996), a pro se inmate sued a district judge, his law clerk, and the clerk of the court as well as a number of attorneys, alleging that they all conspired to deprive him of the proceeds of a judgment in his favor in a separate action. The plaintiff, who had once been employed as an electrician for a defense contractor, had been awarded a \$66,000 compensatory damage judgment, and in a dispute with various officials over payment of the judgment out of the proceeds of a supersedeas bond, sought to hold the district court clerk liable. The Ninth Circuit held that the court clerk “in many of his actions performed quasi-judicial functions as to which he was entitled to absolute immunity,” and that even if the clerk deceived the pro se plaintiff regarding the status of the bond and improperly conducted hearings, all in coordination with the judge, “such acts would fall within (the clerk’s) quasi-judicial duties and are thus protected by absolute immunity”.

In *Rodriguez v. Weprin*, 116 F.3d 62 (2nd Cir. 1997), a defendant convicted of murder and robbery filed a civil rights complaint against a judge, the district attorney, and the Chief Clerk of the New York State Appellate Division. In addressing the claim against the Clerk of the Court, the Second Circuit Court of Appeals stated:

This court has found it unnecessary to determine whether and to what extent judicial immunity extends to a clerk of the court.... However, several other circuits have concluded that the same policies underlying immunity for judges also justify a similar grant of immunity to clerks for performance of tasks which are judicial in nature and an integral part of the judicial process.... A court clerk may not be entitled to absolute immunity in all cases. In this case, the convicted murder claimed that the court clerks wrongfully denied his motion to expand the record on appeal, but the state court judges, not the clerks, were responsible for denying his access to those records. Accordingly, according to the Second Circuit, the clerks were entitled to immunity for their alleged refusal of this document request . The Second Circuit also rejected the convicted murderer’s claim that the court clerks had “violated his due process rights by failing to properly manage the court calendar and more quickly bring his appeal to fruition.”

The Second Circuit reasoned that a court has the inherent power to control its docket, and that this power is part of its function of resolving disputes between parties, and “this is a function for which judges and their supporting staff are afforded absolute immunity.” Thus even viewing the actions of the court clerk as an administrative task, “the court clerks are entitled to immunity for harms allegedly related to the delay in scheduling appellants’ appeal”.

Seeds of Embezzlement

Embezzlement may begin with an act as simple as “borrowing” paper clips. It can escalate to “borrowing” undeposited fines and can then develop into a complex web from which the public employee may

become hopelessly ensnared. True, some crime goes undetected, unpunished, unsolved. But the consequences of embezzlement are severe and very personal. As an employee of the County, a Justice Court Clerk and his/her deputies have multiple responsibilities to the Board of Supervisors, the general public, Justice Court Judges, Appellants, Appellees, and many others. The primary relationship of employer-employee certainly exists as between the Board of Supervisors and the Justice Court Clerk and Deputies, and every effort, every communication, every working hour should be devoted to the strengthening and improvement of that relationship. Similarly, the relationship between the County Prosecutor and the Justice Court Clerk and Deputies requires at times massive amounts of patience, constant coordination and effective communication. When a Justice Court Clerk's office and personnel live in perpetual conflict with the judges, when chronic absenteeism is the rule and not the exception, when the faithful performance of job duties comes as a surprise, a permissive "it's not my job" atmosphere can prevail. It is that atmosphere and it is those circumstances that provide fertile ground for the seed of embezzlement to grow.