

By: Donald L. Paillette, Project Director Subcommittee: No. 1

Date: April 2, 1968 Action: _____

Date: _____

Proposed Code Revision

Subject: Section 5. Theft by deception (Article 14)

Comment on Proposed Revision:

Subsection (1) is derived from Illinois Criminal Code Section 15-4 and Michigan Criminal Code (Final Draft) Section 3201. In paragraph (a) the prepositional phrase "of law, value, intention or other state of mind" which modifies "impression" is taken from Model Penal Code Section 223.3 (P.O.D.). This language seems desirable because it clearly indicates the intent of the section to eliminate needless distinctions based on "fact" as contrasted with "opinion" or "present or past fact" as opposed to "future events."

The rationale of all of the modern codes in dealing with theft by deception is the issue of the impression which the actor's total conduct has on the victim. As the New York Penal Law commentators point out in connection with that code's section on "False Promise," many flagrant swindles are perpetrated by patently fraudulent promises -- and with careful avoidance of any misrepresentation of fact -- many an expert confidence man has gone scot-free for want of such a provision.

The exception contained in subsection (2) of the proposed section is taken from Section 223.3 of the Model Penal Code; however, the term "representation" has been substituted for the phrase "puffing by statements" to avoid limiting it to oral or written "statements." This exception is intended to deal with the problem of mass advertising and "commendation of wares." The non-pecuniary deception would not be criminal, either. (See MPC, Tentative Draft No. 2, pp. 71-73 for comments.)

Subsection (3) is a restatement of language found in New York Penal Law Section 155.05, and is similar to provisions contained in the Model Penal Code and provides that mere nonperformance alone shall not be sufficient to establish an intent not to perform a promise.

The entire section is restricted to include only those instances wherein there exists an intent to defraud and to exclude cases essentially civil in nature and amounting to little more than breaches of contract. Accidental or careless creation of a false misimpression is not covered.