

See: Minutes of Subcommittee No. 1
9/23/68, p. 6, Vol, X, Tapes #20 & 21
10/18/68, p. 1, Vol. X, Tapes #21 & 22
11/15/68, p. 1, Vol. X, Tapes #23 & 24

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
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ARTICLE 18

FORGERY AND RELATED OFFENSES

Preliminary Draft No. 1; September 1968

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Subcommittee No. 1

FORGERY AND RELATED OFFENSES

Preliminary Draft No. 1; September 1968

Section 1. Forgery and related offenses; definitions. As used in _____, except as the context may require otherwise:

(1) "Written instrument" means any paper, document, instrument or article containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person.

(2) "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof.

(3) "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.

(4) To "falsely make" a written instrument means to make or draw a complete written instrument in its entirety, or an incomplete written instrument which purports to be an authentic creation of its ostensible maker, but which is not, either because the ostensible maker is fictitious or because, if real, he did not authorize the making or drawing thereof.

(5) To "falsely complete" a written instrument means to transform, by adding, inserting or changing matter, an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that the complete written instrument falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(6) To "falsely alter" a written instrument means to change, without authorization by anyone entitled to grant it, a written instrument, whether complete or incomplete, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that the instrument so altered falsely appears or purports to be in all respects an authentic creation of its ostensible maker or authorized by him.

(7) To "utter" a written instrument means to issue, deliver, publish, circulate, disseminate, transfer, or tender a written instrument to another.

(8) "Forged instrument" means a written instrument which has been falsely made, completed or altered.

COMMENTARY - FORGERY; DEFINITIONS

This section substantially adopts the comprehensive definitions of New York Revised Penal Law section 170.00. Subsection (7) has been added by your Reporter.

"Written instrument" includes every kind of writing or other article that may be the subject of forgery. Distinctions are made between the terms "complete written instrument" and "incomplete written instrument." Particularly important are the terms "falsely make," "falsely complete" and "falsely alter" which collectively constitute the crime of forgery.

The relationship of the draft provisions to existing law is discussed in the commentary to subsequent sections.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 170.00. Forgery; definitions of terms

1. "Written instrument" means any instrument or article containing written or printed matter or the equivalent thereof, used for the purpose of reciting, embodying, conveying or recording information, or constituting a symbol or evidence of value, right, privilege or identification, which is capable of being used to the advantage or disadvantage of some person.
2. "Complete written instrument" means one which purports to be a genuine written instrument fully drawn with respect to every essential feature thereof. An endorsement, attestation, acknowledgment or other similar signature or statement is deemed both a complete written instrument in itself and a part of the main instrument in which it is contained or to which it attaches.
3. "Incomplete written instrument" means one which contains some matter by way of content or authentication but which requires additional matter in order to render it a complete written instrument.
4. "Falsely make." A person "falsely makes" a written instrument when he makes or draws a complete written instrument in its entirety, or an incomplete written instrument, which purports to be an authentic creation of its ostensible maker or drawer, but which is not such either because the ostensible maker or drawer is fictitious or because, if real, he did not authorize the making or drawing thereof.
5. "Falsely complete." A person "falsely completes" a written instrument when, by adding, inserting or changing matter, he transforms an incomplete written instrument into a complete one, without the authority of anyone entitled to grant it, so that such complete instrument appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer.
6. "Falsely alter." A person "falsely alters" a written instrument when, without the authority of anyone entitled to grant it, he changes a written instrument, whether it be in complete or incomplete form, by means of erasure, obliteration, deletion, insertion of new matter, transposition of matter, or in any other manner, so that such instrument in its thus altered form appears or purports to be in all respects an authentic creation of or fully authorized by its ostensible maker or drawer.
7. "Forged instrument" means a written instrument which has been falsely made, completed or altered.

Section 2. Forgery in the second degree. A person commits the crime of forgery in the second degree if, with intent to injure or defraud, he:

- (1) Falsely makes, completes or alters a written instrument; or
- (2) Utters a written instrument which he knows to be forged.

COMMENTARY - FORGERY IN THE SECOND DEGREE

A. Summary

This section defines the basic offense of "forgery." Falsely making, completing or altering a written instrument or uttering same with knowledge that it is forged are punishable as forgery in the second degree.

Following the pattern of the proposed drafts for other crimes, the Article provides for two ascending degrees of forgery, scaled according to the type of writing forged.

B. Derivation

This section is adapted from New York Revised Penal Law section 170.05, but differs from that statute in one material aspect in that it incorporates "uttering" into the basic definition of the crime, whereas the New York Code (ss. 170.20, 170.25, 170.30) equates uttering with possession rather than forgery, but punishes it the same as its forgery counterpart.

C. Relationship to Existing Law

Forgery is defined at common law as the false making or materially altering, with intent to defraud, of any writing, which if genuine, might apparently be of legal efficacy or the foundation of a legal liability. Willetts v. Scudder, 72 Or 535, 144 P 87 (1914). The requisite intent is the intent to defraud. State v. Wheeler, 20 Or 192, 25 P 394 (1890). It is not necessary that anyone be actually defrauded or injured. State v. Leonard, 73 Or 451, 144 P 681 (1914). The prosecution need not prove an intent to defraud a particular person, a general intent to defraud being sufficient. State v. Frasier, 94 Or 90, 180 P 520 (1919); ORS 165.190. Forgery may be committed by the use of a fictitious or assumed name. State v. Kelliher, 49 Or 647, 88 P 867 (1907).

The term "falsely" does not refer to the contract or tenor of the instrument, or the fact stated in the writing. The writing itself must be false, i.e., not the true instrument which it purports to be. State v. Wheeler, supra. In order to establish that the instrument was falsely made the state must prove a lack of authority by the defendant, unless a fictitious name is used. State v. Fitzgerald, 186 Or 301, 205 P2d 549 (1949).

A receipt, cancelled check or voucher may be the subject of forgery. State v. Frasier, supra. A note which on its face appears to be barred by the statute of limitations may be the subject of forgery because the note could become the foundation of a legal liability. State v. Dunn, 23 Or 562, 32 P 621 (1893).

The primary criminal code sections on forgery are ORS 165.105, 165.110 and 165.115. A score of other sections, some of which are duplicative, sound of forgery or counterfeiting.

C. Existing Law

<u>ORS</u>	<u>Crime</u>	<u>Maximum Penalty</u>
165.105	Making, forging or counterfeiting writing or money	10 years
165.110	Forging note, draft or check	10 years
165.115	Uttering forged instrument	10 years
165.120	Possession of instrument with intent to utter or pass it	5 years
165.125	Making or possessing plate, tool, implement or material for forging instrument	5 years
165.130	Making or uttering false warehouse receipt	5 years
165.135	Connecting parts of bank notes or other instruments	10 years
165.145	Transmission and delivery of false and forged messages	1 yr., \$1,000 fine, or both
165.150	Forgery of railroad tickets	1 yr., \$1,000 fine, or both
165.155	Restoring or uttering canceled railroad ticket	1 yr., \$1,000 fine, or both

<u>ORS</u>	<u>Crime</u>	<u>Maximum Penalty</u>
165.160	Counterfeiting coins	10 years
165.165	Possession of counterfeiting equipment	10 years
165.175	Counterfeiting or removing serial number	6 mos., \$100, or both
165.180	Receiving or concealing article from which serial number has been removed	\$500 fine
165.185	Use of counterfeit label or empty container	6 mos., \$300 fine, or both
165.250	Destruction or falsification of corporate records or securities	1 yr., \$1,000 fine, or both
165.295	Unlawful possession, alteration or use of credit card	5 years
165.525	Manufacture or sale of slugs for coin boxes	6 mos., \$500 fine, or both
323.992	Counterfeiting cigarette tax stamps or meters	10 yrs., \$10,000 fine, or both
94.990	Forgery and fraud in registration of titles	10 yrs., \$1,000 fine, or both

Sections 1, 2 and 3 of the draft retain the crimes of forgery and uttering as now stated in the statutes, though with explicit definitions. The criminal intent, an "intent to injure or defraud," is identical to that set forth in the present statutes.

The definition of "written instrument" as proposed by the draft encompasses the kinds of documents now covered by ORS 165.105 and 165.110.

Whether the crimes of forgery and uttering or passing of forged instruments are separate and distinct offenses in Oregon is not clear. State v. Swank, 99 Or 571, 195 P 168 (1921) held that under the statute (OCLA 23-560, bisected in 1953 into ORS 165.105 and 165.115) the forgery of an instrument and the uttering of a forged instrument were separate and distinct crimes. However, in the case of

Dougharty v. Gladden, 217 Or 567, 341 P2d 1069 (1959), cert. den. 361 U.S. 867, the court held that OCLA 23-560 "clearly states but a single crime which may be committed by committing forgery or uttering, or both, as these crimes were known to the common law." The court distinguished the Swank case, saying that the discussion therein of forgery and uttering as separate offenses was in connection with OCLA 23-561 and 23-562 and applied only to the forging or uttering of an instrument purported to be executed by a sovereign entity "or any corporation, company or person duly authorized" by the sovereign entity to issue a bank bill, promissory note, draft, check, or other evidence of debt." See, Linde, Criminal Law - 1959 Oregon Survey, 39 OLR 166, for a commentary on the two cases wherein he raises the question of whether Swank and Dougharty leave us with the possible situation in which forgery and uttering may be two different crimes if the instrument purports to have sovereign backing, but a single crime if it does not. The draft would clarify the law on the point in issue by providing that forgery is a single crime that may be committed by falsely making, completing, or altering a written instrument or by uttering a forged instrument with knowledge of its forged character.

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Section 3. Forgery in the first degree. A person
commits the crime of forgery in the first degree if he
violates section 2 and the written instrument is or
purports to be any of the following:

(Existing
(Law
(ORS
(165.105,
(165.110,
(165.115

(1) Part of an issue of money, securities, postage
or revenue stamps, or other valuable instruments issued by
a government or governmental agency; or

(2) Part of an issue of stock, bonds or other instruments
representing interests in or claims against any property or
enterprise; or

(3) A deed, will, codicil, contract, assignment, commercial
instrument or other document which does or may evidence, create,
transfer, alter, terminate, or otherwise affect a legal right,
interest, obligation or status; or

(4) A public record, or an instrument filed or required or
authorized by law to be filed with a public office or public servant;
or

(5) A written instrument officially issued or created by a
public office, public servant or government agency.

COMMENTARY - FORGERY IN THE FIRST DEGREE

A. Summary

This section makes forgery more serious if the
instrument is of the kind specified. Subsections (1) and
(2) deal with instruments with an inherent pecuniary value
constituting part of a larger issue by a government or
business entity. Subsection (3) covers instruments that
directly affect a deed, will, contract or commercial
instrument transactions. Subsections (4) and (5)
relate to instruments fileable with or issued by a public
office or public servant.

B. Derivation

New York Revised Penal Law is the source of the section. Sections 170.10 and 170.15 have been combined. MPC section 224.1 is similar to the New York law in its grading of forgery. The more severe punishment is reserved for those cases in which the writing is or purports to be part of an issue of money, securities or other government issued instruments, or part of an issue of stock, bonds or other instruments representing claims against or interests in a commercial enterprise.

C. Relationship to Existing Law

The primary forgery statutes (ORS 165.105, 165.110, 165.115) each prescribe a maximum penalty of 10 years imprisonment, so it may be said that Oregon has no more than one degree of forgery. Orbiting these central forgery statutes, however, is a ring of satellite sections which provide for lesser penalties: Transmission of forged messages (ORS 165.145); forging railroad tickets (ORS 165.150); restoring or uttering canceled railroad ticket (ORS 165.155); counterfeiting serial number or article (ORS 165.175); counterfeiting label or trade mark (ORS 165.185). Forgery of the kind of instruments not included in this section is covered by section 2 which consolidates the above sections.

Present law is not changed by the draft in so far as it concerns forgery of negotiable instruments, public records, contracts, wills and similar writings. These continue to be the highest degree of forgery. Counterfeiting of coins (ORS 165.160) is proscribed by subsection (1).

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Section 4. Criminal possession of a forged instrument in the second degree. A person commits the crime of criminal possession of a forged instrument in the second degree if, knowing it to be forged and with intent to utter same, he possesses a forged instrument.

(Existing
(Law
(ORS
(165.120

COMMENTARY - CRIMINAL POSSESSION OF A FORGED INSTRUMENT
IN THE SECOND DEGREE

The existing statute, ORS 165.120, prescribes a maximum penalty of five years imprisonment for possession of a forged "evidence of debt specified in ORS 165.110" with intent to utter or pass it. Possession of forged writings other than those specified is not prohibited. The draft extends the scope of the statute to include all "forged instruments" as the term is defined in subsection (8) of section 1. The section is derived from New York Revised Penal Law section 170.20 but differs from that statute in that it does not combine uttering with possession. (See commentary to section 2.)

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Section 5. Criminal possession of a forged instrument in the first degree. A person commits the crime of criminal possession of a forged instrument in the first degree if, knowing it to be forged and with intent to utter same, he possesses a forged instrument of the kind specified in section 3.

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(Existing
(Law
(
(ORS
(165.120
(

COMMENTARY - CRIMINAL POSSESSION OF A FORGED INSTRUMENT

IN THE FIRST DEGREE

A. Summary

This section corresponds to section 3, forgery in the first degree, and aggravates criminal possession of a forged instrument if the instrument is of the kind designated therein.

B. Derivation

This section combines the provisions of sections 170.25 and 170.30 of New York Revised Penal Law.

C. Relationship to Existing Law

The draft continues to forbid the possession of the type of forged documents set forth in ORS 165.110, and broadens the scope of the statute to prohibit criminal possession of instruments of the kind enumerated in ORS 165.105, such as public records, deeds, wills, contracts, etc. This will have the effect of making the possession sections consistent with the forgery sections, and recognizes that the threat to the community is essentially the same in either case.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 170.05. Forgery in the third degree

A person is guilty of forgery in the third degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument.

Forgery in the third degree is a class A misdemeanor.

Section 170.10. Forgery in the second degree

A person is guilty of forgery in the second degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

1. A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate or otherwise affect a legal right, interest, obligation or status; or
2. A public record, or an instrument filed or required or authorized by law to be filed in or with a public office or public servant; or
3. A written instrument officially issued or created by a public office, public servant or governmental instrumentality; or
4. Part of an issue of tokens, public transportation transfers, certificates or other articles manufactured and designed for use as symbols of value usable in place of money for the purchase of property or services; or
5. A prescription of a duly licensed physician or other person authorized to issue the same for any drug or any instrument or device used in the taking or administering of drugs for which a prescription is required by law.

Forgery in the second degree is a class D felony.

Section 170.15. Forgery in the first degree.

A person is guilty of forgery in the first degree when, with intent to defraud, deceive or injure another, he falsely makes, completes or alters a written instrument which is or purports to be, or which is calculated to become or to represent if completed:

Text of New York Revised Penal Law (Cont'd)

1. Part of an issue of money, stamps, securities or other valuable instruments issued by a government or governmental instrumentality; or

2. Part of an issue of stock, bonds or other instruments representing interests in or claims against a corporate or other organization or its property.

Forgery in the first degree is a class C felony.

Section 170.20. Criminal possession of a forged instrument in the third degree

A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument.

Criminal possession of a forged instrument in the third degree is a class A misdemeanor.

Section 170.25. Criminal possession of a forged instrument in the second degree

A person is guilty of criminal possession of a forged instrument in the second degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.10.

Criminal possession of a forged instrument in the second degree is a class D felony.

Section 170.30. Criminal possession of a forged instrument in the first degree

A person is guilty of criminal possession of a forged instrument in the first degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses any forged instrument of a kind specified in section 170.15.

Criminal possession of a forged instrument in the first degree is a class C felony.

Text of Model Penal Code

Section 224.1. Forgery

(1) Definition. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:

(a) alters any writing of another without his authority; or

(b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or

(c) utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).

"Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification.

(2) Grading. Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise. Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations. Otherwise forgery is a misdemeanor.

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Section 6. Criminal possession of a forgery device. A person commits the crime of criminal possession of a forgery device if:

(1) He makes or possesses with knowledge of its character any plate, die or other device, apparatus, equipment or article specifically designed for use in counterfeiting or otherwise forging written instruments; or

(2) With intent to use, or to aid or permit another to use, the same for purposes of forgery, he makes or possesses any device, apparatus, equipment or article capable of or adaptable to such use.

COMMENTARY - CRIMINAL POSSESSION OF A FORGERY DEVICE

A. Summary

Subsection (1) designates the manufacture or possession of devices or articles specifically designed for criminal use as criminal per se.

Subsection (2) requires the additional element of an intent to use unlawfully with respect to items designed for legitimate use but adaptable to criminal purposes.

B. Derivation

This section is derived from New York Revised Penal Law section 170.40.

C. Relationship to Existing Law

ORS 165.125 penalizes the manufacture or possession of devices "adapted and designed for forging or making any false or counterfeit evidence of debt." The intent element is an "intent to use the same, or to cause or permit the same to be used in forging or making any such false or counterfeit evidence of debt." Maximum punishment provided is five years imprisonment.

ORS 165.165 employs essentially the same language with respect to the manufacture or possession of implements for counterfeiting coins. However, the maximum punishment provided is ten years imprisonment.

The draft section combines the substance of the two existing statutes, but with two significant modifications: (1) The prohibition is extended to include devices for forging any "written instrument" as that term is defined by section 1 (1) of the Forgery draft and, consequently, is not limited to "evidence of debt." (2) The manufacture or possession of a device specifically designed for use in counterfeiting or forging written instruments is made a criminal act, and an intent to use the device unlawfully is required only with respect to devices "capable of or adaptable to" use in such counterfeiting or forgery. Under subsection (1) the State must prove the requisite knowledge by the defendant, but need not prove an intent to use the item for forgery, as is required under subsection (2).

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 170.40. Criminal possession of forgery devices

A person is guilty of criminal possession of forgery devices when:

1. He makes or possesses with knowledge of its character any plate, die or other device, apparatus, equipment, or article specifically designed for use in counterfeiting or otherwise forging written instruments; or

2. With intent to use, or to aid or permit another to use, the same for purposes of forgery, he makes or possesses any device, apparatus, equipment or article capable of or adaptable to such use.

Criminal possession of forgery devices is a class D felony.

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Text of Michigan Revised Criminal Code

Criminal Possession of a Forgery Device

Sec. 4020. (1) A person commits the crime of criminal possession of a forgery device if:

(a) He makes or possesses with knowledge of its character any plate, die or other device, apparatus, equipment or article specifically designed or adapted for use in forging written instruments; or

(b) He makes or possesses any device, apparatus, equipment or article capable of or adaptable to a use specified in subparagraph (1) (a) with intent to use it himself, or to aid or permit another to use it, for purposes of forgery.

(2) Criminal possession of a forgery device is a Class C felony.

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Section 7. Criminal simulation. A person commits the crime of criminal simulation if:

(1) With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship that it does not in fact possess; or

(2) With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

COMMENTARY - CRIMINAL SIMULATION

This section is directed at fraudulent misrepresentation and simulation of antique or rare objects. It is taken from New York Revised Penal Law section 170.45 and is similar to MPC section 224.2. There is no Oregon statute covering "forgery" of "objects" other than writings; however, your reporter submits that such a provision is a desirable one, because, as the Michigan commentators state, "The preparation of this sort of object shows careful advance planning, and since the monetary stakes are often very high, it appears appropriate to penalize the preparation as such, particularly when apprehension of the criminal after the final frauds have been perpetrated is often very difficult."

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TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.2. Simulating Objects of Antiquity, Rarity, Etc.

A person commits a misdemeanor if, with purpose to defraud anyone or with knowledge that he is facilitating a fraud to be perpetrated by anyone, he makes, alters or utters any object so that it appears to have value because of antiquity, rarity, source, or authorship which it does not possess.

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Text of New York Revised Penal Law

Section 170.45. Criminal simulation

A person is guilty of criminal simulation when:

1. With intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source or authorship which it does not in fact possess; or
2. With knowledge of its true character and with intent to defraud, he utters or possesses an object so simulated.

Criminal simulation is a class A misdemeanor.

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Section 8. Fraudulently obtaining a signature. A person commits the crime of fraudulently obtaining a signature if, with intent to defraud or injure another or to acquire a substantial benefit for himself or another, he obtains the signature of a person to a written instrument by means of any misrepresentation of fact which he knows to be false.

COMMENTARY - FRAUDULENTLY OBTAINING A SIGNATURE

Section 8 covers conduct which is not forgery because the resulting written instrument is exactly what it purports to be -- a document executed by one who has the authority to do so.

A signature is not "property" as defined in the Theft Draft (T.D. #1), so obtaining a signature by fraud would not amount to theft by deception.

The section is derived from New York Revised Penal Law section 165.20 and resembles Michigan Revised Criminal Code (Final Draft) section 4030.

A phrase in the false pretenses statute (ORS 165.205), "or who obtains or attempts to obtain the signature of any person to any writing, the false making of which would be punishable as forgery," is the only existing Oregon law directed at the problem.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Revised Penal Law

Section 165.20. Fraudulently obtaining a signature

A person is guilty of fraudulently obtaining a signature when, with intent to defraud or injure another or to acquire a substantial benefit for himself or a third person, he obtains the signature of a person to a written instrument by means of any misrepresentation of fact which he knows to be false.

Fraudulently obtaining a signature is a class A misdemeanor.

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Text of Michigan Revised Criminal Code

Obtaining Signature by Deception

Sec. 4030. (1) A person commits the crime of obtaining a signature by deception if with intent to defraud or to acquire a substantial benefit for himself or another and by deception he causes another to sign or execute a written instrument.

(2) The definition of deception in section 3201 (a) applies to this section also.

(3) Obtaining a signature by deception is a Class A misdemeanor.

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Section 9. Unlawfully using slugs. (1) A person commits the crime of unlawfully using slugs if:

(a) With intent to defraud the supplier of property or a service sold or offered by means of a coin machine, he inserts, deposits or otherwise uses a slug in such machine; or

(b) He makes, possesses or disposes of a slug with intent to enable a person to use it fraudulently in a coin machine.

(2) Definitions. As used in this section:

(a) "Coin machine" means a coin box, turnstile, vending machine, or other mechanical or electronic device or receptacle designed to receive a coin or bill of a certain denomination or a token made for such purpose, and in return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition or use of some property or service.

(b) "Slug" means an object, article or device which, by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as a fraudulent substitute for a genuine coin, bill or token.

COMMENTARY - UNLAWFULLY USING SLUGS

A. Summary

The purpose of the section is to prevent the use of slugs or other devices in coin-operated machines and the professional manufacture of the slugs themselves. The culpability requirement that must accompany the use of a slug is an "intent to defraud the supplier" of property or services. (Subsection (1) (a)). The intent that must accompany the manufacture or possession of a slug is an "intent to enable a person to use it fraudulently in a coin machine."

"Coin machine" is defined broadly to include any type of vending machine or similar device designed to receive bills or tokens as well as coins, and which dispenses any property or service. "Slug", as the term is defined, includes, in addition to the familiar fake coin, any other device which is capable of being used in a coin machine as a fraudulent substitute for the genuine article.

B. Derivation

Subsection (1) is adapted from Michigan Revised Criminal Code (Final Draft 1967) section 4052, which, in turn, is based on New York Revised Penal Law section 170.55. Both of those states provide for two degrees of the crime, however, making it a more serious offense to possess or make slugs exceeding \$100 in "value" as they define the term. The proposed draft is limited to a single degree, which should be adequate to cover the problem in this state.

Subsection (2) is taken from New York Revised Penal Law section 170.50 with minor variations.

C. Relationship to Existing Law

Two existing statutes, ORS 165.525 and 165.530, now governing the problem will be repealed. The former statute prohibits the manufacture or sale of slugs, and the latter relates to possession of a "machine, appliance, contrivance or device" used or intended to be used to obtain a telephone or telegraphic service or any merchandise or service. ORS 165.530 also prohibits obtaining a service or merchandise without depositing money in the coin-collecting attachment. Such activity would amount to "theft of services" under the provisions of Tentative Draft No. 1 (July, 1968).

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TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code (Final Draft 1967)

Unlawfully Using Slugs: Definition of Terms

Sec. 4050. The following definitions apply to sections 4051 and 4052:

(1) "Coin machine" means a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle designed:

(a) To receive a coin or bill of a certain denomination or a token made for the purpose; and

(b) In return for the insertion or deposit thereof, automatically to offer, provide, assist in providing or permit the acquisition of property or a public or private service.

(2) "Slug" means a metallic or other object or article which by virtue of its size, shape or any other quality is capable of being inserted, deposited, or otherwise used in a coin machine as an improper but effective substitute for a genuine coin, bill or token.

(3) "Value" of the slug means the value of the coin, bill, or token for which it is capable of being substituted.

Unlawfully Using Slugs in the First Degree

Sec. 4051. (1) A person commits the crime of unlawfully using slugs in the first degree if:

(a) He makes, possesses or disposes of slugs with intent to enable a person to use them fraudulently in a coin machine; and

(b) The value of the slugs exceeds 100 dollars.

(2) Unlawfully using slugs in the first degree is a Class C felony.

Unlawfully Using Slugs in the Second Degree

Sec. 4052. (1) A person commits the crime of unlawfully using slugs in the second degree if:

(a) With intent to defraud the supplier of property or a service sold or offered by means of a coin machine, he inserts, deposits or uses a slug in that machine; or

Text of Michigan Revised Criminal Code (Cont'd)

(b) He makes, possesses or disposes of a slug or slugs with intent to enable a person to use it or them fraudulently in a coin machine.

(2) Unlawfully using slugs in the second degree is a Class B misdemeanor.

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Text of New York Revised Penal Law

Section 170.50. Unlawfully using slugs; definitions of terms

The following definitions are applicable to sections 170.55 and 170.60:

1. "Coin machine" means a coin box, turnstile, vending machine or other mechanical or electronic device or receptacle designed (a) to receive a coin or bill or a token made for the purpose, and (b) in return for the insertion or deposit thereof, automatically to offer, to provide, to assist in providing or to permit the acquisition of some property or some service.

2. "Slug" means an object or article which, by virtue of its size, shape or any other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill or token.

3. "Value" of a slug means the value of the coin, bill or token for which it is capable of being substituted.

Section 170.55. Unlawfully using slugs in the second degree.

A person is guilty of unlawfully using slugs in the second degree when:

1. With intent to defraud the owner of a coin machine, he inserts or deposits a slug in such machine; or

2. He makes, possesses or disposes of a slug with intent to enable a person to insert or deposit it in a coin machine.

Unlawfully using slugs in the second degree is a class B misdemeanor.

Text of New York Revised Penal Law (Cont'd)

Section 170.60. Unlawfully using slugs in the first degree

A person is guilty of unlawfully using slugs in the first degree when he makes, possesses or disposes of slugs with intent to enable a person to insert or deposit them in a coin machine, and the value of such slugs exceeds one hundred dollars.

Unlawfully using slugs in the first degree is a class E felony.

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Section 10. Fraudulent use of a credit card. (1) A person commits the crime of fraudulent use of a credit card if, with intent to injure or defraud, he uses a credit card for the purpose of obtaining property or services with knowledge that:

- (a) The card is stolen; or
- (b) The card has been revoked or canceled; or
- (c) For any other reason his use of the card is unauthorized by either the issuer or the person to whom the credit card is issued.

(2) "Credit card" means a card, booklet, or other identifying symbol or instrument evidencing an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

COMMENTARY - FRAUDULENT USE OF A CREDIT CARD

A. Summary

This section is intended to cover instances that probably do not constitute either theft or theft of services. Commentary to section 224.6 of the Model Penal Code indicates the reasons for having a separate statute on the subject:

"This is a new section to fill a gap in the law relating to false pretense and fraudulent practices. Sections 223.3 and 223.7 cover theft of property or services by deception. It is doubtful whether they reach the credit card situation because the user of a stolen or cancelled credit card does not obtain goods by any deception practiced upon or victimizing the seller. The seller will collect from the issuer of the credit card, because credit card users assume the risk of misuse of cards in order to encourage sellers to honor the cards readily. Thus it is the non-deceived issuer who is the victim of the practice." (P.O.D. p. 179 (1962)).

B. Derivation

The section is based on MPC section 224.6 and Michigan Revised Criminal Code (Final Draft, 1967). The stated intent "to injure or defraud" is the same as that which is set forth in the forgery sections of the draft. The existing statute (ORS 165.300) requires an intent "to defraud." The definition of "credit card" is an amended version of ORS 165.290 (1) and is more precise than the Model Penal Code's "writing or other evidence" definition.

C. Relationship to Existing Law

Three existing sections of ORS cover credit card crimes. ORS 165.290 defines the terms "credit card" and "card holder." ORS 165.295 deals with the unlawful taking, procuring, possession, alteration or use of a credit card. ORS 165.300 prohibits the fraudulent use of a revoked or canceled card.

The card itself would constitute "property"; consequently stealing it would be "theft" as defined in Tentative Draft No. 1. Possession of a stolen card would probably amount to "theft by receiving." Forging a credit card or possession of a forged card is prohibited by the forgery sections of the draft. Therefore, there is no purpose in having separate sections relating specifically to theft or forgery of credit cards.

What remains of the present statutes, then, is the gist of ORS 165.300, restated in slightly different and simplified language, with the scope of the crime enlarged to include use of a forged credit card.

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TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code

Section 224.6. Credit Cards.

A person commits an offense if he uses a credit card for the purpose of obtaining property or services with knowledge that:

- (a) the card is stolen or forged; or
- (b) the card has been revoked or cancelled; or
- (c) for any other reason his use of the card is unauthorized.

It is an affirmative defense to prosecution under paragraph (c) if the actor proves by a preponderance of the evidence that he had the purpose and ability to meet all obligations to the issuer arising out of his use of the card. "Credit card" means a writing purporting to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer. An offense under this Section is a felony of the third degree if the value of the property or services secured or sought to be secured by means of the credit card exceeds \$500; otherwise it is a misdemeanor.

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Text of Michigan Revised Criminal Code (Final Draft 1967)

Fraudulent Use of Credit Card

Sec. 4045. (1) A person commits the crime of fraudulent use of a credit card if he uses a credit card for the purpose of obtaining property or services with knowledge that:

- (a) The card is stolen; or
- (b) The card has been revoked or cancelled; or
- (c) For any other reason his use of the card is unauthorized by either the issuer or the person to whom the credit card is issued.

(2) "Credit card" means a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

(3) Fraudulent use of a credit card is a Class A misdemeanor.

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Section 11. Negotiating a worthless negotiable instrument. (1) A person commits the crime of negotiating a worthless negotiable instrument if, with intent to defraud and knowing that it will not be honored by the drawee, he negotiates or delivers a worthless negotiable instrument.

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(2) It is prima facie evidence of an intent to defraud and knowledge that the instrument would not be honored upon presentment if:

(a) The maker or drawer had no account with the drawee at the time the negotiable instrument was negotiated or delivered; or

(b) Presentment was made within a reasonable time after negotiation or delivery and payment was refused by the drawee for insufficient funds and the maker or drawer failed to make good within 10 days after receiving a notice of dishonor.

(3) Definitions. As used in this section, the following definitions apply:

(a) The definition of "presentment" in ORS 73.5040.

(b) The definition of "reasonable time for presentment" in ORS 73.5030.

(c) The definition of "notice of dishonor" in ORS 73.5080.

(d) The definition of "negotiable instrument" in ORS 73.1040.

(e) The definition of "negotiation" in ORS 73.2020.

(f) The definition of "delivery" in ORS 71.2010.

COMMENTARY - NEGOTIATING A WORTHLESS
NEGOTIABLE INSTRUMENT

A. Summary

This section prohibits issuing or passing "bad checks" and other worthless negotiable instruments. Subsection (1) sets out the definitive statement of the crime, employing terms and definitions from the Uniform Commercial Code.

Subsection (2) continues certain prima facie evidence provisions contained in the existing Oregon bad check statute.

Subsection (3) incorporates by reference U.C.C. definitions.

B. Derivation

This section is a modified version of section 4040 of Michigan Revised Criminal Code (Final Draft 1967) and resembles MPC section 224.5. The element of "intent to defraud" does not appear in the Michigan proposal, but your reporter believes it is desirable to retain this language from the present statute in preference to the "intent, knowledge or expectation" wording of the Michigan section. Subsections (2) and (3) have been altered in form to allow for a more precise statement of prima facie evidence provisions, but in substance is the same as the source section.

C. Relationship to Existing Law

Oregon first adopted a bad check statute in 1917 and since that time it has coexisted with the false pretenses statute. In State v. Cody, 116 Or 509, 241 P 983 (1925), the court distinguished the two statutes on the basis of whether property is transferred saying that the worthless check violation consists of drawing a bad check with intent to defraud and no property need change hands. The court recognized the Cody "property transfer" test in Gumm v. Heider, 220 Or 5, 348 P.2d 455 (1960), in which it held that ORS 165.225 is not violated by the making or delivering of a postdated check in payment of a debt if the payee accepts it knowing that it was postdated and if there is no other representation that the check is good. The rationale being that the party receiving the check has not been defrauded. See, also 25 Op. Atty. Gen. (1950-52) p. 40, 41.

The Cody test was discarded by the Oregon Court in Broome v. Gladden, 231 Or 502, 373 P.2d 611 (1962) in which it said:

"We construe ORS 165.205 and ORS 165.225 as defining mutually exclusive crimes. ORS 165.225 applies only where the accused has, prior to presenting the check, established an account in the bank upon which the check is drawn. Where no debtor-creditor relationship exists between the accused and the drawee bank the drawer may be prosecuted under ORS 165.205 but not under ORS 165.225." Id at p. 505.

The Broome doctrine later was extended to cover the case in which there is an account but which has no funds at the time the check was drawn in State v. Scott, 237 Or 390, 390 P.2d 328 (1964). Therefore, if there is a bank account the state must charge the defendant under the bad check statute, whereas, if property is obtained by the use of a check drawn on a non-existent account, the false pretense statute must be used. This result has been criticized as permitting a bad check artist to avoid felony prosecution by opening an account and then making all overdrafts for less than \$75.00. (See 45 Q.L.R. 81-84.) The draft section treats no account and insufficient funds checks alike.

Both statutes have the common element of "an intent to defraud," with the bad check statute containing certain prima facie evidence provisions relating to such an intent. The knowledge of the defendant of insufficient funds under ORS 165.225 is "at the time of the making, drawing, uttering or delivering." The draft section changes this to one of "knowing that it will not be honored by the drawee." As the Michigan commentary states:

"This (knowledge at the time of the making) hardly appears to correspond to commercial practice or popular expectation. The important thing is not whether at the exact time that the instrument is written or passed the drawee happens to have received funds from or on behalf of the drawer. Rather, the important thing is that by the time the instrument is presented there is some reason to honor it." (Michigan Revised Criminal Code, Final Draft, 1967, p. 275.).

The proposed section penalizes either the negotiating or the delivery of a worthless instrument and is probably not substantially different from the "makes, draws, utters or delivers" of the existing statute but utilizes the terminology of the Uniform Commercial Code incorporated by reference. It is intended to ensure that not only one who originally makes or draws an instrument, but also one who indorses it with knowledge that it will not be honored, will be included. This does not change existing law in this respect. See State v. Robinson, 120 Or 508, 252 P. 951 (1927).

Under the prima facie evidence provisions of the section the state meets its initial burden of proving intent if it shows either that the issuer of the instrument had no account with the drawee or that the instrument was not made good within ten days after receipt of a notice of dishonor. This does not mean that the state cannot prosecute until after the ten day period has elapsed, but, merely that the prima facie evidence provisions are not available against a defendant who has an account with the drawee until this time has gone by.

As observed by the MPC reporters, special bad check legislation has two practical advantages that should be retained, even though a comprehensive theft statute is enacted: (1) No actual obtaining of property need be proven and (2) Prima facie evidence provisions take care of the intent or knowledge factors. (Tentative Draft #2, p. 117). Moreover, the Michigan approach emphasizes the protection of the system of negotiable paper itself and there is a sound policy rationale behind a criminal statute that helps to safeguard public confidence in a commercial system that is so widely used in society on a daily basis. However, since the more serious deprecations could be prosecuted for theft by deception, it is anticipated that misdemeanor penalties would be adequate to provide adequate protection for the system under the proposed section.

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TEXT OF REVISIONS OF OTHER STATES

Text of Michigan Revised Criminal Code (Final Draft 1967)

Negotiating a Worthless Negotiable Instrument

Sec. 4040. (1) A person commits the crime of negotiating a worthless negotiable instrument if he negotiates or delivers a negotiable instrument with the intent, knowledge or expectation that it will not be honored by the drawee.

(2) The fact that:

(a) The maker or drawer had no account with the drawee at the time the negotiable instrument was negotiated or delivered; or

(b) Payment was refused by the drawee for lack of funds, upon presentation within a reasonable time after negotiation or delivery, as determined according to section 3503 of the Uniform Commercial Code, and the maker or drawer failed to make good within 10 days after receiving a notice of dishonor as defined in section 3508 of the Uniform Commercial Code, shall be prima facie evidence of intent, knowledge, or expectation that the negotiable instrument would not be honored upon presentation.

(3) The definition of negotiable instrument in section 3104 of the Uniform Commercial Code applies to this section.

(4) The definition of negotiation in section 3202 of the Uniform Commercial Code applies to this section.

(5) The definition of delivery in section 1201 (14) of the Uniform Commercial Code applies to this section.

(6) Negotiating a worthless negotiable instrument is a Class A misdemeanor.

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Text of Model Penal Code

Section 224.5. Bad Checks.

A person who issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee, commits a misdemeanor. For the purposes of this Section as well as in any prosecution for theft committed by means of a bad check, an issuer is presumed to know that the check or order (other than a postdated check or order) would not be paid, if:

(a) the issuer had no account with the drawee at the time the check or order was issued; or

(b) payment was refused by the drawee for lack of funds, upon presentation within 30 days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal.

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