

See: Minutes of Commission  
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Tapes #57 & 58

CRIMINAL LAW REVISION COMMISSION  
311 Capitol Building  
Salem, Oregon

ARTICLE 19. BUSINESS AND COMMERCIAL OFFENSES

Tentative Draft No. 1; May 1970

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Subcommittee No. 1

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# # #

ARTICLE 19. BUSINESS AND COMMERCIAL OFFENSES

Tentative Draft No. 1; May 1970

Section 1. Business and commercial offenses; definitions. As used in this Article, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Business records" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

(3) "Enterprise" means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.

COMMENTARY - BUSINESS AND COMMERCIAL OFFENSES; DEFINITIONS

A. Summary

The definition of "benefit" restates that used in the Article on Perjury and Related Offenses.

"Business records" includes all records maintained incident to a business enterprise. It is intended to include written material prepared for use or distribution outside the normal recordation system, e.g., stock offer prospectus, reports of business activities.

"Enterprise" includes virtually every type of private organized activity for which permanent records are maintained. It does not include any form of governmental instrumentality.

B. Derivation

Reference was made to New York Revised Penal Law s. 175.00 and Michigan Revised Criminal Code s. 4125 (2) and (3).

C. Relationship to Existing Law

As used in this context the definitions are new to Oregon law.

ORS 41.680: Defines the term "business" as including "every kind of business, profession, occupation, calling or operating of institutions, whether carried on for profit or not."

ORS 41.690: Admissibility of business records. "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission."

Section 2. Falsifying business records. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(c) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon him by law or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) Falsifying business records is a Class A misdemeanor.

#### COMMENTARY - FALSIFYING BUSINESS RECORDS

##### A. Summary

Section 2 makes punishable falsifying, destroying or otherwise impairing business records. The culpability element is an intent to defraud.

Current legislation is moving toward the extension of criminal sanctions in this field. New York Revised Penal Law s. 175.05 and 175.10 and Michigan Revised Criminal Code s. 4125 deal with this type of falsification. The New York provisions include public records, which under our proposed code will be treated as tampering with public records.

The modern trend has been to make the falsification of private and public records a distinct substantive offense. It is recognized, of course, that the basic elements of forgery law are inextricably involved in such statutes.

The Model Penal Code commentary (Tent. Draft No. 11, p. 98 (1960)) makes this observation in support of the rationale behind such legislation:

"In a highly organized society like ours where accuracy of corporate and other records is nearly as important as accuracy of public records, the need for deterring tampering with such records seems reasonably clear, and there is no occasion to distinguish in this regard between corporate records and those of a church, union or club."

It should be noted that it is not the intention of the proposed section to preserve the integrity of business records. Instead, the prohibition is directed at conduct preliminary to the commission of a fraud, in that it requires "intent to defraud."

B. Derivation

Section 2 is derived from Michigan Revised Criminal Code s. 4125 and New York Revised Penal Law s. 175.00 and 175.05.

C. Relationship to Existing Law

There are a number of Oregon statutes that deal with falsification of business and commercial records:

ORS 165.235: Issuing a false invoice, bill of lading or estimate of property. Recommend repeal.

ORS 165.250: Destruction or falsification of corporate records. Recommend repeal.

ORS 165.255: Officer or agent of savings and loan association distributing false material. Recommend repeal by section 9.

ORS 165.655: Issuing receipt where no goods are received. Recommend repeal.

ORS 165.660: Issuing receipt containing false statements. Recommend repeal.

ORS 165.665: Fraudulently issuing duplicate or additional receipts. Recommend repeal.

ORS 708.705: False statements in report or book entry by bank. Recommend repeal.

ORS 708.710: False or omitted book entry by bank. Recommend repeal.

No Oregon cases deal directly with falsification of private business records. Reported cases in this area concern themselves primarily with forgery offenses.

In that connection it is essential to distinguish between a false instrument and false statements in an instrument. No amount of misstatement of fact and no amount of fraud will make a false instrument out of what purports to be the very instrument which it is in fact and in law. As stated by Perkins:

"If a man fraudulently executes a deed to real estate with a covenant that it is free and clear of encumbrances, this is a genuine deed even if the grantor knows that the land is subject to a heavy mortgage. It is a genuine deed with a false covenant. This is a case of the false making of a writing with intent to defraud, but it will not support a conviction of forgery because for this purpose it would be necessary to show that the deed itself was false. Typical instances of writings which are falsely made with intent to defraud but are not forgery because they are genuine writings with false statements rather than false writings, are (1) a 'padded' time roll issued by the one authorized to issue it, (2) a warehouse receipt fraudulently issued by a warehouse which did not have the grain purportedly represented thereby, (3) a check wrongfully drawn on a bank in which the drawer has no funds, or insufficient funds, or (4) a false entry made in one's own account book." Perkins, Criminal Law 296 (Foundation Press 1959).

Authorities

41 ALR 231  
2 Burdick, Law of Crime s. 661 (1946)

Section 3. Sports bribery; definitions. As used in sections 4 and 5 of this Article, unless the context requires otherwise:

(1) "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.

(2) "Sports official" means any person who acts in sports contests as an umpire, referee, judge or sports contest official.

(3) "Sports participant" means any person who directly or indirectly participates in sports contests as a player, contestant, team member, coach, manager, trainer, or any other person directly associated with a player, contestant or team member in connection with a sports activity.

#### COMMENTARY - SPORTS BRIBERY; DEFINITIONS

##### A. Summary

The definitions of these three terms are designed to insure brevity and precision in the statutes dealing with sports bribery.

##### B. Derivation

The model for the definitions is New York Revised Penal Law s. 180.35.

##### C. Relationship to Existing Law

The definitions are new to Oregon law.



Section 4. Sports bribery. (1) A person commits the crime of sports bribery if he:

(a) Offers, confers or agrees to confer any benefit upon a sports participant with intent to influence him not to give his best effort in a sports contest; or

(b) Offers, confers or agrees to confer any benefit upon a sports official with intent to influence him to improperly perform his duties.

(2) Sports bribery is a Class C felony.

Section 5. Sports bribe receiving. (1) A person commits the crime of sports bribe receiving if:

(a) As a sports participant he solicits, accepts, or agrees to accept any benefit from another person with the intent that he will thereby be influenced not to give his best effort in a sports contest; or

(b) As a sports official he solicits, accepts, or agrees to accept any benefit from another person with the intent that he will improperly perform his duties.

(2) Sports bribe receiving is a Class C felony.

COMMENTARY - SPORTS BRIBERY; SPORTS BRIBE RECEIVING

A. Summary

Section 4 concerns itself with the bribe giver. Paragraph (a) of subsection (1) prohibits offering, giving or agreeing to give a benefit to a sports participant with the intent that the athlete not give his best effort in a sports contest.

"Benefit" is defined in section 1 to include any kind of gain or advantage. The mens rea requirement is focused here, as it is in all the bribery sections, on the wrongful intent of the actor; it is not necessary to show a bilateral agreement or understanding. Paragraph (b) of subsection (1) prohibits the same conduct in relation to a sports official. The culpability factor here is an intent to influence the official to improperly perform his duties. It should be noted that since the wrongful intent of the actor is the gravamen of the offense, it is immaterial whether the sports participant or sports official was in fact influenced.

Section 5 contains the same elements as found in section 4, except that it relates to bribe receiving.

B. Derivation

The proposed sections are derived from Michigan Revised Criminal Code ss. 4211 and 4212, and New York Revised Penal Law ss. 180.40 and 180.45.

C. Relationship to Existing Law

Oregon has four statutes governing bribery of participants in athletic contests and bribery of athletic coaches and officials. (ORS 167.720-167.735).

In addition, five statutes in ORS chapter 462 (racing) punish the unlawful administration of stimulating or depressive drugs to racehorses.

ORS 167.720: Bribing participant in athletic contest.  
Recommend repeal.

ORS 167.725: Acceptance of bribe by athlete. Recommend repeal.

ORS 167.730: Bribery of athletic coaches and officials.  
Recommend repeal.

ORS 167.735: Acceptance of bribe by coach or official.  
Recommend repeal.

ORS 462.420: Stimulating or depressing racing animal with drugs or unauthorized device.

ORS 462.430: Attempt to affect race result by unlawfully stimulating or depressing participating animal.

ORS 462.440: Entering unlawfully stimulated or depressed animal in race within 48 hours of administration of drug.

ORS 462.450: Regulation of possession, transportation or use of local anesthetics or barbituric acid preparation or derivations within racing enclosure.

ORS 462.990: Penalty provisions for violations of ORS chapter 462. Designated a felony with imprisonment in the Oregon State Penitentiary for not more than two years, or by fine of \$5,000, or both.

It is recommended that these specialized racing statutes be retained.

ORS 136.550: Test of accomplice corroboration. A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the crime. The corroboration is not sufficient if it merely shows the commission of the crime or the circumstances of the commission.

There are no reported appellate cases in Oregon involving sports bribery. The test of accomplice corroboration as it applies to bribery is enunciated by the court in State v. Coffey, 157 Or 457, 72 P2d 35 (1937).

"A person is not an 'accomplice' within the statute requiring an accomplice's testimony be corroborated to sustain a conviction unless such person can be indicted and punished under the same statute which is being invoked against defendant...A person who bribed a police officer was not an 'accomplice' whose testimony was required to be corroborated in prosecution of sergeant under statute making it a crime for executive officers to receive any thing intended to influence them in discharge of their duties, since bribe giver could not be indicted and punished under same statute employed against sergeant." Accord, State v. McCowan, 203 Or 551, 280 P2d, 976 (1955).

The proposed sections on sports bribery do not depart from the substantive coverage presently in effect. The term "with the intent, understanding or agreement that [the participant, contestant or player] shall not use his best effort," is replaced with "intent to influence him not to give his best effort."

Section 6. Misapplication of entrusted property. (1) A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful and that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property, he intentionally misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) As used in this section:

(a) "Fiduciary" means a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity as agent or employe of an organization which is a fiduciary.

(b) "Misapplies" means dealing with property contrary to law or governmental regulation governing the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

(3) Misapplication of entrusted property is a Class A misdemeanor.

#### COMMENTARY - MISAPPLICATION OF ENTRUSTED PROPERTY

##### A. Summary

The mens rea requirements of section 6 include (1) knowledge that the conduct or action is contrary to the legally established rules governing care of entrusted property, and (2) knowledge that such conduct or action involves a substantial risk of loss or detriment to the actual owner or beneficiary of the property, and (3) an intentional misapplication or disposition of that property.

Section 6 is intended to reach recklessness in the handling of certain kinds of property by those acting in a fiduciary capacity, e.g., fiduciaries of governmental and financial institutions, trustees, administrators, executors, attorneys at law. This type of nonfraudulent misdealing with property is distinguished from theft by the moral quality of the conduct. Misdemeanor sanctions in this area would be sufficient to deter persons acting in a fiduciary capacity from wrongful dealing with property involving no gain or advantage to the actor or to a third person in whom he is interested.

To the extent that state regulatory statutes govern banking, insurance, trust companies and investment funds, a knowing violation of such law may reasonably be subject to criminal sanction.

The term "property" is defined in section 1 of this Article. The definitions of "fiduciary" and "misapplies" in subsection (2) are self-explanatory.

#### B. Derivation

Section 6 is derived from Michigan Revised Criminal Code s. 4155, which was modeled after Model Penal Code s. 224.13.

#### C. Relationship to Existing Law

There are a number of Oregon statutes covering the conversion and misapplication of property by certain specified persons which are designated embezzlement. These provisions require an intent to deceive, injure or defraud.

Numerous other provisions impose a standard of legal duty in connection with the care and disposition of entrusted property:

ORS 707.720: Violations of law or omission of duty by bank, trust company officer or director.

ORS 707.990 (2): Provides misdemeanor penalty for violation.

ORS chapter 708: Regulation of Bank and Trust Companies generally.

- ORS chapter 709: Regulation of Trust Business.
- ORS chapter 716: Mutual Savings Banks.
- ORS chapter 722: Loan Associations.
- ORS chapter 723: Credit Unions.
- ORS chapter 724: Industrial Loan Companies.
- ORS chapter 725: Small Loan Companies.
- ORS chapter 733: Accounting and Investments of Insurance Companies.
- ORS 726.270: Prohibits the conversion or disposition of unredeemed pledge by pawnbroker for specified period of time.
- ORS 293.265: Receiving, handling and disbursing state funds.
- ORS 180.370: Turning over to State Public Welfare Commission monies received by Welfare Recovery Division.
- ORS 8.130: Paying over to State Treasurer charges collected by Clerk of Supreme Court.
- ORS 462.260: Monies paid to Racing Commission to be deposited in a bank.
- ORS 423.070: Funds received under Western Interstate Corrections Compact.
- ORS 156.650: Disposition of fines and forfeited bail in criminal actions in district court.
- ORS 251.610: Election recount deposits.
- ORS 292.316: Certain state officers required to pay fees and commissions into treasury.
- ORS 279.722: Disposition of bid deposits.
- ORS 297.120: Investigating loss of public funds or property involving a public officer.
- ORS 126.225: General functions of guardians of estate.
- ORS 126.250: Investments by guardian.
- ORS 127.060: Duties and powers of trustee conserving property of missing persons.
- ORS 128.410 and 128.415: Payments made under prearranged funeral plans as trust funds and their required deposit.
- ORS 128.990: Misdemeanor penalty for violation of ORS 128.410 and 128.415.
- ORS 128.020: Investments by fiduciaries; "prudent man rule."

It is recommended that those statutes designed to penalize misapplication of entrusted property be graded the same as section 6.

Some of the persons covered by these provisions would not be acting in a fiduciary capacity as defined in this section. Public servants who misapply property entrusted to them in their official capacity would be covered by the section on official misconduct if an intent to benefit themselves or to harm another was present.

The conduct reached by section 6 must be clearly distinguished from the fraudulent misapplication of entrusted property. The deviations from fiducial duty contemplated by this section involve the reckless or grossly negligent management of entrusted property. It does not include the culpability element of intent to deceive, injure or defraud.

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Black's Law Dic (4th Ed 1951), defines the term "misapplication":

"Improper, illegal, wrongful, or corrupt use or application of funds, property, etc."

Ferguson v. State, 80 Tex Cr R 383, 189 SW 271, construed a statute similar in import to the present Oregon embezzlement statutes:

"Under statute declaring guilty of a felony an officer or clerk of a state bank who 'embezzles, abstracts, or wilfully misapplies' its funds, 'embezzle' refers to acts done for the benefit of the actor as against the bank, 'misapply' covers acts having no relation to pecuniary profit or advantage to the doers, while 'abstracts' means only to take and withdraw from the possession and control of the bank; and while 'embezzlement' may include the offenses of abstraction and wilful misapplication, either of these offenses may be committed without embezzlement."

A recent Oregon case construed the mens rea requirements of the Oregon embezzlement statutes:

State v. Hanna, 224 Or 588, 356 P2d 1046 (1960), held that criminal intent is necessary to make out the crime of embezzlement by bailee, mortgagor or purchaser under a conditional sales contract. (ORS 165.010). The court quoted Perkins, Criminal Law 817 (1957):

"This intent, while perhaps not strictly an intent to steal, is an intent to deprive the owner of his property and is for practical purposes the counterpart of the animus ferandi required for larceny. Hence the unauthorized retention of the property of another under a bona-fide claim of right is not embezzlement even if the error is one of law."

The court went on to say:

"The crime of conversion of public funds (ORS 165.015) has been generally regarded as not requiring proof of a specific intent to defraud. As explained by Perkins, Criminal Law, pp. 247-249 (1957), this offense is considered to be a special type of crime designed to hold public officers strictly accountable for the conversion of public funds, even though they may not embezzle or fraudulently convert the property."

Marshall v. Frazier, 159 Or 491, 80 P2d 42, 81 P2d 132 (1938), discusses the fiduciary duty of a trustee:

"If a trustee acts within his power, good faith is a defense to a charge of mistake in judgment, and, if the trust provision gives the trustee wide powers of investment, he may exercise his sound discretion within those limits, and his actions are not to be tested by considerations of 'hindsight' judgment. Discretion to a trustee does not mean arbitrary or unlimited or absolute discretion, but a reasonable one, and trustee must use judgment and prudence, and, if no limits are placed on his discretion, must nevertheless invest funds according to approved rules for trust investments.

"Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity, as respects investments."



Section 7. Issuing a false financial statement. (1) A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written statement which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(b) Represents in writing that a written statement purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the statement to be materially inaccurate in that respect.

(2) Issuing a false financial statement is a Class A misdemeanor.

#### COMMENTARY - ISSUING A FALSE FINANCIAL STATEMENT

##### A. Summary

This section covers the preparation or issuance of a false financial report, or the certification of such a report. The mens rea requirement is knowledge that the written statements are false coupled with an intent to defraud. Culpability attaches to issuance of the false statement with the specified intent, regardless of the success or failure of the fraudulent scheme. If property is actually obtained, the crime of theft by deception will have been committed.

Paragraph (a) of subsection (1) applies to the primary source of the fraudulent statement. Paragraph (b) extends beyond the original source of the misstatement to reach the person who either (1) affirms it because of his position, e.g., accountant or auditor, or (2) employs the misstatement for his own fraudulent purposes.

While both subsections require an intent to defraud, the benefit need not flow to the defendant. The term "defraud" is used in its ordinary dictionary sense, "to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." Black's Law Dic (4th ed 1951).

The requirement that the misstatement be "material" is intended to exempt minor inaccuracies not inducing an element of reliance.

B. Derivation

With minor changes the section is a composite of Michigan Revised Criminal Code s. 4145 and New York Revised Penal Law s. 175.45.

C. Relationship to Existing Law

Existing statutes:

ORS 165.615: False statements as to financial condition or ability to pay. Recommend repeal.

ORS 165.620: Procuring benefit upon false statement concerning financial condition. Recommend repeal.

ORS 165.625: Publication of false statement concerning liabilities or assets of company. Recommend repeal.

ORS 59.135: Prohibits fraud and deceit with respect to securities or the security business. Subsection (2) refers to untrue statements of material fact. Recommend retention.

A federal case held that, "Fraudulent representations as to the financial responsibility of another for the purpose of procuring him credit are actionable, though containing no statement as to the amount of credit it is safe to extend." Nevada Bank of S. F. v. Portland National Bank, 59 F 338 (cc Or 1893).

ORS 165.615 was discussed in State v. Bosch, 139 Or 150, 7 P2d 554 (1932). The court reviewed the legislative history of the statute:

"OC 14-335 (now ORS 165.615) was enacted by the legislature at its 1921 session, being 'An act relating to false statements in writing to obtain credit...any person who shall knowingly make...any false statement in writing, with intent that it shall be relied upon, respecting the financial condition, or means or ability to pay of himself...for the purpose of procuring... the making of a loan or credit, the extension of credit...shall be guilty of a misdemeanor.' Section (3) of the act makes it a misdemeanor for any person to make, in writing, a false statement to the effect that any former statement so made was and still is a correct statement, for the purpose of procuring credit or other benefits."

The proposed section is not a departure from existing Oregon law. The present statutes relating to securities should be retained as they are designed to provide increased protection in an area that demands a high degree of public confidence.

Section 8. Obtaining execution of documents by deception. (1)

A person commits the crime of obtaining execution of documents by deception if, with intent to defraud or injure another or to acquire a substantial benefit, he obtains by means of fraud, deceit or subterfuge the execution of a written instrument affecting or purporting to affect the pecuniary interest of any person.

(2) Obtaining execution of documents by deception is a Class A misdemeanor.

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COMMENTARY - OBTAINING EXECUTION OF DOCUMENTS BY DECEPTION

A. Summary

This section is designed to complement coverage provided in other provisions relating to theft by deception and fraudulently obtaining a signature. It avoids the problems involved in the "property" concept inherent in the theft provisions. The same approach was used in drafting the section on fraudulently obtaining a signature in Article 18. Some written instruments whose execution is obtained by deception may not properly be classified as "property" within the theft definition, even though they indirectly represent a beneficial interest, e.g., fishing and hunting license, motor vehicle registration. The basic forgery provisions would not be applicable since the written instrument would legitimately be what it purported to be.

The section does not cover obtaining execution of documents by threats and intimidation. This type of misconduct is reached by a general criminal coercion section.

The scope of the section is broad enough to include the execution of releases, wills, leases, trust agreements, licenses, election certificates, extension of time for obligation payments and other similar written instruments that involve a pecuniary interest.

Article 22 prohibits making unsworn written falsifications to a public servant in connection with an application for any benefit. Section 8 extends that prohibition to the private sector by prohibiting all fraudulent means of obtaining written instruments or documents representing a pecuniary interest.

B. Derivation

The proposed section is derived from Model Penal Code s. 224.14.

C. Relationship to Existing Law

There are numerous Oregon statutes dealing with fraud, deception and misrepresentation in applying for and obtaining various types of documents.

The majority of these provisions are regulatory in nature with misdemeanor penalties attached.

ORS 288.991: Wilful false written representation in support of application for payment or reissuance of lost, mutilated or destroyed evidence of indebtedness. Felony - five years, \$10,000 fine maximum.

ORS 462.195: False statement as to age to obtain mutual wagering ticket or receipt. Misdemeanor

ORS 746.100: False or fraudulent statements or representations in insurance applications or transactions.

The following statutes relate to fraudulent and deceptive practices in obtaining professional licenses and certificates. Some provide criminal penalties, while others refer to the suspension, revocation or refusal to issue or renew such instruments.

ORS 671.090: Architect's certificate.

ORS 672.200: Professional engineers

ORS 673.170: Accountants.

ORS 675.070: Psychologists.

ORS 677.200: Physicians.

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ORS 678.085: Nurses. Misdemeanor penalty (ORS 678.990).

ORS 679.170: Dentists.

ORS 682.110: Podiatrists.

ORS 683.140: Optometrists.

ORS 684.100: Chiropractors.

ORS 685.110: Naturopaths.

ORS 687.081: Masseurs

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ORS 688.120: Physical therapists. Misdemeanor (ORS 688.990).

ORS 689.410: Pharmacists.

ORS 690.220: Barbers. Misdemeanor (ORS 690.990).

ORS 691.130: Cosmetic therapists.

ORS 692.180 (n): Funeral directors and embalmers.

ORS 693.090 (a): Plumbers.

ORS 694.135 (2): Hearing aid dealers.

ORS 695.070 (b): Watch and clock makers.

ORS 696.300: Real estate brokers.

ORS 698.560: Auctioneers.

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The Commission recommends that the penalty sections in these regulatory provisions be graded the same as section 8. Those regulatory sections that do not impose a criminal penalty would, of course, remain unaffected by section 8.

State v. Tauscher, 227 Or 1, 360 P2d 764 (1961), discusses the property concept as it relates to the crimes of larceny, embezzlement and false pretenses:

"Since...the crime of false pretenses is analogous to the crime of larceny, these cases support our conclusion that only property which is tangible and capable of being possessed may be the subject of larceny under ORS 164.310...embezzlement under ORS 165.005 [and false pretenses under ORS 165.205]." At 23.

Fraud, deceit, deception or misrepresentation of a material fact employed in obtaining execution of a document embodying a beneficial interest would not be perjury unless given under oath; it would not constitute an unsworn falsification unless given in writing to a public servant; it would not be forgery since the document would be authentic; and, it would not be theft by deception unless the document or pecuniary interest contained therein fell clearly within the theft concept of "property."

This section attempts to focus on certain culpable misconduct while avoiding collision with those legal distinctions.

SUPPLEMENTAL COMMENTARY - BUSINESS AND COMMERCIAL OFFENSES

A number of proposals were considered by the Commission involving fraud against creditors and commercial bribery, e.g., defrauding secured and judgment creditors, fraud in insolvency, receiving deposits in a failing financial institution. While recognizing that some problems exist in these areas, the Commission rejected coverage herein as being incompatible with the overall objective of criminal code revision. In relegating control of these problems to civil and regulatory provisions outside the criminal code, the Commission was influenced by four considerations:

- (1) The current trend towards liberal credit practices makes impracticable enforcement of security interests by the criminal law.
- (2) Business and commercial standards are varied and complex. It is difficult to legislate in an area that offers no clear line of demarcation between permissible and impermissible conduct, e.g., standards of accountability between employer and employe, expense account transactions, traffic in trade secrets.
- (3) Deposits in financial institutions are federally insured. Banks, trust companies and savings and loan companies are strictly regulated by other Oregon statutes.
- (4) Adequate civil remedies are available to creditors, depositors and employers to redress breach of contractual and employment agreements.



TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

**Section 224.4. Tampering with Records.**

A person commits a misdemeanor if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing.

**Section 224.9. Rigging Publicly Exhibited Contest.**

(1) A person commits a misdemeanor if, with purpose to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:

(a) confers or offers or agrees to confer any benefit upon, or threatens any injury to a participant, official or other person associated with the contest or exhibition; or

(b) tampers with any person, animal or thing.

(2) Soliciting or Accepting Benefit for Rigging. A person commits a misdemeanor if he knowingly solicits, accepts or agrees to accept any benefit the giving of which would be criminal under Subsection (1).

(3) Participation in Rigged Contest. A person commits a misdemeanor if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct which would be criminal under this Section.

**Section 224.13. Misapplication of Entrusted Property and Property of Government or Financial Institution.**

A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner which he knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted. The offense is a misdemeanor if the amount involved exceeds \$50; otherwise it is a petty misdemeanor. "Fiduciary" includes trustee, guardian, executor, administrator, receiver and any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

**Section 224.14. Securing Execution of Documents by Deception.**

A person commits a misdemeanor if by deception he causes another to execute any instrument affecting or likely to affect the pecuniary interest of any person.

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TEXT OF ILLINOIS CRIMINAL CODE OF 1961

**§ 17-1. Deceptive Practices**

A person commits a deceptive practice when:

(a) He causes another, by deception or threat to execute a document disposing of property or a document by which a pecuniary obligation is incurred, or

(b) Being an officer, manager or other person participating in the direction of a financial institution, he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent, or

(c) He knowingly makes or directs another to make a false or deceptive statement addressed to the public for the purpose of promoting the sale of property or services, or

(d) With intent to obtain control over property or to pay for property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository. Failure to have sufficient funds or credit with the depository when the check or other order is issued or delivered is prima facie evidence that the offender knows that it will not be paid by the depository.

Financial Institution.

A financial institution means a bank, insurance company, credit union, savings and loan association, investment trust or other depository of money or medium of savings or collective investment.

Penalty.

A person convicted of deceptive practices shall be fined not to exceed \$500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 17-1.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

**§ 165.00 Misapplication of property**

1. A person is guilty of misapplication of property when, knowingly possessing personal property of another pursuant to an agreement that the same will be returned to the owner at a future time, he loans, leases, pledges, pawns or otherwise encumbers such property without the consent of the owner thereof in such manner as to create a risk that the owner will not be able to recover it or will suffer pecuniary loss.

2. In any prosecution under this section, it is a defense that, at the time the prosecution was commenced, (a) the defendant had recovered possession of the property, unencumbered as a result of the unlawful disposition, and (b) the owner had suffered no material economic loss as a result of the unlawful disposition.

Misapplication of property is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.00 Falsifying business records; definitions of terms**

The following definitions are applicable to sections 175.05 and 175.10:

1. "Enterprise" means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political or governmental activity.

2. "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.05 Falsifying business records in the second degree**

A person is guilty of falsifying business records in the second degree when, with intent to defraud, he:

1. Makes or causes a false entry in the business records of an enterprise; or

2. Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

3. Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

4. Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

Falsifying business records in the second degree is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 175.45 Issuing a false financial statement**

A person is guilty of issuing a false financial statement when, with intent to defraud:

1. He knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of some person and which is inaccurate in some material respect; or
2. He represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to such person's current financial condition or ability to pay, whereas he knows it is materially inaccurate in that respect.

Issuing a false financial statement is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.35 Sports bribery; definitions of terms**

As used in this article:

1. "Sports contest" means any professional or amateur sport or athletic game or contest viewed by the public.
2. "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.
3. "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee, judge or otherwise to officiate at a sports contest. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.40 Sports bribing**

A person is guilty of sports bribing when he:

1. Confers, or offers or agrees to confer, any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or
2. Confers, or offers or agrees to confer, any benefit upon a sports official with intent to influence him to perform his duties improperly.

Sports bribing is a class D felony. L.1965, c. 1030, eff. Sept. 1, 1967.

**§ 180.45 Sports bribe receiving**

A person is guilty of sports bribe receiving when :

1. Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

2. Being a sports official, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

Sports bribe receiving is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

TEXT OF MICHIGAN REVISED CRIMINAL CODE

**[Falsifying Business Records]**

Sec. 4125. (1) A person commits the crime of falsifying business records if, with intent to defraud, he:

(a) Makes or causes a false entry in the business records of an enterprise; or

(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise, or

(c) Omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law other than for the convenience of the government or by the nature of his position; or

(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) "Enterprise" means any entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, industrial, eleemosynary or social activity.

(3) "Business record" means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(4) Falsifying business records is a Class A misdemeanor.

**[Issuing a False Financial Statement]**

Sec. 4145. (1) A person commits the crime of issuing a false financial statement if, with intent to defraud, he:

(a) Knowingly makes or utters a written instrument which purports to describe the financial condition or ability to pay of himself or some other person and which is inaccurate in some material respect; or

(b) Represents in writing that a written instrument purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's current financial condition or ability to pay, knowing the instrument to be materially inaccurate in that respect.

(2) Issuing a false financial statement is a Class A misdemeanor.

**[Misapplication of Property]**

Sec. 4155. (1) A person commits the crime of misapplication of property if, with knowledge that he is misapplying and that the misapplication involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted, he misapplies or disposes of property that has been entrusted to him as a fiduciary or that is property of the government or a financial institution.

(2) "Fiduciary" includes a trustee, guardian, executor, administrator, receiver or any other person acting in a fiduciary capacity, or any person carrying on fiduciary functions on behalf of a corporation or other organization which is a fiduciary.

(3) To "misapply" means to deal with the property contrary to law or governmental regulation of the custody or disposition of that property; governmental regulation includes administrative and judicial rules and orders as well as statutes and ordinances.

(4) Misapplication of property is a Class A misdemeanor.

**[Sports Bribery: Definition of Terms]**

Sec. 4210. The following definitions apply to sections 4211 through 4220:

(1) "Sports contest" means any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons or animals, viewed by the public.

(2) "Sports participant" means any person who participates or expects to participate in a sports contest as a player, contestant or member of a team, or as a coach, manager, trainer or other person directly associated with a player, contestant or team.

(3) "Sports official" means any person who acts or expects to act in a sports contest as an umpire, referee or judge, or otherwise to officiate at a sports contest.

**[Sports Bribery]**

Sec. 4211. (1) A person commits the crime of sports bribery if he:

(a) Confers, or offers or agrees to confer any benefit upon a sports participant with intent to influence him not to give his best efforts in a sports contest; or

(b) Confers, or offers or agrees to confer any benefit upon a sports official with intent to influence him to perform his duties improperly.

(2) Sports bribery is a Class C felony.

**[Receiving a Sports Bribe]**

Sec. 4212. (1) A person commits the crime of receiving a sports bribe if:

(a) Being a sports participant, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that he will thereby be influenced not to give his best efforts in a sports contest; or

(b) Being a sports official, he solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that he will perform his duties improperly.

(2) Receiving a sports bribe is a Class C felony.