



First Draft of Report #63 –
Misrepresentation as a
District of Columbia Entity

SUBMITTED FOR ADVISORY GROUP REVIEW
September 28, 2020

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrdc.dc.gov

This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrdc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for a new Title 22E of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision (and if so, why this change is being recommended).

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report #63 – Misrepresentation as a District of Columbia Entity is November 9, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22E-3201. Misrepresentation as a District of Columbia Entity.

- (a) *Offense.* An actor commits misrepresentation as a District of Columbia entity when that actor:
 - (1) *Knowingly:*
 - (A) Engages in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services; and
 - (B) Uses the words “District of Columbia”, “District”, or “D.C.” in the business name or in a business communication;
 - (2) *With intent to:*
 - (A) Deceive any other person as to the actor’s lawful authority; and
 - (B) Receive a personal or business benefit of any kind; and
 - (3) In fact, the name or communication would cause a reasonable person in the complainant’s circumstances to believe that the actor is a District of Columbia government entity or representative.
- (b) *Prosecutorial authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.
- (c) *Penalty.* Misrepresentation as a District of Columbia entity is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (d) *Definitions.*
 - (1) The terms “with intent” and “knowingly” have the meanings specified in RCC § 22E-206; the terms “in fact” and “complainant” have the meanings specified in RCC § 22E-206; and the term “deceive,” has the meaning specified in RCC §22E-701.
 - (2) In this section, the term “actor,” in addition to the meaning specified in RCC §22E-701, includes a legal entity that is not a natural person.

PENALTY RECOMMENDATION

The CCRC recommends the following penalty for subsection (c) – Class C [90 days].¹

COMMENTARY

Explanatory Note. The RCC misrepresentation as a District of Columbia entity offense prohibits engaging in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services and using the name of the District of Columbia in a business communication with intent to deceive another as to the actor’s lawful authority. The RCC misrepresentation as a District of Columbia entity offense replaces the current D.C. Code statutory provisions concerning the crime of Use of “District of Columbia” by Certain Persons.²

Subsection (a) specifies the prohibited conduct for the revised misrepresentation as a District of Columbia entity statute. Paragraph (a)(1) specifies that the actor must knowingly engage in the business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and knowingly use the words “District of Columbia”, “District”, or “D.C.” in the business name or in a business communication, written or oral. “Knowingly” is a defined term in RCC § 22E-206, and here

¹ The current imprisonment penalty for D.C. Code § 22-3402 is 90 days.

² D.C. Code §§ 22-3401-3403.

means the actor must be practically certain that the actor is engaging in business of collecting or aiding in the collection of debts or obligations, or of providing private police, investigation, or other detective services, and is also practically certain that the actor is using the words “District of Columbia”, “District”, or “D.C.”. The actor’s use of the words “District of Columbia”, “District”, or “D.C.” may be oral or in writing.

Paragraph (a)(2) requires that the conduct outlined in paragraph (a)(1) be committed with intent to deceive any other person as to the actor’s lawful authority, and the actor must intend to receive a personal or business benefit of any kind. “Intent” is a defined term in RCC § 22E-206, and here means that the actor was practically certain that his or her conduct as outlined in subsections (a)(1)(A) and (a)(1)(B) would cause someone to be deceived as to the actor’s authority and result in a personal or business benefit for the actor. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that deception or a personal or business benefit, in fact, occurred, just that the actor believed to a practical certainty that the deception or personal or business benefit would result from his or her conduct.

Paragraph (a)(3) specifies that misrepresentation as a District of Columbia entity requires that, in fact, the name or communication would cause a reasonable person in the complainant’s circumstances to believe that the actor is a District of Columbia government entity or representative. The use of “in fact” indicates that no culpable mental state is required as to whether the misrepresentation would cause a reasonable person in the complainant’s circumstances to believe that the actor is a District of Columbia government entity or representative. However, it must be proven that the communication would cause a reasonable person in the complainant’s circumstances to believe the misrepresentation that the actor is a representative of a District of Columbia government entity.

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [RESERVED.]

Subsection (d) cross-references applicable definitions in the RCC and specifies that in this section the term “actor” includes a legal entity that is not a natural person. This definition of “actor” differs from the RCC general definition of an “actor” which, through its use of the defined term “person,” does not specify whether or not non-natural persons are included for this or other offenses in Subtitle IV.³

Relation to Current District Law. *The revised misrepresentation as a District of Columbia entity statute changes current District law in two main ways.*

³ D.C. Code § 45-604 broadly states that, in interpreting the D.C. Code: “The word “person” shall be held to apply to partnerships and corporations, unless such construction would be unreasonable, and the reference to any officer shall include any person authorized by law to perform the duties of his office, unless the context shows that such words were intended to be used in a more limited sense.” The definition of “actor” in this section more clearly specifies that the crime of misrepresentation as a District of Columbia entity may be committed by non-natural persons. Second, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of intent, requiring that the actor use of the words “District of Columbia”, “District”, or “D.C.” with the intent to deceive and receive a benefit. This is in contrast to the current Use of “District of Columbia” by Certain Persons statute does not specify a culpable mental state current Use of “District of Columbia” by Certain Persons statute does not specify a culpable mental state, which allows for criminal culpability for actors whose communications may be inadvertently misleading but where there is no intent to deceive or receive a benefit.

First, the revised misrepresentation as a District of Columbia entity offense requires that the actor's use of the words "District of Columbia", "District", or "D.C." be done with the intent to deceive another as to the actor's lawful authority and receive a personal or business benefit. The current Use of "District of Columbia" by Certain Persons statute does not require an intent to deceive or to receive a personal or business benefit, and only requires that the use be "in such manner as reasonably to convey the impression or belief that such business is a department, agency, bureau, or instrumentality of the municipal government of the District of Columbia or in any manner represents the District of Columbia."⁴ There is no case law on point. In contrast, the revised statute requires that the actor's use of "District of Columbia", "District", or "D.C." be with intent to deceive another as to the actor's lawful authority and receive a personal or business benefit. The revised statute eliminates criminal liability for actors whose communications are unintentionally misleading and there is no intent to deceive or receive a benefit. Requiring that the actor be practically certain that the use of the District's name will deceive another person and provide a benefit is similar to a knowledge requirement except that deception or benefit need not be proven. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.⁵ Commercial speech is protected under the First Amendment unless there is a recognized exception to such rights.⁶ However, requiring as an element of the offense an intent to deceive another by the commercial speech, for a personal or business benefit, makes the revised statute similar to fraud and other deceptive practices crimes that are not subject to First Amendment protections.⁷ The revised statute's language regarding deception and benefit is also consistent with language RCC § 22E-2201, fraud, and RCC § 22E-3201, impersonation of a District Official offenses. This change improves the clarity, consistency, and completeness of the revised offenses, and may improve the constitutionality of the statute.

Second, the revised statute applies to actors engaged in the collection of non-private debts or obligations. The current Use of "District of Columbia" by Certain Persons statute only applies to actors engaged in the collection of "private debts or obligations."⁸ In contrast, the misrepresentation as a District of Columbia entity offense expands criminal liability to include actors engaged in the collection of debts or obligations, both private and non-private.⁹ When undertaken with intent to deceive as to the actor's lawful authority, it is not clear why the collection of private debt should be treated differently than public debt. This change may reduce an unnecessary gap in liability in the revised statutes.

Beyond these two substantive changes to current District law, three other aspects of the revised misrepresentation as a District of Columbia entity offense may be viewed as substantive changes of District law.

First, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of knowingly as to the nature of the actor's conduct and the use of the

⁴ D.C. Code § 22-3401.

⁵ See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

⁶ *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985).

⁷ *Id.* at 638.

⁸ D.C. Code § 22-3401.

⁹ For example, a private collection agency engaged in the collection of federal student loan payments may be liable under the revised statute if other elements of the offense are satisfied.

words “District of Columbia”, “District”, or “D.C.” in the business name or in a business communication. The current Use of “District of Columbia” by Certain Persons statute does not specify a culpable mental state as to the elements of the offense, and there is no case law on point. To resolve this ambiguity, the revised misrepresentation as a District of Columbia entity offense requires a culpable mental state of “knowingly,” using the RCC definition of that term. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.¹⁰ This change improves the clarity, consistency, and completeness of the revised offenses.

Second, the revised misrepresentation as a District of Columbia entity offense does not limit the type of communication that can fall under the statute to writings. The current Use of “District of Columbia” by Certain Persons statute refers to “use as part of the name of such business, or employ in any communication, correspondence, notice, advertisement, circular, or other writing or publication, the words “District of Columbia”...” in which it is unclear whether the phrase “or other writing or publication” is a limitation on the prior list of nouns such as “communication.” There is no case law on point. To resolve this ambiguity, the revised statute refers broadly to any reference to the District in a business name or business communication, without limit to written or published communications. It is not clear that the harm addressed by the offense differs significantly depending on whether the misrepresentation is oral or written or published. This change improves the clarity of the revised statute and may reduce an unnecessary gap in liability.

Third, the revised statute eliminates specific reference to an actor who is “aiding” in debt collection. The current statute specifically includes liability for a person “aiding in the collection of private debts or obligations.”¹¹ The meaning of “aiding” is unclear, however, and there is no case law on point. To resolve this ambiguity, the revised statute does not refer to “aiding,” and instead relies on the RCC § 22E-210 provisions specifying the requirements and penalty for accomplice liability when a person purposely assists in the planning or commission of conduct constituting an offense. This change improves the clarity and consistency of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

The revised statute eliminates specific reference to the offense covering “any emblem or insignia utilizing any of the said terms as part of its design.”¹² Such conduct is already covered by the current and revised statutes’ reference to any use of the terms in a business name or business communication, whether in an emblem or otherwise.

¹⁰ See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[O]ur cases have explained that a defendant generally must ‘know the facts that make his conduct fit the definition of the offense,’ even if he does not know that those facts give rise to a crime. (Internal citation omitted)”).

¹¹ D.C. Code § 22-3401.

¹² D.C. Code § 22-3401.