



# D.C. Criminal Code Reform Commission

441 Fourth Street, NW, Suite 1C001S, Washington, DC 20001  
(202) 442-8715 [www.ccrdc.dc.gov](http://www.ccrdc.dc.gov)

## MINUTES OF PUBLIC MEETING

**WEDNESDAY, December 6, 2017 at 3:00PM**  
**CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW**  
**WASHINGTON, D.C. 20001**

On Wednesday, December 6, 2017 at 3:00pm, the D.C. Criminal Code Reform Commission (CCRC) held a meeting of its Criminal Code Reform Advisory Group (Advisory Group). The meeting was held in Room 1107 at 441 Fourth St., N.W., Washington, D.C. The meeting minutes are below. For further information, contact Richard Schmechel, Executive Director, at (202) 442-8715 or [richard.schmechel@dc.gov](mailto:richard.schmechel@dc.gov).

**Commission Staff in Attendance:**

- |  |   |
|--|---|
| Richard Schmechel (Executive Director)               | Rachel Redfern (Chief Counsel for Management & Legislation) |
| Michael Serota (Chief Counsel for Policy & Planning) | Bryson Nitta (Attorney Advisor)                             |
| Jinwoo Park (Attorney Advisor)                       |   |

**Advisory Group Members in Attendance:**

- |  |  |
|--|--|
| Dave Rosenthal (Designee of the Attorney General)  | Donald Braman (Council Appointee)  |
| Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia) | Katerina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia) |
| Renata Kendrick Cooper (Designee of the United States Attorney)                                      |  |

## **I. Welcome.**

- a. Based on feedback from the Advisory Group, the Executive Director extended the deadline for Advisory Group comments on the First Draft of Report #12, Definition of a Criminal Conspiracy report. The due date for comments is now December 20th, 2017.
- b. The Executive Director also informed the Advisory Group that draft reports on the next group of offenses (assault, threats, and robbery) would be distributed immediately after the deadline for comments on conspiracy. He also said that Advisory Group comments for the next group of offenses would likely be due roughly eight weeks from the time they are sent out.
- c. The Executive Director reminded the Advisory Group that meetings for 2018 will be presumptively held the first Wednesday of every month, at 10:00am. He said that he will send out calendar invites for meetings for the next year. He added that the next Advisory Group meeting will be January 3<sup>rd</sup> at 10am.

## **II. The Advisory Group discussed Report #12, Definition of a Criminal Conspiracy.**

- a. The Executive Director noted that the agency's draft report addressed criminal conspiracy as an offense and he reminded the Advisory Group that a future report may address the separate matter of *Pinkerton* liability. He then asked the Advisory Group for any input or questions on the draft report.
- b. The Public Defender Service (PDS) representative first asked a question about subsection (b). That subsection currently refers to "any result or circumstance" being subject to mens rea elevation. She asked whether it was intended to refer to *all* results and circumstances in the target offense, such that "and" would be more appropriate than "or." Staff said that it was, and that the language in the statute could be amended to reflect this.
- c. The PDS representative then asked a question concerning jurisdiction in subsection (d). She proposed a hypothetical, wherein Person A is twenty-years-old, and Person B is nineteen-years-old. Additionally, the drinking age in the District is twenty-one, while the drinking age in Maryland is eighteen. If Person A and Person B made a plan to buy beer in Maryland near the border, and Person B (who is nineteen) then entered the District (where the drinking age is twenty-one), could Person A and B be guilty of a conspiracy to purchase alcohol illegally? The PDS representative said that it was strange that there is no mental state for jurisdiction in a case like this. A person could be guilty of a conspiracy while still fully believing that what he or she is doing is lawful in the place he or she believes they are in.
- d. Staff said that it is likely that a conspiracy had been formed. Staff suggested that the hypothetical is really getting at the perceived unfairness of strict liability for *malum prohibitum* offenses. Staff said that similar problems might arise, for example, where both conspirators were located in the District and the drinking age changed from eighteen to twenty-one without their knowledge. If the two people then agreed to purchase alcohol, they could be guilty of a conspiracy. The unfairness might therefore arise in either case unless ignorance of the law could be a justifiable excuse (contrary to the normal situation, where ignorance of the law is not an excuse). Staff also emphasized that the jurisdictional rules that are recommended in the report are distilled from current District law.

- e. The Office of the Attorney General (OAG) representative also suggested that the agreement in the PDS representative's hypothetical might not involve a conspiracy to actually commit an offense. For example, he said that if two people agreed to eat steak for dinner, and one person goes and shoplifts the steak, the other person would not necessarily be guilty of a conspiracy, because the shoplifting was never agreed upon.
- f. Staff agreed. Staff further noted that there is tremendous difficulty in setting out the boundaries and scope of agreements in conspiracy, and that case law would have to fill in many of these gaps. Staff said that, generally speaking, there is no simple answer for determining these issues, but the issue would be considered further.
- g. The OAG representative asked whether a person can be guilty of a conspiracy if the conspiracy is formed in (for example) Maryland to commit an offense in Maryland, but an overt act is completed in the District. Staff said that it would not be within the District's jurisdiction, because conspiracies formed outside the District must be conspiracies to engage in criminal conduct within the District.
- h. The OAG representative also had two questions about possible changes to the scope of conspiracy. He said that it was his understanding that under current District law, a person who conspires with another to commit an offense is guilty of conspiracy, even if one person is an undercover FBI agent or police officer. Thus, a person who conspires to buy drugs from a supplier, where the supplier is actually an undercover officer, can be guilty of conspiracy. Staff said that it appears District law has adopted a bilateral conspiracy requirement, meaning that both conspirators must actually agree; therefore, conspiracies involving undercover agents are not conspiracies under current District law. However, staff said that it would check case law again on that point and follow up with the OAG representative if staff's position changed.
- i. The OAG representative also asked about the elimination of conspiracies to defraud the District. He said that it would be best if such conduct, although no longer part of conspiracy, continue to remain criminalized. The Executive Director said that adding or revising public corruption offenses could help in this area. The Executive Director also said that there may be times during the project when a given Advisory Group member or institution may wish to flag a proposed revision based on future revisions. He urged Advisory Group members to make note of these circumstances in their written comments. Staff also noted that, regardless of future revisions, it remained inconsistent and potentially disproportionate to allow conspiracy liability on a claim of defrauding the District where there was no underlying offense that would be committed when a single person engaged in the requisite criminal conduct..
- j. The PDS representative asked about the word "immaterial" in subsection (e). She suggested that there may be times where the legality of conduct may be of relevance, and therefore that the defendant should be permitted to offer evidence of legality into evidence. The OAG representative agreed that legality of conduct in other jurisdictions might be relevant in unusual circumstances, and that commentary should clarify that normally, per the revised statute, legality is immaterial. Staff agreed to review deleting "immaterial" and adjusting the commentary accordingly.
- k. The Executive Director reminded Advisory Group members that they should reach out to staff with further questions if any arise while drafting comments.

**III. The Advisory Group discussed Advisory Group comments on Report #8, Recommendations for Property Offense Definitions, Aggregation and Multiple Convictions and Report #10, Recommendations for Fraud and Stolen Property Offenses.**

- a. The Executive Director raised a few points that were mentioned in the comments received from the Office of the Attorney General. First, the Executive Director agreed that staff would draft language, either in the draft statute or commentary, to ensure that causing the transfer of funds would be covered conduct. With respect to identity theft, OAG proposed that ID theft should cover conduct that not only enriches the defendant, but also conduct that harms another person (even if it doesn't enrich the defendant). The example was proposed of setting up a website purporting to be owned by another, and causing reputational harms to that purported owner. Staff said that criminal liability for such harms, if short of stalking, does not appear to be in current law and could be a significant expansion in liability. The Executive Director said that this may be a gap in law that the agency should address, but as a separate offense or in conjunction with review of stalking rather than as identity theft. OAG's comments on identity theft also iterated their position that giving a false name to a police officer should remain criminalized, either in identity theft or in a separate offense to be drafted at another point. The Executive Director noted that the agency at this point in time was simply saying that such conduct should not be part of identity theft, and the gravamen of the conduct was a different kind of harm. Finally, OAG comments also requested that the mental state required for the victim's age in financial exploitation of a vulnerable adult be something less than knowledge. The Executive Director indicated that staff was considering whether recklessness is more appropriate, and the OAG representative said that would seem appropriate.
- b. The Executive Director then turned to the comments received from PDS. First, the PDS comments suggested adding a provision to check fraud reflecting the mental state of the defendant at the time the check is actually signed or used. The Executive Director said that such a meaning was intended and staff would review how to clarify the point. The PDS comments also recommended deleting the presumptive inference in check fraud entirely. The Advisory Group discussed whether and how often the presumption is relied upon. The Executive Director solicited any feedback from practitioners in stakeholder agencies as to the importance or use of the permissive inference. The PDS comments also noted that financial injury seems to include any legal costs associated with recovering loss; such legal costs might balloon to the point of being unreasonable. The OAG representative suggested adding the word "reasonable," which would at least provide some limitation on the definition. The PDS representative agreed.

**IV. Adjournment.**

- a. The meeting adjourned at 4:50pm. A public audio recording of the meeting is available online.