



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, MARCH 1, 2017 at 2:00PM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, March 01, 2017 at 2:00pm, 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.

Commission Staff in Attendance:

Richard Schmechel (Executive Director)

Bryson Nitta (Attorney Advisor)

Rachel Redfern (Chief Counsel for Planning)

Michael Serota (Chief Counsel for Policy & Management & Legislation)

Jinwoo Park (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Paul Butler (Council Appointee)

Donald Braman (Council Appointee)

Laura Hankins (Designee of the Director of The Public Defender Service for the District Of Columbia)

Renata Kendrick Cooper (Designee of the United States Attorney)

Katerina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia)

David Rosenthal (Designee of the Office of the Attorney General)

I. Welcome

- a. The Executive Director called the meeting to order.
- b. The Executive Director gave the Advisory Group an update on the status of the Commission's data request to the D.C. Sentencing Commission. The Executive Director said that no new data has been provided since the felony data received the end of January. He said that he does expect to receive more data relating to fines from the Sentencing Commission, but the data had not yet been delivered.
- c. The Executive Director also said that additional data that the Commission must use as part of its statutory mandate will have to be sought outside the Sentencing Commission.
- d. The Executive Director said that a Memorandum of Understanding (MOU) between the Commission and the Lab was being finalized. The Lab will provide data analysis on a number of relevant areas of inquiry. At the request of the Office of the Attorney General (OAG) representative (Mr. Dave Rosenthal), the Executive Director said that more details concerning the nature of the Lab's analysis would be provided to interested Advisory Group members.
- e. The Executive Director discussed the expected timeline for the next month of work. He said that a final version of Report #1 (Enactment Plus) would be completed and delivered to the Advisory Group in the coming days, with the expectation that a final vote on that Report would take place at the April meeting. Additionally, he said that new recommendations for reforming doctrines of voluntary intoxication, willful blindness, and preliminary provisions for the general part will be distributed in the coming weeks.
- f. Finally, the Executive Director reminded the Advisory Group that a copy of the CCRC work-schedule is in the Annual Report and was provided to the Advisory Group. He said that members of the Advisory Group are encouraged to consult the schedule to have a sense of future work flow.

II. Discussion of Second Draft of Report No. 1 (Enactment Plus).

- a. The Executive Director said that one last detail remained from prior discussions of Report #1. The question is whether a statement of legislative intent ought to be codified as part of Enactment, or whether the current statement (which would not be codified) is sufficient. The Executive Director explained that, after consulting with OAG, the Commission had prepared a version of the Report that requests that the Office of the General Counsel for the D.C. Council resolve the issue.
- b. The Advisory Group members present, including OAG, expressed general agreement with adding proposed language to Report #1 requesting that the Office of the General Counsel for the D.C. Council resolve the issue.

III. Discussion of First Draft of Report No. 2 (General Part).

- a. The Executive Director said the United States Attorney's Office (USAO) and OAG had provided comments to the first draft of Report No. 2. He thanked both offices.

- b. Staff said that the comments had been reviewed and there were five comments in particular that staff said merited group discussion.
- c. 22A-202, Possession Definition. First, staff discussed USAO and OAG comments concerning possession. USAO's comments centered on a concern that fleeting possession, which is an affirmative defense under current law, has been shifted to an element the government must prove in each case. Additionally, OAG's comments expressed concern how fleeting possession in drug transactions would be treated. Further, OAG's comments said it was unclear how long a person must actually possess an object in order for possession to be proved. Staff agreed that the proposed reform does shift the burden from the defendant to the government in cases where fleeting possession is an issue. With respect to temporality, staff said that factors described in the Commentary would guide the factfinder's analysis in a given case. These factors included "dangerousness" of the object and the amount of time needed to safely dispose of the object. Thus, the amount of time one must have control over an object in order to constitute possession might differ based on the quality or nature of the object itself.
 - 1. Professor Butler asked why dangerousness was included as a factor. He said that the opportunity to safely dispose of the object includes the concept of dangerousness; therefore, dangerousness itself was redundant. He recommended eliminating the provision as superfluous. The Public Defender Service (PDS) representative, Ms. Laura Hankins, agreed. Staff said that the language in the Commentary concerning dangerousness would be reexamined in order to determine whether dangerousness ought to be struck from the Commentary and/or other changes made to the listed factors.
 - 2. Mr. Rosenthal also questioned how jury instructions would work in possession cases and questioned whether the "sufficient time" requirement in the possession definition might confuse juries. Staff noted that similar language is employed in various jurisdictions.
 - 3. The USAO representative, Ms. Renata Kendrick-Cooper, noted that one of the benefits of "elementizing" is that it allows for such clarity that the statutes themselves can be the basis for jury instructions. Ms. Hankins suggested that the "sufficient time" requirement would simply be omitted from the jury instructions in cases where the timing issue was not a relevant factual question; therefore, in many cases involving possession, jurors would never be instructed on the "sufficient time" requirement at all. She said this was the way jury instructions already work at present.
 - 4. Staff stated that it would keep all of these issues in mind as it develops a second draft of Chapter 2.
- d. 22A-204, Factual Cause. USAO's written comments suggested that the abandonment of "substantial step" analysis for factual causation would disrupt the "urban gun battle" theory of causation as articulated by the D.C. Court of Appeals (DCCA). Staff said that

it was not the intention of the proposed reform to preclude urban gun battle liability. Further, staff noted that staff did not think that the proposed factual cause general provision would preclude urban gun battle liability. Staff said that other jurisdictions that apply a similar definition of factual cause allow for urban gun battle liability, including those cited to by the D.C. Court of Appeals in prior urban gun battle liability cases. Therefore, staff said that urban gun battle liability could remain viable under the proposed reform. Staff said that language could be added to the Commentary clarifying that it did not intend to preclude urban gun battle liability. .

- e. D.C. Code § 22A-204, Legal Cause. The USAO’s written comments indicated that it disagreed with the proposed general provision for legal causation to the extent it suggested that “reasonably foreseeable” intervening acts or forces can ever defeat legal causation. USAO stated that this would conflict with District law. Staff agreed that this is generally true, particularly in the context of urban gun battle cases, but noted that other jurisdictions have recognized some intervening causes can negate legal causation in other contexts, even if they are reasonably foreseeable. The law on these issues appears to be unresolved in the District, as the D.C. Court of Appeals has not issued opinions in analogous cases. Staff noted that, at minimum, the Commentary could be revised to clarify that the proposed general causation provision was not intended to preclude urban gun battle liability. However, staff noted that it would be better situated to address all causation issues in the second draft of Chapter 2 after considering the topics of accomplice liability and felony murder.
- f. D.C. Code § 22A-206, Recklessness Definition. OAG’s written comments suggested reformatting the recklessness definition to avoid internal inconsistencies with the prefatory clause. The proposed revision would not change the substance.
 - 1. Mr. Rosenthal added that the comment addressed drafting style, not an issue of substance. Staff said that a few attempts had been made to draft statutes in different ways. After examining three alternatives developed by staff, Mr. Rosenthal and other Advisory Group members agreed that the definition of “recklessness” need not follow the typical format of definitions found elsewhere in the D.C. Code. All Advisory Group members present agreed that the third stylistic alternative developed by staff, based upon the Model Penal Code, was preferable.
 - 2. Staff said that it would consider how to similarly reformat the definitions of purpose, knowledge, and negligence for the second draft of Chapter 2.
- g. D.C. Code § 22A-206, Gross Deviation. OAG’s written comments asked whether the gross deviation factors applicable to recklessness and negligence ought to be codified. Staff said that no other jurisdictions follow a similar codification practice with respect to recklessness or negligence. Staff noted, however, that at least one jurisdiction has incorporated a comparable multi-factor gross deviation analysis into its jury instructions.

Staff said that it may be worth exploring the placement of the gross deviation factors into the Code itself.

1. Mr. Rosenthal said that it seemed that if these factors are so important and crucial, then perhaps it makes more sense to place the factors in the Code itself, rather than in the Commentary. Ms. Hankins suggested that this would be difficult and unnecessary given the number of affected cases, and could diminish the clarity and readability of the Code as a whole. She added, however, that this may be one particular instance where placing the factors in the Code makes sense, but in the future, it would probably be best to avoid repeating the same process when possible.
2. Staff stated that it would keep all of these issues in mind as it develops a second draft of Chapter 2, with the hopes of developing a consistent and principled approach to determining when factors should be codified and when they should be placed into commentary.

IV. Adjournment.

- a. The meeting was adjourned at 3:45pm. Audio recording of the meeting will be made available online for the public.