



D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, DC 20001
(202) 442-8715 www.ccrc.dc.gov

MINUTES OF PUBLIC MEETING

WEDNESDAY, JUNE 5, 2019, at 10:00 AM
CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001

On Wednesday, June 5, 2019, at 10:00 am, 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 1112 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)	Michael Serota (Sr. Attorney Advisor)
Jinwoo Park (Attorney Advisor) (by phone until 11:30 a.m.)	Patrice Sulton (Attorney Advisor)
Rebecca Fallk (Intern)	Melissa Barbee (Intern)

Advisory Group Members and Guests in Attendance:

Laura Hankins (Designee of the Director of the Public Defender Service for the District of Columbia)	Katarina Semyonova (Visiting Attendee of the Public Defender Service for the District of Columbia)
Dave Rosenthal (Representative of the Office of the Attorney General of the District of Columbia)	Renata Kendrick Cooper (Designee of the United States Attorney for the District of Columbia)
Elana Suttenger (Visiting Attendee of United States Attorney for the District of Columbia)	Kevin Whitfield (Representative of the D.C. Council Committee on the Judiciary and Public Safety)
Paul Butler (Council appointee)	Don Braman (Council appointee)

I. Welcome and Announcements.

- a. The Executive Director noted the Advisory Group meeting scheduled for July 3, 2019, has been moved to June 26, 2019. The Advisory Group meeting scheduled for August 7, 2019, has been moved to July 31, 2019. The Commission welcomes requests for individual meetings with Advisory Group members as needed.

II. The Advisory Group discussed First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code and Advisory Group Memo #22 Supplemental Materials to the First Draft of Report # 36.

- a. There were no comments from the group at this time on the revised homicide offenses in Chapter 11 of RCC Title 22E.
- b. The group discussed USAO's written comments on the definition of attempt, received on May 20, 2019.

- i. Staff asked USAO for clarification of its proposed revisions to the culpability of attempt, which would allow the phrase "with the intent to engage in conduct constituting that offense" to constitute the sole culpable mental state requirement governing general attempt liability under RCC § 22E-301.
- ii. USAO noted that it recommended deleting the word "planning" from section 301(a) because it effectively adds an element of premeditation that is not required under current law.
 1. Staff explained that the word "planning" was not intended to add this additional element, and that the RCC would clarify this point.
- iii. Staff further explained its request for clarification as to how the USAO proposed language would relate to the result and circumstance elements of the target offense.
 1. Staff offered a hypothetical in which a demolition operator comes dangerously close to destroying a building that—unbeknownst to him—is occupied by an elderly homeless person who snuck in at the last moment. In such a scenario, it can be said that the demolition operator both intended and came dangerously close to engaging in the conduct that would constitute aggravated reckless manslaughter, but did not intend the result element (death) or the circumstance element (an elderly person) that comprise the offense.
 2. Staff explained that under one construction of USAO's recommended language the blameless demolition operator could be convicted of this form of attempted homicide, which would constitute a form of strict liability and a marked expansion of attempt liability.
 3. Staff further noted that even if USAO's proposed language were read to imply a recklessness default and/or simply preserve the mental state requirements governing the target offense, this would still in some ways constitute a marked expansion of attempt liability (e.g., by allowing for reckless attempt liability, which is barred in nearly every jurisdiction in America).
 4. Drawing on this hypothetical and analysis, staff highlighted the important explanatory and clarificatory roles of the RCC language which USAO recommended for deletion. Staff also noted that the

RCC approach is largely consistent with District law and national legal trends as a matter of policy, and that any derogations primarily serve the interests of providing further clarity.

5. USAO observed that its written comments may have not distinguished two relevant issues: current District case law, which actually requires intent to commit the crime, versus the intent to engage in conduct constituting an offense proposed by USAO. USAO said that it will revisit its research, confer with its appellate division, and follow up with Commission staff.
- iv. Staff explained that the same culpability/drafting issues arise in the context of USAO's proposed revisions to the RCC definitions of solicitation and conspiracy under sections 302 and 303.
 1. Focusing on solicitation, staff noted that USAO's revisions would leave a bare purpose to solicit conduct constituting an offense to be the sole culpable mental state requirement governing general solicitation liability section 302. Staff discussed various ways in which this bare purpose requirement could be construed.
 2. USAO noted that attempt may require a different solution than solicitation and conspiracy, but that it would further consider the issue.
- v. OAG requested that the Commission circulate something following any follow-up between the Commission and USAO so that others have an opportunity to comment on USAO's position.
 1. The Executive Director explained that, while 2020 planning is dependent on the timing necessary for legislative consideration of the Commission's work, the Commission expects there will be at least one more draft and another opportunity for comment, likely in the late Fall or Winter, before a final draft is circulated for a vote.
 2. Advisory Group written comments received late will be distributed and made a part of the record, but may not be part of the agency's next draft recommendations. The Commission faces particular staffing pressures regarding changes to the draft Chapters 2 and 3 of the RCC.
- c. USAO raised for discussion the issue of whether the revised attempt statute would replace all of the "AWI" offenses, e.g., assault with intent to rape, assault with intent to rob, and whether the scope of such attempt liability would be as extensive.
 - i. Staff confirmed that the revised attempt provision will replace all AWI offenses under the RCC. Staff explained that this is generally consistent with modern legal trends, and that given that revised attempt statute adopts a dangerous proximity standard (as opposed a mere substantial step), there is very little difference, if any, between the scope of liability for attempt and AWI. Staff noted that the dangerous proximity test is typically understood to attach liability *before* an assault has even occurred, and based on DCCA case law, attempt liability may well be more expansive in scope than AWI offenses.
 - ii. USAO noted that there are different penalties for criminal attempts and AWI offenses under current law.
 - iii. Staff explained that although penalty recommendations have not been issued, the Commission has recommended that the penalty for any attempt be equal to

- one half of the penalty for a completed offense, and is not, at this time, aware of any need to deviate from uniform application of that penalty across all revised offenses.
- iv. USAO explained that it heavily relies on AWI offenses in practice. USAO offered a hypothetical in which a person breaks into someone's home, attacks someone, and states that they intend to commit a rape.
 - v. Staff explained its belief that this hypothetical would amount to an attempted rape under current District law. For example, current case law has held that a person does not have to enter or even immediately next to a bank to be guilty of bank robbery. In addition, the RCC commentary gives numerous examples which further clarify this point.
 - vi. USAO noted that its practice has been to charge AWI in such cases, even though the facts might amount to an attempt. USAO also explained that, in some instances, the intervention of a Good Samaritan prevents AWI conduct from coming dangerously close to a completed offense.
 - vii. Staff reiterated that, although case law has not yet addressed this specific sex crime fact pattern, it seems clear based on the DCCA's bank robbery/attempt opinion that a person who has succeeded in physically assaulting someone while stating an intention to commit rape has committed attempted rape under current District law. Staff also noted the common law principal that dangerous proximity is broader than (i.e. precedes) assault, while highlighting one DCCA case which noted the similarity between the two standards.
 - viii. USAO noted that the revised assault statute is now narrower because it requires bodily injury, while menacing involves frightening conduct. USAO also stated that, although AWI and assault may significantly overlap, one involves proof of intent whereas the other involves proof of conduct.
 - ix. Professor Butler explained that in some instances evidence of dangerous proximity may corroborate intent in a significant way as compared to AWI offenses which may allow a factfinder to infer intent based on stereotypes. He cited a case involving a black man was convicted of raping white woman on very thin evidence.
 - x. USAO offered a hypothetical in which a person shoots at someone and misses, which is commonly charged as assault with intent to kill.
 - 1. Staff explained that this hypothetical amounts to a completed attempt.
- d. The Executive Director noted that penalty recommendations are forthcoming and may be issued as early as September or October 2019. The revised code's 50% rule for attempts—which makes the code more consistent—will be a change in law for many offenses because current law is so varied. Moreover, given that many offenses now have multiple degrees, there will be a greater array of some attempt penalties than in current law.
 - e. There were no comments from the group at this time on RCC § 22E-214, Merger.
 - f. The group discussed various drafting style choices in the special part.
 - i. OAG recommended repeating the name of the offense in the italicized subheading for each degree in the offense definition. OAG stated that it may make charging documents clearer, without making any substantive change to the offenses.

1. Staff noted the Rules of Interpretation in the General Part (RCC § 22E-102(c)) addresses the effect of headings and captions, and that the titles are non-substantive.
 2. The Committee representative noted codification counsel may be inclined to make its own non-substantive changes to the style and format of the revised statutes. Examples include adding lead-in language and renumbering.
 3. USAO emphasized the importance of retaining the language and structure upon which the Advisory Group relied when drafting comments and recommendations, explaining that the group expected the recommendations would retain their final form after review by codification counsel.
 4. OAG noted its legal counsel division has concerns about the current formatting and organization that OAG has raised. For example, the subsections that cross-reference the definitions in RCC § 22E-701 may prove problematic if a term is erroneously omitted.
 5. Professor Butler recommended determining and clarifying what role codification counsel will play when it reviews the final recommendations.
 6. Staff noted that one approach may be to meet with codification counsel and explain why the revised code should not be modified in the same manner other titles are modified.
 7. The Committee representative recommended including a preliminary statement with the agency's recommendations that explains why Title 22 must be read differently than the remainder of the D.C. Code.
 8. Professor Braman recommended clarifying that the Commission's goals include changing the way criminal codes are drafted, with the expectation that future legislation will follow a new, modern format.
 9. Staff noted that it aims to style the revised code in a format that is as easy as practicable for non-lawyers to understand.
 10. USAO noted that it must be easily searchable online.
- ii. Staff asked the group whether it preferred the current approach of cross-referencing a list of definitions in RCC § 22E-701 to defining every term inside of each offense statute. The Commission recognized that the cross-references are arguably superfluous, but explained that it expected the current approach would be easiest for practitioners to navigate.
1. OAG noted the danger of confusion if a cross-reference to a definition is inadvertently omitted. For example, under current law, the term "dangerous weapon" is defined in some sections and undefined in others, leaving an open question as to its meaning.
 2. USAO explained that the revised code helpfully avoids the confusion entirely the confusion that arises under current law, by

- defining all terms for the entire revised code, whether a cross-reference is noted or not.
3. Staff explained the current draft continues to define terms inside of an offense statute if either (1) the term appears only in that statute or (2) the term has a different meaning in that statute than it does elsewhere in the code.
 4. OAG recommended defining a term inside the offense statute only if it has a different meaning in the offense statute than it does elsewhere in the code. OAG recommends defining all other terms in the master list, RCC § 22E-701, even if the term appears only once, so that it can be easily cross-referenced when drafting future legislation.
 5. PDS, OAG, and USAO agreed that the cross-references to RCC § 22E-701 are helpful as a signal to the reader and should be retained.
- iii. Staff asked the group whether including the lead-in phrase “Except as provided” is helpful or misleading, where an offense includes exclusions from liability.
1. USAO stated that the language serves as a helpful flag to the reader.
 2. PDS noted, however, that such language may be misleading insofar as similar flags are not included for general and specific defenses.
 3. The Committee representative stated that the current drafting practice is to begin the exclusion from liability with “Notwithstanding section X, no person shall be guilty...”
 4. The group agreed that the “except as provided” language should be deleted and the “notwithstanding” language should be added. This approach makes clear that the exclusion applies to all of the degrees in a given section.
- g. Staff noted that a number of style recommendations that were received in the written comments will be addressed, e.g., changing “conspiracy” to “agreement,” and changing “defendant” to “actor.”
- h. USAO inquired whether the change to the reasonable mistake of age defense (requiring recklessness), was intended to apply only to the revised sexual abuse of a minor offense and not also to stalking, trafficking, and other offenses with an age element.
- i. Staff confirmed that the change was intended to apply to sexual abuse of a minor only.

III. Adjournment.

- a. The meeting was adjourned at 11:41 a.m.