



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, MAY 17, 2017 at 2:00PM

**CITYWIDE CONFERENCE CENTER, 11th FLOOR OF 441 4th STREET NW
WASHINGTON, D.C. 20001**

On Wednesday, May 17, 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)

Rachel Redfern (Chief Counsel for Planning)

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

Jinwoo Park (Attorney Advisor)

Bryson Nitta (Attorney Advisor)

Advisory Group Members and Guests in Attendance:

Paul Butler (Council Appointee), via phone, until 3:30 PM

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)

Chanell Autrey (Representative of the D.C. Council Judiciary Committee), via phone

I. Welcome

- a. The Executive Director noted that the agency's home page has been re-designed.
- b. The Executive Director noted the dates of the next scheduled meetings to confirm Commission member availability. Some members noted they may be unavailable for the August meeting. One member noted he may be unavailable for the July meeting. The Executive Director will email members possible dates for rescheduling.
- c. The Executive Director noted that staff anticipates that the next three reports will present recommendations on attempt liability, penalty enhancements, and property offenses.

II. Discussion of Commission Comments on First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication

- a. **Deliberate Ignorance.** The group discussed alternate proposals for language on deliberate ignorance submitted by the Public Defender Service (PDS) and U.S. Attorney's Office (USAO).
 - i. Staff explained at the outset that the primary goal of the deliberate ignorance provision is to identify those situations where reckless conduct can be deemed equally culpable as knowing conduct. Staff also noted that the legislature may always opt to apply the culpable mental state of recklessness instead of knowledge to a circumstance.
 - ii. The group discussed the USAO proposal, which suggests replacing the phrase "with the purpose of avoiding criminal liability" with the phrase "the purpose of avoiding knowledge of whether the circumstance existed." USAO explained that the current phrase could be misinterpreted as to require proof that a defendant knew that his/her actions would be against the law, which conflicts with the general rule that ignorance of the law is not a defense.
 - iii. Staff explained that the current language was affirmatively intended to require proof that a defendant knew that his/her actions would be against the law to the extent that awareness of illegality is a necessary prerequisite to acting with the purpose to avoid criminal liability. This particularly culpable purpose is arguably what is necessary to render a reckless actor as culpable as a knowing actor.
 - iv. The group discussed the ways in which USAO's proposed revision might widen the willful blindness doctrine to capture less blameworthy actors. One example considered was that of a mother who declines to check her child's backpack that she is transporting based upon a suspicion that it has drugs inside of it because she doesn't want to know whether that child is, in fact,

using drugs. Several members agreed that the mother could be deemed deliberately ignorant under USAO's recommended approach since she acts "with the purpose of avoiding knowledge of whether the circumstance existed."

- v. The group discussed the PDS proposal, which would incorporate a "primary purpose" test into the second prong of the general provision on deliberate ignorance.
 - vi. Staff noted that underlying PDS' recommendation was the idea, raised at the last meeting, that people have mixed motives for their conduct, and where the desire to avoid criminal liability is a non-primary motive, then imputation of knowledge could be disproportionate. Staff explained, however, that where the primary motive is something itself blameworthy—for example, the desire to continue receiving benefits from participation in a suspected conspiracy—then the fact that avoiding criminal liability was a lesser motive does not seem to cut against imputing knowledge.
 - vii. Staff explained that, based upon preliminary research, to the extent that courts have confronted the issue of mixed criminal motives in other contexts, they appear to have adopted the substantial motivating factor test.
 - viii. Staff proposed the possibility of preserving the current version of the purpose prong but then clarifying through commentary that the purpose to preserve a defense must be a "substantial factor" in the actor's avoiding confirming or failing to investigate whether the suspected circumstance exists. The representatives of both the Office of the Attorney General (OAG) and PDS appeared to express interest in pursuing such an approach.
- b. **Correspondence between intoxication and negligence.** The group discussed alternate proposals for language on the correspondence between intoxication and negligence submitted by OAG and PDS.
- i. The group discussed OAG's proposal for a statutory statement that explicitly states that a person's intoxication does not negate the culpable mental state of negligence.
 - ii. Staff explained that a blanket statement of this nature, while providing clarity as to voluntary intoxication, could improperly exclude evidence of involuntary intoxication. OAG agreed that it intended this statement to apply to self-induced, not involuntary intoxication. Other members of the Advisory Group affirmed this position, indicating a general consensus that while evidence of involuntary intoxication may negate negligence, evidence of self-induced intoxication may not. The remaining question is how best to codify this point.

- iii. The group then discussed PDS' specific proposal to accomplishing this goal, which clarifies that: "A person's intoxication negates the existence of the culpable mental state of negligence applicable to a result or circumstance when, due to the person's intoxicated state, that person failed to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists, and the person's intoxication was not self-induced."
 - iv. Staff explained that while the PDS proposal intuitively tracks other general provisions, it may not effectively communicate an underlying point regarding the gross deviation prong of the negligence definition. Staff presented potential alternative language, which raised various questions concerning the relationship between recklessness, negligence, and intoxication. Staff noted that PDS' proposal may have highlighted the need for some minor revisions to the RCC's definition of negligence, which in turn might simplify the task of addressing the relationship between negligence and intoxication.
 - v. The Executive Director noted that, in addition to ongoing revision of a general provision on the relationship between negligence and intoxication, consideration of addressing all of the foregoing issues through commentary might also be appropriate.
- c. **Definition of self-induced intoxication.** The group discussed PDS' proposed definition of self-induced intoxication.
- i. Staff explained that PDS' general recommendation to codify a definition of self-induced intoxication is well taken and that the MPC definition which forms the basis of PDS's proposal may provide the best existing basis for a statutory approach to the relevant issues. Staff noted, however, that the PDS proposal might be too broad with respect to treatment of intoxicating substances prescribed by a physician, insofar as it could be interpreted to mean that a person who is prescribed an intoxicating substance, and is aware that it is an intoxicating substance, may have that substance's intoxicating effect held against him for any crime committed regardless of the circumstances.
 - ii. The group discussed various examples illustrating that a person who is prescribed intoxicating medication, knowing its intoxicating effects, should sometimes be able to present evidence of that intoxication to prove the absence of recklessness or negligence.
 - iii. Staff presented a potential proposed revision that would address this issue, establishing that self-induced intoxication does not cover intoxicating substances "introduce[d] . . . pursuant to and in accordance with medical advice." The group generally liked this approach, but noted that important caveats should be made through commentary.
 - iv. Staff noted that these caveats might include that such language: (1) does not include cases where a patient knowingly takes more than the

prescribed dosage; (2) mixes a prescription medication with alcohol or other controlled substances; or (3) one who undertakes an activity incompatible with the drug's side effects. The group generally agreed with these caveats.

- v. Staff noted one final drafting point: the phrase “under such circumstances as would afford a defense to a charge of crime” leaves ambiguous the type of defense that is relevant. Staff explained that what is intended here are the circumstances relevant to a justification or excuse defense—for example, intoxication caused by duress—but not circumstances relevant to a failure of proof defense. With that in mind, staff proposed that the relevant language be modified to read: “under such circumstances as would afford a *justification or excuse* defense to a charge of crime.” There was general agreement that this revision was sound.

III. Discussion of Commentary of the Rule of Lenity.

- a. The Executive Director thanked the Advisory Group for its various comments on the proposed Chapter 1 general provisions for the Revised Criminal Code. He said that all the comments would be reflected in the next draft, although there was one comment regarding a change to the statutory language describing the rule of lenity that he thought might be a matter of disagreement and merited discussion by the full group.
- b. The USAO had proposed alternate language for codifying the rule of lenity that would replace the words “two or more reasonable interpretations” with “meaning” in the proposed statute, and also add the words “genuinely in doubt.” The Executive Director noted that both the CCRC proposed language and the USAO comment's proposed language are taken from current District case law, and that the CCRC had cited in the Commentary the language now proposed by USAO for the statute. He noted that staff's intent was not to change current law with respect to the rule of lenity, and asked the Advisory Group for further input on the drafting options.
- c. PDS said that it preferred the original CCRC language. OAG said that it preferred the USAO language. The USAO added that it believed its proposed language captured the more recent trend in DCCA opinions.
- d. The Executive Director noted that some DCCA opinions cite both the CCRC and USAO articulations of the rule of lenity in an apparent attempt to clarify that the rule of lenity requires not only that there be more than one conceivable interpretation, but that there must be at least two interpretations meriting significant attention. He asked if there might be a way to address both points in the RCC.
- e. PDS noted that the “genuinely in doubt” language seemed to miss the mark insofar as it sounds as if the issue is one of sincerity in recognizing an alternative interpretation.
- f. The Executive Director thanked the Advisory Group and said it would further research the matter before issuing the next draft.

IV. Discussion of Legal Effect of Headings and Captions.

- a. The Executive Director noted USAO had suggested adding the words “otherwise ambiguous” to the draft provision on the effect of headings and captions. He said this language could limit reliance on headings and captions in cases when the statutes are otherwise clear, but that this was supported by at least one case. He said he thought the USAO recommendation was helpful and should be adopted in the next draft.

V. Adjournment.

- a. The meeting was adjourned at 4:05 pm. Audio recording of the meeting will be made available online for the public.