



# D.C. Criminal Code Reform Commission

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## MINUTES OF PUBLIC MEETING

**TUESDAY, SEPTEMBER 19, 2017 at 2:00PM**

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

On Tuesday, September 19, 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 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](mailto:richard.schmechel@dc.gov).

### **Commission Staff in Attendance:**

Richard Schmechel (Executive Director)

Bryson Nitta (Attorney Advisor)

Michael Serota (Chief Counsel for Policy & Planning)

### **Advisory Group Members in Attendance:**

Dave Rosenthal (Designee of the Attorney General)

Donald Braman (Council Appointee) (by phone)

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)

## **I. Welcome**

- a. The Executive Director said that, contingent on confirmation of the designee of the United States Attorney (USAO), the Advisory Group's remaining meetings in the calendar year 2017 will be held from 3pm-5pm. He said he would email an updated schedule as soon as practicable. He also reminded the Advisory Group members that the next meeting would be held October 4<sup>th</sup>. The meeting would focus on any issues remaining from the present meeting, as well as CCRC Report #10, which provides recommendations for reforms of the various fraud offenses.
- b. The Executive Director also noted that written comments for the property offense reports are due November 3<sup>rd</sup>.

## **II. Discussion of Report No. 7, Definition of Criminal Attempt.**

- a. The United States Attorney's Office (USAO) representative said that her office would like the Commission to hew close to DCCA case law. She said that some of the Commentary does a good job trying to reconcile some of the DCCA's opinions on attempt, but that there are a few places where the Commentary could be clearer.
- b. The Executive Director said that staff would review the Commentary regarding case law on attempt for the second draft.

## **III. Discussion of Report No. 8, Recommendations for Property Offense Definitions, Aggregation, and Multiple Convictions.**

- a. The Executive Director noted that Report #8 has three basic parts: first, it includes definitions that are applicable to the property offenses generally; second, it includes a provision relating to the aggregation of value in certain property offenses; and third, it includes a provision limiting multiple convictions for related property offenses.
- b. With respect to the definition of "coercion," the Office of the Attorney General (OAG) representative asked what staff intended by the use of the word "ridicule." Staff explained that this word and the surrounding phrase was drawn directly from the current blackmail offense. OAG asked whether this provision would cover situations wherein a person uses a threat to reveal a nude photograph. Staff said that the particular prong of coercion that uses the word "ridicule" may or may not apply depending on the facts of the case; however, another possible prong that would cover such conduct is contained in subsection (5)(J).
- c. The OAG representative noted that the current "deception" definition should be rewritten in order to ensure that the final subsection of the definition reads well with the introductory phrase. He suggested that the final subsection be its own sentence. The Executive Director said that the syntax of the final subsection would be reviewed.
- d. The Public Defender Service (PDS) representative noted that the definition of "property" includes both "tangible and intangible" kinds of goods. She said that this might unintentionally sweep in certain kinds of property (such as intellectual property, or even more abstract goods or ideas) that make the definition far too broad. The Executive Director noted that current law includes such "intangible" forms of property, but agreed that it merits careful attention to how liability for various property offenses works for intangible property. He also noted that legislative history from the 1982 Theft and White

Collar Crime Act did not give systematic attention to how that law's definition of property as including "intangible" property might affect the scope of offenses.

- e. The OAG representative questioned whether the definition of "dwelling" might be too narrow. He said that the definition limits itself to places that are used "overnight." He pointed out that some places that are used as dwellings might not be actually used "overnight," but actually used during the day. The United States Attorney's Office (USAO) representative also noted that the definition uses both "lodging" and "residing" overnight, which imply a temporary versus a permanent use distinction. She said that a person who stays in his or her office overnight might be "lodging" but not "residing" in the office. The PDS representative asked whether that office would constitute a "dwelling" under the Revised Criminal Code. The Executive Director said that the definition of "dwelling" is subject to some interpretation, because the definition must be flexible to account for many types of physical locations and types of usage. He noted that other jurisdictions' definitions are in line with the proposed language, or provide even less clarity. However, he said that staff would review whether it is possible to clarify the meaning of the statute even further, including the removal of the word "overnight."
- f. The OAG representative asked about the naming and definition of "payment card." The Executive Director said that the phrase "payment card" and its definition are drawn directly from the current definition of "credit card fraud" in current law. However, because "credit card" is defined very broadly in current law, and actually includes debit cards, the phrase "payment card" seemed to convey the breadth of current law more clearly. The OAG representative wondered whether the definition and revised offense would cover situations involving online accounts with their own credit, like PayPal. The Executive Director explained that, under both current law and the Revised Criminal Code, the account number must be linked to a "physical" instrument. The Executive Director noted that the current definition and the Revised Criminal Code definitions are broad. They could include cards that are used to obtain services (a form of property), perhaps even library cards and gym membership cards. The Executive Director emphasized that the CCRC recommendations on the scope of the definition of payment cards are merely intended to reflect the state of current law.
- g. The Executive Director noted that, unlike the Model Penal Code and some other jurisdictions, the Revised Criminal Code does not have a separate "theft of services" offense or means of committing theft. Instead, as in current District law, it simply defines property to include services, and then provides another definition for "services."
- h. The OAG representative noted that the Commentary to the definitions on pages 32 and 34 provided an incorrect citation for the current definition of "person."
- i. With respect to the limitations on multiple convictions provision in Report #8, the OAG representative said that there are some possible procedural problems that could arise from this provision. In particular, he said that the provision could potentially give rise to multiple sentencing hearings and multiple appeals. He suggested that the limitations on multiple convictions provision could instead include a procedural provision that would codify the D.C. Superior Court's current practice with respect to merger. He said that, in such a provision, the court would leave the convictions in place until either the period of time to file a notice of appeal has lapsed (30 days), at which point the Superior Court

would vacate any convictions subject to the limitations on multiple convictions. Alternatively, if an appeal takes place, the Superior Court would not vacate any multiple convictions until the appeal has been resolved. The Executive Director said that this sounds like a workable solution that would have the same policy effect, but minimize the administrative burden. He asked the OAG representative to work with staff to develop this idea further or to submit a proposal in writing. The OAG representative said that he could work on language that would codify this procedure.

**IV. Discussion of Report No. 9, Theft and Damage to Property Offenses.**

- a. Professor Don Braman raised an organizational point regarding the placement of definitions in the revised offenses. He suggested that the definitions should be placed at the beginning or end of every section, rather than in the middle which breaks up the relationship between the offense definition and penalties, which may include gradations. The OAG representative said that it would be best to have the definitional section at the end of the offenses. The USAO representative added that it would be best to have phrases separated by semicolons for clarity. The Executive Director said these drafting points made sense and invited any further comments on drafting and organizational style for the Revised Criminal Code.
- b. The USAO and OAG representatives asked about the use of “effective consent” in the Revised Criminal Code’s Unauthorized Use of Property (UUP) offense. Staff explained that “effective consent” is simply a drafting technique that prevents the need to list all the different forms of ineffective consent. The OAG representative asked whether incapacitation through intoxication would render consent ineffective. Staff said that intoxication is not included as something that renders otherwise valid consent ineffective, and noted that there does not appear to be any case law suggesting that intoxication can render consent ineffective for purposes of property offenses. However, intoxication may well be a question of fact in whether there is consent at all in a given case. The USAO representative noted that it may be confusing to use “consent” and “effective consent,” and that breaking out all of the elements of “effective consent” into the statute would be easier for readers to understand. The Executive Director said that staff would review whether and how to break out the elements of effective consent in the second draft.

**V. Adjournment.**

- a. The meeting was adjourned at 4:00pm. Audio recording of the meeting will be made available online for the public.