



D.C. Criminal Code Reform Commission

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MINUTES OF PUBLIC MEETING

WEDNESDAY, NOVEMBER 1st, 2017 at 3:00PM

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

On Wednesday, November 1st, 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 4th 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
Management & Legislation)

Michael Serota (Chief Counsel for Policy &
Planning) (by phone)

Bryson Nitta (Attorney Advisor)

Jinwoo Park (Attorney Advisor)

Advisory Group Members in Attendance:

Dave Rosenthal (Designee of the Attorney
General for the District of Columbia)

Donald Braman (Council Appointee)
(by phone)

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)

Kate Mitchell (Committee Director of the
Council of the District of Columbia Committee
on the Judiciary and Public Safety)

I. Welcome.

- a. The Executive Director welcomed Kate Mitchell to the Advisory Group meeting and recognized the long service of Chanell Autrey who had moved to another position at the Council.
- b. The Executive Director reminded the Advisory Group that written comments on the property offense reports are due November 3rd.
- c. He also informed the Advisory Group that a new report will be distributed the following week. That report will concern the Commission’s recommendations for codifying conspiracy liability. He said that comments on that report will be due in mid-December, the date being specified in the draft report.
- d. The Executive Director also said that the Commission is currently working on drafts for offenses against persons—specifically assault, threats, and robbery. Once these draft reports are complete, additional reports will follow addressing reforms to homicide and sexual assault laws. He encouraged the Advisory Group members to affirmatively contact the Commission with any ideas or points of particular interest with respect to these offenses, even prior to the distribution of the Commission’s first drafts.
- e. Finally, the Executive Director noted that a basic set of data and statistical information will be provided to the Advisory Group soon, hopefully in the coming month. He added that Advisory Group members should feel free to inquire with staff about any particular questions they may have in the interim.

II. The Advisory Group discussed Report #8, Recommendations for Property Offense Definitions, Aggregation and Multiple Convictions.

- a. The Public Defender Service (PDS) representative asked about a subsection in the definition of “deception.” Subsection (D) includes failures to disclose adverse claims or liens with respect to property. The PDS representative asked whether this relates to an otherwise freestanding legal duty to disclose liens. And if it does not, does subsection (D) create a kind of strict liability offense of fraud for non-disclosure?
- b. Staff said that the use of the definition within the revised fraud offense would require that the failure to disclose the lien be done knowingly and the defendant must also know that the failure to disclose is a but-for cause of the transaction. Thus, if the defendant knew that a particular transaction would not move forward if the victim knew that some property was encumbered by a lien, and did not disclose that lien to the victim, then the defendant could be guilty of fraud. But if the victim, for example, knew of a lien through some other means (such as by researching the property’s title history), and the failure to disclose was not a cause of the transaction going forward, then the defendant’s failure to disclose the lien could not be a basis for fraud liability. Therefore, that defendant could not be guilty

of fraud. Staff said that the Commentary entry would be reviewed to clarify this point.

- c. The PDS representative also asked about the use of the word “material” throughout the offenses, but in particular, its use in subsection (J) of the definition of “coercion.” She asked if “material” is intended to be objectively assessed, or subjectively assessed from the viewpoint of the complainant.
- d. Staff explained that this point was not clarified in the Commentary draft. The assessment of what is “material” could be objective or perhaps subjective from the point of view of the defendant (consistent with the reference to the coercive act being “calculated”), but the reason for including the word is to require that the threatened harm must be more than trivial or insubstantial. The PDS representative suggested that a clearer example in the Commentary could help clarify the meaning of the provision.
- e. The Office of the Attorney General (OAG) representative also addressed a provision in the Limitations on Multiple Convictions statute. He said that his office favors finding a way to make the procedure for this statute more streamlined. He also noted that the statute provides that, in cases where two offenses subject to a limitation have the same penalty, the court decides which offense to vacate and which to retain. He suggested that instead, the statute should specify that the court should vacate the offense the government chooses, rather than have it be purely discretionary. The PDS representative objected to this suggestion, noting that the defendant may have an interest in collateral consequences stemming from a particular offense. The Executive Director agreed that the provision could be expanded to include a more specific process for judicial decision making. For example, the statute could require the judge to hear from both the government and the defendant concerning which offense to enter. He said that staff will look into other jurisdictions’ practices, and would also consider the Advisory Group members’ comments in their written responses concerning this provision.

III. The Advisory Group discussed Report #10, Recommendations for Fraud and Stolen Property Offenses.

- a. The OAG representative noted that the use of the word “transfer” in fraud suggests that the defendant must be the one who is required to transfer the property. He said that in many fraud cases, it is really the victim who transfers property at the inducement of the defendant. Staff said that the word “transfer” is intended to cover transactions initiated either by the defendant or a victim or a third party and that staff would review the language to see how this could be clarified.
- b. The OAG representative also suggested eliminating the requirement in the graffiti offense that the graffiti be visible from a public-right-of-way. Staff explained that this is a requirement in current law, most likely due to the offense’s relationship to

civil graffiti abatement laws. The OAG representative said that it would make the most sense to simply have a conforming amendment for the civil abatement statutes, and remove the requirement from the offense. The PDS representative agreed. The Executive Director said staff would propose such a revision in the second draft.

- c. The PDS representative asked what the Commission intended to cover in the offense of payment card fraud, with respect to the subsection on using a card that has not been issued. Staff explained that this is intended to cover situations involving payment cards or card numbers that are not tied to a real card that are still used to obtain property. The PDS representative also asked about the jurisdiction provision in subsection (d)(3) of the offense. She wondered whether the provision is redundant. Staff suggested a few scenarios where it would not be redundant, and added that the provision is drawn from the current statute.
- d. The OAG representative noted that in the identity theft provision, reference is made to employees and contractors; he said that this is not necessary and should be revised to simply say “another person.” Staff said they would review the drafting to clarify the point. He also said that the reformed identity theft offense excludes giving false names to police officers. He said that it is important that this conduct continue to be criminalized, although he recognized that it may not fit conceptually within identity theft. The PDS and OAG representatives also agreed that it should probably not fall within the reformed obstruction of justice offense, given that offense’s seriousness. Staff agreed that the conduct should remain criminalized somewhere within the code, and that it will be addressed in future reforms. The Executive Director said the commentary on this point would be updated for the second draft.
- e. The PDS representative asked about the alteration of motor vehicle identifying numbers offense. Specifically, she said that the penalty provisions are somewhat vague; it seems that if a defendant had a vehicle that had a legitimate ID number, but then altered a part within that vehicle, the penalty provision could be read to allow the value of the whole vehicle (not the part) to determine the penalty. The OAG representative agreed that, in the example, the value of the part that has an altered number should be the basis for the penalty, not the value of the car. The PDS and OAG representatives agreed to alter the text of the offense to reflect that the value of the property that should be considered is the value of the part or vehicle that the defendant altered. The Executive Director said a change to that effect would be incorporated in the second draft.

IV. Adjournment.

- a. The meeting was adjourned at 4:30pm. Audio recording of the meeting will be made available online for the public.