

MINUTES

KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

July 25, 2007
Room 519-S—Statehouse

Members Present

Tom Stacy, Chairman
Ed Klumpp, Vice-Chairman
Senator John Vratil
Senator David Haley
Representative Paul Davis
Michael Kaye
Tim Madden
Kim Parker
Judge Richard Smith
Judge Larry Solomon
Jacqie Spradling
Debra Wilson

Staff Present

Jill Wolters, Senior Assistant, Office of the Revisor of Statutes
Duston Slinkard, Assistant, Office of the Revisor of Statutes
Jason Thompson, Assistant, Office of the Revisor of Statutes
Jerry Ann Donaldson, Principal Analyst, Kansas Legislative Research Department

Professor Stacy introduced the new Commission members, Representative Paul Davis, Judge Larry Solomon and Debra Wilson, public defender.

Ms. Spradling moved, Professor Kaye seconded, that the July 6, 2007 minutes be approved as drafted. The motion was unanimously adopted.

The Commission reviewed the Reporter's letter of agreement (Attachments 1 and 2). Professor Stacy stated if the terms of the agreements were to be discussed, the Commission could go into executive session. The Commission agreed there was no need to go into executive session.

Professor Kaye moved, Ms. Spradling seconded, to authorize Professor Stacy and Mr. Klump to enter into an agreement with the Reporters for their services pursuant to the letters of agreement. The motion was unanimously adopted.

In regard to the staff attorney position, Ms. Parker expressed concerns that the Commission spend the allocated money wisely and that the Commission hear what the Reporters thought about a need for a staff attorney. Members discussed whether it was necessary to hire a staff attorney. Ms. Parker clarified that the discussion was not meant to hold up progress, but wanted the Reporters to be involved in the hiring decision.

Both Reporters spoke of the need for staff attorney. Judge Brazil continues to serve as a senior judge. A staff attorney should possess research and writing skills with time to produce a quality work product. The job description required applicants to demonstrate their reading and writing skills. The Reporters would devote more time to develop and expand the comments in areas that are new to or expand philosophy of Kansas criminal law.

Judge White was concerned with efficiency. The preparation of charts and word processing could be done by someone else and may produce a better work product. He was not able to get to other things which are more important, such as comments. The staff attorney will free the reporters time to address other issues. He has spoken to other Reporters and it has been suggested that work product be prepared by a smaller group of people and presented to the entire Commission. He is also hoping to have the ability to revise the drafts during meetings with power point.

Professor Stacy discussed the role of reporter's relative to the Commission. He is of the opinion we are paying the Reporters for experience and judgement. The staff attorney would be compiling research such as how many jurisdictions have a rule, case law analysis, etc. The staff attorney would free the Reporters for more time to think about whether adopting the rule would be wise for Kansas. The Reporters would adopt a considered view and lead the Commission toward a considered view.

The hiring sub-committee met prior to the start of the meeting. Fourteen applications were received. The sub-committee voted to interview 4 or 5 persons. Interviews will be scheduled next week. The sub-committee could make a recommendation regarding a hiring decision and present it to the Commission or select two or three candidates and let the Commission decide. Members discussed the options. Many members believed the Reporters views during interview process were important.

Ms. Wilson moved, Professor Kaye seconded, that the Commission delegate the hiring authority to the sub-committee. The motion was unanimously adopted.

Professor Kaye requested that if Commission members know someone who would be interested in the staff attorney position, have such person contact Janelle Williams, Kansas Judicial Council.

Senator Vratil asked Commission members what direction the Commission intends to take a recodification or a revision of the Code. Judge White stated that is the first question to be discussed under Agenda Item 5. Professor Stacy reported that the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project voted to recodify, not to revise. To follow-up, Senator Vratil asked if this Commission would establish policy or leave that up to the legislature. Judge White inquired as to the expectations of the legislature. Judge White opined that there will be issues the Commission can not agree on, there may be a majority and minority report. It is Senator Vratil's opinion that the Legislature authorized a recodification, but not to have major philosophical changes within code. It would be advisable for this Commission to make recommendations for policy changes, but not policy itself. Senator Vratil stated that defining key terms is not a policy change, merely good judgment and common sense. Professor Stacy stated hot button issues such as the death penalty would not be changed, but asked about the drug grid, severity level one offenses, which have a downward departure rate of approximately 50 percent. Senator Vratil suggested

leaving drug grid, severity level one sentences as they are currently, but draft a separate section of the report to make recommendations of policy changes. Representative Davis agreed with Senator Vratil, and pointed out the Legislature does struggle with these policy decisions. He is of the opinion that it would be extremely helpful to the Legislature for the Commission to make policy recommendations in the report, not in the draft revisions.

As an example, Mr. Madden pointed out that drug quantity and the role of offender in the crime are distinctions other states use in sentencing.

Professor Stacy stated that in the legislative process, presenting an effective constituency is important. There is not a lobbying group for criminals. There is considerable political risk to not being tough on crime. When there is clear evidence that exists where sentences are unduly harsh, the Commission could present that evidence.

Senator Vratil reminded the Commission that the Vera Institute Report shows such sentences are disproportionate. He is of the opinion that if this Commission would recommend sentences that are proportionate, the Commission work will be discounted. Such changes need to be made in a separate section of the report. Professor Stacy requested that Senator Vratil guide the Commission when making recommendations that clearly are policy.

Judge White opined that the Commission should ask lobbying groups, such as the Kansas Association of County and District Attorney's, Kansas District Judges Association and Kansas Bar Association (KBA), to be involved in the discussions, not just reviewing drafts. Representative Davis supports keeping these groups informed.

Senator Vratil stated that not just attorney groups should be informed, but also law enforcement organizations. Such groups have a powerful voice in the Legislature. The leaders of such groups should be requested to solicit opinions from the members of such groups.

Professor Stacy is of the opinion that there is value in writing article for the KBA journal as well as posting drafts on the website for the solicitation of comments. The article could also be published in other groups publications.

Mr. Klump reminded members that they represent a constituency and should keep such constituency up to date on what the Commission is accomplishing. It is a Commission member's responsibility. If there is a website, the article should contain the website so interested persons could Commission contact members.

Senator Haley believes it is important to have a central site where interested persons can find information. Also, it is important to have Legislative Judiciary Committee leadership support.

Judge Brazil encouraged legislative members of the Commission to review a critique by Professor Robinson on the process of recodification.

Regarding defenses, Judge White stated that Kansas does not have defenses which are included in the MPC and that other states have adopted. He believes that is a policy change and should be considered. Senator Vratil stated if the defenses are recognized in case law and commonly accepted, he does not consider it a policy change.

Professor Stacy pointed out the Commission will have the discussion on the specific parts of the code when each article is discussed. The current discussion should focus on:

- Role of Commission and Legislature;
- Comprehensive recodification or piece meal; and
- Process to follow with the Reporters.

Regarding point 2, Senator Vratil asked for a definition of comprehensive recodification vs. piece meal. Professor Stacy responded that a comprehensive recodification would look at the entire code and make revisions, making it more coherent and simplified.

Judge White reported that in 1969, the code was based on the MPC. Kansas adopted one-half to two-thirds of the MPC. He is not aware of the reason for not adopting the entire MPC. The MPC does not address all the current issues. Two-thirds of the states have adopted criminal codes based on the MPC. Texas and Arkansas are good examples. The Reporters plan to review issues Kansas does not address from the MPC and how Kansas could address such issues. If changes are made, the Reporters will present solid reasoning for the changes, changes that are research based with data to support the changes.

Senator Vratil stated a recodification is comprehensive by definition and that is what the Commission should be doing.

Professor Stacy discussed specific problems with the code. With recodification, those can be revised. In regard to the degree to which the Commission will review the cost of recodification vs. benefit, should culpability be revised.

Ms. Parker believes if the Commission does change culpability, it will be very expensive to implement. She suggested skipping over Articles 1 and 2 and move to other crimes.

Professor Stacy questioned how the Commission would define crimes and establish sentences if the culpability standards have not been established.

Judge Smith objected to the measurement of cost. He argued there is no way to measure costs at this time. Members discussed the costs to mean the costs of "relearning" by prosecutors, judges, law enforcement and others in the criminal justice system.

Judge White believed starting with the general principles of criminal liability will set the guidelines for what will happen in the other parts of the code.

Regarding the Working Statement of Goals and Process ([Attachment 3](#)), the Commission discussed the role of the Reporters and the Commission. Concerns were expressed that the Reporters would control the process. The Recodification subcommittee reviewed memos prepared by Professor Stacy and KU law students and gave drafting directions to the Reporters. Members believed the Commission would be better served in a process where the Reporters served a role of guiding the work. The Reporters would initially review parts of code not previously reviewed and prepare an initial draft for the Commission review. Judge White was comfortable with either approach.

Judge Brazil brought up another consideration of time commitment. Other Commission members have full-time jobs. The recodification is not going to be complete by working one day a month. The staff attorney will spend full-time on research, review, and drafting.

Mr. Klump supports reviewing drafts, not reviewing memos, discussing drafts, then having the Reporter's revise.

Members discussed the value of the prepared charts with proposed drafts of the current statute with proposed changes and if appropriate, then compared with the MPC.

Professor Stacy noted the Commission is ceding some authority that subcommittee insisted on in the past.

Judge Smith stated it is important to have a final product after discussion, not revisiting the issue.

Judge Brazil noted that the minutes should be prepared and distributed in a timely manner.

The Commission members discussed bringing together all criminal statutes which are currently located in other K.S.A. chapters. Senator Vratil believed under ideal conditions, that should be done. However currently, the Commission should focus on chapter 21 and the drug offenses.

Professor Stacy reported that a searchable CD of crimes would be available to the Commission in September, 2007. The Revisor's Office will provide this for the Commission.

The Commission members reviewed the budget (Attachment 4). The Commission will submit a proposed budget for FY'09 within the next two months through the Judicial Council. It was pointed out that if the staff attorney is a member of the KBA, they can use Case Maker free of charge; there would be no need to have the office expense of a Lexis Nexis subscription. Members are reviewing office space options. Ms. Spradling will investigate whether the Attorney General has any available office space.

The meeting was recessed at 12:05 p.m.

The meeting reconvened at 1:30 p.m.

Professor Stacy requested the Revisor's Office distribute a memorandum concerning the Kansas open meetings act that had been previously presented to the Recodification subcommittee.

The Commission members began the review of Article 1 PRELIMINARY (Attachment 5).

[Note: If the section of the Article is not specifically listed, there was no discussion or changes made to the section.]

21-115 Jurisdictional Applicability

The Reporters will consider redrafting the statute to incorporate *State v. Grissom*, 251 Kan. 851, or address the difference between the statutory language and *State v. Grissom*. Ms. Parker stated this is also a question between counties.

Members discussed acts vs. elements of the crime. Regarding the question of burden of proof, Professor Stacy stated Kansas case law is inconsistent on jurisdiction applicability. Members discussed whether the burden of proof is to be determined beyond a reasonable doubt by the jury or by a preponderance of the evidence by the court. The Reporters will review these issues.

21-120 Time Limitations

Judge White questioned whether the proposed changes were policy changes. Senator Vratil believes this case is on the border line. In regards to the limitation for KPERS, it was the Senators suggestion to leave the ten-year statute of limitations as in current law, but in proposed policy recommendations, state that a five-year statute of limitations is more appropriate. Members discussed the additional discovery procedure within the time limitations. Ms. Spradling is of the opinion that all homicides should have no statute of limitation. Further, the Commission discussed the discovery and reporting of crimes. Senator Vratil questioned why misdemeanors and traffic infractions have different discovery provisions. Professor Stacy opined it was because of the lesser punishment and as such, the offenses do not merit an increase in statute of limitations. Senator Vratil questioned the lack of consistency and making it uniformly applicable. Ms. Parker stated the short statute of limitations encourages citizens to report crimes.

21-130 Burden of Proof

It was suggested to revise this section to clarify the “state has the burden of proof” not prosecution. Also in line 6, delete “required” in front of “element”. In regard to affirmative defenses, it was pointed out that the defenses that do not go to culpability need not be proven beyond a reasonable doubt. Professor Stacy was requested to prepare a specific proposal in regard to this section. Commission members will also review the MPC.

21-150 Definitions

In regard to subsection (d), members discussed whether this should also include a pleading of no contest and a finding of guilt by the jury or court.

Article 2 PRINCIPLES OF CRIMINAL LIABILITY

Judge Brazil suggested reading the November 11, 2005 Professor Robinson critique concerning the principles of criminal liability. It contains a good discussion of culpability, specifically see pages 8 to 14. Judge White will send out the critique electronically. Another perspective on culpability is in the article in the Ohio State Criminal Journal of Law, Vol. 1, page 179, “Should the Model Penal Code *Mens Rea* Provisions Be Amended?” ([Attachment 6](#)).

Professor Kaye questioned if it is a change. He is of the opinion it is a synthesis of the law. Offenses should be graded according to culpability, eliminating difficult concepts.

Members questioned if the comments have any legal significance. This was briefly discussed but no conclusion reached.

Judge White will gather information on culpability for further discussion at a later meeting. Changes will effect available defenses, but MPC carries over the same principles but may use different terms. There may be value in having three levels of culpability, as some states do, or four levels like the MPC.

Members requested seeing specific examples of language on crimes. Members expressed concern with how the murder statutes would then be revised. It was cautioned not to have unintended consequences of statutory changes, not creating new crimes which were not intended to be crimes.

Judge Smith suggested establishing levels of culpability first, then looking at a number of crimes and see how that level would fit in the statutes. Also, reviewing the language of states that use the MPC.

Ms. Parker questioned the reason for changing culpability, is there a problem the Commission is trying to address.

Judge Brazil opined that it would assist in addressing the issue of proportionality.

Professor Stacy stated the following reasons in support of the change:

- There are a number of offenses which use culpability terms.
- The Legislature never defines what level of culpability goes with each element of the crimes.
- The Legislature does not define the difference between reckless and negligence.

Members questioned whether it would be a better, fairer trial if three or four defined levels of culpability would be used. Other members questioned whether the problem could be resolved through definitions.

If the changes are made, they must be made consistence throughout the entire code.

The Commission will further review culpability at the next meeting.

The next meeting will be August 22, beginning at 9:30 a.m., in Room 519-S, Statehouse.

The meeting was adjourned at 4:10 p.m.

Submitted by Jill Wolters, Senior Assistant,
Office of the Revisor of Statutes

Approved by Committee on:

August 22, 2007

(Date)