

VIRGINIA CODE COMMISSION

Wednesday, April 19, 2011 – 10:00 a.m.

General Assembly Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

MEMBERS PRESENT: John S. Edwards; Bill Janis; Jim LeMunyon; Ryan McDougle, Charles S. Sharp; Thomas M. Moncure, Jr.; Frank Ferguson; Wesley G. Russell, Jr.; E.M. Miller, Jr., Patricia West

MEMBERS ABSENT: Robert L. Calhoun

OTHERS PRESENT: Brian Kennedy, LexisNexis

STAFF PRESENT: David Cotter, Jane Chaffin, Lilli Hausenfluck

Call to order; introduction of new members

Senator Edwards called the meeting to order at 10:05 a.m. The Commission welcomed new members Wesley G. Russell, Jr. and Judge Charles S. Sharp. Mr. Russell is the Deputy Attorney General in the Civil Litigation department at the Attorney General's office. Mr. Russell was designated by Attorney General Cuccinelli to represent him on the Code Commission. Governor McDonnell appointed Judge Sharp of the Stafford Circuit Court to succeed Judge Roush.

Minutes

By a motion made by Mr. Miller and seconded by Mr. Moncure, the Commission approved the minutes of the November 17, 2010, meeting with an amendment to show that Mr. Ferguson was present at that meeting.

Legislative update

Jane Chaffin provided an overview of the legislation recommended by or affecting the Virginia Code Commission that was enacted at the 2011 Session of the Virginia General Assembly:

Chapters 241 and 315 affect Administrative Process Act provisions relating to the review of regulations for adverse impact on small businesses. Chapter 464 establishes (i) a 90-day timeframe for filing changes to regulations based on mandates by statute in which the agency has no discretion and (ii) a 120-day timeframe for filing a Notice of Intended Regulatory Action whenever amendments are necessitated by statute.

Small Business Impact: Chapters 241(LeMunyon) and 315 (Edwards), which are duplicate acts, are Code Commission recommendations based on a report of the Administrative Law Advisory Committee. The acts clarify the process for the notice of completion of the small business impact statement and review of existing regulations to minimize the economic impact of regulations on small businesses. The acts (i) change the periodic review requirement from five years to four years to conform to the procedures for regulatory review adopted by each Governor under §§ 2.2-4013 and 2.2-4017, (ii) require agencies to publish a notice of the review and report of the findings in the Virginia Register of Regulations and post the notice on the Virginia Regulatory Town Hall, and (iii) provide for a 21-day public comment period after publication of the notice.

1 The acts also clarify the publication requirements of agency statements required by § 2.2-
2 4007.1 D related to extending the timeframe to review final regulations in existence on July 1,
3 2005, and adopted between July 1, 2006, and July 1, 2010.

4 APA Timeframes: Chapter 464 (Pollard) requires agencies to file updated regulations with the
5 Registrar of Regulations within 90 days of the law's effective date when regulatory changes are
6 (i) nondiscretionary and (ii) necessary to conform to a change in law. The act also requires
7 agencies to file a Notice of Intended Regulatory Action with the Registrar of Regulations
8 within 120 days of a law's effective date whenever a Virginia statutory change necessitates a
9 change to, or repeal of, all or a portion of a regulation, or the adoption of a new regulation.

10 Code Commission membership: Chapter 848 (Edwards) changes the appointment authority for
11 the two circuit court member representatives to the Code Commission from the Governor to the
12 Speaker of the House of Delegates and the Senate Committee on Rules. The legislation also
13 adds the Governor or his designee to the Commission.

14 **Foreword to the Code of Virginia**

15 Mr. Moncure handed out a draft revision to the Code of Virginia Foreword, which is located in
16 Volume 1. Since Volume 1 is being replaced this year, Mr. Moncure volunteered to review the
17 2008 edition and draft suggested changes for the Commission's consideration. Members are
18 requested to submit comments on the changes to Mr. Moncure. A final draft will be available at
19 the next meeting.

20 **Request to modify catchline of § 18.2-479.1**

21 Mr. Miller presented a request from Henry County Commonwealth's Attorney Roberet
22 Bushnell that the Commission consider changing the section catchline of § 18.2-479.1 of the
23 Code of Virginia to more clearly describe the content of the section. In Mr. Bushnell's letter
24 dated February 10, 2011, he explains that the language of § 18.2-479.1, which states that it is
25 unlawful for a person to flee from a law-enforcement officer to avoid an arrest, is often
26 overlooked by police and magistrates who instead focus only on the section catchline. His letter
27 further indicates that defendants are often erroneously charged with § 18.2-479.1 when the
28 appropriate charge would be § 18.2-460, which prohibits obstruction of a law-enforcement
29 officer in the performance of his duties. Mr. Bushnell suggests that an appropriate remedy
30 would be to change the catchline of § 18.2-479.1 from "resisting arrest" to "fleeing to avoid
31 arrest."

32 Mr. Miller stated that § 1-217 of the Code of Virginia provides that headlines of sections are
33 intended as mere catchwords to describe the contents of a section, but are not considered part of
34 the act of the General Assembly. Section 30-149 gives the Code Commission some discretion
35 in making certain minor changes to the Code of Virginia, including changes to section
36 catchlines.

37 After discussing Mr. Bushnell's request, Mr. Miller made a motion, seconded by Judge West, to
38 change the catchline of § 18.2-479.1 to read "Resisting arrest; fleeing from a law-enforcement
39 officer; penalty." The motion was approved.

1 **Code Commission nonlegislative citizen member recommendation**

2 Subdivision 5 of § 30-145 of the Code of Virginia provides for the appointment of two
3 nonlegislative citizen members to the Virginia Code Commission upon recommendation of the
4 Commission. Last year, Frank Ferguson was appointed to one of the nonlegislative citizen
5 member vacancies by the House Speaker. The chairman stated that a second citizen member
6 seat is available for appointment by Senate Rules, and he opened the floor for discussion. After
7 a brief discussion, Mr. Moncure made a motion, seconded by Mr. Ferguson, to recommend to
8 the Senate Committee on Rules the appointment of E.M. Miller, Jr., to fill the second citizen
9 vacancy. The Commission unanimously approved the motion. As Division of Legislative
10 Services Director, Mr. Miller has served on the Commission in an ex-officio capacity since
11 1988. Senator Edwards will advise the Senate Rules Committee chair of the Commission's
12 recommendation and of the Committee's authority to make the appointment.

13 **Work plan**

14 The Commission discussed title revisions and other projects to include on its work plan. The
15 Title 64.1 recodification is expected to be completed this year and ready to prefile for
16 introduction to the 2012 General Assembly session. Title 55, Property and Conveyances, has
17 never been recodified by the Commission and was previously proposed as a recodification
18 candidate. However, the DLS staff attorney assigned to Title 55 recently left the division to
19 take a position elsewhere, and currently no staff is assigned to this project.

20 Mr. Miller briefed the Commission on how titles have been selected in the past. Historically,
21 the Code Commission was directed to recodify a title by a resolution passed by the General
22 Assembly. However, for approximately the past 12 years, titles have been selected by
23 Commission vote pursuant to the Commission's authority found in § 30-152. Mr. Miller stated
24 that he could solicit suggestions from DLS staff. Additionally, at the suggestion of Delegate
25 LeMunyon, staff will post a notice in the Virginia Register. The Commission will revisit title
26 recodification candidates at a future meeting.

27 Other projects on the work plan include:

- 28 • Continue with the obsolete laws analysis project required by § 30-151 (statute requires
29 reporting at least every four years, but it was suggested that reporting should be in even-
30 numbered years when there are less restrictions on bill limits for House members).
- 31 • Study incorporation by reference of federal law into Virginia law, including (a) terminology
32 inconsistencies within the code that reference federal law; (b) whether the incorporated law
33 will automatically conform to the referenced federal law when amended at the federal level,
34 or whether the incorporated federal law remains effective as it existed on the date of the
35 Virginia General Assembly's enactment; and (c) whether prospective incorporation of
36 federal law is an unconstitutional delegation of legislative power. Delegate Janis
37 commented that this issue does not need to be addressed by the Commission, but instead
38 should be addressed by the legislature if a specific issue arises or a problem manifests.
- 39 • Revise the Virginia Code Commission regulations implementing the Virginia Register Act,
40 which were last revised in 1994.

- 1 • Review the Model State Administrative Procedures Act adopted by the Uniform Law
2 Commission (ULC). The Commission will refer this issue to the Administrative Law
3 Advisory Committee for study and a comparison of the model act and Virginia's
4 Administrative Process Act.
- 5 • Monitor ULC's Electronic Legal Material Act drafting committee and consider impact on
6 Virginia statutory and administrative codes. Mr. Miller will assign a DLS staff attorney to
7 update the Commission on the act later this summer.
- 8 • Revisit status of Virginia Rules of Evidence. The Code Commission has the authority to
9 adopt rules of evidence upon recommendation of the Supreme Court. Senator Edwards will
10 contact the Supreme Court Chief Justice to discuss whether the Supreme Court plans to
11 adopt formal rules of evidence.
- 12 • The Virginia Register printing agreement with LexisNexis expires June 1, 2012, and the
13 Virginia Administrative Code publishing contract with West expires in December 31, 2012.
14 The process for renewing or reissuing those contracts should begin by the end of the year.
- 15 Mr. Moncure made a motion, seconded by Delegate LeMunyon, to approve the work plan. The
16 motion was approved.

17 **Status of Title 64.1 recodification**

18 David Cotter briefed the members on the status of the Title 64.1 recodification. The
19 Commission reviewed approximately 50% of the recodification material last year. The
20 workgroup is currently reviewing proposed Chapter 4 (Personal Representatives and
21 Administration of Estates), and a General Provisions chapter is being created. Also, Titles 26
22 and 31 will be incorporated into proposed Title 64.2. SB750, relating to uniform guardianship
23 and conservatorship, passed during the 2011 General Assembly Session and will be
24 incorporated into the new title as well. The goal is to introduce the recodification bill into the
25 2012 General Assembly Session.

26 **Virginia Administrative Code replacement volumes**

27 Lilli Hausenfluck presented a proposal to replace Volumes 4 (Corporations; Criminal Justice
28 and Corrections; Economic Development), 5 (Education), and 13 (Housing) of the Virginia
29 Administrative Code. These recom compilations will be shipped with the 2011 Fall supplements.
30 Mr. Ferguson made a motion, seconded by Mr. Moncure, to approve the staff recommendation.
31 The motion was approved.

32 **Other Business; Public Comment; Adjourn**

33 Senator Edwards asked Ms. Chaffin to poll members for meeting dates.

34 Mr. Miller advised the Commission that DLS had decided on a vendor to install the new
35 telephone system. The goal is to have the system installed before the end of June.

36 Brian Kennedy, Associate Director - Government Content Acquisition, introduced himself to
37 the new Commission members.

- 1 The chair opened the floor for public comment. As there was no public comment and no further
- 2 business to be discussed, the meeting adjourned at 11:30 a.m.