

VIRGINIA CODE COMMISSION

Wednesday, September 7, 2011 - 12 noon

General Assembly Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

MEMBERS PRESENT: John S. Edwards, Ryan McDougle; Bill Janis, Jim LeMunyon; Patricia West; Robert L. Calhoun; Thomas M. Moncure, Jr.; Wesley G. Russell, Jr.; Jeffrey S. Palmore; Robert L. Tavenner; E.M. Miller, Jr.

MEMBERS ABSENT: Charles S. Sharp, Frank Ferguson

OTHERS PRESENT: Chris Nolen; Lane Kneedler; Brian Kennedy, LexisNexis; Jeannine Rose, Department of Planning and Budget

STAFF PRESENT: Lisa Wallmeyer, David Cotter, Wenzel Cummings, Elizabeth Palen, Jane Chaffin, Lilli Hausenfluck, Karen Perrine

Call to order; minutes

Senator Edwards called the meeting to order at 12:10 p.m.

The minutes of the July 18, 2011, meeting were presented. Upon a motion made by Mr. Miller and seconded by Delegate Janis, the Commission approved the minutes.

Mr. Miller asked the Chairman to revisit an issue from the last meeting. He expressed his concern about two individuals being designated by the Governor to fill the Governor's seat on the Commission and asked whether a precedent is being set for other members to do the same thing. Mr. Palmore stated that the Governor's office feels the designation is consistent with the statute and that the Governor would more likely have a continued presence on the Commission with two designees.

Administrative Law Advisory Committee (ALAC)

Work Plan

Chris Nolen, ALAC Chair, reported that ALAC has met twice this interim. At ALAC's first meeting, Lane Kneedler, Virginia Uniform Law Commissioner, provided an overview of the Model State Administrative Procedures Act as adopted by the Uniform Law Commission in 2010. ALAC decided to divide into two work groups--regulatory and judicial. The work groups are charged with assessing Virginia's existing Administrative Process Act and comparing the model act, noting where improvements could potentially be made to Virginia's regulatory process. The Regulatory Workgroup is looking at the regulatory structure and rulemaking aspects and the Judicial Workgroup is looking at agency action and circuit court review.

With the Commission's approval, the work groups will continue studying the model act and form recommendations to present to the Code Commission. Mr. Moncure made a motion, seconded by Mr. Miller, to approve ALAC's work plan as presented. The motion was approved.

Budget

Mr. Nolen presented the proposed 2011-2012 ALAC budget. ALAC is requesting a \$20,000 allocation from the Virginia Code Commission budget for the conduct of meetings; hiring interns and, if needed, consultants; conferences and training; and publications and supplies. This figure is consistent with the budget approved last year.

Mr. Miller recommends changing the "Consultant Expenses/Intern Expenses" line item to read "Intern Compensation and Expenses." Delegate Janis made a motion, seconded by Mr. Russell, to include Mr. Miller's recommended change and to approve the budget as amended. The motion carried.

Code of Virginia Notice Delivery Provisions

Lisa Wallmeyer summarized the issues previously addressed concerning the expansion of Code provisions requiring delivery of notices by U.S. postal carrier to include commercial delivery services and presented a bill draft for the Commission's review. Ms. Wallmeyer stated that the issue is not as straightforward as she thought it would be leaving the last meeting. The terms "registered mail" and "certified mail" seem to be used interchangeably throughout the Code, although there are differences in how each are processed through the mail system. Registered mail is insured, but both services provide a return receipt as opposed to only a tracking mechanism. The current code states that registered mail can be used in place of certified mail, but does not allow for the reverse.

One issue that arose at the last meeting was whether the term "commercial delivery" should be defined. Ms. Wallmeyer said that the term is currently used in the Code of Virginia and Rules of the Supreme Court, but it is not defined in either. Also, her research indicates that other states have not defined the term.

The other issue from the last meeting concerns the addition of § 1-206 B, which states if state agencies send notice by certified mail, subsequent mail may be sent by regular mail. Also, a 2011 bill added similar language for local governments in § 15.2-107.2. Ms. Wallmeyer contacted the Virginia Association of Counties and the Virginia Municipal League and neither are opposed to incorporating the language for local governments into § 1-206 B.

Further discussion suggested that consideration should also be given to (i) whether a commercial delivery receipt would be admissible as evidence in court, (ii) the fact that commercial delivery companies do not require a signature for every delivery, (iii) the logistical reasons that regular mail might be used, and (iv) how to address the use of private couriers, which generally require a signature.

Ms. Wallmeyer stated that as an alternative to amending § 1-206, another drafting option would be to identify each instance in the Code where notice is required and make a policy determination on each reference and amend the provision accordingly.

Senator Edwards asked Ms. Wallmeyer to study the issue further and report back to the Commission. Delegate Janis suggested starting with a blanket policy that if you use any specified option to invoke delivery, notice is considered to be given unless another law sets forth another delivery method.

Uniform Electronic Legal Materials Act

Wenzel Cummings briefed the Commission on the Uniform Electronic Legal Material Act (UELMA) adopted by the Uniform Law Commission this year at its annual meeting. UELMA establishes an outcomes-based, technology-neutral framework for providing online legal material with the same level of trustworthiness traditionally provided by publication in printed form. UELMA requires that official electronic legal material be (i) authenticated by providing a method to determine that it is unaltered, (ii) preserved in

either electronic or printed form, and (iii) accessible for use by the public on a permanent basis.

Topics discussed included (i) whether Virginia has an official version of the Virginia Code and, if so, what makes it official; (ii) whether there should be a disclaimer on the Legislative Information System (LIS) website that the LIS version of the Code is not the official version; (iii) how a copy of a Code section is authenticated; (iv) how to electronically preserve each version of the Code from year to year; and (v) the possibility of someone hacking the electronic version of the Code and possible liability for the Commonwealth.

Staff explained that some sections of the LIS version of the Code can be misleading because the annotations and other explanatory notes are omitted from the electronic version. An example is a section with a contingent effective date or a fee that is changed by the appropriation bill, but the section that specifies the fee is not amended. Also, a few complicated tables are missing and many tables lose formatting when electronic files are transferred back and forth between the Commonwealth and the publisher.

Mr. Cummings concluded that, in his opinion, Virginia is not yet prepared to designate the LIS versions of the Code of Virginia and Virginia Administrative Code as official; however, he recommended adding a disclaimer to LIS notifying the end-user that the online version is not official. Senator Calhoun made a motion, seconded by Mr. Russell, to add language to LIS that notifies the user that the LIS version of the Code is not official.

The Code Commission ultimately decided to take no action on UELMA at the present time.

Title 64.2 Recodification: Subtitle III, Fiduciaries and Guardians

David Cotter presented Parts B (Powers of Attorney), C (Guardianship of a Minor), and D (Guardianship of Incapacitated Persons) of Subtitle III. Part A will be presented at the October meeting.

Mr. Cotter explained that the Commission agreed to separate the Healthcare Decisions Act from the recodification at the last meeting. Originally, the act was included in the proposed organization of the Title 64.2 recodification that is currently under review. Given the close association between advance medical directives that are governed by the act and powers of attorney, it was thought that the act and the statutes governing powers of attorney would logically fit together in the portion of the revised Title 64.1 dealing with guardian and fiduciary relationships.

However, stakeholders raised objections to the proposed revision and relocation of the act, noting that it had been the subject of sometimes contentious legislation in recent years, as well as noting that some of the provisions of the act address the conduct of health care providers.

The Code Commission was convinced to avoid relocating the act from Title 64.1, but agreed that it should be moved to a more logical location in the Code. After hearing a recommendation from staff and further discussing proper placement of the act, the Commission concluded that Title 32.1 (Health) is a better fit for the act.

Mr. Cotter said that stakeholders continue to be concerned that any legislation introduced to implement a renumbering change is a potential target for substantive amendments during the legislative process. There is also a financial concern because forms would have to be reprinted to reflect the new code sections.

In light of the objections raised, the Code Commission decided to effect this relocation using its statutory authority in § 30-149 to renumber the act rather than by introducing legislation.

Mr. Miller made a motion, seconded by Delegate Janis, to relocate the Health Care Decisions Act from Article 8 (§ 54.1-2981 et seq.) of Chapter 29 (Medicine and Other Healing Arts) of Title 54.1 (Professions and Occupations) to Title 32.1 (Health) on its own motion during the annual code supplementation process. The motion carried.

Senator Edwards asked Mr. Cotter to bring a draft of the renumbered act to the next meeting. In addition, Senator Edwards requested a detailed proposal and suggested that notice be provided to the appropriate legislative standing committee chairs at a suitable time.

Part B, Powers of Attorney

No changes were made to the Uniform Power of Attorney Act, other than moving it from Title 26 to Title 64.2.

Part C, Guardianship or Minor

Mr. Cotter stated that the changes to Chapter 17, Appointment of Guardian, are primarily technical in nature, except that the elimination of the requirement that parents are only the natural guardians of "legitimate" children may be viewed as substantive. This change is arguably necessary as the section's current distinction between parents of legitimate and illegitimate children is possibly unconstitutional.

Senator Calhoun made a motion, seconded by Mr. Russell, to strike the words "every legitimate" in the first sentence of § 64.2-1700 (former § 31.1). The motion was approved with a vote of 7-3. Judge West, Delegate Janis, and Mr. Moncure cast the dissenting votes.

Part D, Guardianship of Incapacitated Persons

Chapter 20, Guardianship and Conservatorship, is being moved from Title 37.2 to Title 64.2. This chapter was part of a 2005 recodification, so very few changes are proposed. Mr. Cotter noted that in § 64.2-2003, line 147, a list of examples of powers of the guardian or conservator were removed since it is a nonexhaustive list. Also, in § 64.2-2016, the term "ex-service person" was changed to "veteran of the armed forces."

Mr. Cotter stated that the term "protective order," which is defined as an "order appointing a conservator," has been replaced with the term "conservatorship order" in order in Chapter 21, Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, to avoid confusion with how the term "protective order" is typically used in the Virginia Code. Even though this is a uniform act, the work group does not see a problem with the change. However, this change would make Virginia the single state with a different defined term.

Other Business; Public Comment; Adjourn

Mr. Tavenner stated that he spoke with DLS transportation staff about a recodification of Title 33.1 (Highways, Bridges and Ferries) and staff agreed that it is a good candidate. Title 23 (Higher Education) is also a potential candidate and staff is available. Senator Calhoun made a motion, seconded by Delegate LeMunyon, to begin recodifying Title 33.1 in 2012. The motion carried.

Ms. Chaffin asked if the Commission would be interested in hearing about a Virginia statutory code project created by a web developer at the University of Virginia's Miller Center. Waldo Jaquith has created what he considers to be a user friendly Internet database of Virginia's state laws. The Miller Center was recently awarded a \$165,000 grant to allow Mr. Jaquith to expand his project to the other 49 states. The Commission indicated that it would be interested in hearing more. Ms. Chaffin will invite Mr. Jaquith to the October meeting.

The Chair opened the floor for public comment. As there was no public comment and no further business to be discussed, the meeting adjourned at 2:35 p.m.