

VIRGINIA CODE COMMISSION

Monday, October 3, 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; Robert L. Calhoun; Thomas M. Moncure, Jr.; Robert L. Tavenner; Jeffrey S. Palmore; Wesley G. Russell, Jr.; E.M. Miller, Jr.

MEMBERS ABSENT: Frank Ferguson; Charles S. Sharp; Patricia West

OTHERS PRESENT: Katya Herndon, Waldo Jaquith, Professor Kent Sinclair, Nathan Kottcamp

STAFF PRESENT: David Cotter, Jane Chaffin, Lilli Hausenfluck, Karen Perrine

Call to order; minutes

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

The minutes of the September 7, 2011, meeting were presented. Upon a motion made by Delegate Janis and seconded by Mr. Moncure, the Commission approved the minutes.

Virginia Rules of Evidence

Kent Sinclair, law professor at the University of Virginia, presented proposed rules of evidence as approved by the Supreme Court of Virginia on September 12, 2011. Professor Sinclair explained the importance of evidence laws and related how frequently immediate rulings must be made relating to evidence issues. Massachusetts and Virginia are the only two states that have not codified rules of evidence, although a number of evidence-related provisions are scattered throughout Virginia's statutory code. Professor Sinclair highlighted the efforts to codify the rules of evidence, which began in 1993 and was led by the Boyd-Graves Conference.

The Commission discussed the mechanics of turning the rules into law. Subsection E of § 8.01-3 of the Code of Virginia requires the rules of evidence prepared by the Supreme Court to be submitted to the Virginia Code Commission for approval. Section 30-153 outlines the Code Commission's responsibility related to drafting rules of evidence for introduction into the General Assembly, and specifies that the rules are codified upon enactment by the General Assembly.

Senator Edwards stated that legislation to put the rules in place would need to be approved by the General Assembly in an up or down vote. The proposed legislation would repeal the Commission's oversight of the rules of evidence and provide that further amendments to evidence rules would be adopted by the Supreme Court of Virginia in the same manner as other court rules. To change any of the Supreme Court's later amendments, the General Assembly would need to act through legislation. Professor Sinclair explained that very few states have enacted rules of evidence into their statutory codes and that the majority of the states promulgate rules of evidence through the rules of court.

Mr. Russell suggested that the draft legislation adopting the new rules include a savings enactment to address situations where there is a discrepancy between the statutory code and the rules of evidence. He mentioned § 8.01-581.20 as an example.

1 The Commission also discussed whether the rules apply to the State Corporation Commission.
2 Professor Sinclair noted that § 12.1-30 provides that the State Corporation Commission "shall
3 observe and administer the common and statute law rules of evidence as observed and
4 administered by the courts of the Commonwealth."

5 The Commission's discussion stressed the importance of providing broad public notice and
6 dissemination of the rules. Professor Sinclair stated that bar groups were notified and comments
7 were solicited during the development of the rules and that no one has expressed opposition to
8 their adoption. In addition, the Chief Justice has invited representatives of law groups, the State
9 Corporation Commission, and the Attorney General's office to discuss the rules later this month.

10 Mr. Miller stated that the Code Commission should notify the Virginia State Bar, the Virginia
11 Bar Association, State Corporation Commission, and other appropriate groups to make sure they
12 are aware that the Code Commission will be taking action on the rules and to provide an
13 opportunity for comment.

14 Mr. Miller made a motion, seconded by Senator Calhoun, to broadly disseminate the rules of
15 evidence and the draft legislation and place the adoption action on the next Code Commission
16 agenda. In further discussion, the motion was amended to include posting the rules of evidence,
17 draft legislation, notice of the meeting at which the Commission will take action on the matter,
18 and point of contact on the Commission's website. Staff will email the notice and information to
19 an interested parties list to include the Virginia State Bar, Virginia Bar Association, Virginia
20 Association of Defense Attorneys, Virginia Trial Lawyers Association, Commonwealth's
21 Attorneys Advisory Council, Local Government Attorneys Association, State Corporation
22 Commission, Attorney General's Office, Boyd-Graves Conference, and the Virginia Association
23 of Criminal Defense Lawyers, as well as Virginia Lawyers Weekly. The motion was approved.

24 To give a sufficient amount of time for the information to circulate through the various groups
25 and for comments to be submitted, the Commission rescheduled its November meeting to
26 Monday, December 5, 2011.

27 **Virginia DeCoded: The Virginia State Code for Humans**

28 Web developer Waldo Jaquith spoke to the Code Commission about his project to make the
29 online Virginia statutory code more user friendly. His goal is to provide the information in a
30 more attractive and accessible format with links to statutory definitions, court decisions, attorney
31 general opinions, and helpful legal guides. Mr. Jaquith has applied the same treatment to the
32 Virginia Code as he uses in his Richmond Sunlight website, which is a resource for tracking
33 Virginia legislation. He emphasized that his target market for this free database is the general
34 public, not lawyers.

35 Mr. Jaquith was awarded a \$165,000 Knight Foundation grant to take his project nationwide. He
36 hopes that the model he has developed for Virginia will set a standard to be used in all 50 states.

37 Mr. Jaquith explained some of the difficulties that he encountered with the code on the General
38 Assembly's website. Recommendations from Mr. Jaquith include (i) placing a link to the
39 machine-readable file (SGML) in an obvious location to make it easier to find and (ii) stating any
40 licensing terms on the website. Mr. Jaquith stressed his desire to help improve Virginia's online
41 code and offered to give his database to the Commonwealth if it wants to use all or parts of it.

1 The Commission congratulated Mr. Jaquith on his efforts and suggested that staff from the
2 Division of Legislative Automated Systems, Division of Legislative Services, and LexisNexis
3 meet with Mr. Jaquith to discuss the matter in more detail.

4 **Health Care Decisions Act**

5 David Cotter reported that some concerns were voiced about the Commission's decision at its
6 last meeting to move the Health Care Decisions Act (HCDA) from Title 54.1 to Title 32.1. Some
7 commenters argue that placement in Title 32.1 is no better than Title 54.1, and the question arose
8 as to what would be gained by moving the HCDA as opposed to leaving it in its current location.
9 Also, some costs are associated with moving the HCDA because a number of forms would need
10 to be reprinted after being updated to reflect the new code section numbers.

11 The Chair recognized Nathan Kottcamp whose expertise is in healthcare law. Mr. Kottcamp's
12 position is that moving the Health Care Decisions Act will be a logistical nightmare, and he
13 opposes the move. Mr. Kottcamp said that the Virginia Hospital and Healthcare Association and
14 the Advanced Directives Task Force also share his position.

15 The Commission discussed whether to reconsider its vote to move the Health Care Decisions
16 Act. Although some members believe that the move to Title 32.1 is logical, a suggestion was
17 made to monitor the act for now and, if changes are introduced in the legislative session,
18 consider relocating the act at that time. Mr. Palmore stated that the administration prefers to keep
19 the HCDA in its current location.

20 Mr. Moncure made a motion, seconded by Mr. Palmore, to reconsider the Commission's vote
21 from the last meeting to move the Health Care Decisions Act to Title 32.1. The motion carried.

22 Mr. Moncure made a motion, seconded by Mr. Tavenner, to table the relocation of the Health
23 Care Decisions Act. The motion carried.

24 **Recodification of Title 64.1 of the Code of Virginia**

25 Mr. Cotter presented Part A (Fiduciaries) of Subtitle III of Title 64.2, which consists of Chapters
26 11 (Commissioners of Accounts), 12 (Inventories and Accounts), 13 (Fiduciaries Generally), and
27 14 (Investments). These chapters are derived from existing Chapters 1 through 4 of Title 26.

28 Staff discovered missing pages from the material under review, and the Commission recessed for
29 30 minutes at 11:55 a.m. so copies could be replaced.

30 The Commission reconvened at 12:30 p.m.

31 Mr. Cotter reviewed the changes made by the workgroup. Most changes clarify existing
32 language or are technical in nature and are described in the drafting notes.

33 The Commission discussed the "legal list" of lawful fiduciary investments contained in proposed
34 § 2.2-4519, which is derived from § 26-40. This section pertains to investments made by the
35 Virginia Resources Authority and Virginia Housing Development Authority. The Commission
36 noted that the "legal list" contains references to certain lawful investments that may no longer
37 exist in the same form as they did at the time they were added to this section. Mr. Cotter was
38 asked to add language to the drafting note explaining that the Commission recognizes the
39 obsolete terminology in the legal list and that the Commission determined the issue to be beyond
40 the scope of this recodification.

1 The Commission completed its review of Part A. On motion of Delegate Janis, seconded by
2 Delegate LeMunyon, the Commission voted to accept the proposed amendments as presented for
3 inclusion in the final report.

4 Mr. Cotter advised that the general provisions chapter, several outstanding issues, and the final
5 report with an executive summary will be presented to the Commission at the December
6 meeting.

7 **Other Business, Public Comment; Adjourn**

8 The Chair opened the floor for public comment. As there was no public comment and no further
9 business to discuss, the meeting adjourned at 1:25 p.m.