

Monday, July 21, 2014 - 10 a.m.
General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219

MEMBERS PRESENT: John S. Edwards; Gregory D. Habeeb; Ryan T. McDougle; James M. LeMunyon; Robert L. Calhoun; Charles S. Sharp; E.M. Miller, Jr.; Christopher R. Nolen; G. Timothy Oksman; Carlos L. Hopkins; Robert L. Tavenner

MEMBERS ABSENT: Thomas M. Moncure

STAFF PRESENT: Jane Chaffin, Lilli Hausenfluck, Andrew Kubincanek, Nicole Brenner, Ryan Brimmer, Tom Stevens, Cheryl Jackson

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

Approval of minutes: Hearing no objection, Senator Edwards stated that the minutes of the May 7, 2014, meeting of the Code Commission stand approved as printed and distributed to the members of the Code Commission.

Pending the arrival of the ALAC Chair to present the Administrative Law Advisory Committee agenda item, Senator Edwards moved ahead to agenda item 4.

2005 research on Code of Virginia numbering scheme options: Cheryl Jackson, DLS Reference Center Manager, explained that she had been asked to present historical information relating to research done and options presented in 2005 on Code of Virginia numbering schemes. For comparison purposes, the original 1950 Code used a title-section scheme that did not reference or embed the chapter or article in section-level numbering. Since 1984, a title-section scheme that embeds the chapter in section-level numbering has been used. In 2005, a DLS work group reviewed the numbering systems used by the other 49 states and presented several options to the Code Commission with the Code Commission adopting a two-dash system that embeds both chapter and article. More detailed information on the 2005 recommendation can be found in the minutes of the April 20, 2005, meeting.

Following Ms. Jackson's remarks, the Code Commission discussed how a new numbering system would be phased in and agreed that the civil and criminal codes would be problematic. One member suggested renumbering as volumes are replaced, and another member suggested renumbering during the title revision process. Ms. Hausenfluck noted that half of the titles have been converted to the current numbering scheme initiated in 1984 (i.e., title-section scheme with chapter embedded). Only the titles that have never been recodified do not embed the chapter in section-level numbering.

Mr. Calhoun made a motion, seconded by Mr. Miller, to begin using the two-dash system with embedded chapter and article in future title recodifications. The Commission discussed the issue further, with members expressing concerns about the Code simultaneously containing three different numbering systems, describing obstacles to renumbering the Code, and inquiring whether the current numbering system (title-section scheme with embedded chapter) might be preferable to the two-dash system.

Senator Edwards restated the motion on the floor. Mr. Miller offered a substitute motion to have the attorneys working on the Title 23 recodification prepare a sample of how a chapter would look using the two-dash system and present it to the Commission for review. Ms. Brenner

offered to prepare a chapter of the recently completed Title 33.2 title revision for the members to review. The motion was deferred until the next meeting.

Virginia Administrative Code proposed contract change: Chris Nolen explained that, at the last meeting, the Chair asked the Virginia Administrative Code Contract Subcommittee to review West's request to amend the contract to allow increases in CD-ROM pricing to be consistent with increases in print pricing. This issue was discovered when West notified the Code Commission earlier this year of a 3.1% increase in the print product. The contract establishes the initial CD-ROM pricing but does not address increases in CD-ROM pricing. The subcommittee looked into whether the Producer Price Index for Book Publishing is intended to include CD-ROM or only print and discovered that the index is described as including print, CD-ROM, or proprietary electronic works. The subcommittee recommends that the Code Commission adopt a contract amendment to make it clear that price increases apply to the CD-ROM product under the limits set forth under the original contract. The proposed amendment reads, "Beginning May 1, 2014, and in May of each year following for the remainder of the term of the Contract, the annual price of printed sets ~~and, printed~~ volumes, and CD-ROMs may be increased by West by an amount no greater than the change in the Producer Price Index for Book Publishing - Industry Code 2731 ("PPI") for the previous year or 5.0%, whichever is less. West will provide notice of a price increase and the effective date on or before May 1 of each year."

Mr. Nolen made a motion, seconded by Mr. Tavenner, to adopt the amendment. The Commission voted to approve the amendment.

Proposed legislation to allow mailing of certain notices by commercial delivery: Caroline Stalker explained a bill draft requested by Senator Edwards that adds sections in Titles 16.1, 17.1, 18.2, and 19.2 to allow delivery of certain notices required to be sent by U.S. mail to include delivery by commercial delivery service. The bill is based on a narrow proposal that appeared in the Supreme Court's Study of Notice Provisions report presented at the last meeting. Delegate Habeeb asked if "commercial delivery service" is defined anywhere. Ms. Stalker responded that the term is neither currently defined nor defined in the proposed legislation. The Supreme Court's report indicates that the Court intentionally did not propose a definition of the term and further noted that the Rules of Virginia Supreme Court have used the term without definition for several years without difficulty. Delegate LeMunyon made a motion, seconded by Delegate Habeeb, to approve the bill. The motion carried.

Policy to not set out certain provisions of the Code of Virginia: Mr. Oksman stated that an assistant attorney general called his attention to a Code section listed in the printed Code where the section number is followed by the phrase "not set out." The section text could be found in an online Code service, however. Omission of statutory text struck him as problematic. He understands that some enacted provisions do not need to be codified and understands there is a history of and rationale for not setting out certain provisions, but is calling the issue to the attention of the Code Commission.

Ms. Chaffin briefed members on the background and current policy. The policy on statutes included and statutes omitted from the 1950 Code appears in an explanatory note in the 1948 Report of the Commission on Code Recodification and Proposed Code of Virginia. The general policy as stated in the report was to include only statutes of a general nature and to leave out

special and local acts. The report further specifies a number of categories of statutes that were omitted from the 1950 Code, including (i) repealed, expired, superseded, or obsolete statutes; (ii) statutes declared unconstitutional by the Virginia Supreme Court; (iii) preambles and preliminary recitals and legislative policy; (iv) severability provisions; and (iv) statutes not effective unless a contingency is met. At its September 2013 meeting, the Code Commission reaffirmed its current policy to set out provisions from the Acts of Assembly in the Code of Virginia only when the provisions have general or permanent application and to exclude provisions that establish policy, purpose, and legislative intent.

A general discussion ensued about who applies the criteria and decides which sections are not set out. Staff explained that the Code Commission's Executive Committee, led by DLS Deputy Director Bill Crammé, makes such decisions. The publisher might present the question, but the Executive Committee makes the decision. Also, the Code Commission applies the "not set out" criteria during the recodification process, and this information is noted in the report's drafting notes and later applied in the Code by the publishers.

Staff noted that approximately 100 sections currently are not set out in the Code. The annotated print Code describes the subject matter of the Code section and explains why it is not set out, but the online Code does not contain this information. More and more people are going to the online Code as its prominence and accessibility increases; a section described as "not set out" without explanation is more likely to raise a red flag.

Mr. Miller stated that provisions that fall into one of the categories that warrant omission from the Code should not be drafted with Code section numbers and should be drafted, instead, as uncodified acts. The Commission recognizes that, although the Division of Legislative Services staff might advise legislators to avoid codifying certain provisions, the legislator makes the final decision. Staff pointed out that the Code Commission is given specific authority in § 30-149 to omit from statutes provisions that, in the judgment of the Commission, are inappropriate in a Code.

Mr. Nolen asked if staff would check into adding links to the acts of the not set out sections on the Legislative Information System.

Senator Edwards stated that the way the policy is implemented is inconsistent and ambiguous and asked Mr. Tavenner to have DLS look at the existing policy and associated issues and report back with a recommendation.

Mr. Tavenner mentioned that he had recently returned from the Uniform Law Commission (ULC) meeting. The ULC is encouraging all states to adopt the Uniform Electronic Legal Materials Act (UELMA). For Virginia to adopt UELMA would require designating the electronic version of the Code as official. He has staff looking at why Virginia does not designate any statutory code as official and what problems might be faced going to an official Code. He will report his findings on this matter and on the not set out policy at an upcoming meeting.

Recodification of Title 23, Educational Institutions: Tom Stevens and Ryan Brimmer presented draft language amending the enabling legislation for four-year public universities. Mr. Stevens clarified that the language before the Commission consists of only a portion of each university's enabling legislation. The full chapters will be presented at another meeting. The draft

language deals with the membership and terms of, appointment to, and removal from the governing boards. The most extensive changes are to the removal and alumni provisions.

Provisions for removing board members exist for some, but not all, universities. Staff recommends, and the work group concurs, that provisions relating to the removal of the board of visitors of each public institution of higher education appear in a newly created general provisions chapter that applies uniformly to all universities.

The Commission discussed the removal provisions at length presented in subsection B of page 2 of Chapter 13 (Governing Boards). Seven of 14 institutions have existing removal provisions. Mr. Miller asked if the removal provisions have ever been used. Elizabeth Hooper with Virginia Tech was called upon to answer this question. She stated that Virginia Tech used it about 10 years ago for nonattendance purposes. Mr. Stevens added that Longwood University asked to have it added to its basic law.

Judge Sharp commented that he finds subsection B confusing. The first sentence addresses nonperformance of duties and the second deals with nonattendance. Nonattendance is not an issue unless you cannot establish a quorum. The Code Commission asked staff to readdress the language with the work group.

Administrative Law Advisory Committee (ALAC) work plan and budget: Andrew Kubincanek, Program Coordinator for ALAC, advised the members that the ALAC Chair had been unavoidably delayed; therefore, Mr. Kubincanek presented ALAC's proposed work plan and budget request.

Continuing studies include the review of the Model State Administrative Procedure Act (MSAPA). The MSAPA judicial work group is discussing default orders in administrative hearings, ex parte communications, and disqualification of hearing officers. ALAC also plans to discuss administrative hearings by teleconference or videoconference. Agencies' use of guidance documents has been studied by ALAC in the past. In anticipation of a future study on guidance documents, ALAC is soliciting presentations from the Department of Environmental Quality and the Department of Health Professions regarding their use of guidance documents.

A new work group has been formed to work with the Governor's office to offer input on the implementation of Executive Order 17, Development and Review of State Agency Regulations. The Governor's office expressed an interest in hearing suggestions from ALAC on the implementation of this executive order.

ALAC plans to form a work group to discuss alternative delivery methods, such as commercial delivery services, for administrative notices. This issue is added at the request of Senator Edwards.

ALAC is monitoring the FOIA Advisory Council study of FOIA exemptions directed by HJR 96 (2014).

Additionally, ALAC will review two Administrative Process Act (APA) exemption issues-- House Bill 955 (2014), which was carried over and would effectively exempt all regulations from the APA, and a 2011 amendment that places a time restriction on using the APA exemption for regulations that are necessary to conform to changes in Virginia law where no agency discretion is involved.

Mr. Kubincanek presented ALAC's proposed 2014-2015 budget for approval. The total amount requested is \$20,000 for meetings and related expenses, consultant and intern expenses, conferences and training, and publications and supplies. Mr. Kubincanek stressed that any expenditure related to consultants/interns would be made in consultation with the Director of Legislative Services.

Mr. Miller made a motion, seconded by Judge Sharp, to approve ALAC's proposed work plan and budget. The motion carried.

Other business: Staff distributed an amendment from the budget passed at the end of June prohibiting the Code Commission from renumbering or recodifying the Code of Virginia without a specific appropriation addressing the fiscal impact of such action.

Public comment; adjournment: The Chair opened the floor for public comment. As there was no public comment and no further business to discuss, the Chair adjourned the meeting at 12:10 p.m.