

VIRGINIA CODE COMMISSION

*Tuesday, November 18, 2014 - 10 a.m.*  
*General Assembly Building, 6th Floor*  
*Speaker's Conference Room*  
*Richmond, Virginia 23219*

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

**MEMBERS ABSENT:** Pamela S. Baskervill

**OTHERS PRESENT:** Eric Page, LeClair Ryan; Brian Kennedy, LexisNexis; Alex Medrano, West (Thomson Reuters); Jeff Palmore; Melanie West, Department of Planning and Budget; and NBC29

**STAFF PRESENT:** Jane Chaffin, Lilli Hausenfluck, Andrew Kubincanek, Karen Perrine, Nicole Brenner, Ryan Brimmer, Jescey French, Scott Meacham, Sarah Stanton, and Tom Stevens, Division of Legislative Services (DLS)

**Call to order:** Senator John Edwards called the meeting to order at 10:05 a.m.

**Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the October 21, 2014, meeting of the Code Commission stand approved as printed and distributed to the members of the Code Commission.

**Administrative Law Advisory Committee (ALAC):** Andrew Kubincanek, DLS, explained that he and Eric Page are presenting the ALAC report in the absence of ALAC Chair Tom Lisk, who was unable to attend the meeting due to illness. Mr. Kubincanek stated that ALAC had approved two draft bills to present to the Code Commission.

Mr. Kubincanek stated that ALAC reviewed provisions regarding delivery of notice in administrative matters in response to the Chair's request. ALAC drafted a bill to amend Titles 2.2 and 54.1 to allow delivery of certain notices required to be sent by U.S. mail to include delivery by a commercial service. The language is based on the bill approved by the Code Commission for Titles 16.1, 17.1, 18.2, and 19.2 at its meeting on July 21, 2014. However, this bill uses the term "third-party commercial carrier" instead of "commercial delivery service."

The Code Commission discussed the notice bill presented by Mr. Kubincanek and the use of the term "third-party commercial carrier." In response to a question raised by E.M. Miller, staff advised that the Rules of Supreme Court of Virginia use both "commercial carrier" and "third-party commercial carrier." Timothy Oksman moved to accept the ALAC proposal to use "third-party commercial carrier" and change the previous bill for Titles 16.1, 17.1, 18.2, and 19.2 to also use "third-party commercial carrier." The motion was seconded and approved.

Delegate James LeMunyon moved to approve ALAC's recommendation to allow state agencies under Titles 2.2 and 54.1 to use a third-party commercial carrier when service, delivery, or transmission of any notice or paper is authorized or required to be accomplished by mail, ordinary mail, registered mail, or certified mail. Upon second of Mr. Miller, the motion passed. Delegate Gregory Habeeb voted against the motion.

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43 Mr. Page, chair of the ALAC Model State Administrative Procedures Act Judicial Work Group,  
44 presented a revised draft bill pertaining to ex parte communications intended to resolve Code  
45 Commission concerns that the ALAC proposal presented at the last meeting only allowed ex  
46 parte communications from ministerial matters on the agency side. The proposal adds a new  
47 § 2.2-4024.2 to the Administrative Process Act regarding ex parte communications that applies  
48 to hearing officers in formal hearings, establishes the types of ex parte communications that are  
49 permissible, and establishes a mechanism to handle inadvertent or nonmaterial discussion. The  
50 revised draft permits a hearing officer to communicate with a private party on ministerial  
51 matters.

52 Delegate Habeeb questioned whether the ex parte communication bill was within the authority of  
53 the Code Commission and whether the issue would be more properly referred to the Boyd-  
54 Graves Conference.

55 After discussion, the Code Commission determined that the proposed language, which was  
56 intended to expand the use of ex parte contact, may actually constrict the use and sent the matter  
57 back to ALAC for further review.

58 **Follow-up on cleanup bill changing "exemplary damages" to "punitive damages":** Delegate  
59 Habeeb advised that in response to a request from the Code Commission at its meeting on  
60 September 16, 2014, he circulated the bill draft proposing to change the term "exemplary  
61 damages" to "punitive damages" to potential stakeholders. Delegate Habeeb reported that overall  
62 the comments were benign or none; however, the Motor Vehicle Dealer Board expressed a  
63 concern because the Board has used the term "exemplary damages" in some of its rulings. Upon  
64 motion of Delegate Habeeb, seconded by Robert Calhoun, the bill was approved as presented.

65 **Follow-up on obsolete laws bills (Titles 44 and 51.5):** A staff recommendation to repeal  
66 § 51.5-35.1 of the Code of Virginia was approved at the September 16, 2014, meeting, subject to  
67 staff findings. Sarah Stanton, DLS attorney, advised that she had contacted the Board for People  
68 with Disabilities and confirmed that there are no outstanding issues concerning the two obsolete  
69 boards, Board for Rights of the Disabled or Board for the Rights of Virginians with Disabilities.  
70 The Code Commission endorsed introducing legislation at the 2015 Session of the General  
71 Assembly to repeal this section of the Code of Virginia.

72 Jeseey French, DLS attorney, presented a draft bill regarding removing obsolete provisions from  
73 Title 44, which reflects the Code Commission's decisions at its meeting on September 16, 2014.  
74 Ms. French reviewed the bill and the associated chart and information handed out at the meeting.  
75 In response to a previous request by the Code Commission, Carlos Hopkins reported that he  
76 reviewed several provisions pertaining to air raids. Section 44-207 was only applicable during  
77 World War II and can be repealed. Sections 44-147 through 44-151 are unnecessary, as other  
78 sections of the Code of Virginia address the Governor's authority during an emergency. Section  
79 44-206 is also obsolete. Finally, § 44-18 has never been implemented; the Adjutant General uses  
80 the seal of the Department of Defense and does not object to the repeal of this section.

81 On motion of Judge Charles Sharp and second by Delegate LeMunyon, the Code Commission  
82 approved legislation repealing provisions of Title 44 as presented in the draft bill.

83 **Title 33.2 technical corrections bill:** Nicole Brenner, DLS attorney, presented a technical  
84 corrections bill for the Title 33.2 recodification. The draft bill corrects typographical errors and  
85 other mistakes; reinserts language that was omitted from Chapter 805 of the 2014 Acts of

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86 Assembly and provides that the reinsertion is effective retroactively to October 1, 2014; and  
87 implements clarifying changes. Ms. Brenner reviewed and explained the reason for each change .  
88 Mr. Calhoun asked if the change to § 33.2-321 on lines 69-70 was a substantive change. Ms.  
89 Brenner explained that the purpose of the amendment is to allow counties who have withdrawn  
90 or elect to withdraw from the secondary state highway system to take advantage of this section;  
91 current statutes about who can withdraw or how to withdraw are not affected.

92 Ms. Brenner stated that the Williamsburg Area Transit Authority, currently located in Title 15.2,  
93 was inadvertently omitted from the Title 33.2 recodification legislation last year. Although this  
94 change was not included in the bill presented to the Commission at this meeting, staff  
95 recommends moving this authority from Title 15.2 to Title 33.2. The executive director and  
96 attorney for the Authority have no objection to moving these provisions to Title 33.2.

97 On motion of Delegate LeMunyon and second by Robert Tavenner, the Code Commission  
98 approved the presented bill with amendments moving the Williamsburg Area Transit Authority  
99 from Title 15.2 to Title 33.2.

100 **Codification of compacts:** Ms. Brenner gave a brief history of the compilation of compacts,  
101 advising that prior to 2001, the Secretary of the Commonwealth compiled a compacts volume on  
102 a periodic basis. The Secretary of the Commonwealth's compacts volume included both  
103 historical compacts and active compacts. This function was transferred to the Code Commission  
104 in 2001, and a separate compacts volume has been in place as part of the Code of Virginia since  
105 that time.

106 Ms. Brenner described existing Code Commission policy concerning the codification of  
107 compacts and explained that each compact is assigned a Code section number in accordance with  
108 its proper title location. If a compact is general and permanent in nature, the compact is set out in  
109 full in both the Code and in the compacts volume. Otherwise, compacts are set out in full only in  
110 the compacts volume, and the section number in the Code contains only a reference directing the  
111 reader to the compacts volume. A review of the Code and the compacts volume reveals that most  
112 compacts are set out in both. Ms. Brenner added that, as of July 1, 2014, all compacts reside  
113 online as part of the Virginia Law Portal.

114 Ms. Brenner asked the Commission to consider assigning Code sections to the few compacts that  
115 are not codified. In doing so, the Commission could eliminate the compacts volume as  
116 duplicative and unnecessary since all compacts would appear in the Code and be available  
117 online.

118 The Code Commission agreed with the staff recommendation to set out all compacts in the Code  
119 of Virginia and approved the following motions:

- 120 • §§ 10.1-1149 and 10.1-1150 (forest fire compacts) - Judge Sharp moved, seconded by  
121 Christopher Nolen, to set out these compacts, which are currently incorporated by reference  
122 in the Code.
- 123 • Interstate Civil Defense Compact of 1952 - Ms. Brenner indicated that this compact is no  
124 longer in effect, but was not enacted by the General Assembly, so it cannot be repealed. Mr.  
125 Calhoun moved, seconded by Judge Sharp, that this compact be removed from the the  
126 compacts volume. Staff suggested retaining the compact online for historical purposes, but  
127 labeling it as "not in effect."

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- 128 • Nonresident Violator Compact of 1977 - Ms. Brenner advised that this compact is in effect  
129 and used and should be assigned a Code section number in Title 46.2. Delegate LeMunyon  
130 moved, seconded by Mr. Calhoun, that the compact be assigned a Code section number in  
131 Title 46.2.
- 132 • Breaks Interstate Park Compact of 1954 - Ms. Brenner advised that this compact needs a  
133 Code section number assigned in Title 10.1. Delegate LeMunyon moved, seconded by Mr.  
134 Calhoun, that the compact be assigned a Code section number in Title 10.1.
- 135 • Potomac River Bridge Towing Compact of 1991 - Ms. Brenner advised that this compact  
136 needs a Code section number assigned. Judge Sharp moved, seconded by Delegate  
137 LeMunyon, that the compact be assigned a Code section number in Title 46.2.
- 138 • Woodrow Wilson Bridge and Tunnel Compact - Ms. Brenner suggested repealing this  
139 compact, which is codified as § 33.2-1300, because it is no longer in effect. The Department  
140 of Transportation (VDOT) requested an opportunity to review the compact. Mr. Calhoun  
141 moved, seconded by Mr. Miller, that, barring opposition from VDOT, the compact be  
142 repealed.
- 143 • Virginia-North Carolina Interstate High-Speed Rail Compact, Washington Metropolitan Area  
144 Transit Regulation Compact of 1958, and Washington Metropolitan Area Transit Authority  
145 Compact of 1966 (Title 33.2) - Ms. Brenner advised that these compacts have been assigned  
146 Code section numbers, but are not set out in the Code. After discussion, Mr. Miller moved,  
147 seconded by Mr. Calhoun, to set out these three compacts in the Code.

148 Mr. Miller commented that he has observed that certain uniform laws and random statutes that  
149 are not compacts are included in the compacts volume. Staff advised that this had been noted and  
150 that if the Commission decides to retain the volume, the matter must be addressed. Senator  
151 Edwards deferred the item on whether to retain or eliminate the compacts volume. Mr. Miller  
152 suggested that staff add this item to the work plan for 2015.

153 **Review of 2015 Code Commission legislation:** Jane Chaffin presented a chart summarizing the  
154 Code Commission legislation for the 2015 Session of the General Assembly. Staff stated that  
155 patrons are needed for several of the bills. Senator Edwards agreed to carry the ALAC study bills  
156 and bills regarding delivery of certain notices by third-party commercial carrier. The obsolete  
157 laws bills (Titles 10.1, 51.5, and 44) do not have a patron, and it was suggested to ask Senator  
158 Ryan McDougle.

159 **Review of sections not set out in Code pertaining to legislative intent, findings, purpose,**  
160 **and policy statements:** Ms. Chaffin reviewed the Code Commission policy on "not set out" and  
161 its recent request to see the actual text before deciding to remove any "not set out" section that  
162 contained legislative findings, policy, or purpose. The meeting materials included a list of the  
163 sections and the Act of Assembly containing the actual text. The Commission discussed the  
164 matter briefly but did not take any action.

165 **Recodification of Title 23, Educational Institutions:** Ryan Brimmer, DLS attorney, presented  
166 the recodification report regarding the following chapters of Subtitle V - Other Educational  
167 Institutions: Commonwealth Health Research Board and Fund, Other Educational Entities, and  
168 Museums and Other Cultural Entities. Mr. Brimmer indicated that the report has been revised in  
169 accordance with the determinations made at the October 21, 2014, meeting of the Code

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170 Commission, including a request for more descriptive drafting notes. In addition, the provisions  
171 regarding the Commonwealth Health Research Board and Fund are ready for review, as staff  
172 received a response from the Board.

173 Existing Chapter 22 (§ 23-277 et seq.) - Commonwealth Health Research Board and Fund (lines  
174 1-187). Mr. Brimmer recommended moving this chapter into Title 32.1 as Chapter 5.3 instead of  
175 placing it in proposed Title 23.1. He pointed out that the Board is established as an independent  
176 body and there is no place in the title where it is declared an educational institution. The  
177 placement in Title 32.1 was proposed by the Office of the Attorney General and the Board  
178 agrees. The Code Commission concurred and accepted the report with the following changes to  
179 proposed § 32.1-162.23:

- 180 • In subsection B, first paragraph, last sentence pertaining to filling vacancies, change  
181 "original appointments" to "initial appointments" (line 41).
- 182 • Proposed subsection G provides that Board members will not receive compensation;  
183 however, the last sentence says that "Such compensation and expenses shall be paid from  
184 the Fund." Staff was directed to make the language consistent by striking "compensation  
185 and" on line 66.

186 Proposed Chapter 31 - Other Educational Entities (lines 188-933). Staff explained that the  
187 proposed name change of the A.L. Philpott Manufacturing Extension Partnership to Genedge  
188 Alliance stems from approval of the new trade name in 2010 by the entity's board. It was noted,  
189 however, that appropriations are directed toward the original name. The Code Commission  
190 agreed that the name change should not be part of the recodification, nor should the proposal in  
191 § 23-231.9 to change the quorum be part of the recodification. The Code Commission agreed  
192 that amendments of this nature should be in separate legislation initiated by the entity. Mr.  
193 Calhoun moved, seconded by Judge Sharp, to return the entity name and quorum language to  
194 original form, with the exception of nonsubstantive technical changes.

195 Proposed Chapter 32 - Museums and Other Cultural Entities (lines 934-1692). The Code  
196 Commission discussed amendments to the Frontier Culture Museum of Virginia (proposed  
197 Article 1). In the last paragraph of § 23-297 the amendments remove the per diem for board  
198 members. Staff stated that the Attorney General's office had advised that language in the  
199 appropriation act supersedes the per diem payment. The Code Commission is not in favor of  
200 conforming the statutes to the appropriation act when the appropriation act is effective for a  
201 limited amount of time. Senator Edwards moved, seconded by Mr. Nolen, to leave the per diem  
202 language in the code. The motion was approved.

203 In proposed Article 4, Jamestown-Yorktown Foundation, staff will return the language in § 23-  
204 287 pertaining to who appoints the executive committee so that the chairman makes the  
205 appointments.

206 **Other business:** Mr. Tavenner advised that the contract for publication of the Code of Virginia,  
207 currently held by LexisNexis, was coming up for renewal in 2016.

208 **Public comment; adjournment:** The Chair opened the floor for public comment. As there was  
209 no public comment and no further business to discuss, the Chair adjourned the meeting at  
210 12:15 p.m.