

VIRGINIA CODE COMMISSION

Monday, May 4, 2015 - 10 a.m.
General Assembly Building, 6th Floor
Speaker's Conference Room
Richmond, Virginia 23219

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

MEMBERS ABSENT: Robert L. Calhoun; Charles S. Sharp

OTHERS PRESENT: Delegate Marcus Simon; Karen Grimm, Department of Motor Vehicles; Brian Kennedy, LexisNexis

STAFF PRESENT: Jane Chaffin, Karen Perrine, Nicole Brenner, Ryan Brimmer, Tom Stevens, Kristen Walsh, Division of Legislative Services (DLS)

Call to order: Senator Edwards, Chair, called the meeting to order at 10:05 a.m.

Approval of minutes: Hearing no objection, Senator Edwards stated that the minutes of the April 6, 2015, meeting of the Code Commission stand approved as printed and distributed to the members of the Code Commission.

Remaining compacts issues: At its November 18, 2014, meeting, the Code Commission decided to set out the full text of all compacts in the Code of Virginia. Nicole Brenner reported on the status of the implementation of this decision at the April 6, 2015, meeting, and she is reporting today on the last remaining issues. In the 2015 Session of the General Assembly, three compacts were repealed as no longer effective. Also in that session, the General Assembly adopted a compact regarding Interstate 73, but the compact will not be effective in Virginia until other partnering states adopt the compact. The Code Commission agreed with Ms. Brenner's recommendation to list the Interstate 73 compact on the Virginia Law Portal (<http://law.lis.virginia.gov/>) but not add it to the Code of Virginia.

Ms. Brenner reviewed the three remaining compacts that are not currently codified: the Southeastern Interstate Forest Fire Protection Compact, the Middle Atlantic Interstate Forest Fire Protection Compact, and the Nonresident Violator Compact of 1977. Ms. Brenner asked the Commission to reconsider its decision to codify the forest fire compacts until the existing Code of Virginia sections that incorporate the compacts by reference are repealed. Ms. Brenner will present a draft to repeal the existing sections and to set out the compacts in full in the Code of Virginia at a later meeting. Karen Grimm, Department of Motor Vehicles (DMV), addressed the Commission regarding the nonresident violator compact; she advised the Commission that the compact is outdated and that DMV would like to withdraw from the 1977 compact and enter into a new one. Ms. Brenner indicated that this compact will likely be addressed in the 2016 Session of the General Assembly pending further information from the DMV.

On motion of Judge Baskervill, seconded by Delegate Habeeb, the Code Commission approved drafting a bill regarding the forest fire compacts as described by Ms. Brenner.

Senator Edwards advised that Agenda Item No. 5 would be considered next, and there was no objection.

Letter from House Courts requesting review of HB1600 (2015, Simon) and SB1211 (2015, Ebbin) pertaining to use of gender-specific references in the Code of Virginia. Delegate Simon, patron of House Bill 1600, explained that this administration bill was intended to revise references to certain gender-specific terms in the Code of Virginia to bring Virginia's statutory code into the 21st century. Although the bills are not identical, House Bill 1600 and Senate Bill 1211 both revise references to certain gender-specific terms in the Code of Virginia in light of the 2014 *Bostic v. Rainey* decision, which changed the definition of what constitutes a marriage. The House Courts of Justice Committee tabled both bills and requested that the Code Commission review the bills and make suggestions for clarification or improvement. Although Delegate Simon believed that the bills are sufficient as drafted, he suggested that the Code Commission may want to review every instance of "husband" and "wife," as well as other gender-specific terms, in the Code of Virginia.

Delegate Habeeb, a member of the House Courts of Justice Committee, gave additional background on the bill. Delegate Habeeb stated that the Civil Courts Subcommittee recommended tabling the bills for several reasons, including the pending ruling from the U.S. Supreme Court on same-sex marriage and the need to evaluate the best method of implementing gender-specific reference changes in the Code of Virginia.

Delegate Habeeb suggested that the Commission wait for the upcoming U.S. Supreme Court ruling in *Obergefell v. Hodges* before moving forward.

Senator Edwards directed staff to perform a keyword search of the Code of Virginia, compile a list of Code sections that contain gender-specific terms, identify any complexities or potential unintended consequences, and report back to the Commission at a subsequent meeting. The Commission will revisit this issue after the U.S. Supreme Court rules on the same-sex marriage issue.

Recodification of Title 23, Educational Institutions: Ryan Brimmer and Tom Stevens presented Chapters 1 through 3 of Subtitle I (General Provisions) and Chapters 26 (Virginia Polytechnic Institute and State University), 27 (Virginia State University), 28 (The College of William and Mary), and 29 (State Board for Community Colleges; Virginia Community College System) of Subtitle IV (Public Institutions of Higher Education).

Chapter 1 - Definitions and General Provisions (lines 10 through 115)

§ 23.1-100 - Definitions:

- **"Four-year public institution" (lines 29–36) and "two-year public institution" (lines 51–54).** Mr. Brimmer explained that staff and the workgroup developed definitions for the terms "four-year public institutions" and "two-year public institutions" because these terms are used throughout current Title 23. The members discussed the use of the word "includes" and the listing of universities by name. In response to Delegate LeMunyon's inquiry as to whether any institutions were not included in the list, staff replied that the list is not exclusive because of the statutory rule of construction in § 1-218, which states, "'Includes' means includes, but not limited to."

The Commission also considered using "bachelor's degrees" or "associate degrees" instead of four-year or two-year public institution. Ellen Davenport, Virginia Community College System, opposed replacing references to two-year college with associate degree.

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After extensive discussion, Judge Baskervill moved to delete the sentences in each definition (lines 31–36 and 53–54) that list the names of the colleges and universities. During the discussion on the motion, Kirsten Nelson, State Council of Higher Education for Virginia (SCHEV), indicated that SCHEV could support removal of the specific list of institutions.

After additional discussion, Senator Edwards decided to delay the vote on the motion until the Code Commission reviews the remainder of the materials. When the Code Commission returned to this matter, Judge Baskervill withdrew her motion.

- "In-state student" (lines 37–40). Delegate Habeeb advised that there is an Attorney General's opinion that may affect the definition of "in-state student" and that the Code Commission must be careful not to make a substantive change in this definition that will differ from the current law.
- § 23.1-101 (lines 63–115). Section 23.1-101 relates to governmental contracts with certain nonprofit private institutions of higher education. Delegate Habeeb suggested that the workgroup consider developing definitions of "nonprofit" and "for-profit." Senator McDougle noted that in the definition of "private institution of higher education," the applicable sections of the Code of Virginia are no longer cited as they are currently in § 23-9.10:3 (line 68).

Chapter 2 - State Council of Higher Education for Virginia.

- § 23-9.3 (lines 9–67). On line 51, the Code Commission approved correcting an error by changing "board" to "council."
- § 23-276.1 (lines 531–632). Mr. Brimmer advised that the definition of "degree" on lines 555–557 is applicable only to new Article 3 and not the entire title. In response to a question from Senator McDougle, Mr. Brimmer explained that the changes to "degree" and "degree credit" were not substantive. Mr. Oksman suggested that "degree" be defined because there are many references to the term in the Code of Virginia. Judge Baskervill stated that her concern is unintended consequences of these changes and requested that the workgroup look at this issue. Mr. Moncure reminded the Code Commission that the Southern Association of Colleges and Schools is an important factor to consider.

Chapter 3 - The Virginia Higher Education Act (lines 1–528).

- § 23-38.87:10 (lines 48–128). The Code Commission concurred in the workgroup's request to retain the short title for this chapter on the basis of current usage and practices.
- § 23-38.87:14 (lines 184–207). The Code Commission concurred in the workgroup's request to retain the phrase "unfunded enrollment growth" in subsection B, even though the phrase may be obsolete.

Chapter 27 - Virginia State University (lines 1–148). Consideration of this chapter will be postponed until the Virginia State University representative meets with staff. In addition, the Attorney General's office expressed concerns over the land grant language.

Selection of Code of Virginia title for next recodification: Ms. Chaffin advised the Commission that this matter was presented at the April 6, 2015, meeting, at which time the Chair deferred this item to solicit public comment. No comments were received.

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Ms. Chaffin reminded the Code Commission that the letter from Delegate Tom Rust relating to referencing statutes of limitations should be addressed during this agenda item. Brian Kennedy, LexisNexis, confirmed that all statutes of limitations are listed in the index of the Code of Virginia. Kristen Walsh advised the Commission that the index in the Code of Virginia contains an exhaustive list under statute of limitations, limitations of action, and limitations of repose. Judge Baskervill stated that this information addresses the issue in Delegate Rust's letter, at least in the short term.

Senator Edwards asked if DLS had a recommendation on which title to select for recodification. Mr. Tavenner observed, regarding the candidacy of Title 8.01, that when Title 8 was recodified to the current Title 8.01, the process took five years and outside counsel was used. Another concern is that the recodification of Title 8.01 may raise sufficient political concerns such that the recodification bill would not pass during the legislative session. Considering the selection criteria, DLS staff suggests Title 55 or Title 20 for the next recodification. Mr. Miller suggested appointing a subcommittee or workgroup of the Code Commission to conduct an in-depth review and return with a recommendation. After further discussion, and in light of Delegate Habeeb's interest in Title 8.01 and his absence from today's discussion, the Code Commission deferred the matter to a later meeting.

Overview of Code Commission responsibility - Part I--Virginia Register Act and Administrative Process Act: At the Code Commission's last meeting, staff was requested to provide information on the Code Commission's authority and responsibilities. Staff will present this information in two parts -- Virginia Register Act (VRA) and Administrative Process Act (APA) at this meeting and the Code of Virginia at a later meeting.

Ms. Perrine reviewed the handout in the meeting materials outlining the Code Commission authority and responsibilities related to the VRA and APA. She explained that under the Code Commission's basic law, the Code Commission is responsible for publishing and maintaining the Virginia Administrative Code (VAC) and the Virginia Register of Regulations (Register); making minor changes to VAC; and monitoring the APA and the VRA, which includes the appointment of the Administrative Law Advisory Committee.

The VRA requires the Code Commission to publish a list of agency guidance documents, designates the Registrar's Office as the central repository for state agency regulations, and gives the Code Commission the authority to adopt regulations to carry out the purpose of the VRA.

The APA establishes additional duties of the Registrar. For example, the Registrar determines the applicability of the exemption to the APA contained in subdivision of § 2.2-4006 A 4 c regarding regulations that are necessary to meet the requirements of federal law or regulations, provided that the regulations do not differ materially from those required by federal law or regulation. The Registrar and her staff review proposed regulation packages to verify that certain statutory requirements are met. The Registrar's office also functions as the central repository for proposed and final regulations and related information. The APA also contains a specific provision regarding the Register that requires the Registrar to publish the Virginia Register every two weeks and outlines the information to be included.

In response to a question, Ms. Chaffin explained the organization of the titles in the VAC and the detailed review process by her office once a proposed or final regulation is submitted for publication in the Register.

Proposed revisions to Code Commission regulations: Senator Edwards deferred this item to a later meeting.

Other business: The Chair opened the floor for other business. No items were presented.

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 12:30 p.m.