

VIRGINIA CODE COMMISSION

Monday, October 5, 2015 - 10:30 a.m.

General Assembly Building, 6th Floor

Speaker's Conference Room

Richmond, Virginia 23219

Approved

November 16, 2015

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

4 **MEMBERS ABSENT:** Robert L. Calhoun; Jr.

5 **STAFF PRESENT:** David Cotter, Kristen Walsh, Jane Chaffin, Karen Perrine, Lilli Hausenfluck,
6 Ryan Brimmer, Tom Stevens, Division of Legislative Services (DLS)

7 **OTHERS PRESENT:** Delegate Marcus Simon; Senator Adam Ebbin; Cindy Norwood, Senior
8 Assistant Attorney General; Chris McGee, General Counsel, Virginia College Savings Plan;
9 Allyson Tysinger, Section Chief, Health Services Section, Office of the Attorney General

10 **Call to order:** Senator Edwards, Chair, called the meeting to order at 10:30 a.m.

11 **Approval of minutes:** Hearing no objection, Senator Edwards stated that the minutes of the
12 September 9, 2015, meeting of the Commission stand approved as printed and distributed to the
13 members.

14 Without objection, the Chair deferred agenda item 3 until the arrival of Delegate Simon and Senator
15 Ebbin and moved ahead to agenda item 4.

16 **Meaning of "court" in Code of Virginia (judge vs. jury):** Delegate Habeeb stated that the recent
17 decision of the Supreme Court of Virginia in *REVI, LLC v. Chicago Title Insurance Company*
18 involved a statutory amendment contained in a recodification bill. The issue involves the use of the
19 word "court" in § 38.2-209 A of the Code of Virginia and whether it means "judge" or "jury."
20 Specifically, during the recodification of Title 38.1 to 38.2, the word "trial judge" was changed to
21 "court" in § 38.2-209 A, and the recodification report described the change as technical. Delegate
22 Habeeb noted that the Code Commission and the recodification report played a significant role in
23 Justice Mims' majority opinion and was referenced in Justice Kelsey's dissent. The dissent also
24 noted that the use of "court" is inconsistent throughout the Code of Virginia.

25 Delegate Habeeb asked if the Commission was interested in taking up this issue and having DLS
26 staff review how the term "court" is used throughout the Code. The Code Commission briefly
27 discussed the issue, but no action was taken.

28 **Use of gender-specific references in Code of Virginia:** Delegate Simon addressed the Code
29 Commission and briefly reviewed the background for this item, including his prior presentation to
30 the Code Commission regarding HB 1600 and SB 1211 of the 2015 Session of the General
31 Assembly, the U.S. Supreme Court decision in *Obergefell v. Hodges*, the request from the Speaker
32 Howell and Senator Norment, and the comprehensive compilation of gender references in the Code
33 prepared by DLS. Mr. Cotter explained that the chart, prepared by Caroline Stalker of DLS,
34 presents the scope of gender references in the Code of Virginia. A code-wide definition may be
35 problematic in some topic areas, such as assisted conception. If the approach is to make changes in
36 each instance where a gender-specific reference is used, many places are easily changed, but others
37 are more complicated and stakeholders would need to be involved. Delegate Habeeb advised that
38 during consideration of HB 1600 by the House Courts Civil Subcommittee, the subcommittee asked
39 whether changing the existing language in § 1-216 was sufficient or if the *Obergefell* decision

40 mandates a different approach. Delegate Habeeb supported a comprehensive approach to amend the
41 Code and recommended that staff use the chart to make amendments section by section. If
42 necessary, the Code Commission could appoint a subcommittee. Delegate LeMunyon also
43 supported a comprehensive approach.

44 Senator Ebbin addressed the Code Commission and stated that his goal was certainty and not a
45 piecemeal approach. Delegate Simon concurred and volunteered to be on a committee if one was
46 established by the Code Commission.

47 Delegate Habeeb moved that DLS staff proceed with a comprehensive approach in preparing a bill
48 to amend gender-specific references in the Code of Virginia. Upon second by Mr. Oksman, the
49 motion carried unanimously.

50 After discussion regarding the timeframe for completion of the bill, staff will report to the Code
51 Commission in November.

52 **Selection of next title recodification:** Mr. Tavenner recommended that the Code Commission
53 select Title 55, Property and Conveyances, as the next recodification project and called on Mr.
54 Cotter to present additional information. Mr. Cotter informed the Code Commission that the Real
55 Estate Section of the Virginia Bar Association supports the recodification of Title 55 and has begun
56 forming a committee to assist DLS. The bankers also support this recodification, Mr. Cotter
57 reported, and other stakeholders have shown interest.

58 On motion of Mr. Tavenner, seconded by Judge Baskervill, the Code Commission unanimously
59 approved Title 55 as the next title for recodification.

60 **Recodification of Title 23, Educational Institutions:**

61 Mr. Moncure explained that a colleague had identified an inconsistency in the use of "appointed and
62 qualified" and "appointed and confirmed" in Title 23.1 as it relates to holdover members of
63 governing bodies. Mr. Moncure moved that "appointed and confirmed" be replaced with "appointed
64 and qualified" throughout Title 23.1. Upon second of Mr. Oksman, the motion carried unanimously.

65 Mr. Brimmer and Mr. Stevens presented the last four chapters of Title 23.1 for initial review by the
66 Code Commission and revisited issues previously raised in other chapters.

67 Proposed Chapter 5, In-State Tuition and Reduced Rate Tuition Eligibility (lines 1-508). The
68 provisions of existing Chapter 1 of Title 23 relating to in-state tuition eligibility have been
69 consolidated into this chapter.

70 Proposed Chapter 6, Financial Assistance (lines 510-1803). This chapter is a consolidation of
71 provisions of Title 23 relating to financial assistance.

- 72 • Mr. Brimmer advised that in § 23.1-614 (line 1026), the change in the maximum amount of
73 graduate nursing scholarships from \$4,000 to \$5,000 is not a substance change because the new
74 dollar amount reflects the appropriation act.
- 75 • Due to a formatting error, Mr. Brimmer explained that in § 23.1-614, the text beginning with
76 "the Advisory Committee" and ending with "this section." (lines 1028 through 1034) was
77 inadvertently stricken due to a formatting error. This text should be unstricken.
- 78 • Mr. Brimmer advised that existing § 23-38.2 (lines 1172-1193) is recommended for repeal. The
79 Department of Behavioral Health and Developmental Services is checking on this
80 recommendation. Staff will report at the next meeting.

- 81 • Mr. Brimmer noted that existing § 23-38.8 (lines 1278-1283) is recommended for repeal as
82 obsolete at the request of the Attorney General's Office. The section limits an applicant for a soil
83 scientist scholarship to "the minimum military service required by virtue of either being drafted
84 into such service or voluntarily enlisting therein in lieu of being drafted." Ms. Norwood with the
85 Attorney General's office added that this section violates the Uniformed Services Employment
86 and Reemployment Rights Act, which prohibits discrimination based on an individual's election
87 to serve our country. The Commission discussed whether the repeal should be addressed in the
88 recodification bill or as a separate bill and concluded that, although the change is substantive,
89 the change is appropriate in the recodification. The Commission directed staff to note the repeal
90 as a substantive change in the executive summary and drafting notes of the recodification report.

91 Proposed Chapter 7, Virginia Savings Plans (lines 1805-2274). Existing Chapter 7 (Virginia
92 College Savings Plan and ABLE Savings Trust Accounts) is reorganized as this proposed chapter.
93 Mr. Brimmer advised that staff was still fine-tuning this chapter. Mr. McGee, General Counsel for
94 the Virginia College Savings Plan, stated that the Plan now includes five programs, one of which
95 was added in the 2015 Session of the General Assembly to include ABLE accounts. Mr. McGee
96 identified a number of issues that remain to be addressed to ensure that there are no unintended
97 consequences from the recodification, and he recommended that the Code Commission proceed
98 slowly and carefully, particularly regarding the liabilities and obligations under the prepay plan.
99 Delegate Habeeb emphasized the limited time remaining for completing the recodification, and Mr.
100 McGee stated that he expects all issues on this chapter to be resolved by the Commission's
101 November meeting.

102 Proposed Chapter 10, Restructured Higher Education Financial and Administrative Operations Act
103 (lines 2276-3938). Existing Chapter 4.10 is reorganized as this chapter. In § 23.1-1000, in the
104 definition of the term "capital project," staff pointed out that dollar amounts were changed to reflect
105 those in the appropriation act (lines 2295 and 2296). Mr. Miller suggested either changing the
106 specific dollar amount to a reference to the appropriation act or to ask the Code publisher to note the
107 amount in an annotation to the section.

108 Additional chapters or sections for review.

- 109 • Chapter 18.1 - The Miller School of Albemarle. Mr. Stevens indicated that he contacted the
110 headmaster of the Miller School, who stated that the school's position is that all statutes tying
111 the school to the Commonwealth have been repealed. However, the headmaster indicated that he
112 would verify this information. Mr. Stevens stated that his concern is that the 1986 Act of
113 Assembly has not been repealed, and the act states that the school is continued as an educational
114 institute of the Commonwealth of Virginia.

115 Staff proposed repealing the codified sections, retaining the 1986 and subsequent acts, and
116 striking ", an educational institution of the Commonwealth of Virginia." After discussion, the
117 Code Commission continued this item until its November 16 meeting.

- 118 • Section 23.1-100 - Definitions. The definition of "chief executive officer" has been revised.
- 119 • Section 23.1-204 - Post-graduation employment rates. Mr. Stevens indicated that existing § 23-
120 2.4 is now subsection B of § 23.1-204.
- 121 • Section 23.1-401 - Restrictions on student speech; limitations. Mr. Stevens explained that this
122 section was inadvertently omitted from Chapter 4 during a prior review and was therefore being
123 presented that day with only technical changes.

- 124 • Section 23.1-802. Student mental health; policies; website resource. Mr. Oksman stated that the
125 involuntary commitment notification requirement in this section raises concerns due to the
126 overlay of state and federal laws regarding patient privacy, so he asked Ms. Tysinger with the
127 Office of the Attorney General to explain the issues to the Code Commission. Ms. Tysinger
128 stated that the text in subsection B of this section is problematic. Involuntary commitment is
129 considered health information that is protected under both federal and state law. Subsection B
130 implies that a university would be notified of an involuntary commitment, but notification
131 would not occur without the student's consent. The provision regarding discharge, which
132 requires student consent, is permissible but is more restrictive because under current law, a
133 university can be notified of a student's return without the student's consent. Mr. Stevens pointed
134 out that the statute only requires designation of a contact person; it does not require notification,
135 which would violate federal law. Mr. Oksman emphasized that this section implies notification
136 should occur, which might result in improper notifications. He requested that the Code
137 Commission identify this section for closer scrutiny by the General Assembly.

138 After discussion, the Code Commission directed staff to review this section and report back to
139 the Code Commission.

- 140 • Mr. Stevens also presented several other sections with technical changes, including §§ 23.1-
141 1300 and 23.1-1504, which were previously inadvertently omitted from the recodification
142 report.

143 In conclusion, Mr. Stevens indicated that staff will revisit the unresolved issues at the November
144 meeting and present (i) the final changes made by the work group, (ii) the executive summary for
145 the recodification report, (iii) and the enactment clauses for the draft bill.

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

147 **Public comment; adjournment:** The Chair opened the floor for public comment. As there was no
148 public comment and no further business to discuss, the Chair adjourned the meeting at 1:12 p.m.