

VIRGINIA CODE COMMISSION

*Monday, November 20, 2017 - 10:00 a.m.
Richmond, Virginia 23219*

Approved May 7, 2018

Members Present: John S. Edwards; James M. LeMunyon; Ryan T. McDougle; Gregory D. Habeeb; Robert L. Calhoun; Leslie L. Lilley; E.M. Miller, Jr.; Thomas M. Moncure, Jr.; G. Timothy Oksman; Mark Vucci; Noah Sullivan

Members Absent: Charles S. Sharp, Chris Nolen

Staff Present: David Cotter, Meg Lamb, Scott Meacham, Amigo Wade, Brittany Olwine, Kristen Walsh, Jane Chaffin, Karen Perrine, Anne Bloomsburg, Andrew Kubincanek, Lilli Hausenfluck, Division of Legislative Services (DLS)

Others Present: Tom Lisk, Chair, Administrative Law Advisory Committee; Kenneth Grigg, Office of the Executive Secretary, Supreme Court of Virginia; Brian Kennedy, LexisNexis; Alex Medrano, Thomson Reuters

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

Approval of minutes: The minutes of the October 16, 2017, meeting of the Commission, as printed and distributed to the members, were approved without objection.

Virginia Administrative Code - CDs: Karen Perrine stated that the Commission's contract with Thomson Reuters (West) to publish the Virginia Administrative Code (VAC) includes a provision requiring West to provide 25 CDs, which come out quarterly, to the Commission at no charge. West is phasing out Premise, the platform for the VAC CDs, and has a proposal for a replacement, which will be presented by Alex Medrano. This change requires Commission approval and a contract amendment.

Mr. Medrano addressed the Commission by telephone and explained that his company will provide the Commission and staff with access to VAC on Westlaw™ in place of the CDs, with distribution of the access passwords as determined by the Commission. Mr. Medrano stated that currently there are only 50 subscribers to the VAC CDs, and those are mainly law libraries that receive the CDs as part of a bundle of products from West. On the basis of customer feedback, he does not expect any concern or negative effect from discontinuing Premise and the CDs.

On motion of Senator McDougle and seconded by Mr. Miller, the Commission approved an amendment to the contract as presented.

In response to a question from Judge Lilley, Mr. Medrano stated that Westlaw™ has versioning, and he will check how far back the versioning goes.

Virginia Administrative Code - Copyright: As reported at the June 20, 2016, meeting, West applies to register a copyright for the VAC with the United States Copyright Office on behalf of the Commonwealth. The Commonwealth owns the copyright and grants a license to West to publish and sell the print version of VAC. The Copyright Office declined to register the copyright filed for 2015, claiming that the material was not copyrightable because it lacked a sufficient amount of new copyrightable material or compilation authorship. At the direction of the Commission, West requested reconsideration of the copyright registration rejection. Ms. Perrine stated that the Copyright Office reexamined the application and determined that it would grant the copyright registration.

Mr. Medrano stated that the application for copyright registration has been filed for 2016, but a decision has not been reached.

Proposed policy for drafting gender-neutral language: At the October 16, 2017, meeting, the Commission requested that staff develop a written policy regarding an ongoing process for new and existing statutory language consistent with § 1-216 of the Code of Virginia regarding the use of "he" as a neutral term. In addition, the policy should address terms such as "husband" or "wife." David Cotter presented and reviewed a draft written policy and list of terms that would be standardized.

On motion of Mr. Calhoun and seconded by Delegate Habeeb, the Commission approved the policy.

Follow-up: Proposed bill draft to repeal obsolete statutory prohibitions on same-sex marriages and civil unions: As requested by the Commission at its October 16, 2017, meeting, Mr. Cotter presented a draft bill to repeal obsolete statutory prohibitions on same-sex marriages and civil unions in §§ 20-45.2 and 20-45.3 of the Code of Virginia. Mr. Cotter also presented a summary of the bill for the Commission's review.

On motion of Mr. Oksman, seconded by Delegate Habeeb, the Commission approved the bill for introduction at the 2018 Session of the General Assembly with an amendment to the summary to include a reference to the Opinion of the Attorney General to the Commission regarding this matter.

Report of the Administrative Law Advisory Committee (ALAC): Mr. Lisk presented a report on ALAC activities.

Mr. Lisk stated that ALAC has two draft bills for introduction in the 2018 Session of the General Assembly for consideration by the Commission. The first proposal was brought to ALAC by the Executive Secretary of the Supreme Court. The bill modifies the time frame for completion of a hearing officer's report to align with federal requirements. After a brief discussion, Judge Lilley moved approval of the draft bill. Mr. Miller seconded, and the motion passed.

Mr. Lisk stated that the second draft bill, prompted by the Model Administrative Process Act, addresses a hearing officer's discretion to close a hearing or seal a record in limited cases. Hearing officers are closing hearings and records now, and no standard exists to govern closure. The bill addresses this gap and exempts from court review the decision to close a hearing or record. In response to a question from Senator Edwards, Mr. Lisk explained that the purpose of exempting the decision from court review is to prevent overburdening the courts. Commission members also expressed concerns over the use and interpretation of "includes but not limited to." After a brief discussion, the Commission requested that ALAC review the implications of the bill and report back to the Commission.

Mr. Lisk reported that ALAC will continue to look at the executive review process for promulgating regulations with the goal of shortening the time it takes. ALAC also is reviewing information from other states regarding veto by a governor. Senator Edwards requested that ALAC continue to study this matter.

Mr. Lisk reported on ALAC's review of Department of Taxation regulations. The review was initiated because the department had started a number of regulatory actions some years ago and many were still pending. In addition, a concern had been raised regarding the department's use of guidance documents. Mr. Lisk stated that after an informative presentation by the department to ALAC, it appears that the department has been using the regulatory process more recently, and the concerns seem to be alleviated.

Follow-up: Title 24.2 obsolete laws draft legislation: At the October 16, 2017, meeting, Ms. Lamb presented information regarding obsolete laws in Title 24.2 of the Code of Virginia. On the basis of the discussion at that meeting, Ms. Lamb presented a draft bill for consideration by the Commission

to be introduced in the 2018 Session of the General Assembly. The proposed bill amends §§ 24.2-613, 24.2-614, 24.2-615, and 24.2-644 and repeals § 24.2-113 of the Code of Virginia. On motion of Senator McDougle, seconded by Delegate Habeeb, the bill draft was approved.

Code of Virginia: 2018 Code of Virginia replacement volumes and pricing proposal: Brian Kennedy presented the annual analysis of the current Code of Virginia volumes for determining the 2018 replacement volumes. LexisNexis recommends four replacement volumes: 2B (Titles 9.1 and 10.1), 5B (Titles 29.1-32.1), and a split of 3A (Title 15.2) into 3A Part I and 3A Part II. After discussion, including how to label the two parts of current Volume 3A once split, Mr. Calhoun moved that the Commission accept Mr. Kennedy's proposal to replace Volumes 2B and 5B and to split Volume 3A into two parts. The motion was seconded by Senator McDougle and passed. Staff will work with LexisNexis on how to label the two parts of Volume 3A.

At the request of Mr. Calhoun, Mr. Vucci agreed that staff will review the authorities in Subtitle IV of Title 15.2 for possible relocation.

Mr. Kennedy presented the annual price increase proposal from LexisNexis. He explained that every year, LexisNexis reviews the Producer Price Index (PPI) for professional publications, and last year there was an 8% increase in the PPI. Lexis is proposing a 5% increase for state and private purchasers of the print Code of Virginia. On motion of Judge Lilley, seconded by Senator McDougle, the Commission approved the 5% price increase.

Code of Virginia contract expiration and option to renew: Mr. Vucci stated that the most recent contract with LexisNexis was signed in 2009 and contained an expiration date of August 31, 2016, with two two-year renewal options. The first two-year renewal option was exercised, and the contract will expire on August 31, 2018. If the Commission decides to exercise the second two-year renewal option, the final contract expiration will be August 31, 2020. On motion of Senator McDougle, seconded by Judge Lilley, the Commission approved renewing the contract until August 31, 2020.

Recodification of Title 55, Property and Conveyances:

Subtitle I - Property Conveyances.

Amigo Wade stated that after additional review by staff or the work group in response to questions raised at the October 16, 2017, meeting regarding proposed Article 1 (Creation and Transfer of Estates) of Chapter 1 (Creation and Limitation of Estates), staff recommends that (i) § 55-3 remain in Title 55.1, as the section addresses property of a living person, and that the reference to the Uniform Commercial Code be removed and (ii) in § 55-4, "attainder of felony" and "corruption of blood" be retained. In response to a question from Mr. Oksman as to whether § 55-24 (lines 232-238) were necessary, Mr. Wade stated that the work group did not want to risk repealing language that might still be applicable, even if unlikely. Mr. Wade went over the remainder of Article 1, which completed the review of Chapter 1.

Mr. Wade presented proposed Chapter 2 (Property Rights of Married Persons) and noted that the language is updated to replace gender-specific terms with gender-neutral terms in accordance with title-wide conventions.

Subtitle II - Real Estate Settlements and Recordation.

Mr. Wade presented proposed Chapters 1 (Recordation of Documents), 2 (Virginia Property Disclosure Act), 3 (Exchange Facilitators Act), 4 (Real Estate Settlements), 5 (Real Estate Settlement Agents), and 6 (Commercial Real Estate Broker's Lien Act). During its review, the Commission discussed or took action as follows:

Chapter 1, Article 5, § 55-123 (line 621): Mr. Miller asked the significance of the date "July 1, 1995." Staff advised that the statute was amended in 1995, when the date of "1989" was changed to "1995." Staff will research this question and report back to the Commission.

Mr. Wade stated that Subtitle V and the rework of Subtitle III are the remaining subtitles for consideration by the Commission.

2018 legislation recommended by the Virginia Code Commission; selection of bill patrons:

Senator Edwards stated that he will carry the Commission bills regarding obsolete laws in Title 24.2, repeal of notification of withholding order, repeal of same-sex marriages prohibition, and time frame for decisions by hearing officers. Senator McDougle will carry the bills on Title 23.1 cleanup and venue in criminal cases. Delegate Habeeb also will carry the bills on venue in criminal cases and obsolete laws in Title 24.2.

Next title recodification recommendation: As requested by the Commission, staff contacted the Department of Mines, Minerals and Energy (DMME) regarding the recodification of Title 45.1. Michael Skiffington, DMME, indicated that the department supports the recodification of Title 45.1.

Other business: Mark Vucci provided information regarding adoption of the Uniform Electronic Legal Material Act (UELMA) by other states, as requested by the Commission. As shown on the handout, 17 states have adopted UELMA, but there is a diverse spectrum of the legal materials to which UELMA applies in each state. The goals of UELMA are authenticity of, preservation of, and access to an online code. In Virginia, the issue is authenticity; many of the provisions of the Appropriation Act override the Code of Virginia, and some Code sections have a version that is effective until one date and a version that is effective on or after another date. Senator Edwards asked about cybersecurity and hacking. Mr. Vucci suggested that David Burhop, Director of the Division of Legislative Automated Systems, be invited to a meeting in 2018 to provide information and address those concerns.

Senator Edwards stated that this meeting is Delegate LeMunyon's last meeting. He thanked Delegate LeMunyon for his service on the Commission, particularly as vice chair.

Mr. Vucci stated that Jane Chaffin is retiring January 1, 2018, so this is her last meeting. He commended Ms. Chaffin for her dedication, professionalism, and hard work as Registrar and as a state employee for many years. Mr. Vucci presented Ms. Chaffin with a gift on behalf of the Commission. Ms. Chaffin thanked the Commission for the gift and the staff of the Registrar's Office for its work and support.

Public comment, adjournment: Senator Edwards opened the floor for public comment. As there was no public comment and no further business to discuss, the meeting was adjourned at 12:30 p.m.