


Commonwealth of Virginia		
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Elizabeth Palen, Executive Director		
Administrative Law Advisory Committee		

Agenda
House Room 2, Capitol Building
May 11, 2011, 12:00 P.M.

Members present: Chris Nolen, Mike Quinan, Tom Lisk, Roger Chaffe, Phyllis Errico, Eric Page, Karen Perrine, Angela Bowser, Alex Skirpan, Martin Kent, Cindy Berndt, and Elizabeth Andrews

Staff present: Elizabeth Palen, Beth Jamerson

I. Welcome and Call to Order

- Chris Nolen, *Chair*
 - The meeting was called to order at 12:12 PM.
- Chris Nolen informed committee members that the work plan agenda for the coming year was not yet determined and to notify him if they have issues for the committee to take up for the coming year. This meeting is an initial discussion regarding issues that have come up in practice, and the committee will follow up with the Chair of the Code Commission and decide whether ALAC is the appropriate venue to consider those issues. The committee will first follow-up on the *Volkswagen of America, Inc. v. Smit* case. Although the case is fact-specific, there may be some lessons to take from it that apply more broadly.

II. Volkswagen of America, Inc. v. Smit Work Group

- Dissemination to agencies; Mike Quinan
- Mike Quinan reminded the committee of its discussion of the *Volkswagen* case at the previous meeting, and that the case was denied certiorari by the United States Supreme Court. He then summarized the case and the significance of the court's decision.
 - The case addresses Department of Motor Vehicles (DMV) regulations that use language similar to language found in the Virginia Code.

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- When motor vehicle manufacturers are allocating vehicles to dealerships, they have to allocate in a way that is equitably related to vehicle importation. In the *Volkswagen* case, a dealer complained he couldn't get any new, in-demand Volkswagens at a particular time. The DMV said that was equitable under the statute. The Virginia Supreme Court found the statute wasn't unconstitutional on its face, but was unconstitutional as applied.
- The most significant point is that the court noted the agency was empowered by the statute to issue regulations, which could have illuminated the meaning of the words "equitably related." The failure of the DMV to issue regulations was critical to the court's finding that there wasn't sufficient guidance in the statute or the regulations to make the statute constitutional.
- The message to state agencies is that they need to issue regulations if they are operating under statutes that have vague but common standards (*e.g.*, "equitably," "fairly," "reasonably," etc.), are empowered to issue regulations, and haven't done so with a view toward how those standards are defined.
- Mike Quinan referenced the initial draft of the memorandum to directors of and counsel to Virginia State Agencies, dated October 18, 2010. Revisions were proposed and the memorandum dated May 11, 2011 reflects those changes. The issue before the committee now is whether there are any reasons not to distribute the memo dated May 11, 2011, and the logistics involved in any dissemination of the memo.
- Chris Nolen suggested the committee provide the memo to the Attorney General's office to initiate conversation about the issue of agency regulations. However, the committee still needs to decide whether it is appropriate for ALAC to do so.
- Alex Skirpan asked whether the memo would be distributed to all agencies.
- Chris Nolen responded the committee needs to discuss to which agencies the memo should be distributed, but would at least include any executive branch agencies with the authority to promulgate regulations. There needs to be wide-scale dissemination. The basic principle of the case is typical; the situation involved a legislative-created commission that was authorized to promulgate regulations and had not done so. There would likely be very few agencies affected, but nonetheless, dissemination to executive branch agencies is appropriate for the memo.
- Mike Quinan pointed out that several months have passed since the case was decided, and it might be appropriate for the committee to ensure there have been no developments since the memo was drafted.
- Eric Page suggested the committee run a Shepard's report to verify the case's validity. He agreed that dissemination of the memo should be done, as the issue is topical and important, and one of the committee's charges is to assist state agencies.
- Mike Quinan volunteered to check the validity of the case and follow up with staff.
- Chris Nolen noted that with no objections, the committee will proceed in the manner discussed.

III. Guidance Documents

- Discussion
 - Practitioners/agencies
 - Utilization

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- Chris Nolen noted that the memo references the court’s decision that the agency could have provided guidance documents on the relevant Code section. He suggested the possibility of this committee undertaking a review of guidance documents in general. In 1996, this committee did a study related to defining guidance documents. A bill was introduced that would have defined guidance documents, and a much narrower definition was adopted. Now, there are agencies that have several pages of guidance documents. Sometimes those documents are readily available, but often they are not. Each agency is supposed to send its guidance documents to the Registrar’s office for publication with the Virginia Register of Regulations. The guidance documents are promulgated and created by agencies, and they detail how those agencies will interpret state law.
- Accessibility
 - Karen Perrine explained the general filing process of guidance documents. An email is sent to agency coordinators asking them to file their agency’s guidance documents. The majority of agencies file the documents, but some do not always consistently file them each year. Large agencies have a lot of guidance documents, and do routinely file. The Virginia Register’s website has recently been redone, and it is now possible to search guidance documents that are a part of a list, and to select an agency to see its list of guidance documents. If the agencies provide a link, the link is validated by staff so the guidance documents are accessible that way as well. More agencies are beginning to provide a link. A word search will make it easier to find guidance documents on a particular subject than in the past when the only search method was to manually scroll through the list of documents. Some agencies may need to review the documents posted, because some are old and may have since been replaced. Town Hall also has guidance documents on its website, but the documents on the Town Hall website and the Virginia Register’s website are not always the same.
 - Cindy Berndt explained that the Administrative Process Act (APA) requires agencies to file a list of currently filed guidance documents with the Registrar’s Office. An Executive Order requires agencies to maintain a list of current guidance documents on Town Hall.
 - Chris Nolen asked if the guidance documents are accessible on Town Hall.
 - Cindy Berndt responded that only those documents that are currently effective are available. The website does not show

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those documents from the past that have been amended or replaced.

- Chris Nolen asked Melanie West, the associate director of the Department of Planning and Budget, if all agencies post guidance documents.
- Melanie answered that most do, but there are some agencies who do not. There are cases where agencies have guidance documents listed on their websites, and in those instances, as long as they are posted somewhere her department does not want to create twice as much work for agencies by requiring them to post on Town Hall as well. The bigger concern is with the agencies that do not have guidance documents posted anywhere.
- Chris Nolen suggested to the committee that this is a topic they can bring back and discuss further.

IV. Administrative Process Act

- Lane Kneedler, Commissioner, Uniform Law Commission
- Lane Kneedler began by providing background information on the Uniform Law Commission:
 - The Commission used to be known as the National Conference of Commissioners on Uniform State Laws. The name was changed to Uniform Law Commission three years ago, but there are times where either name may be used to identify the Commission.
 - The Commission is made up of 350 gubernatorial appointees. Practitioners make up 60%, and the remaining 40% is divided fairly equally between judges and law professors. Of the members, 30–40 are sitting legislators.
 - The Commission meets once every year for ten days, and the meetings are a very deliberative process.
 - Before each act is adopted, it appears for at least two readings after the drafting committee has completed its draft of the act. The Administrative Process Act (APA) came up for four readings, and each one involved a lengthy debate. The APA was on the floor over those four years for twelve hours, and each reading was a deliberative process. The APA can be thought of as two acts; one that deals with administrative agencies in the judicial context, and another that deals with agencies in the legislative context. While there is some interrelationship between the two parts of the act, it is limited.
 - Each act is read line by line each year, and at the end of every section the Commission stops and debates what was just read. After at least two readings, the act is ready for adoption.
 - Uniform acts go to the American Bar Association (ABA) for approval. The ABA does lobbying work now, but uniform acts still go before the ABA House of Delegates.

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- The Commission focuses on uniform acts, like the Uniform Commercial Code (UCC). The Commission tries to reach out where there is a need for uniformity among the states.
- Certain standards apply to a uniform act.
- Sometimes the Commission will adopt model acts. There might be a motion for a model act rather than a uniform act when internal politics are involved, and the legislators may not want to impose a uniform act on their states. As a result, model acts are often given secondary status, but that was not the case with the APA. A decision was made years ago to create a model act and allow states to adopt the portions of it that are applicable to them. The act was revised in 1981, and again in 2010.
- Lane Kneedler explained that the APA has not yet been introduced anywhere in total. Several states are currently deciding whether they want to update their own administrative procedures. He compared the adoption of the model act in its entirety to Virginia's refusal to change its Rules of Evidence. Now that each state has its own administrative act, the idea that states will completely change their administrative codes is not realistic.
- Lane Kneedler suggested the committee consider undertaking a number of projects. He indicated it might be appropriate to have a work group look more closely at the rulemaking, regulatory part of the APA, and another work group do the same for the adjudication part of the act. Within the act, there is an emphasis on judicial review, and providing for an administrative law panel. Requiring an administrative panel nationwide would have been met with resistance, so it was incorporated in the model act. He suggested a review of the administrative law panel and adjudicatory regulations section of the model act could be done by a third work group.
- Lane Kneedler described one of the projects ALAC undertook while he was a member, involving third party contacts and whether or not they were permissible. There are no third party contact rules in the legislative context. However, there was a dispute over what kind of contact should be permitted with administrative agencies as those members have a wider range of responsibilities. For instance, if the agency member is acting as a judge, there shouldn't be any third party contact allowed. The provisions with third party contacts were, and still are, hotly debated. Those who favor allowing third party contacts have focused on big federal agencies, and those agency heads do not necessarily have any experience in the area in which they are working. Therefore, supporters argue third party contacts should be permitted to allow agency heads to contact the applicable office for decision-making guidance. Others are against third party contacts to the extent that the conversations are not recorded; the conversation must be on the record. There is a potential for abuse when conversations are not recorded.
- Lane Kneedler explained that third party contacts and the requirement of administrative law panels was, and still are, the most controversial parts of the act. The rest of the act does not have many differences between the model act and Virginia's version. Guidance documents are treated the same way in both acts.
- Lane Kneedler explained that provisions will be bracketed either because 1) the committee and floor decide the provision is not necessary, but provide an option to

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proceed in a uniform way, and 2) there are two alternatives and both are acceptable. He asked if there were any questions and offered to come back and give a more extensive talk.

- Chris Nolen asked how consistent Virginia's APA is with the model act.
- Lane Kneedler replied the two acts are fairly consistent. The way third party contacts are treated is different between the two acts, and he suggested studying the differences further. Virginia's APA and the model act are conceptually the same with regard to rulemaking, but the model act allows more participation and opportunity for the public to initiate comments.
- Elizabeth Palen pointed out that other states have more exempted agencies than Virginia.
- Lane Kneedler responded that exemptions are very rare.
- Chris Nolen asked the committee if they had anymore questions for Lane. He informed Lane the committee will be taking him up on his offer to return to speak to ALAC. He advised the committee that they will need to look over what has been proposed, and divide up into two work groups to look at the model act and make a recommendation to the Code Commission. He asked Lane whether Virginia has any gaps in its act, and if there are any improvements that he thought could be made before Virginia's adoption.
- Lane Kneedler responded that the committee could also review administrative law panels and the adjudicatory process. He suggested the committee focus on how an informal hearing is started and then progress to formal hearings.
- Chris Nolen advised the committee that part of the work plan for the coming year would be to study Virginia's APA and how it compares to the model act. The committee will divide into two work groups, with one group focusing on the regulatory aspects of the acts, and the other focusing on the judicial aspects of the acts.
- Alex Skirpan clarified that the regulatory part of the act involves the legislative process.
- Mike Quinan asked about the timeline for the two work groups.
- Chris Nolen responded that the work will need to be completed by November to make recommendations to the Code Commission. The committee will need to reach out to the state Bar, and utilize E.M. Miller and Jessica French from the Division of Legislative Services. Without objection the committee will incorporate this into the work plan and make recommendations to the Code Commission. The work will be substantive enough to carry through summer and nearly fall. The committee will try to have three work groups at a time, completing all work within a year. He asked the committee members to call either Elizabeth Palen or himself if they have ideas regarding issues to incorporate into the committee's work plan. He asked committee members to inform staff as to which work group they would like to be on before May 24.

V. Adjourn

- The meeting was adjourned at 12:57 P.M.

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