

MINUTES

Code Commission



Margaret V. Gillespie, Chair
Thomas E. Lee, Vice Chair

One hundred thirty-first Meeting
Friday, November 20, 2020

Room 413, State Capitol
Pierre, South Dakota

The one hundred thirty-first meeting of the South Dakota Code Commission was called to order by Chair Margaret Gillespie at 9:04 a.m. (CT) on November 20, 2020, via electronic conference and in Room 413 at the State Capitol, Pierre, South Dakota.

A quorum was determined with the following members answering the roll call: Commissioners Margaret Gillespie (Chair), Tom Lee (Vice Chair), Doug Decker, Steven Haugaard, and Arthur Rusch.

Staff members present were Justin Goetz, Code Counsel, Kelly Thompson, Senior Legislative Secretary, Hilary Carruthers, IT Support Specialist, and Reed Holwegner, LRC Director.

All material distributed at the meeting is attached to the original minutes on file in the Legislative Research Council (LRC). For purposes of continuity, these minutes are not necessarily in chronological order.

Approval of Minutes

Commissioner Rusch moved, seconded by Commissioner Lee, that the October 16, 2020, meeting minutes be approved. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Acknowledgement of Guests

Mr. Justin Goetz, Code Counsel, advised members that **Ms. Katie Hruska, Office of the Governor**, was in attendance in person and **Mr. Andrew Fergel, State Bar of South Dakota**, and **Ms. Lila Hambleton, Thomson Reuters**, were participating remotely.

Update on *Georgia v. Public.Resource.Org, Inc.*

Mr. Goetz briefly reviewed *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498 (2020), which the Code Commission had discussed previously at its June 4, 2020, meeting. Discussion had centered on the potential need to revise [SDCL 2-16-6](#) and [2-16-8](#) to accurately indicate what is copyrightable. Mr. Goetz provided proposed legislation, Draft 106 ([Document 1](#)), to commissioners for review and discussion. The draft bill strikes the Code Commission's statutory duty to determine the contents of case annotations and clarifies that material will be copyrighted to the extent permitted by federal copyright law.

Commissioner Rusch noted a word appeared to be missing in statute currently codified that was included in the draft. Mr. Goetz acknowledged the omission.

Commissioner Decker moved, seconded by Commissioner Rusch, that the word "that" be inserted between "provide" and "the" on page 1, line 27 of Draft 106. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Commissioner Decker said if the draft legislation is approved, it is important for people to know there will still be annotations in the Code and that the issue could be addressed through the printing contract with West Publishing, a Thomson Reuters company. Mr. Goetz noted the current contract specifies that annotations and updates will be provided.

Commissioner Gillespie asked if passage of the bill could impact negotiations with the printer. Commissioner Rusch responded that it could put the Commission in a weaker position for negotiations. Ms. Hambleton advised that it is unlikely annotations would not be included.

Commissioner Decker reminded commissioners that they have the authority to put the Code out for publishing bid and if West Publishing made the decision not to include annotations, the Code Commission could move forward with that action.

Commissioner Lee said Draft 106 deals with the Code Commission's obligation, not its authority, and the entity has the latitude to make the necessary decisions with its supplier.

Commissioner Lee moved, seconded by Commissioner Decker, that Draft 106 be approved, as amended, as a bill to be brought on behalf of the Code Commission for the 2021 Legislative Session. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Discussions with the State Bar of South Dakota Regarding Initiated Measures, Legislative Amendments, and Section Length and Organization

Mr. Goetz explained the issues and requests for input from the State Bar of South Dakota were initiated by the prior Code Counsel and were discussed by the Code Commission previously on [October 16, 2019](#), [January 15, 2020](#), [February 20, 2020](#), and [June 4, 2020](#). When asked by Commissioner Haugaard for his thoughts on the matter, Mr. Goetz responded that there are pros and cons on the issue regarding section length and that the technology used by LRC imposes certain limits that could curtail the length of sections during the drafting process. He noted there were other individuals in attendance at today's meeting that would offer their perspective on the remaining issues.

Commissioner Haugaard asked if LRC staff could become more proactive in cleaning up the Code by providing guidance to legislators as to when sections of the law could be combined for clarity and effectiveness. Mr. Goetz said he and LRC staff are working to compile a listing of such sections for review.

Commissioner Decker said while having like subject matter spread out through the Code can make research difficult, that does not mean that like sections of law should automatically be combined into one large section. He noted that the goal of the Code Commission in overseeing the Code should be to make it simple, plain, and direct so it can be understood by the public and lawyers alike.

Commissioner Gillespie commented it is not practical nor realistic to do a wholesale rewrite of the Code but efforts for making sure statutes are where they need to be in the Code should be supported. That could be accomplished in phases when valid and clear opportunities are present to do so.

Commissioner Haugaard said the LRC office has been of the opinion that they should be detached and not provide assertive legal advice to legislators but it would be useful for new legislators if the LRC legal staff saw themselves more in the position of guiding their "client", advising as they would in a law office, when drafting bills requested by legislators.

Public Testimony

Mr. Andrew Fergel, South Dakota Bar Association, told commissioners that if input was requested on issues with ballot measures and statute amendments, there likely would not be a consensus among the organization's membership. In terms of changing practices with section length in the Code, Mr. Fergel estimated 8 out of 10 members would be in favor of the current form and style but no member is opposed to general clean up of the Code. He reiterated that the organization appreciates the opportunity to partner with the Code Commission in providing input when appropriate.

Mr. Reed Holwegner, Director, Legislative Research Council, said prior to returning to South Dakota, he worked for the last 13 years in a jurisdiction that used longer code sections and has spoken to attorneys who have trouble understanding other states' law relative to South Dakota law because the latter is so tightly written. Mr. Holwegner said the focus for writing and maintaining the Code should be on the need to make it understandable for everyone who uses it, commenting that sometimes laws are written by ordinary people, too, not just legislators or attorneys.

Technical Corrections Legislative Issues with State Agencies

Mr. Goetz explained that the vetoes of House Bills [1012](#) and [1013](#) during the 2020 Legislative Session resulted in various agencies claiming aspects of the failed legislation as agency bills for the 2021 Legislative Session. A request was made to have a representative of the Governor's Office brief the Code Commission on the process and potential legislation.

Ms. Katie Hruska, Office of the Governor, said the technical corrections bills were vetoed due to concerns about the length of the legislation and how it was drafted. Following session, the Governor's Office received a report from LRC identifying all sections and cross references and after an internal review, these proposed edits were assigned to agencies based on subject matter. Agencies and their legal staff further reviewed the material and reached out to other interested stakeholders for input. Currently, 19 bills covering over 158 sections of the Code are planned for introduction during the 2021 Legislative Session. The goal is to correct the Code and keep the statutes up to date.

Commissioner Lee thanked Ms. Hruska for the update and said he hoped the Governor's Office understands the technical corrections bills were not initiated by the Code Commission even though they were presented as Code Commission legislation. Ms. Hruska acknowledged that understanding.

Changes to LRC's Website Code

Mr. Goetz said that occasionally, the official version of the Code as contained in the published volumes differs from the version of the Code as shown on the LRC website. Prior to his arrival as Code Counsel, Ms. Hambleton provided LRC with a listing of sections where the website deviated from the official published edition. The changes were reviewed by LRC staff and subsequently made. Mr. Goetz asked commissioners for guidance on whether the Code Commission wants to oversee the process of reconciling the LRC website statutes with the official Code.

Commissioner Decker, who had previously served as Code Counsel, explained that during his tenure, if such deviations were found, he consulted with either the Chair or the Code Commission as a whole as to whether the changes should be made so the website Code was reconciled with the printed Code. He said as the printed Code is the official Code of the State of South Dakota, the statutes displayed on the website should mirror it.

Mr. Goetz asked for clarification that if the edits are non-substantive, they can be authorized by the Code Counsel without consulting the Code Commission, but any substantive changes should at least involve the guidance of the Chair before action is taken. Commissioner Gillespie, as Chair, confirmed that direction.

Draft Legislation to Codify Legislation Enacted in 2020

Mr. Goetz presented Draft 104 ([Document 2](#)), the annual codification bill introduced on behalf of the Code Commission.

Commissioner Gillespie said she did not believe the Commission needed to take action on the draft to move it forward as historically, the bill was submitted by the Code Counsel on the Commission's behalf. Commissioner Rusch expressed concern over that practice, saying last year commissioners had not had a chance to review the bill before it was filed.

Commissioner Haugaard said having the bill draft on the Commission's agenda for discussion provides an official record that members have seen and approved the legislation. While it is not typically an issue, the circumstances of its introduction last year resulted in some difficulty in getting the bill passed in the Senate.

Commissioners discussed the options for filing the annual legislation if pre-filing deadlines are missed and determined that today's meeting provided an opportunity for the Commission to authorize the pre-filing of the bill by the Committee on Judiciary.

Commissioner Decker moved, seconded by Commissioner Lee, that Code Counsel Goetz be directed to submit Draft 104 to the Chair of the Committee on Judiciary, as a bill to be brought on behalf of the Code Commission for the 2021 Legislative Session. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

LRC Staff Request for Guidance on the Preferred Structure of Catchlines

Mr. Goetz relayed a request from an LRC attorney for guidance on the preferred structure of catchlines in the Code. A longer, narrative style had been the norm prior to the 2020 Legislative Session, when a shorter index style for catchlines was used.

Commissioner Lee applauded the effort to make the catchlines more concise and include with them appropriate search topics. Commissioner Decker agreed and asked West Publishing for comment.

Ms. Hambleton offered suggestions regarding the order of search topics, advising that the lead topic should not be a title or chapter heading. Commissioner Lee encouraged LRC staff to utilize the benefit of Thomson Reuters' experience for style directives and suggestions.

Mr. Goetz said the input provided is a good starting point and he will make sure the Bill Drafting Manual reflects today's discussion.

Delegation of Authority to the Code Counsel

Mr. Goetz reviewed the statutory authority of the Code Commission and the Code Counsel and said in the past, previous Code Counsels have regularly used Commission-delegated authority. As the new Code Counsel, he is requesting the Commission's delegation of authority to him to act on their behalf and for parameters to be established for his accountability to the Commission. A proposed Limited Delegation of Commission Authority to Code Counsel as Commission Agent Agreement ([Document 3](#)) was provided for their consideration.

Commissioner Decker said while the delegation of authority during his tenure as Code Counsel was granted informally, the agreement presented is a good place to start and should be adopted by the Commission.

A further review of the document resulted in the need for a correction in terminology.

Commissioner Decker moved, seconded by Commissioner Lee, that the word "Omitted" in Section 1 of the document be stricken and replaced with the word "Executed." Motion passed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Commissioner Lee moved, seconded by Commissioner Decker, that the Limited Delegation of Commission Authority to Code Counsel as Commission Agent Agreement be approved, as amended. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Request of Hazelden Betty Ford Foundation to Reproduce Code in an Outside Publication

On October 15, 2020, LRC received a written request from the Hazelden Betty Ford Foundation to reprint [SDCL 22-42-4.3](#) in their print/electronic publication, *Meth: A Guide for Community Leaders*. Mr. Goetz told the Commission that in a follow-up conversation with the organization on November 16, 2020, the

organization informed him that they printed the publication without reproducing the statute. No further action was needed on the request.

Need for Repealed Statutory Language to be Accessible on the LRC Website

Mr. Goetz noted that individuals wanting to look at the history or language of a repealed section of law are unable to see that information on the LRC website. He proposed a number of solutions including the linking of old Codes to the website and retaining source notes on repealed legislation.

Commissioner Gillespie said for members of the State Bar of South Dakota who do not have access to Westlaw, there are concerns about their ability to access this information and while scanning of historical sections by the South Dakota State Library is helpful, the issue of repealed sections needs to be addressed.

Commissioner Decker agreed it is an important issue but questioned whether the Code Commission has the authority to tell LRC what content they need to make available on their website. He added that there was a negotiation between LRC and the publisher as to what would be available to LRC to put on their website and copyright questions were raised about what belonged to the printed Code and could not be on the website.

Ms. Hambleton said in the printed Code, the source notes don't disappear; they appear in historical and statutory notes that have longer captions.

Commissioner Rusch asked if the information is available through the State Library. Mr. Goetz replied that old Code volumes are available through the State Library electronically and are helpful to an extent but problems arise when those scanned versions do not include the pocketparts that show the changes. He said the simplest solution would be to include the source notes to show the Session Laws where the language was adopted or amended as well as the Session Law that repealed it.

No action was taken. Commissioner Gillespie said the issue would be kept alive for later discussion.

Closing Comments/Next Meeting

Commissioner Gillespie noted the Code Commission generally meets in February, during the Legislative Session. A meeting date will be discussed and finalized in the next few months.

Adjournment

Commissioner Rusch moved, seconded by Commissioner Haugaard, to adjourn. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Chair Gillespie adjourned the meeting at 11:11 a.m.