

MINUTES

Code Commission



Margaret Vandemore Gillespie, Chair
Thomas Lee, Vice Chair

One hundred thirty-third Meeting
Wednesday, June 16, 2021

Meeting Room 10, Sioux Falls Convention Center
Sioux Falls, South Dakota

The one hundred thirty-third meeting of the South Dakota Code Commission was called to order by Chair Margaret Gillespie at 11:06 a.m. (CT) on June 16, 2021, in Meeting Room 10 of the Sioux Falls Convention Center, Sioux Falls, 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, Acting Chief Research & Legal Analyst/Code Counsel.

Others present were Nickie Nielsen, Lila Hambleton, and Anne Barnard--all with Thomson Reuters--and Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System.

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 Decker, that the March 5, 2021, meeting minutes be approved. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Public Testimony

No public testimony was provided.

Review of Code Counsel Actions Taken Since February 2021

Mr. Justin Goetz, Acting Chief Research & Legal Analyst/Code Counsel, presented two technical corrections made under authority delegated by the Code Commission since the last Commission meeting. The first technical correction related to the spelling of "tranquility" in the Preamble of the South Dakota Constitution. The second involved an amendment to SDCL 58-17-87 from the 2001 Legislative Session, and the mistaken strike of a comma separating an item in a list.

Notice of Updated LRC Drafting Manual for Legislation

Mr. Goetz requested a personal privilege, granted by the Chair, to provide a brief summary of his transition from Code Counsel to Chief Research & Legal Analyst. He thanked the Commission for making his time as Code Counsel the most enjoyable of his career, and said he looked forward to training his replacement.

Mr. Goetz thanked Mr. David Ortbahn, the recently retired former Chief Research & Legal Analyst, for his years of service and noted his role in compiling the draft edits to the Drafting Manual provided to the Commission. Mr. Goetz solicited the Commission's feedback on its content, and noted that they can individually provide their thoughts directly to him at a later date.

Commissioner Gillespie asked about the timeframe for adoption. Mr. Goetz indicated that final approval of content would come from Mr. Reed Holwegner, LRC Director, and that his review was the next step. Mr. Goetz indicated that he wanted to have the Drafting Manual updates finalized and posted before the bill drafting bootcamp put on annually by LRC for the benefit of state agencies.

Report on Discussion with State Bar of South Dakota Regarding Criminal Code Revision Commission

Mr. Goetz indicated that, per the Commission's suggestion at its last meeting, **Mr. Andrew Fergel, Executive Director, State Bar of South Dakota**, inquired with Bar stakeholders about their interest in, and perceived need for, a reconstituted Criminal Code Revision Commission. Mr. Goetz summarized Mr. Fergel's feedback that, in general, a concern about the relative flux of drug law in South Dakota makes the issue ripe for addressing in two or three years, but doing so this year might be premature.

Report on Suggestions for Memorializing Repealed Codified Statute Language

Mr. Goetz noted that the Commission discussed this issue at its November 2020 meeting, and how some legal practitioners noted a concern about the accessibility of repealed statutory language. Where a statute is repealed, the bill repealing the statute and the resulting session law do not contain the repealed language, but rather a caption indicating the repeal. In communicating with LRC leadership, Mr. Goetz was provided with ideas on how to memorialize struck language. Two ideas in particular were presented--depicting the repealed statute in full in the session laws, with the appropriate strike-through; or having an archived statute button similar to the archived administrative rules on the LRC website. The latter option would open up the possibility of depicting what any amended statute or repealed statute looked like prior to the amendment or repeal.

Commissioner Decker summarized the archival process for administrative rules, given his prior role as Code Counsel. He indicated the archived function is useful, and he preferred it over having all of the repeal language in the session laws, which could make the session law book much longer. Commissioner Decker conditioned this recommendation on LRC leadership and LRC IT staff supporting this option.

Commissioner Haugaard described the value of obtaining ready access to historic information regarding the evolution of code sections. He reinforced that both establishing and then maintaining this historic information was important.

Commissioner Gillespie reiterated her prior concern about the ability to go back and see how a statute had previously read. She stated her appreciation for having this discussion, particularly for practitioners

relegated to finding an old statute in unconventional places, such as Supreme Court opinions. She seconded Commissioner Decker's preference, given the costs and volume size.

Republished Volumes of the Official Code

Mr. Goetz summarized his staff memo, noting that the Code Commission, per SDCL 2-16-7.1, is authorized to republish volumes of the Official Code and that, historically (per the June 2020 Commission minutes), the standard for republishing volumes is when the pocket part page count is 25 percent or more of the total volume's page count and where the volume's total page count is 1,000 or greater. He indicated that he provided a copy of the spreadsheet reporting these thresholds for each volume as provided by Thomson Reuters.

Ms. Lila Hambleton, Thomson Reuters, clarified that the 25 percent and 1,000 page threshold applied to volume splits. She explained further the page counts for the pocket parts are not always a good indication of what the republished volume's ultimate page count will be, as the amendments depicted in the pocket part may largely involve substitution of one word for another. Once reconciled, this would not add additional pages to the main volume. Nevertheless, based on her read of what was in the pocket part, Volumes 2, 3, and 20 would very likely go over the 1,000 page mark and have pocket parts higher than 25 percent. She also indicated, historically, Code Commissions have republished an average of three volumes per year, but that more recently, the Commission has averaged two volumes republished annually.

Commissioner Gillespie provided that some years the spreadsheet has less volumes reaching the 25 percent threshold, but that this year has a lot of volumes reaching this point.

Commissioner Rusch indicated that Volumes 2, 3, 20, and possibly 26 are ones that the Commission may want to consider this year.

Commissioner Gillespie solicited the legislator-members of the Commission to indicate whether there is anything in particular proposed for legislation that would impact the length of these volumes, so as to prioritize which should be republished.

Commissioner Rusch replied that he was not aware of anything in particular in these volumes.

Commissioner Lee asked whether SDCL titles should be reassigned amongst volumes. He provided as an example Volume 4, which has not been republished in a long time and it does not look like it will reach the republication threshold anytime soon. He noted that shifting some pages from Volume 3 to Volume 4 might create a better page balance. Commissioner Lee asked Ms. Hambleton whether such a shift can be done.

Ms. Hambleton responded that title shifts can make sense, but it may be found that by shifting titles, more splits are required. She intoned that these splits can be tricky particularly where certain SDCL titles have

been organized in certain volumes because they are more germane to one another. Splitting up SDCL titles into two different volumes can be even more problematic for this reason, she stated.

Commissioner Rusch moved, seconded by Commissioner Lee, to approve a split and republication of Volumes 2 and 3 of the Official Code. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Review of Publication Contract with West Publishing

Mr. Goetz summarized the substantive revisions proposed from last year's Thomson Reuters (d/b/a West Publishing) contract, noting that Chair Gillespie had requested his engagement with West Publishing on the new contract, that the contract would again be for an annual term, but that three substantive revisions were made. The first substantive revision was to clarify language in Section 2, regarding what the Code Commission asserted as its copyright, which were made by Code Counsel. The second was in Section 19, the "pricing" section, involving edits made by Thomson Reuters to increase the price of the physical volumes of the Official Code based on an increase in the PPI. The third edit was to Section 23, the indemnification provision, prompted by Code Counsel's determination that the Commission could not indemnify West Publishing per SDCL 3-21-13. Because the indemnification was no longer mutual, West Publishing requested that its indemnification be reduced from "errors and omissions" to "grossly negligent acts or willful misconduct."

Ms. Anne Barnard, legal counsel with Thomson Reuters, provided a similar recitation of the substantive changes from her client's perspective.

Commissioner Gillespie inquired with Ms. Barnard about the PPI, wondering when the PPI was released and whether the percent has been a lot higher than recent years. Ms. Barnard indicated that she was not sure precisely the source of the rate, but that it was available publicly, and that the 8.33 percent increase this year was a bit higher rate than the 7.76 percent increase from last year, both rates possibly being impacted by the pandemic.

Commissioner Lee moved, seconded by Commissioner Rusch, to approve the West Publishing Contract as drafted and presented to the Commission. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Rules of Professional Responsibility

Mr. Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System, brought an issue seeking feedback from the Commission on behalf of the Supreme Court. Mr. Sattizahn noted that in SDCL chapter 16-18's Appendix, the Rules of Professional Responsibility guiding attorney ethics are situated. While the rules have been adopted by the Court, the commentary contained underneath each of the rules is not approved by the Court. In other words, the commentary (derived from the ABA Model Rules commentary) is not in the Rules by official Court action. Recognizing that the Rules of Professional Responsibility will be changed, and the commentary may need to be changed by the State Bar Ethics Committee to account for these changes, the Court wanted to make sure that it got the Commission's thoughts on what might be the most appropriate way to handle the commentary. Mr. Sattizahn indicated

that the Court's preference was to adopt the Preamble and Scope in a court order, wherein the commentary is described as being informative and helpful, but not authoritative. In that way, the commentary continues to be tweaked by the State Bar Ethics Committee with any rule changes. Mr. Sattizahn was uniquely concerned with getting the Commission's feedback because it is unusual that a State Bar committee would produce material to be published in an Appendix to the Code, despite this being the practice for these Rules for a number of years.

Mr. Sattizahn also inquired as to whether it would be possible for the commentary to be on the LRC website for the benefit of practitioners.

Commissioner Gillespie responded that the Court's proposal has the support of the Commission. The request for having the commentary on the LRC website, she noted, would be something that needed to be directed to Mr. Holwegner. She also agreed that this information is important to practitioners.

Commissioner Decker stated his support for including the commentary within the Appendix. The explanation regarding the commentary being informative but not binding made sense and was something he could support, also. He indicated that this could be done as a statement at the beginning of the Appendix, and that it would be appropriate to include there. However, Commissioner Decker indicated that getting material on the LRC website would require the LRC's approval.

Commissioner Lee inquired as to what ABA copyright interests might be infringed in reproducing the commentary from the ABA.

Mr. Goetz indicated that permission had been obtained years ago from the ABA, and that this permission appears to have been open-ended, although he had no official documentation to that effect. Mr. Goetz further noted that in the future, should the material need to be reproduced in other contexts, or the material need to be updated from the ABA, a renewal of permission or license could be requested from the ABA.

Commissioner Gillespie thanked Mr. Sattizahn for bringing this important issue to the Commission.

Authorization to Print and Distribute South Dakota Codified Law

On a request to reproduce certain chapters of the SDCL by the South Dakota Retirement System, Mr. Goetz indicated that the Commission had delegated authority to Code Counsel under its November 2020 delegation instrument to approve this request. Specifically, item 10 authorizes Code Counsel, on behalf of the Commission, to approve or deny "requests to republish or reproduce SDCL by state agencies, and only individual sections by outside entities." Mr. Goetz stated that in accordance with the delegation, he approves the request, particularly given its regularity and the degree of care the South Dakota Retirement System puts into its use of the SDCL provisions.

Consideration of Draft Legislation

Mr. Goetz, before the meeting, provided the Commission with two pieces of draft legislation for its approval. First, Mr. Goetz brought up the annual codification bill draft (Draft 8 – [Document 1](#)), noting that

its content was shaped by the earlier action taken by the Commission regarding the republication of the Official Code volumes. He had originally drafted the legislation with suggested edits that capture all of the Official Code volumes meeting the republication threshold this year. He stated that with the Commission's prior action, two new subdivisions would need to be added to account for the two new volumes having been split, and that the new volume would likely be Volume 2A, following the established method. Mr. Goetz did ask whether, despite the volume being newly created, the nomenclature of "revision" should be used.

Commissioner Decker answered that "revision" has been used for new volumes, as well as republished volumes.

Commissioner Decker moved, seconded by Commissioner Rusch, to approve Draft 8 with the proposed edits removed, save "The 2021 revision of volume 2" and "The 2021 revision of volume 3," with the addition of any subdivisions for a new volume split. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Describing a second piece of draft legislation (Draft 9 – [Document 2](#)), Mr. Goetz related that SDCL 2-13-2, the statute laying out the LRC's obligation to publish the session laws, does not specify that voter-approved initiated measures and initiated constitutional amendments are to be included in the session law compilation. Session laws are helpful, according to Mr. Goetz, because they provide the unadulterated version of the law before codification. Noting that the official copy of these initiated items is maintained with the Secretary of State's Office, Mr. Goetz nevertheless pointed out that this material is not generally accessible on the internet after the election. Incorporating this material into the session laws would make it more accessible, and would validate the prior Code Counsel practice of including the material in session law.

Commissioner Decker provided the history on the incorporation of initiated measures and initiated constitutional amendments, and gave additional context for why this material should be in the session law. He noted that current code counsel views the language in SDCL 2-13-2 as being an exclusive list, and that this would provide clarity. To provide further clarity, he suggested that "approved" be modified to "voter-approved" to underscore that only those initiated measures and initiated constitutional amendments approved by voters make it into the session laws. Commissioner Gillespie agreed that the additional amendment was sound.

Commissioner Rusch moved, seconded by Commissioner Lee, to amend Draft 9 to read "voter-approved initiated constitutional amendments, and voter-approved initiated measures." Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Commissioner Decker moved, seconded by Commissioner Rusch, to approve Draft 9 as amended to be brought on behalf of the Code Commission for the 2022 Legislative Session. Motion prevailed on a roll call vote with 5 ayes. Voting aye: Decker, Gillespie, Haugaard, Lee, and Rusch.

Consideration of Standards for Triggering Recodification of Chapters, Titles, or the Code

Mr. Goetz brought up this issue given the work on SB 70 in the 2021 Legislative Session, and its recodification of SDCL chapter 10-6. Specifically, Mr. Goetz asked the Commission for its feedback, now

or in the future, regarding when Code Counsel should proactively recommend certain chapters be recodified, and what form that recodification should take.

Commissioner Decker indicated that developing standards may be difficult, and the Commission may be better served if Code Counsel ID's a likely recodification because of a lot of repealed or transferred statutes. He suggested Code Counsel should then bring the recodification to the Code Commission for the Commission to approve it as legislation brought on behalf of the Commission. He recognized that there is risk in bringing these bills up, as agencies and stakeholders for these laws may not want the changes, or legislators may try to hijack the bill for other, substantive ends.

Commissioner Gillespie indicated that this can be an issue the Commission considers going forward.

Closing Comments

Commissioner Gillespie thanked everyone for their dedication to the Commission's work and thanked Thomson Reuters for working with them throughout the meeting.

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 12:20 p.m.