

Statutory Codification in North Carolina, or What Happens to a Law After It Is Enacted?



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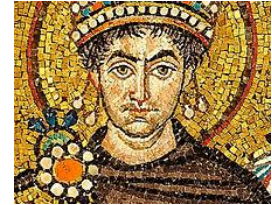
Two major sources of State law:

- The Session Laws –
These contain all the acts of the General Assembly, published session by session. The acts from each session appear in the order the act became a session law.
- The General Statutes –
This is a codification of the general and permanent laws of this State. Being a codification, the laws are grouped topically. "Codification" is the process by which the individual session laws are placed into the General Statutes each year.

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Justinian I
Eastern Roman Emperor
527 to 565

Noted for ordering the codification of Roman law that is named after him.



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General Statute vs. Session Law

- A session law is a law enacted by the General Assembly pursuant to Article II, Section 22, of the NC Constitution. In other words, it is the document read three times in each chamber of the General Assembly, signed by the presiding officer of each chamber, signed by the Governor as needed, and chaptered by the enrolling clerk.
- The General Statutes is a codification of the general and permanent provisions contained in the session laws. G.S. 164-11(a) provides that the General Statutes are "prima facie" evidence of the law.
- If there is a conflict between the General Statutes and a session law, the session law wins. The session law is the law, since it is the document that satisfies Article II, Section 22.

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About the General Statutes

The General Statutes were adopted by the General Assembly in Chapter 33 of the Session Laws of 1943. They were a revision of the existing North Carolina statutes (the Consolidated Statutes) and were the product of four years of work by a committee, the Attorney General and staff, and a recodification commission created by the General Assembly. The Michie Company, the publisher, also provided assistance in the overall organization and the annotations. See *Original Preface to the General Statutes of North Carolina* (which continues to be published in Volume I and has additional information on the history of the creation of the General Statutes).

The 1943 set contained four volumes, including the index, divided into 164 chapters. The 2017 replacement set contained 27 volumes. The basic organization is still that of the 1943 revision and is reflected in the table of contents.

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About the General Statutes Commission

The General Statutes Commission was created by the General Assembly in 1945 for the purpose of advising the Attorney General's Division of Legislative Drafting in its continuous statutory research and correction, in the publication of the General Statutes, and in making a continuing study of all matters involved in the preparation and publication of modern codes of law. In 1951, the General Assembly expressly authorized the Commission to recommend substantive changes in the law. In 1981, the General Assembly expressly authorized the Commission to receive and consider proposed changes in the law recommended by The American Law Institute, by the National Conference of Commissioners on Uniform State Laws (also known as the Uniform Law Commission), or by other learned bodies.

Effective June 1, 2011, the General Assembly transferred the General Statutes Commission and its staff and the remaining functions of the Division of Legislative Drafting from the Department of Justice to the General Assembly. The transfer was made by Session Law 2011-97. Under that session law, the Commission is located within the General Assembly for administrative purposes but continues to exercise all its prescribed statutory powers independently.

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About the General Statutes Commission, continued

The General Statutes Commission meets regularly on the first Friday of each month except July and August. Special meetings may be called by the chairman or by any two members of the Commission whenever the work of the Commission requires.

In addition to its annual technical corrections bill, the General Statutes Commission also recommends other legislation to the General Assembly on a variety of subjects. These can be derived from Uniform Acts, model acts, or recommendations from members of the Commission, other governmental entities and other organizations, other attorneys, including its staff, and, on occasion, members of the public. The Commission typically does not recommend legislation in areas where another body is charged with implementing or reviewing the law on that subject.

The General Statutes Commission's policies are available through the Revisor of Statutes, Bill Drafting Division, North Carolina General Assembly, 300 N. Salisbury Street, Suite 401, Raleigh, North Carolina 27603-5925; telephone (919) 733-6660; fax (919) 715-5459.

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§ 164-13. Duties; use of funds.

(a) It shall be the duty of the Commission:

- (1) To advise and cooperate with the Legislative Services Office in the work of continuous statute research and correction for which the Legislative Services Office is made responsible by G.S. 120-36.21(2).
(2) To advise and cooperate with the Legislative Services Office in the preparation and issuance of supplements to the General Statutes pursuant to G.S. 120-36.21(1).
(3) To make a continuing study of all matters involved in the preparation and publication of modern codes of law.
(4) To recommend to the General Assembly the enactment of such substantive changes in the law as the Commission may deem advisable.
(5) To receive and consider proposed changes in the law recommended by the American Law Institute, by the National Conference of Commissioners on Uniform State Laws or by other learned bodies.

(b) Funds made available to the Commission by appropriation of the General Assembly, by allotment from the Contingency and Emergency Fund, or otherwise, may be used to employ the services of persons especially qualified to assist in the work of the Commission and for necessary clerical assistance. (1945, c. 157; 1951, c. 761; 1957, c. 1405; 1969, c. 341, s. 3; 1971, c. 1093, s. 7; 1981, c. 599, s. 20; 2011-97, s. 6.)

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Role of the General Statutes Commission in Codification

Essentially, the General Statutes Commission has two roles related to codification:

(1) Advisory.

The Commission is typically consulted on proposed major changes or major questions. The need for consultation arises only infrequently.

(2) Corrective.

The Commission typically recommends a technical corrections bill every year. A portion of that bill ordinarily consists of errors identified by the staff or the publishers during the codification process.

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Role of the Codifier

The Codifier of Statutes works together with the publisher of the General Statutes of North Carolina to review each session law enacted by the General Assembly, section by section, and to agree on the proper codification treatment to be given to each session law.

In addition, the Codifier independently checks each act for certain things related to codification, for example, that each act begins with the enacting clause "The General Assembly of North Carolina enacts;" and that the G.S. numbers assigned in an act meet the requirements of the numbering system.

The Codifier also resolves problems the publisher discovers when incorporating new legislation into the existing statutes, including conflicts that can arise when the same statute is amended by multiple session laws. The Codifier consults with the Revisor of Statutes as needed. The source of the Codifier's authority is G.S. 164-10.

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§ 164-10. Supplements to the General Statutes; rearrangement of laws, and correction of errors.

The Legislative Services Office shall have the following duties and powers with regard to the supplements to the General Statutes:

- (1) Within six months after the adjournment of each General Assembly, or as soon thereafter as possible, the Legislative Services Office shall cause to be published under its supervision, cumulative supplements to the General Statutes, and any replacement or recompiled volumes thereof, which shall contain an accurate transcription of all laws of a general and permanent nature enacted by the General Assembly, the material contained in the next preceding supplement, complete and accurate annotations to the statutes, appendices and other material accumulated since the publication of the next preceding supplement, and a cumulative index of said material.
(2) Periodically, every six months after the publication and issuance of a cumulative supplement following a session of the General Assembly, or as soon thereafter as possible, the Legislative Services Office shall cause to be published an interim supplement containing all pertinent annotations and other material issued by the Legislative Services Office to be necessary and proper, accumulating since the publication of the said cumulative supplement or the last interim supplement.

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- (3) In the preparation of the general and permanent laws enacted by the General Assembly the Legislative Services Office is hereby authorized:
a. To rearrange the order of chapters, subchapters, articles, sections and other divisions or subdivisions;
b. To provide titles for any such divisions or subdivisions and section titles or catchlines when they are not provided by such laws;
c. To adopt a uniform system of lettering or numbering sections and the various subdivisions thereof and to reletter or renumber sections and section subdivisions in accordance with such uniform systems;
d. To rearrange definitions in alphabetical order;
e. To rearrange lists of counties in alphabetical order; and
f. To make such other changes in arrangement and form that do not change the law as may be found by the Legislative Services Office necessary for an accurate, clear and orderly codification of such general and permanent laws.

General and Permanent Laws

- During the codification process, the first question to be determined is whether or not a provision is general and permanent. G.S. 164-10 directs the Legislative Services Office to codify in the General Statutes "all laws of a general and permanent nature enacted by the General Assembly."
• This policy balances the twin goals of ensuring that the laws are easily accessible to the public and maintaining a concise, inexpensive code.
• The Codifier makes an independent determination on the issue of codification and looks at the face of the session law and any available objective extrinsic evidence that bears on whether the provision is general and permanent; it is not a subjective test. The Codifier's codification treatment of a provision may differ from the session law's codification treatment of the provision.
• What is a general and permanent law?

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What is a General Law?

- Below are two tests that the Codifier uses in determining whether a law is general:

- (1) Does the law affect 10 or more localities?
- (2) Is the law "general" as defined by NC courts interpreting Article II, Section 24, of the NC Constitution?

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What is a General Law? - 10 or more localities

- In 1943, the Division of Legislative Drafting and Codification of Statutes determined that "any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code." See *Original Preface to General Statutes of North Carolina*, p. viii.
- Today, the Codifier slightly rephrases this requirement: a general law is a law that affects at least 10 or more *localities*. If a law affects fewer than 10 localities, the Codifier does not codify it although the Codifier may direct the publisher to note it.

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What is a General Law? – Article II, Section 24

- The second way in which a law can be "general" for purposes of codification is if NC courts would treat the law as "general" in interpreting Article II, Section 24, of the NC Constitution. In other words, if the law is "general" for purposes of Article II, Section 24, then the law is also "general" for purposes of codification even if the law affects fewer than 10 localities.

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What is a General Law? – Article II, Section 24

- Statutes that have been challenged under Article II, Section 24, or a predecessor constitutional provision include:
 - (1) A statute applying only to 28 counties that, in part, allowed county commissioners to fix the number of justices of the peace appointed in the county. *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961).
 - (2) The Coastal Area Management Act that applies only to the "coastal area." *Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978); see also Article 7 of Chapter 113A of the General Statutes.
 - (3) A statute enabling a particular county to enact a civil rights ordinance. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 581 S.E.2d 415 (2003).

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What is a General Law? – Article II, Section 24

- In these cases, the NC Supreme Court has used a "reasonable classification" test. The *McIntyre* Court describes the test as follows:
 A law is general, not because it operates on every person in the State, but because every person brought within the relations and circumstances provided for by the Act is affected. Statutes relating to persons or things as a class are general laws. The test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications must be general within the limits of the subject matter. They must be reasonable and the statute must affect all within the class uniformly. Classifications must not be arbitrary or capricious, but must be natural and intrinsic and based on substantial differences. Classifications have been sustained on the ground of need.
McIntyre, 254 N.C. at 519, 119 S.E.2d at 894-95.

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What is a General Law? – Article II, Section 24

- In *McIntyre* and *Williams*, the NC Supreme Court held that the statutes at issue were local because there was no reason to classify the chosen counties differently than other counties. *McIntyre*, 254 N.C. at 524-25, 119 S.E.2d at 898; *Williams*, 357 N.C. at 188, 581 S.E.2d at 428.
- In *Adams*, the NC Supreme Court held that the Coastal Area Management Act was general because the coastal area chosen was reasonably related to the purpose of the statute. *Adams*, 295 N.C. at 696, 249 S.E.2d at 410.

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What is a General Law? – Article II, Section 24

- An interesting wrinkle in the caselaw: In *Town of Emerald Isle v. State of N.C.*, the NC Supreme Court announced a separate test for a statute that was "ill-suited" to the "reasonable classification" test. *Emerald Isle*, 320 N.C. 640, 650-51, 360 S.E.2d 756, 762-63 (1987). The statute directed the establishment of public pedestrian beach access facilities. *Id.* at 651-52, 360 S.E.2d at 763. The court held that this statute was general because it was designed to "promote the general public welfare by preserving the beach area for general public pedestrian use." *Id.*, 360 S.E.2d at 763.
- Since *Emerald Isle*, however, NC courts have frequently declined to use the *Emerald Isle* test. See, e.g., *Williams*, 357 N.C. at 184-85, 581 S.E.2d at 426; *City of New Bern v. New Bern-Craven Co. Bd. of Educ.*, 338 N.C. 430, 436, 450 S.E.2d 735, 739 (1994); *City of Asheville v. State*, 192 N.C. App. 1, 25-26, 665 S.E.2d 103, 122 (2008), appeal dismissed and disc. review denied, 672 S.E.2d 685 (2009); *City of Asheville v. State*, 369 N.C. 80, 92, 794 S.E.2d 759, 769 (2016). Accordingly, the Codifier codifies bills under *Emerald Isle* extremely rarely and only when the facts surrounding the bill fit very closely with the facts in *Emerald Isle*.

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What is a Permanent Law?

- To be codified, not only must a bill be "general," but it also must be "permanent."
- Generally, a law that lasts more than ten years is considered permanent and a law that lasts less than five years is considered temporary. If a law is intended to last between five and ten years, the Codifier will look at the circumstances surrounding the law to determine if codifying it would be beneficial to the legal community and to the public.
- Sometimes, a law that imposes a one-time action also includes an ongoing duty to maintain. For instance, S.L. 1997-351, ss. 1 and 2, required State agencies to reprogram their telephone systems by September 1, 1997, in part, "to allow the caller to reach an attendant or operator from the first menu when calling during normal business hours." This one-time action necessarily implies an ongoing duty to maintain. Because these provisions are general and permanent, the Codifier codified them as G.S. 143-162.1.

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What is a Permanent Law?

- Regarding budget bills, most of these provisions are not permanent, because they are presumptively subject to the biennial limitation. See, e.g., S.L. 2015-241, s. 33.4 ("Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2015-2017 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2015-2017 fiscal biennium.") (emphasis added). A budget bill passed during the short session is even further limited and generally applies to only one fiscal year.
- Provisions in budget bills that deal with appropriations, salaries, or accounts are not codified because they apply only to the biennium. Even if the General Assembly appropriates money beyond the current fiscal biennium, this appropriation is not treated as permanent because one General Assembly cannot bind a future General Assembly.
- Some budget bill provisions, however, clearly extend beyond the fiscal biennium. For example, a provision that requires an agency to report by a certain date and then every four years thereafter clearly extends beyond the biennium and thus is permanent.

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Selected Codification Problems

- Every year, the Codifier needs to deal with technical questions about the incorporation of new legislation into the General Statutes where, for one reason or another, there is a problem. In resolving these problems, the Codifier relies on what the General Assembly actually did, not what it intended.

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Problem: In an Amendment, Failure to Identify Correctly the Basic Law to be Amended.

The amendatory language in an act must correctly identify the basic G.S. section number or the session law number that is being amended. If this does not happen, the amendment will not be incorporated into the law.

For example, if the amendatory language reads, "G.S. 1-1 reads as rewritten;" but the text of G.S. 1-12 is set out as the base for redlining, the Codifier will direct that the amendments not be incorporated into G.S. 1-1 or G.S. 1-12 but that an editor's note explaining what happened be placed under both G.S. sections.

If, however, the amendatory language contains a parallel citation that is correct AND we can tell which reference is the correct one, we will tell the publisher to incorporate it. For example, if the amendatory language reads, "G.S. 1-1, as amended by Section # of S.L. 2019-xxx, reads as rewritten;" the text set out belongs to G.S. 1-12, and Section # of S.L. 2019-xxx amended G.S. 1-12, we would tell the publisher to incorporate the amendment. We would probably also request an editor's note at both G.S. 1-1 and G.S. 1-12.

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Problem: In an Amendment, Failure to Identify Correctly the Basic Law to be Amended. (continued)

- Conversely, as long as the basic law to be amended is correctly identified, errors in identifying subsections or subdivisions, etc., of the law is not fatal IF we can locate the proper place in that law for the amendment intended. For example, if the amendatory language reads, "G.S. 1-1(c) reads as rewritten;" but the text amended belongs to G.S. 1-1(e), we would tell the publisher to incorporate the amendment into subsection (e) of G.S. 1-1.

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Problem: Garbage Language

Garbage language – extraneous words added to a statute or words unintentionally left in the statute when it is amended – can be the result of redlining errors, text dropping out instead of being lined out, and multiple amendments to the same statute. Although the General Assembly has processes in place to avoid redlining errors and conflicts between multiple amendments to the same law, occasionally one slips through the cracks.

As an example, assume G.S. x(f) is amended by S.L. A as follows:
G.S. x(f) reads as rewritten:

"(f) The Department shall report annually by September 1 of each year on the progress of the program and shall file a final report upon the implementation of the program's conclusion."

Assume further that G.S. x(f) was also amended by S.L. B as follows:

G.S. x(f) reads as rewritten:
"(f) The Department shall report upon the quarterly to the Hypothetical Projects Oversight Committee on the implementation of the program."

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Problem: Garbage Language, continued.

If the amendments can be combined in a way that will make sense and appears to be what was intended, the Codifier will direct the publisher to set the statute out that way. If this cannot be done, the Codifier will direct that the statute be set out in a way that makes it clear that a problem exists. In either event, the Codifier will request an editor's note explaining the problem.

In the example above, the result would be something like this:
"(f) The Department shall report quarterly to the Hypothetical Projects Oversight Committee on the annually by September 1 of each year on the progress of the program and shall file a final report program's conclusion."

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Incomplete Use of the Coded Bill Drafting Format.

Many people know that we show the addition of new language to a law by underlining and the deletion of material from an existing law by striking out the material. The only authority the Codifier has to implement these changes in the statutes as intended is found in G.S. 120-20.1. If the requirements of that section are not met, the result may not be what the drafter intended.

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Problem: Use of Redlining on Redlining

To correct or revise an amendment in a session law that is in the coded bill drafting format, drafters here are trained to do one of the following:

- (1) Repeal the original and start over.
- (2) Enross the earlier amendment and amend that version of the law.
- (3) Use old-style drafting (that is, "is rewritten to read:").

If the drafter attempts to use the coded bill drafting format on an amendment already in the coded bill drafting format, the result will be a form of gibberish because it will not be possible to tell what is actually being amended—the existing law or the original amendment. There are a few instances where the Codifier has been able to set out the statute in a sensible fashion with all intended amendments, but in other cases, this is treated as a fatal error, no amendments are incorporated, and the Codifier requests an explanatory editor's note.

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Powers of the Codifier

Examples of some of the Codifier's powers

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Powers of the Codifier

G.S. 164-10(3) provides that the Codifier has the following powers:

- (3) In the preparation of the general and permanent laws enacted by the General Assembly the Legislative Services Office is hereby authorized:
- a. To rearrange the order of chapters, subchapters, articles, sections and other divisions or subdivisions;
 - b. To provide titles for any such divisions or subdivisions and section titles or catchlines when they are not provided by such laws;
 - c. To adopt a uniform system of lettering or numbering sections and the various subdivisions thereof and to reletter or renumber sections and section subdivisions in accordance with such uniform system;
 - d. To rearrange definitions in alphabetical order;
 - e. To rearrange lists of counties in alphabetical order; and
 - f. To make such other changes in arrangement and form that do not change the law as may be found by the Legislative Services Office necessary for an accurate, clear and orderly codification of such general and permanent laws.

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Powers – Codifying Language

- The Codifier has the duty to codify language that is general and permanent, including language from old session laws.
- Ancillary to this power, the Codifier can direct the publisher to update statutory references and certain other references, e.g., replacing “under this act” with “under this section”.
- If the language is being codified as a new G.S. section, the Codifier can give the new section a catchline.

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Powers – Renumbering G.S. Sections

- The Codifier has the power to renumber a G.S. section.
- During codification, the Codifier examines each new G.S. section and determines if its number is (1) available, (2) valid, and (3) makes sense.
- First, to be available, the number cannot be the same as a current or repealed section’s number. Second, to be valid, the number must follow the General Statutes numbering structure. Finally, to make sense, the number must place the section in an area of the General Statutes that relates to the same subject matter and where a researcher would logically think to look for it.

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Powers – Bracketed Language

- The Codifier can, if necessary, add bracketed language to the text of a G.S. section.
- Examples include:
 - (1) Supplying a word or phrase that is obviously missing - “The petitioner is required [to] submit an affidavit.”
 - (2) Supply a word or phrase that is missing from language that introduces a list -
 - “The petitioner must submit [the following] documents.
 - (1) An affidavit.
 - (2) A copy of the petitioner’s drivers license.”

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Powers - Punctuation

- The Codifier can change or add non-substantive punctuation.
- In the previous example, the Codifier could also change the period after the word "documents" to a colon so that the language reads:

"The petitioner must submit [the following] documents:

- (1) An affidavit.
- (2) A copy of the petitioner's drivers license."

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Powers – Directions from the General Assembly

- The General Assembly sometimes gives the Codifier additional ministerial powers for certain tasks.
- It is important that the bill drafter is very specific in describing these additional powers. For instance, the following direction is appropriately specific: "In Chapter X of the General Statutes, the Revisor of Statutes shall replace "dog" with "cat." As a practical corollary, the drafter should examine each place where the change needs to be made to ensure that the directions in the bill will actually work.
- It is also important that the new power is constitutional. For instance, the following direction would amount to an unconstitutional delegation of power: "The Revisor of Statutes shall amend the General Statutes to promote the policies of this act."

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Powers – An Important Limitation

- The power to codify is not a blanket power to recodify. The Codifier only recodifies language when new legislation makes it necessary.

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Annotations

Annotations

- The General Statutes is an annotated code.
- Although the Codifier's main priority is to supervise LexisNexis's changes to the statutory text, the Codifier should also direct that certain uncodified provisions are appropriately noted.
- It is important to remember that annotations themselves are not law.
- The purpose of all annotations is to help the researcher as much as possible. In this way, annotating, or even codification in general, can be considered "reverse research."

Types of Notes (some examples)

- Historical Citations - This note begins with the original source of the law and follows the sequence of session law sections that later amended the G.S. section or its predecessor. LexisNexis will also include in the historical citations a bill section that amends the effective date section of a section that amended the G.S. section.
- Effect of Amendments - This note summarizes recent amendments to the G.S. section and includes effective dates. It sometimes will refer the researcher to an associated editor's note for issues of applicability.

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Types of Notes (some examples)

- Editor’s Note – This a catch-all for many types of notes, including the following:
 - (1) Providing information about an amendment’s applicability.
 - (2) Explaining that LexisNexis is setting out a G.S. section at the direction of the Revisor of Statutes.
 - (3) Summarizing or directly quoting part or all of an uncodified provision that relates to the G.S. section, e.g., the provision “notwithstands” the G.S. section.

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Types of Notes (some examples)

- Local Modification - If a session law section applying to a certain locality “notwithstands” a G.S. section, LexisNexis will note this local modification by listing the locality and the relevant session law citation.
- Section Set Out Twice - This note explains why there are multiple versions of a G.S. section or G.S. subunit and the effective date of each version.
- Delayed Repeal Date. - This note alerts the researcher that a G.S. section has a delayed repeal date.

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When to Note?

- In determining when to note a provision, the Codifier must continue to strike a balance between making the laws accessible to the public and maintaining a concise, inexpensive code. Deciding when to note is more of an art than a science; unlike the decision to codify, there are few bright-line rules. Among the factors to consider, two are:
 - (1) How long will this provision be relevant? If the provision will be irrelevant in a few months, it probably should not be noted.
 - (2) If the provision is not noted, how difficult would it be for a researcher to find it? If it is an appropriation and nothing more, it probably should not be noted.

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Where to Note?

- In determining where to place a note, the Codifier considers where a researcher would most likely look. For instance, if the provision deals with universities, the Codifier probably should make a note somewhere in Chapter 116. Or if the provision authorizes the Environmental Management Commission to perform some act, then the note should be located under the G.S. section describing the powers of the Commission.

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When to Remove a Note?

- In odd-numbered years, LexisNexis publishes a replacement set of the General Statutes. In preparing this replacement set, LexisNexis asks the Codifier which notes should be removed.
- Generally, Effect of Amendments notes are removed two years after the last relevant date and editor's notes are removed after about four to six years. There are, however, many exceptions. For example, suppose the following editor's notes exist:
 - (1) An editor's note about a pilot program that terminates in 2023. The Codifier will typically ask LexisNexis to keep this note until 2025, two years after the termination date.
 - (2) An editor's note about a contingent effective date, which includes information about when the contingency was satisfied. Unless this information can be readily obtained elsewhere, this editor's note should be kept permanently. (Note: It is very helpful when the bill drafter directs an agency to report to the Revisor of Statutes when the contingency occurs.)
 - (3) An editor's note about the Revisor of Statutes directing LexisNexis to set out the statutory text a certain way. This editor's note should be kept until it is no longer needed.

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Questions?

- Feel free to contact us with any questions:

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