

FILED

2005 APR 16 A 9:03

OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
Regular Session, 2005

ENROLLED

SENATE BILL NO. 616

(By Senator BOWMAN, ET AL)

PASSED April 8, 2005

In Effect From Passage

FILED

2005 APR 16 A 9:03

OFFICE WEST VIRGINIA
SECRETARY OF STATE

ENROLLED

Senate Bill No. 616

(BY SENATORS BOWMAN, KESSLER, MCKENZIE AND YODER)

[Passed April 8, 2005; in effect from passage.]

AN ACT to amend and reenact §4-1-17 of the Code of West Virginia, 1931, as amended; and to amend said code by adding thereto a new article, designated §4-1A-1, §4-1A-2, §4-1A-3, §4-1A-4, §4-1A-5, §4-1A-6, §4-1A-7, §4-1A-8, §4-1A-9, §4-1A-10, §4-1A-11, §4-1A-12, §4-1A-13, §4-1A-14, §4-1A-15 and §4-1A-16, all relating to legislative priorities and immunities under statute, common law and constitutional law.

Be it enacted by the Legislature of West Virginia:

That §4-1-17 of the Code of West Virginia, 1931, as amended, be amended and reenacted; and that said code be amended by adding thereto a new article, designated §4-1A-1, §4-1A-2, §4-1A-3, §4-1A-4, §4-1A-5, §4-1A-6, §4-1A-7, §4-1A-8, §4-1A-9, §4-1A-10, §4-1A-11, §4-1A-12, §4-1A-13, §4-1A-14, §4-1A-15, and §4-1A-16, all to read as follows:

**ARTICLE 1. OFFICERS, MEMBERS AND EMPLOYEES; APPROPRIATIONS;
INVESTIGATIONS; DISPLAY OF FLAGS; RECORDS; USE**

**OF CAPITOL BUILDING; PREFILING OF BILLS AND
RESOLUTIONS; STANDING COMMITTEES; INTERIM
MEETINGS; NEXT MEETING OF THE SENATE.**

§4-1-17. Priority of legislative business for members and designated employees.

1 (a) In accordance with the constitutional separation of
2 powers and principles of comity, it is the purpose of this
3 section to provide that members of the Legislature and
4 certain designated legislative employees are not required
5 to attend to matters pending before tribunals of the
6 executive and judicial branches of government when the
7 timing of those matters may present conflicts with the
8 discharge of the public duties and responsibilities that are
9 incumbent upon members or employees of the Legislature.
10 During legislative sessions or meetings and for reasonable
11 time periods before and after, the judicial and executive
12 branches should refrain from requiring the personal
13 presence and attention of a legislator or designated
14 employee who is engaged in conducting the business of the
15 Legislature.

16 (b) For the purposes of this section, the words or terms
17 defined in this subsection have the meanings ascribed to
18 them. These definitions are applicable unless a different
19 meaning clearly appears from the context.

20 (1) "Applicable time period" means and includes the
21 following:

22 (A) The ten-day time period immediately before any
23 regular or extraordinary session of the Legislature;

24 (B) The time period during any regular or extraordinary
25 session of the Legislature;

26 (C) The thirty-day time period immediately following the
27 adjournment sine die of any regular or extraordinary
28 session of the Legislature;

29 (D) The four-day time period before any interim meet-
30 ings of any committee of the Legislature or before any
31 party caucus;

32 (E) The time period during any interim meetings of the
33 Legislature or any party caucus; or

34 (F) The four-day time period following the conclusion of
35 any interim meetings of any committee of the Legislature
36 or party caucus.

37 (2) "Designated employee" means any legislative em-
38 ployee designated in writing by the Speaker of the West
39 Virginia House of Delegates to the Clerk of the House of
40 Delegates or by the President of the West Virginia Senate
41 to the Clerk of the West Virginia Senate to be necessary to
42 the operation of the Legislature, such that the legislative
43 employee will be afforded the protections of this section.

44 (3) "Member" means a member of the West Virginia
45 House of Delegates or the West Virginia Senate.

46 (4) "Tribunal" means a judicial or quasijudicial entity of
47 the judicial or executive branch of government, or any
48 legislative, judicial or quasijudicial entity of a political
49 subdivision, created or authorized under the Constitution
50 or laws of this state.

51 (c) A notice filed with a tribunal pursuant to subsection
52 (e) of this section operates as an automatic stay of a
53 judicial or administrative action or proceeding commenced
54 before or after the notice was filed. The automatic stay is
55 in force for the applicable time period or periods described
56 in the notice unless it is otherwise waived in accordance
57 with the provisions of subsection (f) of this section. In the
58 event a session or meeting of the Legislature is extended,
59 the notice may be amended to reflect a longer applicable
60 time period. The filing of the notice and the automatic
61 stay do not prohibit the commencement of an action or
62 proceeding, the issuance or employment of process or other

63 preliminary procedures that do not require the presence or
64 personal attention of the member or designated employee.

65 (d) During any applicable time period, a member or
66 designated employee who does not otherwise consent to a
67 waiver of the stay is not required to do any of the follow-
68 ing:

69 (1) Appear in any tribunal, whether as an attorney,
70 party, witness or juror;

71 (2) Respond in any tribunal to any complaint, petition,
72 pleading, notice or motion that would require a personal
73 appearance or the filing of a responsive pleading;

74 (3) File in any tribunal any brief, memorandum or
75 motion;

76 (4) Respond to any motion for depositions upon oral
77 examination or written questions;

78 (5) Respond to any written interrogatories, request for
79 production of documents or things, request for admissions
80 or any other discovery procedure, whether or not denomi-
81 nated as such; or

82 (6) Appear or respond to any other act or thing in the
83 nature of those described in subdivision (1), (2), (3), (4) or
84 (5) of this subsection; or

85 (7) Make any other appearance before a tribunal or
86 attend to any other matter pending in a tribunal that in
87 the discretion of the member or designated employee
88 would inhibit the member or designated employee in the
89 exercise of the legislative duties and responsibilities owed
90 to the public.

91 (e) A member or designated employee who desires to
92 exercise the protections afforded by this section shall not
93 be required to appear in any tribunal to assert the
94 protections. In all cases, it shall be sufficient if the
95 member or designated employee notifies the tribunal in

96 question orally or in writing, stating that he or she is
97 invoking the protections of this section, describing the
98 action, proceeding or act to be stayed, and further identi-
99 fying the applicable period or periods for which the notice
100 will operate as a stay. An oral communication with the
101 tribunal shall be followed by a written notice or facsimile
102 transmission to the tribunal mailed or transmitted no later
103 than two business days after the oral communication.
104 From the time of the oral communication or the mailing or
105 transmission of the written notice, whichever is earlier, the
106 notice operates as a stay of all proceedings in the pending
107 matter until the applicable time periods have passed and
108 expired.

109 (f) Notwithstanding the filing of a notice that operates as
110 a stay, a member or designated employee may later
111 consent to waive the stay and make an appearance or
112 attend to a matter that would otherwise be stayed.
113 However, a waiver as to a particular appearance or act
114 does not terminate, annul, modify or condition the stay for
115 any other purpose.

116 (g) The deference afforded by this section to members
117 and designated employees who are serving a client in a
118 representative capacity is also fully and completely
119 extended to their clients, so that no person whose repre-
120 sentative before a tribunal is a member or designated
121 employee may be required, during any applicable time
122 period, to do anything that his or her representative is not
123 required to do under subsection (d) of this section.

124 (h) Unless the member or designated employee consents
125 thereto, no cocounsel, partner, associate, spouse or em-
126 ployee of the member or designated employee may be
127 required to make any appearance or do any act during any
128 applicable time period in the place and stead of the
129 member or designated employee.

130 (i) Any sentence, judgment, order, decree, finding,
131 decision, recommendation or award made contrary to the

132 provisions of this section in any action or proceeding in
133 any tribunal, without the consent of the member or
134 designated employee, is void.

135 (j) Tribunals of the federal government and those of
136 other states are requested to honor the spirit and purpose
137 of this section pursuant to the doctrines of comity and
138 federalism. Further, it is the policy of this state that
139 tribunals of this state shall afford to legislators and staff
140 personnel of the federal government and other states the
141 protections afforded by the provisions of this section if the
142 tribunals of the federal government and the other jurisdic-
143 tions afford members or designated employees of the West
144 Virginia Legislature the same protections in their tribu-
145 nals.

ARTICLE 1A. LEGISLATIVE IMMUNITY.

§4-1A-1. Purpose; legislative findings and declarations.

1 (a) The purpose of this article is to describe the scope
2 and limitations of legislative immunity provided by:

3 (1) English common law;

4 (2) The Speech or Debate Clause of the United States
5 Constitution, Article I, Section 6;

6 (3) Decisions regarding legislative immunity as devel-
7 oped in federal common law by the federal judiciary in
8 interpreting the Speech or Debate Clause of the United
9 States Constitution, Article I, Section 6;

10 (5) The Speech or Debate Clause of the West Virginia
11 Constitution, Article VI, Section 17;

12 (6) The Separation of Powers Doctrine and the system of
13 checks and balances embodied in the United States
14 Constitution; and

15 (7) The Division of Powers set forth in the West Virginia
16 Constitution, Article V, Section 1.

17 (b) The Legislature finds and declares as follows:

18 (1) That the privilege of Speech or Debate has been
19 recognized as an important protection of the independence
20 and integrity of the Legislature.

21 (2) That the ancestry of this privilege traces back to a
22 clause in the English Bill of Rights of 1689 and the history
23 traces even further back, almost to the beginning of the
24 development of the English Parliament as an independent
25 force.

26 (3) That in the American governmental structure,
27 privileges arising under the Speech or Debate Clause
28 reinforce the Separation of Powers Doctrine and the
29 system of checks and balances that was so deliberately
30 established by the founding fathers and was carried over
31 into the West Virginia Constitution.

32 (4) That the protections provided by the Speech or
33 Debate Clause and the Separation of Powers Doctrine
34 were not written into the national and state Constitutions
35 simply for the personal or private benefit of members of
36 Congress, the state Legislatures and local governing
37 bodies, but were intended to protect the integrity of the
38 legislative process by insuring the independence of indi-
39 vidual legislators.

§4-1A-2. Applicability of definitions.

1 For the purposes of this article, the words or terms
2 defined in this article have the meanings ascribed to them.
3 These definitions are applicable unless a different meaning
4 clearly appears from the context.

§4-1A-3. Legislative act defined.

1 "Legislative act" means an act that is generally to be
2 performed by the Legislature in relation to the investiga-
3 tive, deliberative and decision-making business before it.
4 A "legislative act":

5 (1) Is an integral part of the processes by which members
6 participate in proceedings that come before the Senate or
7 House of Delegates or a committee thereof; and

8 (2) Relates to the consideration and passage or rejection
9 of proposed legislation; or

10 (3) Relates to other matters that constitutional law
11 places within the jurisdiction of either the Senate, the
12 House of Delegates or the legislative branch of state
13 government as a whole.

§4-1A-4. Legislative sphere defined.

1 The “legislative sphere” includes all activities that are
2 an integral part of the deliberative and communicative
3 processes by which members of the Legislature participate
4 in committee and house proceedings with respect to the
5 consideration and passage or rejection of proposed legisla-
6 tion or with respect to other matters which the Constitu-
7 tion places within the jurisdiction of either house.

§4-1A-5. Political act defined.

1 “Political act” means an act, nonetheless legitimate, that
2 is political in nature rather than being a legislative act as
3 defined in section three of this article.

§4-1A-6. Scope of legislative immunity generally.

1 (a) Legislative immunity, affording protection under the
2 Separation of Powers Doctrine and the Speech or Debate
3 privilege, extends to all of a legislator’s legislative acts, as
4 defined in section three of this article.

5 (b) The Speech or Debate privilege, when it applies, is
6 absolute and has two aspects:

7 (1) A member of the Legislature has immunity extending
8 both to civil suits and criminal prosecutions for all actions
9 within the legislative sphere, even though the conduct, if
10 performed in other

11 than a legislative context, would in itself be unconstitu-
12 tional or otherwise contrary to criminal or civil statutes;
13 and

14 (2) A member of the Legislature is provided a testimonial
15 privilege that operates to protect those to whom it applies
16 from being compelled to give testimony as to privileged
17 matters and from being compelled to produce privileged
18 documents.

§4-1A-7. Legislative immunity in specific instances.

1 The scope of legislative immunity includes, but is not
2 limited to, the following legislative acts:

3 (1) Introducing and voting for legislation;

4 (2) Failing or refusing to vote or enact legislation;

5 (3) Voting to seat or unseat a member;

6 (4) Voting on the confirmation of an executive appoint-
7 ment;

8 (5) Making speeches;

9 (6) Enforcing the rules of the Senate or House of Dele-
10 gates or the joint rules of the Legislature;

11 (7) Serving as a member of a committee or subcommit-
12 tee;

13 (8) Conducting hearings and developing legislation;

14 (9) Investigating the conduct of executive agencies;

15 (10) Publishing and distributing reports;

16 (11) Composing and sending letters;

17 (12) Drafting memoranda and documents;

18 (13) Lobbying other legislators to support or oppose
19 legislation;

- 20 (14) Abolishing personnel positions; and
- 21 (15) Hiring and firing employees.

§4-1A-8. Actions taken without lawful authority are not immune.

1 Legislative immunity does not extend to activities by
2 legislators that are without lawful authority under consti-
3 tutional law, statutory law or rules of the legislature,
4 including, but not limited to, the following:

5 (1) Using an unconstitutional procedure to enact legisla-
6 tion;

7 (2) Conducting an illegal investigation or an unlawful
8 search or seizure;

9 (3) Performing another otherwise valid legislative act
10 without proper legislative authority;

11 (4) Filing a false or incomplete report, disclosure or
12 claim regarding an otherwise valid legislative act; or

13 (5) Using legislative office for private gain in violation of
14 the provisions of chapter six-b of this code that define and
15 enforce governmental ethics.

§4-1A-9. Political acts are not privileged.

1 Legislative immunity does not extend to political acts,
2 including, but not limited to, the following:

3 (1) Communications to the press through letters, elec-
4 tronic mail, newsletters or news releases: *Provided*, That
5 the release of pending legislation, committee reports,
6 journals, acts and other official legislative reports and
7 documents is a legitimate legislative activity;

8 (2) Privately releasing a republication of a speech made
9 within the legislative sphere;

10 (3) Holding a press conference;

11 (4) Making speeches or giving interviews outside of the
12 legislative sphere; or

13 (5) Assisting a constituent or supporter through constitu-
14 ent services, including, but not limited to, making appoint-
15 ments with government agencies, attempting to influence
16 discretionary acts of a government officer or providing
17 assistance in securing government contracts.

§4-1A-10. Administrative acts are not immune.

1 (a) Legislative immunity does not extend to activities by
2 legislators that are administrative in nature rather than
3 legislative. If the underlying facts on which a decision is
4 based are legislative facts involving establishment of a
5 general policy or state of affairs, then the decision is
6 legislative. If the facts used in the decisionmaking are
7 more specific, such as those that relate to particular
8 individuals or situations, then the decision is administra-
9 tive.

10 (b) With regard to legislative personnel matters, whether
11 a personnel decision regarding a legislative employee is
12 shielded by legislative immunity depends upon the nature
13 of the duties of the employee about whom the personnel
14 decision is made. Personnel decisions regarding a legisla-
15 tive employee are afforded immunity if the employee's
16 duties are directly related to the functioning of the legisla-
17 tive process and the duties:

18 (1) Involve work that significantly informs or influences
19 the shaping of laws, such as when the employee has an
20 opportunity for meaningful input into the legislative
21 process; or

22 (2) Are peculiar to a legislator's work as a legislator or
23 intimately cognate to the legislative process.

§4-1A-11. Certain offers of proof about legislative activities not prohibited.

1 (a) Proof of a person's status as a member of the Legisla-
2 ture is not prohibited.

3 (b) A member of the Legislature who chooses to offer
4 evidence of legislative acts as a defense to a criminal
5 prosecution has not been “questioned”, even though the
6 member thereby subjects himself or herself to cross-
7 examination.

§4-1A-12. Legislative acts of legislative staff, aides or assistants.

1 Legislative immunity extends to legislative staff, aides
2 or assistants working on behalf of a legislator. Inquiry is
3 prohibited into things done as a legislator’s staff member,
4 aide or assistant which would have been legislative acts if
5 performed by the legislator personally.

§4-1A-13. Legislative immunity from ultimate relief.

1 Legislative immunity may be invoked to shield a legisla-
2 tor from judicially ordered relief, including, but not
3 limited to, the following:

- 4 (1) Criminal prosecution for his or her legislative acts;
- 5 (2) Liability for damages for his or her legislative acts;
- 6 (3) Declaratory judgments;
- 7 (4) Injunctive relief; and
- 8 (5) Extraordinary writs.

§4-1A-14. Testimonial immunity.

1 (a) Testimonial immunity is an aspect of legislative
2 immunity that protects a legislator from questioning
3 elsewhere than in the legislative forum.

4 (b) When a legislator has been improperly questioned
5 before a grand jury concerning legislative acts, the counts
6 in a criminal indictment that are based on the testimony
7 must be dismissed.

8 (c) When a legislator is found to be immune from a civil
9 complaint, the relief to be granted is to have the complaint

10 dismissed or to have a writ of prohibition issued to stop
11 further proceedings.

12 (d) In the case of a subpoena that seeks to improperly
13 question a legislator's conduct as to legislative acts, to
14 depose a legislator or to seek disclosure as to any matters
15 pertaining to the memoranda, documents or actions by a
16 legislator which are or were in connection with the
17 legislative process, the subpoenas may be quashed or the
18 court may grant a motion for a protective order.

§4-1A-15. Right to interlocutory appeal.

1 Denial of a claim of legislative immunity is immediately
2 appealable under the collateral order doctrine because the
3 Speech or Debate Clause is designed to protect legislators
4 not only from the consequences of litigation's results but
5 also from the burden of defending themselves.

**§4-1A-16. Common law regarding legislative immunity not
affected by the enactment of this article.**

1 The Legislature of the State of West Virginia, in codify-
2 ing certain elements and doctrines of the common law
3 regarding legislative immunity through the enactment of
4 this article, does not intend to narrow the common law
5 definition of legislative immunity that is afforded the
6 Legislature under the Speech or Debate privilege and the
7 Separation or Division of Powers, and does not, with the
8 enactment of this article, otherwise revoke or abrogate any
9 portion of the common law. This article shall not be
10 construed so as to narrow, restrict, revoke or abrogate the
11 common law.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chand White
.....
Chairman Senate Committee

W. Rich Burr
.....
Chairman House Committee

Originated in the Senate.

In effect from passage.

Carroll Thomas
.....
Clerk of the Senate

Bugby D. Bond
.....
Clerk of the House of Delegates

Carl Roy Tomblin
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within *is disapproved* this the *16th*
Day of *April*, 2005.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

APR 14 2005

Time 10:45a