ENROLLED

SENATE BILL NO. 616

(By Senator Bowman, et al.)

PASSED April 16, 2005

In Effect from Passage
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Senate Bill No. 616

(By Senators Bowman, Kessler, McKenzie and Yoder)

[Passed April 16, 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
§4-1-17. Priority of legislative business for members and designated employees.

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

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

(1) “Applicable time period” means and includes the following:

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

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

(C) The thirty-day time period immediately following the adjournment sine die of any regular or extraordinary session of the Legislature;
(D) The four-day time period before any interim meetings of any committee of the Legislature or before any party caucus;

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

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

(2) “Designated employee” means any legislative employee designated in writing by the Speaker of the West Virginia House of Delegates to the Clerk of the House of Delegates or by the President of the West Virginia Senate to the Clerk of the West Virginia Senate to be necessary to the operation of the Legislature, such that the legislative employee will be afforded the protections of this section.

(3) “Member” means a member of the West Virginia House of Delegates or the West Virginia Senate.

(4) “Tribunal” means a judicial or quasijudicial entity of the judicial or executive branch of government, or any legislative, judicial or quasijudicial entity of a political subdivision, created or authorized under the Constitution or laws of this state.

(c) A notice filed with a tribunal pursuant to subsection (e) of this section operates as an automatic stay of a judicial or administrative action or proceeding commenced before or after the notice was filed. The automatic stay is in force for the applicable time period or periods described in the notice unless it is otherwise waived in accordance with the provisions of subsection (f) of this section. In the event a session or meeting of the Legislature is extended, the notice may be amended to reflect a longer applicable time period. The filing of the notice and the automatic stay do not prohibit the commencement of an action or proceeding, the issuance or employment of process or other
preliminary procedures that do not require the presence or personal attention of the member or designated employee.

(d) During any applicable time period, a member or designated employee who does not otherwise consent to a waiver of the stay is not required to do any of the following:

1. Appear in any tribunal, whether as an attorney, party, witness or juror;
2. Respond in any tribunal to any complaint, petition, pleading, notice or motion that would require a personal appearance or the filing of a responsive pleading;
3. File in any tribunal any brief, memorandum or motion;
4. Respond to any motion for depositions upon oral examination or written questions;
5. Respond to any written interrogatories, request for production of documents or things, request for admissions or any other discovery procedure, whether or not denominated as such; or
6. Appear or respond to any other act or thing in the nature of those described in subdivision (1), (2), (3), (4) or (5) of this subsection; or
7. Make any other appearance before a tribunal or attend to any other matter pending in a tribunal that in the discretion of the member or designated employee would inhibit the member or designated employee in the exercise of the legislative duties and responsibilities owed to the public.

(e) A member or designated employee who desires to exercise the protections afforded by this section shall not be required to appear in any tribunal to assert the protections. In all cases, it shall be sufficient if the member or designated employee notifies the tribunal in
question orally or in writing, stating that he or she is invoking the protections of this section, describing the action, proceeding or act to be stayed, and further identifying the applicable period or periods for which the notice will operate as a stay. An oral communication with the tribunal shall be followed by a written notice or facsimile transmission to the tribunal mailed or transmitted no later than two business days after the oral communication. From the time of the oral communication or the mailing or transmission of the written notice, whichever is earlier, the notice operates as a stay of all proceedings in the pending matter until the applicable time periods have passed and expired.

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

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

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

(i) Any sentence, judgment, order, decree, finding, decision, recommendation or award made contrary to the
provisions of this section in any action or proceeding in any tribunal, without the consent of the member or designated employee, is void.

(j) Tribunals of the federal government and those of other states are requested to honor the spirit and purpose of this section pursuant to the doctrines of comity and federalism. Further, it is the policy of this state that tribunals of this state shall afford to legislators and staff personnel of the federal government and other states the protections afforded by the provisions of this section if the tribunals of the federal government and the other jurisdictions afford members or designated employees of the West Virginia Legislature the same protections in their tribunals.

ARTICLE 1A. LEGISLATIVE IMMUNITY.

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

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

(1) English common law;

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

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

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

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

(7) The Division of Powers set forth in the West Virginia Constitution, Article V, Section 1.
(b) The Legislature finds and declares as follows:

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

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

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

4 That the protections provided by the Speech or Debate Clause and the Separation of Powers Doctrine were not written into the national and state Constitutions simply for the personal or private benefit of members of Congress, the state Legislatures and local governing bodies, but were intended to protect the integrity of the legislative process by insuring the independence of individual legislators.

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

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

§4-1A-3. Legislative act defined.

1 "Legislative act" means an act that is generally to be performed by the Legislature in relation to the investigatory, deliberative and decision-making business before it.
2 A "legislative act":
(1) Is an integral part of the processes by which members participate in proceedings that come before the Senate or House of Delegates or a committee thereof; and

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

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

§4-1A-4. Legislative sphere defined.

The “legislative sphere” includes all activities that are an integral part of the deliberative and communicative processes by which members of the Legislature participate in committee and house proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house.

§4-1A-5. Political act defined.

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

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

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

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

(1) A member of the Legislature has immunity extending both to civil suits and criminal prosecutions for all actions within the legislative sphere, even though the conduct, if performed in other than a legislative context, would in
(2) A member of the Legislature is provided a testimonial privilege that operates to protect those to whom it applies from being compelled to give testimony as to privileged matters and from being compelled to produce privileged documents.

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

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

(1) Introducing and voting for legislation;

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

(3) Voting to seat or unseat a member;

(4) Voting on the confirmation of an executive appointment;

(5) Making speeches;

(6) Enforcing the rules of the Senate or House of Delegates or the joint rules of the Legislature;

(7) Serving as a member of a committee or subcommittee;

(8) Conducting hearings and developing legislation;

(9) Investigating the conduct of executive agencies;

(10) Publishing and distributing reports;

(11) Composing and sending letters;

(12) Drafting memoranda and documents;

(13) Lobbying other legislators to support or oppose legislation;
20 (14) Abolishing personnel positions; and
21 (15) Hiring and firing employees.

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

Legislative immunity does not extend to activities by legislators that are without lawful authority under constitutional law, statutory law or rules of the legislature, including, but not limited to, the following:

1 (1) Using an unconstitutional procedure to enact legislation;
2 (2) Conducting an illegal investigation or an unlawful search or seizure;
3 (3) Performing another otherwise valid legislative act without proper legislative authority;
4 (4) Filing a false or incomplete report, disclosure or claim regarding an otherwise valid legislative act; or
5 (5) Using legislative office for private gain in violation of the provisions of chapter six-b of this code that define and enforce governmental ethics.

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

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

1 (1) Communications to the press through letters, electronic mail, newsletters or news releases: Provided, That the release of pending legislation, committee reports, journals, acts and other official legislative reports and documents is a legitimate legislative activity;
2 (2) Privately releasing a republication of a speech made within the legislative sphere;
3 (3) Holding a press conference;
(4) Making speeches or giving interviews outside of the legislative sphere; or

(5) Assisting a constituent or supporter through constituent services, including, but not limited to, making appointments with government agencies, attempting to influence discretionary acts of a government officer or providing assistance in securing government contracts.

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

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

(b) With regard to legislative personnel matters, whether a personnel decision regarding a legislative employee is shielded by legislative immunity depends upon the nature of the duties of the employee about whom the personnel decision is made. Personnel decisions regarding a legislative employee are afforded immunity if the employee's duties are directly related to the functioning of the legislative process and the duties:

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

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

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

(a) Proof of a person's status as a member of the Legislature is not prohibited.
(b) A member of the Legislature who chooses to offer evidence of legislative acts as a defense to a criminal prosecution has not been "questioned", even though the member thereby subjects himself or herself to cross-examination.

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

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

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

Legislative immunity may be invoked to shield a legislator from judicially ordered relief, including, but not limited to, the following:

1. Criminal prosecution for his or her legislative acts;
2. Liability for damages for his or her legislative acts;
3. Declaratory judgments with respect to his or her legislative acts;
4. Injunctive relief with respect to his or her legislative acts; and
5. Extraordinary writs with respect to his or her legislative acts.

§4-1A-14. Testimonial immunity.

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

(b) When a legislator has been improperly questioned before a grand jury concerning legislative acts, the counts in a criminal indictment that are based on the testimony must be dismissed.
(c) When a legislator is found to be immune from a civil complaint, the relief to be granted is to have the complaint dismissed or to have a writ of prohibition issued to stop further proceedings.

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

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

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

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

The Legislature of the State of West Virginia, in codifying certain elements and doctrines of the common law regarding legislative immunity through the enactment of this article, does not intend to narrow the common law definition of legislative immunity that is afforded the Legislature under the Speech or Debate privilege and the Separation or Division of Powers, and does not, with the enactment of this article, otherwise revoke or abrogate any portion of the common law. This article shall not be construed so as to narrow, restrict, revoke or abrogate the common law.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the 25th Day of April, 2005.

Governor