

2023 LEGISLATIVE SUMMARY

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NOTE: If the legislation has a title, the title has been provided. If not, then the “summary” provided by the legislature for the bill is set forth. The summary is not always accurate and is provided to give you some idea of the legislative content and some perspective on what may have been originally intended by the introduced legislation. For this reason, you should not rely on the summary, but, instead, read the provided description. But, again, the description is the author’s interpretation of the legislative changes and the effect of the changes, so it is incumbent upon you, with this foundation, to do independent research if the statute has bearing on a matter in which you are involved.

I also have provided the sponsors of the bills. If questions arise, you might be in the jurisdiction of a sponsor and could possibly approach the legislator to gain more insight. However, many times the legislation introduced by the sponsors is hijacked by a committee and the committee substitute may deviate substantially from what was introduced.

Finally, I have listed the Senate bills, first, in numerical order and then the House bills also in numerical order. Simply, the bills are not arranged, nor could they effectively be arranged, in any subject matter order.

SENATE BILL 10

Title: Campus Self Defense Act
Sponsors: Phillips, Karnes, Maynard, Tarr, Grady, Taylor, Roberts, Smith, Rucker, Hamilton, Barrett, Woodrum, Hunt, Azinger, Stuart, Deeds
W. Va. Code: Amends §18B-1-6, §18B-1B-4, and §18B-2B-6; adds §18B-4-5b
Effective Date: February 21, 2023

While the legislation is in effect from its passage, i.e., February 21, 2023, the provisions of the act do not take effect until July 1, 2024.

The amendments to the existing provisions of the West Virginia Code restrict the rulemaking and regulatory authority of the West Virginia Council for Community and Technical College Education, the Higher Education Policy Commission, and Boards of Governors from regulating carrying a concealed pistol or revolver on the campus of, and in the buildings of, a state institution of higher learning except as set forth in the new code section.

The new code section authorizes carrying a concealed weapon on the campus of, or in the buildings of, an institution of higher learning if the person holds a valid license to carry a concealed weapon.

However, institutions may regulate this activity in the following locations on a campus: (i) a stadium or arena with a capacity of more than 1,000 spectators in which an event is being held; (ii) a facility for daycare; (iii) the offices of law enforcement personnel; (iv) single occupancy offices except that the person to whom the office is assigned may carry a concealed weapon; (v) secondary school functions being conducted by formal agreement; (vi) private functions being conducted by formal agreement; (vii) areas where possession is prohibited by other state law or federal law; (viii) areas in which medical care or mental health counseling is provided; (ix) laboratories using hazardous materials or animals; and (x) residence halls except

for the common areas. The institutions are to make available means for persons on campus to store weapons when entering restricted areas, including providing safes in a student's room or a storage area within a residence hall. The institutions may charge a "reasonable" fee for such services.

The legislature intended, essentially, to limit possession of a weapon to situations in which "self-defense" might be necessary and to prohibit possession in areas in which personnel or students might be vulnerable such as animal testing laboratories. A provision exists, therefore, which allows restricting this permission to carry when security measures are in place that ensure no person is in possession of a weapon. The accepted security measures require the use of electronic equipment and armed personnel at the entrances to the public area.

The statute does not authorize a person who has a license to carry a concealed weapon to then "carry a pistol or revolver which is partially visible, or intentionally or knowingly display a firearm in plain view of another person in a way or manner to cause, or threaten, a breach of the peace, regardless of whether the firearm is holstered." The legislation does not create a criminal offense for this violation but refers to "applicable criminal charges." The legislation permits schools to discipline persons violating this provision.

Finally, institutions are not liable for incidents involving the use of a concealed weapon unless the person was authorized to do so by the institution. Notably, the failure to provide "adequate security measures" in public areas in which concealed weapons are not permitted to be carry does not give rise to a cause of action if a concealed weapon is, in fact, possessed by a person causing harm. But, again, security measures are required including electronic equipment and armed personnel if carrying a concealed firearm is restricted, but if this proves inadequate, the legislation seemingly immunizes the involved institution.

SENATE BILL 89

Summary:	Requiring hospitals to staff qualified personnel to perform sexual assault forensic exams
Sponsors:	Woelfel, Grady, Woodrum, Hamilton, Rucker, Plymale
W. Va. Code:	Amends §§15-9B-1a, 4
Effective Date:	May 22, 2023

As introduced, the proposed legislation would require that by July 1, 2024, hospitals must always have available a health care provider to do sexual assault forensic examinations.

As passed, the legislation amended an existing section of the West Virginia Code to require the Sexual Assault Forensic Examination Commission, created by W. Va. Code §15-9B-1 to establish best practices and to include in its promulgated rules the requirement that hospitals have a "trained health care provider available or transfer agreement as provided in a county plan, to complete a sexual assault forensic examination." "Available" is defined to include access to an expert via telehealth.

SENATE BILL 132

Summary:	Clarifying criminal offense of harassment
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Sponsors: Boley, Hamilton, Clements, Grady, Jeffries, Karnes, Nelson, Roberts, Stover, Trump, Weld, Woelfel, Phillips, Plymale, Martin, Rucker, Takubo, Smith, Woodrum, Deeds, Oliverio, Azinger, Stuart, Barrett, Queen, Maroney
W. Va. Code: Amends §61-2-9a
Effective Date: May 2, 2023

The exiting code provision references only “harassment” in its heading, i.e., “Harassment; penalties; definitions.” And while the statute sets forth two provisions that could be violated, the word “stalking” is never used. Nonetheless, subdivision (a) of the statutory provision is obviously directed toward stalking and sets forth a criminal penalty for the specified conduct. Nevertheless, “stalking” does not appear in the heading or in the statutory provisions.

The legislation inserts “stalking” into the section heading and as the prefatory label to subdivision (a). Moreover, “stalk” or “stalking” is also inserted wherever the word “harass” or “harassing” is used in Section 9a,

Interestingly, the existing statute expressly defines “harasses,” but not “stalking.” “Stalking” is merely the label attached to the already prohibited conduct in subdivision (a) of the section.

Somewhat ironically, the clarification includes attaching the label “harassment” to the other prohibited conduct in subdivision (b), but subdivision (b) identifies both a person who “harasses” another or who “makes credible threats against another.” “Harasses” is expressly defined in another provision of the section. So, the label “Harassment” is a label for conduct that is not included in the definition of “harasses.” Simply, this could cause confusion and the purported clarification may need clarification.

SENATE BILL 136

Summary: Requiring persons convicted of certain offenses to undergo psychological or psychiatric testing and have treatment plan to be eligible for probation

Sponsors: Trump, Deeds, Oliverio, Stuart, Phillips, Woodrum, Grady

W. Va. Code: Amends §§62-12-2, 9

Effective Date: May 31, 2023

The offenses of soliciting a minor via computer or soliciting a minor and traveling to engage the minor in prohibited sexual activity as set forth in W. Va. Code §61-3C-14b are added to the list of offenses requiring that, to be eligible for probation, the offender must undergo a physical, mental and psychiatric study and diagnosis and must have a treatment plan that requires “active participation in sexual abuse counseling at a mental health facility or through some other approved program.”

The legislation adds the following offenses to the list of offenses for which release on probation of the offender must include the condition that the offender not reside with a minor child or have visitation with a minor child or have contact with the minor victim: (i) W. Va. Code

§61-3C-14b addressing the solicitation of a minor via computer or soliciting a minor and traveling to engage the minor in prohibited sexual activity; (ii) W. Va. Code §§61-8A-1, *et seq.*, addressing the preparation, distribution or exhibition of obscene material to minors; and (iii) W. Va. Code §§61-8C-1, *et eq.*, addressing the filming of sexually explicit conduct of minors.

SENATE BILL 187

Summary: Making it a felony offense for school employee or volunteer to engage in sexual contact with students

Sponsors: Clements, Woelfel, Roberts, Stuart, Plymale, Hunt, Rucker, Deeds, Grady

W. Va. Code: Adds §61-8B-11b

Effective Date: June 9, 2023

A new offense has been created. “Any teacher, principal, counselor, other employee, or volunteer of any private or public elementary or secondary school who engages in sexual intercourse, sexual intrusion, or sexual contact ... with any student enrolled in the school regardless of the age of the student is guilty of a felony.” The consent of the student is not a defense. Remember, the age of the student is not an element of the offense. The fact that the sexual act did not occur on school property or during a school function is also not a defense.

The resulting punishment is an indeterminate period of incarceration of one to five years and/or a fine of five thousand dollars (\$5,000). Additionally, conviction will result in the “permanent forfeiture” of any teaching certificate.

Also, the legislation expressly states that this is intended to be “a separate and distinct criminal offense” from any other applicable offense, thus staving off challenges of double jeopardy for being punished for the same conduct under two or more statutory offenses.

Interestingly, the House of Delegates passed a version of this bill with a “marital” exception; that is, when the school employee is married to the student. The Senate refused to accept the changes and the House receded and accepted the Senate version. So, a “marital” exception is not expressly stated.

SENATE BILL 191

Summary: Relating to liability for payment of court costs as condition of pretrial diversion agreement

Sponsors: Trump, Hunt

W. Va. Code: Amends §62-11C-9

Effective Date: June 9, 2023

When introduced, the legislation intended only to correct an internal reference in the provisions of W. Va. Code §62-11C-9, entitled “use of community corrections programs for those not under court supervision.” In subdivision (d), court costs are imposed on a person whose case is disposed by a pretrial diversion program. This provision refers to programs established pursuant to “section twenty-two, article eleven of *this chapter* [italics added].” This is a

reference to Chapter 62 even though the provisions governing pretrial diversion programs are in Chapter 61.

However, the final form of the legislation expanded the amended section to expressly add deferred adjudication as a permitted vehicle for requiring participation or supervision in a community corrections program. This amendment corrects anomalies in the original legislation which governed pretrial diversion agreements but made references to matters that are more related to deferred adjudication agreements.

Finally, an amendment was made to the imposition of court costs to state that the “financial inability” to pay court costs is not a basis for denying a person a pretrial diversion or a deferred adjudication.

SENATE BILL 208

Title: Relating to criminal justice training for all law-enforcement and correction officers regarding individuals with autism spectrum disorders
Sponsors: Caputo, Woelfel, Oliverio, Rucker, Hamilton, Hunt, Chapman, Stuart, Deeds
W. Va. Code: Amends §30-29-5a
Effective Date: May 31, 2023

Current law requires that law enforcement officers during their basic training and correctional officers during their certification receive instruction on interacting with individuals with autism spectrum disorder, Alzheimer’s and related dementias. This instruction is to be three hours in length regarding autism spectrum disorder and two hours in length regarding Alzheimer’s and related dementias. As a note, law enforcement includes officers with any state institution of higher education.

This legislation amends the statute to provide that this instruction is to be part of the “mandated in-service training requirement every three years” for law enforcement officers. The requirement is not imposed on correctional officers.

SENATE BILL 232

Summary: Creating study group to make recommendations regarding diversion of persons with disabilities from criminal justice system
Sponsors: Trump and Rucker
W. Va. Code: Adds §27-6A-12
Effective Date: March 11, 2023

A multi-disciplinary study group is to be formed and is to include among the eighteen (18) enumerated entities a designee of the Public Defender Services. The group is to be convened by the Chairman of the Dangerousness Assessment Advisory Board and is to provide written recommendations by November 30, 2023.

The legislation is based on findings that include (i) “persons with mental illness, developmental disabilities, cognitive disabilities, and/or substance use disorder may be overrepresented in the criminal justice system, and many of these people might not present a danger to the public if they could participate in a functioning community behavioral health continuum of care”; and (ii) “there is a need for improved coordination among the Department of Health and Human Resources, the Division of Corrections and Rehabilitation, and the Division of Rehabilitation Services to promote the identification, safe discharge, and effective community intervention and placement of persons who suffer from mental illness, a developmental disability, a cognitive disability, and/or substance use disorder.”

The study group is to provide “opinion, guidance, and informed objective expertise” to the legislature on topics that include, among others: (i) “the development and implementation of a Sequential Intercept Model to divert adults and juveniles with mental illness, developmental disabilities, cognitive disabilities, and/or substance use disorders away from the criminal justice system and into community-based treatment or other settings where appropriate”; and (ii) “the recommendation of a model to coordinate services and interventions among the Department of Health and Human Resources, the Division of Corrections and Rehabilitation, the Division of Rehabilitation Services, behavioral healthcare providers, law enforcement, and the court system to facilitate the appropriate diversion, identification, evaluation, assessment, management, and placement of adults and juveniles who suffer from mental illness, a development disability, a cognitive disability, and/or substance use disorder to ensure public safety and the effective clinical management of such persons.”

Interestingly, the study group is expressly excluded from the open governmental proceedings statute and the state’s freedom of information statute.

SENATE BILL 273

Summary:	Relating to allocation of child protective workers in counties based upon population of county
Sponsors:	Trump, Woelfel, Plymale, Rucker, Barrett, Deeds
W. Va. Code:	Amends §§49-2-101, 102 & 809; Adds §49-10-101, 102, & 103; Adds §49-11-101
Effective Date:	March 11, 2023

The first component of the legislation is to create the Bureau for Social Services and to place it under the supervision of a commissioner. The Bureau then assumes the responsibility to provide care, support and protective services for children who “are handicapped by dependency, neglect, single parent status, mental or physical disability.” Additional provisions dictate that the commissioner is to “allocate and station child protective services workers by county based on population, referrals and average caseload.” The allocation is not to be decreased in any area as it presently exists. The bureau is to report its allocation annually to the Legislative Oversight Commission on Health and Human Resources.

The legislation further provides for reporting of child abuse and neglect by a method other than telephone and, if web-based, the Bureau is to ensure a method for dealing with emergency situations. The Bureau is also directed to create a redundancy system to avoid

problems during an outage so that reporting will remain timely and effective. An annual report is to be filed with the Joint Committee on Government and Finance on the number of calls referred to a centralized intake by county and the time from referral to investigation.

The legislation exempts the Bureau from the Division of Personnel and empowers the commissioner to develop a merit-based system for the Bureau. No uniformity in the pay scale of child protective services workers will be required.

Finally, the Bureau is to change the “existing child welfare dashboard by July 1, 2023” to report on “system-wide issues, including, but not limited to, system-level performance indicators, intake hotline performance indicators, field investigation performance indicators, open case performance indicators, out-of-home placement performance indicators, and federally mandated indicators.”

SENATE BILL 490

Title: Patrol Officer Cassie Marie Johnson Memorial Act
Sponsors: Deeds, Hamilton, Hunt, Jeffries, Karnes, Maroney
Martin, Phillips, Stuart, Trump, Weld, Woodrum
Plymale, Swope, Roberts Grady, Nelson, Taylor
W. Va. Code: Adds §61-5-17a
Effective Date: June 4, 2023

The legislation is concise and self-explanatory. To quote: “... any person who knowingly, willfully, and *forcibly* obstructs or hinders a law-enforcement officer, probation officer, parole officer, courthouse security officer, correctional officer, the State Fire Marshal, a deputy or assistant fire marshal, firefighter, or emergency medical service personnel lawfully acting in his or her official capacity and thereby proximately causes the death of ... [an aforementioned individual] is guilty of a felony, and upon conviction thereof, shall be imprisoned in a state correctional facility for a term of 15 years to life.” [italics added].

The legislation defines “forcibly” for purposes of the new section as “actions which involve the use of physical force.”

SENATE BILL 495

Summary: Providing correctional institutions and juvenile facilities video and audio records be confidential
Sponsors Trump, Takubo, Clements, Woelfel, Deeds, Rucker
W. Va. Code: Amends §15A-4-8A
Effective Date: March 11, 2023

The code section amended by this legislation was newly added to the state code in the 2022 Legislative Session.

This legislation completely rewrites the section and seemingly provides for greater disclosure of otherwise confidential “records necessary for the safe and secure management of inmates and residents committed to state correctional and juvenile facilities.”

The rewrite more specifically denotes the records which are the focus of the section: video and audio recordings produced in a correctional or juvenile facility, incident reports, investigation reports and any accompanying witness statements, and any other document or recording “containing information which would reasonably place the safety of an employee, inmate, or resident in jeopardy.”

The new legislation continues the circumstances in which disclosure can currently be made, i.e., to the Secretary of the Department of Homeland Security and the Commissioner of the Division of Corrections and Rehabilitation for official use, to law enforcement when the commissioner determines it is necessary for the investigation, prevention, or prosecution of crimes, to the Juvenile Justice Commission, to comply with a “lawful order” of a court of record or administrative tribunal for use in a civil, criminal, or administrative matter, and to an attorney who represents a person with claims for personal injury or violation of a constitutional right allegedly caused while in the custody of the Division of Corrections and Rehabilitation.

The new legislation further provides that such records are now subject to the Freedom of Information Act, the discovery provisions of the Rules of Civil or Criminal Procedure, and the provisions of W. Va. Code §49-5-101 pertaining to release of juvenile records.

Additionally, attorneys may have access to the records when representing a relative of an inmate who suffered injury or death while in the custody of the Division of Corrections and Rehabilitation.

SENATE BILL 546

Summary:	Adding and removing certain compounds from controlled substance list
Sponsors:	Stuart, Woodrum, Deeds, Taylor, Maynard, Hamilton
W. Va. Code:	Amends §§60A-2-204, 206, 210, 212
Effective Date:	June 8, 2023

The legislation adds numerous compounds to the various schedules. Notable is the addition of Xylazine to Schedule IV. Xylazine is a tranquilizer used by veterinarians but is currently a widely used street drug resulting in substantial numbers of overdoses. While the summary provided by the legislative staff refers to the removal of compounds, no compound was actually removed. One was stricken from one section probably because it also appeared in another section.

Schedule 1 did list additional Delta 8 and Delta 10 compounds, but a provision was also added that “the provisions of this section related to tetrahydrocannabinols are inapplicable to products or substances lawfully manufactured, distributed, or possessed under the provisions of §19-12E-1, *et seq.*, and Chapter 16H of this code.”

Amusingly, the more common spelling of marihuana, i.e., marijuana, was added to the listing for “Cannabis.”

SENATE BILL 558

Summary: Prohibiting law-enforcement agencies from posting booking photographs of certain criminal defendants on social media
Sponsors: Weld, Woelfel, Woodrum
W. Va. Code: Adds §62-1-6a
Effective Date: June 7, 2023

As originally introduced, the legislation intended to prohibit the sharing of booking photographs on social media if the individual was arrested for a nonviolent offense.

As eventually enacted, the prohibition extends to only a “minor offense” which is defined as a “misdemeanor or nonviolent felony eligible for expungement as provided by §61-11-26(a) of this code, and not excepted from eligibility for expungement under §61-11-26(c) of this code.” The exceptions to expungement are numerous and include all sexual offenses, all domestic violence offenses, all offenses in which a weapon was used or exhibited, all offenses in which harm to a minor or law-enforcement officer occurred, all offense involving cruelty to incapacitated people or cruelty to animals and many other offenses. Although driving on a suspended license or DUI is excluded from expungement, the legislation does make these offenses subject to the prohibition against publishing the booking photograph.

If the offense is one for which sharing the booking photograph would be generally prohibited, the booking photograph might still be shared if the individual is convicted of the crime for which he or she was booked, if necessary to locate the individual or warn the public of possible threats to safety, or if a court finds sharing to be in furtherance of a legitimate interest.

If, nonetheless, a booking photograph is shared by reason of “mistake of fact” or error when acting in good faith, law enforcement cannot be subjected to a civil action or held liable.

If the criminal charges against an individual have been dismissed or an indictment is declined by a grand jury or a judgment of acquittal has been entered or a conviction has been overturned, a request to law enforcement can be made by the affected individual or an authorized representative to remove the booking photograph from the social media platforms within 14 days.

SENATE BILL 568

Summary: Relating to Dangerousness Assessment Advisory Board
Sponsors: Trump, Deeds, Hunt, Rucker, Stover, Stuart, Taylor, Woelfel
W. Va. Code: Amends §27-6A-13
Effective Date: March 10, 2023

The legislation first clarifies that the Secretary of Department of Health and Human Resources or the “medical director” does not have “supervisory authority” over the Dangerousness Assessment Advisory Board. Based on an earlier correction in the language of the bill, “medical director” is intended to refer to the forensic clinical director.

The amended statute was originally enacted in 2021 and was amended in 2022. The originally codified purpose of the Advisory Board is “to provide opinion, guidance, and informed objective expertise to circuit courts as to the appropriate level of custody or supervision necessary to ensure that persons who have been judicially determined to be incompetent to stand trial and not restorable or not guilty by reason of mental illness are in the least restrictive environment available to protect the person, other persons, and the public generally.”

This legislation modifies this statement by modifying the foregoing stated purpose of the Advisory Board with the word “primary.” The legislation then provides that, in addition to its primary purpose, the Advisory Board, when requested by a court, may provide information or communication that in the Advisory Board’s “independent judgment” would “assist the court with ... treatment, placement, discharge, release, community outings, custody, supervision, and barriers to treatment, placement, discharge, release, community outings, custody and supervision of forensic patients.”

SENATE BILL 633

Summary: Requiring prompt appearances for persons detained on capiases
Sponsors: Woodrum, Trump, Deeds, Caputo, Woelfel, Rucker
W. Va. Code: Amends §§62-1-7, 62-1C-17b, 62-2-17
Effective Date: June 9, 2023

This is the rare criminal justice reform bill.

Primarily, the legislation imposes timeframes on what must occur after arrest, especially when it relates to a capias warrant.

Regarding arrest on a warrant, generally, if a person is arrested in a county other than the county in which the warrant issued and remains incarcerated after arraignment, then, within five days of the arrest, the person is to be transported to the regional jail serving the charging county. Apparently the Legislature forgot that regional jails are not a thing anymore.

Regarding capiases or bench warrants for failure to make a court appearance, the first requirement for issuance is a determination that the defendant was provided “effective notice of the court appearance” by the court. “Effective notice” is defined as a “notice stating the date, time, location, and purpose of the hearing, transmitted to the defendant or defendant’s counsel, no fewer than 10 days prior to the scheduled court appearance.” The 10 days’ period may be waived by the court if the court finds “emergent” circumstances. “Emergent” is a strange choice of words and the question is whether it was intentional or was an unintended variant offered by auto-correct.

If the record does not reflect that the person failing to appear received effective notice or has no documented history of failing to appear, a capias may not be issued until 24 hours have elapsed. If the defendant appears within that time, no penalty will ensue.

And, of course, the court can issue a bench warrant or *capias* if it has “credible information of danger to a person or community, new criminal conduct or a bail violation other than failure to appear.”

Commendably, an arrest on a *capias* requires a hearing to be scheduled and heard within five days of the arrest. And also commendably, when the defendant appears, a court is to provide written notice to the sheriff for further dissemination to other law-enforcement agencies that a *capias* is no longer active and is to be removed from all databases.

If a person is arrested and held under a *capias* for failure to appear and the underlying offense is other than murder in the first degree, then an initial appearance on the charges is to be held “as soon as practicable, or within five days whichever is sooner.” Bail is then to be considered.

SENATE BILL 647

Summary:	Relating to substantiation of abuse and neglect allegations
Sponsors:	Trump
W. Va. Code:	Amends §4-4-601b
Effective Date:	June 9, 2023

In the NOTE to the introduced bill, it was stated that “the purpose of this bill is to change the amounts of time a name will appear on the child abuse registry for various offenses.”

The heading to the amended statute in the bill as introduced refers to “file purging” and “expungement.” The amendments to the legislation provide, instead, for sealing records rather than destroying them or removing them from the state’s filing cabinets. The heading was not changed to reflect this different approach. Of course, the general rule is that the heading to a statute has no significance. *See* W. Va. Code §2-2-12.

Currently, if an allegation of abuse and neglect is substantiated but no judicial finding is made, the name of the person against whom the allegation is made will appear on the registry maintained by the Department of Health and Human Resources. The only way a name may be removed is through a grievance procedure in which the person proves the allegation to be unfounded.

This legislation provides that if an allegation is substantiated, but no petition for abuse and neglect is filed, the allegation is to be sealed after one year unless another allegation is substantiated within that period.

Interestingly, the legislation provides that if an allegation is substantiated but the petition filed with the court does not end in an adjudication, then the allegation is to be “unsubstantiated” and, therefore, should not appear on the registry.

If a person is found by the court to have abused or neglected a child upon a petition filed by the Department, the person may petition to have the record sealed after five years have elapsed since the finding, but only if the person has not been subject to other substantiated

findings of abuse and neglect. Upon receipt of such a petition, “the court, in its discretion, may look at all relevant factors related to the petition, including, but not limited to, efforts at rehabilitation and family reunification.”

So, what does sealing the record mean? The legislation provides that it “means that any inquiry of the department about a person having a record of child abuse and/or neglect for purposes of employment shall be answered in the negative.”

The Department is directed to propose legislative rules to effectuate the amendments to the statute.

HOUSE BILL 2218

Title: Robin W. Ames Memorial Act
Sponsors: Westfall, Garcia, Fast, Kelly, Kump, Fluharty, Warner
W. Va. Code: Amends §17C-14-15
Effective Date: June 9, 2023

I was present in Senate Judiciary when this legislation was discussed. The Insurance Federation/WV advocated for the bill which was described as model legislation that was also being considered or had been adopted by many other states. The claim was made and supported by an attorney for the Department of Motor Vehicles that the failure to adopt the legislation could result in the loss of substantial federal funding. This loss did not prevent a prolonged debate, however, on what is distracted driving and how this legislation differed from the existing prohibition against using a cell phone while driving unless it is “hands free.”

As introduced, the NOTE to the bill stated: “The purpose of the bill is to expand prohibitions on distracted driving of motorists utilizing a wireless communication device or stand-alone electronic device.”

The bill was to be dedicated to the memory of Robin W. Ames who, at 37 years of age, was bicycling near Bruceton Mills, West Virginia when he was struck and killed by a distracted driver.

Essentially, a person cannot perform any of the following actions or engage in any of the following activities on a telecommunications device or stand-alone electronic device when operating a motor vehicle “on any street, highway, or property open to the public for vehicular traffic”: (1) “Physically hold or support, with any part of his or her body” any such device but an exception is made for the wearing of a smartwatch; (2) “write, send, or read any text-based communication on such a device but an exception is made for a “voice operated or hands-free communication feature which is automatically converted by such device to be sent as a message in a written form”; (3) “make any communication” including a phone call, voice message, or one-way communication” but an exception is made for a voice operated or hands-free communication feature or function; (4) “engage in any form of electronic data retrieval or electronic data communication”; (5) “manually enter letters, number, or symbols into any website, search engine, or application”; (6) “watch a video or movie ... other than watching data

related to the navigation of such vehicle”; (7) “record, post, send, or broadcast video, including a video conference”; and (8) “actively play any game.”

Restrictions are also listed for commercial vehicles.

Exceptions from the statute are made for reporting road conditions, accidents or other emergencies to governmental authorities; for utility services’ providers responding to an utility emergency; for a mobile data terminal in a commercial vehicle; for first responders in the course of performing their duties; and when the actions are taken in a lawfully parked motor vehicle.

A discussion in the Senate hearing was whether this would be a primary offense for which an officer could pull over a vehicle. A prohibition on use of electronic communications has been in force since 2013 as a primary offense. The final version of the legislation is silent on the issue, so the presumption would be that it is a primary offense.

Fines and suspensions of licenses are imposed. If damage to property occurs as the proximate result of a violation, the penalty can include 30 days of incarceration. If harm to a person occurs as a proximate result of a violation, the penalty can include 120 days of incarceration. If a death occurs as a proximate result of a violation, then the violation is to be prosecuted as a negligent homicide.

HOUSE BILL 2875

Summary: Clarifying that Circuit Court Judges have the ability/authority to waive the requirement that a party pass a home study performed by the DHHR

Sponsors: Kirby, Steele, C. Pritt, Summers, Foster, Fast, Kimble, Kump

W. Va. Code: Amends §49-4-114

Effective Date: June 8, 2023

Currently, the affected statutory provision directs the Department of Health and Human Resources to “first consider” grandparents when placing a child for adoption. The current provision then requires a “home study evaluation, including home visits and individual interviews by a licensed social worker.”

The amendment provides that “a circuit court judge may determine the placement of a child for adoption by a grandparent or grandparents is in the best interest of the child without the grandparent or grandparents completing or passing a home study evaluation.”

HOUSE BILL 2890

Summary: Modifying student discipline

Sponsors: Gearhart, Ellington, Westfall, Storch, Bridges, Foster, Butler, Householder, Cooper, Dean, Heckert

W. Va. Code: Amends §18A-5-1

Effective Date: June 9, 2023

Without going into the details, the legislation gives teachers of grades 6 through 12 the authority to remove students from their classroom and imposes restraints on the principal's reinsertion of the student into the classroom. If the student is excluded three times in one month, the principal is required to impose in-school suspension, out-of-school suspension, or placement in an alternative learning center. The legislation also provides that teachers cannot be disciplined for removing a child from the classroom.

The legislation requires counties to develop a policy that develops a "tier system", with teacher input, to provide a framework for dealing with student behaviors. Notably, "the policy shall be clear and concise with specific guidelines and examples." An appeal process is to be developed so a teacher can go to the superintendent "if a school principal refuses to allow the exclusion of a student from the classroom or if a teacher believes the school principal has prematurely ended the exclusion of a student from the classroom." Again, "the teacher may not be reprimanded if their actions are legal and within the structure of the county board's policy for student behavior and punishment."

The purpose of the statute is best summarized in the following language: "The principal shall support the teacher in the discipline of the students if proper cause and documentation is provided following the schoolwide discipline policy."

HOUSE BILL 3018

Summary:	Establishing that 18 is the age of consent and removing the ability of an underage person to obtaining [sic] a consent to marry through their parents, legal guardians, or by petition to the circuit court
Sponsors:	Young, Garcia, Crouse, Chiarelli, Hornby, Fast, Worrell, Holstein, Hansen
W. Va. Code:	Repeals §48-2-103; Amends §§48-2-106, 301
Effective Date:	June 9, 2023

W. Va. Code §48-2-301 provided that if an applicant for a marriage license was under 18 years of age, a marriage license was not to issue until two full days had elapsed, unless a court order provided otherwise. This section is repealed.

The amendment to W. Va. Code §48-2-106 originally intended to remove the affidavits of parents or legal guardians as an acceptable form of proof of an applicant's age, but as enacted, this form of proof remains and only removes the provision discussing the identity of the affiant in the case of death of a parent or both parents.

The amendment to W. Va. Code §48-2-301 intended to remove the ability of anyone under 18 to consent to marriage. As enacted, the statute still authorizes the marriage of a person who is between the age of 16 and 18 years. Notably, the statute expressly requires the consent of the applicant as well as the applicant's parents or legal guardian and further requires a signed and acknowledged affirmation by the applicant that the consent to marry is a voluntary choice and not the "product of duress or coercion by any person." However, the statute prohibits marriage of a person between 16 and 18 years of age if the other person is more than four years older.

The authority of a circuit court to order the issuance of a license to marry for persons under 18 years of age is removed.

The legislation provides, further, that the underage person may petition, without a parent's or a guardian's consent, for annulment of the marriage until the person reaches 18 years of age.

The legislation expressly provides that the provisions of the statute will not serve to annul any marriage entered into before the enactment of the statute or any marriage legally entered into in another jurisdiction.

HOUSE BILL 3061

Summary:	Relating to updating the authority of the Foster Care Ombudsman
Sponsor:	Summers, Tully
W. Va. Code:	Amends §§49-9-101, 102, 107
Effective Date:	February 15, 2023

Since 2020, the authority of the Foster Care Ombudsman extended to receiving, investigating and resolving complaints filed on behalf of a “foster child, foster parent or kinship parent” or, on the Ombudsman’s own initiative on behalf of a “foster child,” investigating decisions of a state agency, child-placing agency, or residential care facility which adversely affected a foster child, foster parent or kinship parent.

This legislation extends the investigatory authority of the ombudsman to matters adversely affecting any child who is subject to a reported allegation of abuse and neglect, any child who has died or sustained a critical incident, or any child in the juvenile justice system.

Moreover, the advocacy of the Ombudsman extended previously to foster children residing in the state but is now extended to “the legal, civil, and special rights of children in the child welfare system and the juvenile justice system.”

A provision is added so that the Ombudsman cannot be compelled to testify or produce evidence in any judicial or administrative proceeding regarding the identity of an individual providing information during an investigation or regarding the substance of the individual’s report. The legislation provides “the purpose of this provision is to ensure a level of confidentiality between the ombudsman and a person reporting to, complaining to, or providing other evidence to the ombudsman as part of an official investigation....”

An interesting provision was added that states: “Another office, department, agency or official may not prohibit the release of an ombudsman’s recommendations to the Governor and Legislature.”

The provisions governing confidentiality of information relating to an investigation were amended to remove disclosure with written consent of the complainant and to add the right to

disclose information “where imminent risk of serious harm is communicated directly” to the Ombudsman or his or her staff.

HOUSE BILL 3156

Summary: Raising the compensation rates of panel attorneys
Sponsors: Steele, Nestor, Fast, Kirby, C. Pritt, Hanna, Holstein, Dean, Shamblin, Householder
W. Va. Code: Amends §19-21-13a
Effective Date: June 9, 2023

This legislation amends the governing statute for Public Defender Services.

For various reasons, when the compensation rates were increased by around 30% in 2019 for the private attorneys who took court appointments, the compensation and reimbursement caps for cases that did not involve life imprisonment were not commensurately increased.

In this legislation, these caps are increased. The compensation cap on the attorney’s fee has increased from \$3,000 to \$4,500. The expenses cap has increased from \$1,500 to \$2,500.

The agency supported the bill on the grounds, mainly, that this represented an administrative convenience. If the compensation or expenses exceed the cap, it requires a court order allowing the caps to be exceeded before payment can be made. Currently, the orders are routinely obtained and then uploaded electronically. By raising rates, the number of orders that have to be obtained is reduced and, therefore, the vouchers can be electronically submitted without waiting for an order, scanning the order, and adding to the documents to be reviewed. The agency was opposed to removing the caps because, even if the orders are routinely entered, a judge does see what has been billed in a matter and, occasionally, judges have informed the agency that the bill is seemingly excessive.

The legislation adds a new subsection to the statute which provides that, if a criminal charge is dismissed or an acquittal on the charged is obtained, the private counsel involved in the representation may continue representation for the purpose of expunging the charges from the client’s record if the charges qualify under the provisions of W. Va. Code §61-11-25. The maximum compensation for the legal service is \$1,000 and the maximum expenses that can be reimbursed are \$500. A court can approve payment of additional amounts if good cause can be shown.

The agency did not object to this provision but did make two points that were not addressed. First, the expungement services are within the ambit of legal services provided by Legal Aid of West Virginia, so the services may already be available. Second, the provision only provides for continuing representation by panel attorneys to do the expungement but does not extend the eligibility for such services to the public defender corporations.

The legislation as introduced also provided for a ten dollar an hour raise for the rate of compensation to investigators, but the budget conscious Senate Finance Committee removed this provision.

HOUSE BILL 3166

Summary: To permit a hospital to hold a patient experiencing a psychiatric emergency for up to 72 hours

Sponsors: Summers, Tully, Heckert

W. Va. Code: Amends §27-5-2a

Effective Date: June 9, 2023

The legislation merely adds the words “patient or a” before the word “individual” so that now the operative provision is: “If a mental hygiene commissioner, magistrate, and circuit judge are unavailable or unable to be immediately contacted, an authorized staff physician may order the involuntarily hospitalization of *a patient or* an individual who is present at, or presented at, a hospital emergency department if need of treatment....”

HOUSE BILL 3190

Summary: Amending the definition of “minor”

Sponsors: Steele

W. Va. Code: Amends §§61-3C-14b, 61-8A-1, 61-14-1; Adds §61-8-32

Effective Date: June 9, 2023

W. Va. Code §61-8-32 makes it a felony to use a computer to actually or attempt to solicit, entice, seduce, or lure a “minor known or believed to be at least four years younger” for the purpose of engaging in prohibited sexual activity.

A felony is created by the newly added §61-8-32 for when a minor is solicited to engage in a prohibited sexual activity by means other than a computer. The punishment is incarceration for two to ten years and/or a fine up to \$5,000. This new felony is a lesser included offense of another new felony which adds the element of an overt act to bring the perpetrator into the minor’s physical presence for the purpose of engaging in a prohibited sexual activity. The punishment for this offense is, interestingly, a “determinate” sentence of incarceration between five and thirty years and/or a fine of \$25,000.

Currently, §§61-8A-1, *et seq.*, governs the preparation, distribution, or exhibition of obscene matter to minors and §§61-14-1, *et seq.*, govern human trafficking.

In each of the foregoing sections, this legislation added the following definition of a minor: “a person younger than 18 years of age *or a person representing himself or herself to be a minor.*” The legislation also added that prosecution for a crime involving a person representing himself or herself to be a minor is limited to investigations being conducted or overseen by law enforcement officers.

HOUSE BILL 3265

Summary: Remove statutory mandates that the sheriff of a county shall serve process or is responsible for cost of service or arrest by another law enforcement agency

Sponsors: Heckert, Adkins, Ross, Maynor, Foggin, Cooper, Miller, Crouse,

W. Va. Code: Kump
Amends §59-1-14
Effective Date: June 8, 2023

Curious. As originally introduced, the legislation provided that a county sheriff would not have to pay the statutory fees for service of process or for levying to another sheriff's department or law enforcement agency who performed the actual service or levy.

As passed, the legislation provides that a county sheriff "shall" owe the fees to another sheriff's department or law enforcement agency.

My presumption is that this is a pass-through. The county sheriff charges the fee for the requested service and then is obligated to pay this amount to whatever law enforcement agency completes the task.

HOUSE BILL 3302

Summary: To recognize unborn child as distinct victim in a DUI causing death
Sponsors: Westfall, Burkhammer, Pinson, Capito, Kelly, Steele, Fast, Kimble, Martin, Kump, C. Pritt
W. Va. Code: Amends §17C-5-2 and §61-2-30
Effective Date: June 9, 2023

W. Va. Code §17C-5-2(b) sets forth the offense for driving in an impaired state and causing the death of any person. W. Va. §17C-5-2(c) sets forth the offense for driving in an impaired state and causing serious bodily injury to any person.

This legislation provides that "person" in these sections includes "an embryo or fetus."

"Embryo" and "fetus" are currently defined in §61-2-30. This legislation adds in this section references to §§17C-5-2(b), (c) when it provides that "for purposes of enforcing the [following] provisions..., a pregnant woman and the embryo or fetus she is carrying in the womb constitute separate and distinct victims."

HOUSE BILL 3332

Summary: Creating judicial circuits and assigning the number of circuit judges in each circuit to be elected in the 2024 election
Sponsors: Hanshaw (Mr. Speaker By Request), C. Pritt, Vance
W. Va. Code: Amends §3-1-16, §§50-1-2,8,9,9a, 9c, §51-2-1, and §§51-2A-3, 6
Effective Date: June 9, 2023

INTRODUCTION

General knowledge was that the judicial circuits were being redrawn. However, the legislation contains many other changes affecting the process of electing judges as well. NOTE:

I will refer to counties in the following discussion simply by name without the designation of county.

ELECTION OF JUDGES

Beginning with the judicial election in 2024, if no candidate for a judge in the division of a judicial circuit receives more than 30% of the votes cast in the non-partisan judicial election in May, then a runoff election is to be held in the following general election in November between the two candidates “who received the highest and next-highest number of votes cast in that division.”

Other election anomalies arise. In certain judicial circuits, residency restriction will apply from the “time of filing.” Presumably, in others, the residency requirement will be imposed only upon election.

In the newly constituted third circuit consisting of Doddridge, Pleasants, Ritchie and Wirt, a restriction is imposed that no more than one judge may be a resident of any county in the circuit. If two judges are elected in the two divisions and are from the same county, the judge with the highest number of votes overall will be the winner from the division in which he or she ran and the judge with the highest number of votes in the other division who is not a resident of the same county will win the other division. This same procedure will apply to the newly constituted seventeenth circuit consisting of Braxton, Clay, Gilmer and Webster.

In the unchanged fifth circuit consisting of Calhoun, Jackson, Mason and Roane, three judges will be elected with one division slotted for a judge residing in Jackson at the time of filing; one division slotted for a judge residing in Mason at the time of filing; and one division slotted for a judge residing in either Calhoun or Roane at the time of filing.

In the newly constituted eleventh circuit consisting of Logan and Mingo, three judges will be elected with one division slotted for a judge residing in Mingo at the time of filing and the other two divisions slotted for a judge residing in Logan at the time of the filing.

In the newly constituted twelfth circuit consisting of McDowell and Wyoming, two judges will be elected with one division slotted for a judge residing in McDowell at the time of filing and the other division slotted for a judge residing in Wyoming at the time of filing.

In the newly constituted eighteenth circuit consisting of Lewis and Upshur, two judges will be elected with one division slotted for a judge residing in Lewis and the other division slotted for a judge residing in Upshur.

And, notably, Raleigh County Circuit Court replaces the Kanawha County Circuit Court as the Court to have concurrent jurisdiction with the one remaining circuit that will have only one judge for the times when that sole judge is unavailable due to sickness, vacation or other reason.

MAGISTRATE COURTS

Beginning January 1, 2025, the following changes will be made in the number of magistrates within a county: Berkeley – gains a magistrate; Jefferson – gains a magistrate; Kanawha – gains 3 magistrates; Logan – gains a magistrate; Monongalia – gains 2 magistrates, one of whom is to be immediately appointed; Raleigh – gains a magistrate; and Wood – gains a magistrate. These magistrates are to be elected in the 2024 elections of magistrates generally. The Supreme Court is directed to do another caseload study and is to make recommendations regarding the number of magistrates to be elected in 2028. The salary of magistrate court clerks is raised from \$52,296 to \$54,596. The salary of magistrate assistants is raised from \$46,932 to \$49,232. Finally, the Supreme Court is given authority to create additional classifications of support for magistrate courts, with salaries capped at what magistrate court assistants make.

JUDICIAL CIRCUITS

Beginning January 1, 2025, the number of judicial circuits will be reduced from 31 circuits to 30 judicial circuits. Overall, five new judges will be added in the reconfiguration except that the combined circuit of Wyoming and McDowell will be reduced from the three current judges to two.

The newly constituted thirtieth circuit consisting of Monroe and Summers will be the only circuit that continues to have only one judge.

FAMILY COURTS

For family courts, the legislative changes were minimal. Braxton was moved from the circuit consisting also of Lewis and Upshur to the circuit consisting currently of Webster and Pocahontas. One family court judge was added to the circuit consisting of Berkeley and Jefferson. Salary increases are provided for the secretary-clerk of the family court judge and for the family case coordinator. Similarly to the provision for magistrate court judges, the Supreme Court is authorized to create additional classifications of personnel to support the family courts. The salary is not to exceed that established for the secretary-clerk.

HOUSE BILL 3337

Summary:	Prohibiting additional drug and alcohol treatment facilities in a certain county
Sponsors:	Heckert, Fehrenbacher, Cooper, Foggin, Hott, Criss, Hanshaw, Rohrbach, Petitto, A. Hall, Anderson
W. Va. Code:	Amends §16-2D-9
Effective Date:	March 8, 2023

The legislation as finally passed prohibits the issuance of a certificate of need by the West Virginia Health Care Facility to “add licensed substance abuse treatment beds in any county which already has greater than 250 licensed substance abuse treatment beds.”

HOUSE BILL 3432

Summary: Relating to statutory construction
Sponsors: Hanshaw (Speaker)
W. Va. Code: Amends §§2-2-10, 12; and §4-1-13
Effective Date: March 11, 2023

Unknown to many practitioners, W. Va. Code §2-2-10 provides definitions for certain words and phrases used frequently in statutes and provides general rules for the construction of statutes. An immediate impact of this legislation is to organize the words alphabetically and to separate into a separate section the rules of construction. Additionally, this legislation removes the definition of the following words or phrases: “preceding, succeeding or following,” “justice or justices,” “personal representative,” “will,” “under disability,” “insane person,” “horse,” “infant,” and “board of regents.”

In a presentation by attorneys from the Legislative Drafting office, the primary purpose of this legislation was to provide a rule for applying revisions to the same statute in separate bills passed in the same legislative session.

As enacted, the legislation added the following rules of statutory construction: (i) “Statutes are construed to avoid absurd results”; (ii) “Statutes are to be read as a whole, in context, and, if possible, the court is to give effect to every word of the statute,”; and (iii), addressing the principal concern, “When two or more bills amending the same statute are passed during the same session of the Legislature, the form of the statute in the enrolled bill passed latest in time shall control.”

Finally, the legislation amends W. Va. Code §4-1-13, governing the Clerk of the House’s duties and compensation, by adding: “When two or more bills amending the same statute are passed during the same session of the Legislature, the form of the statute in the enrolled bill passed latest in time shall control.” It is odd that this is in the House of Delegates’ statute and not in the comparable Senate statute. If, under another added rule set forth above, it is to be construed in context, then it would seemingly only apply to House bills. But, of course, the general provisions of Chapter 2 would govern all bills seemingly.

HOUSE BILL 3448

Summary: Relating generally to probation officer field training
Sponsors: Kelly, Hott
W. Va. Code: Amends §62-12-5
Effective Date: June 5, 2023

The legislation added the following provision to the general statute governing the Supreme Court of Appeals’ appointment of probation officers: “The Administrative Director of the Supreme Court of Appeals, or his or her designee, may hire field training probation officers to provide uniform training to new and current probation officers statewide. A field training probation officer shall have all the powers granted to a probation officer under this code while performing his or her duties.”

HOUSE BILL 3552

Summary: Relating to per diem jail costs
Sponsors: Brooks, Phillips, Honaker, Hott, Heckert
W. Va. Code: Amends §15A-3-16
Effective Date: June 9, 2023

This legislation originated in the House Committee on Prisons and Jails. The stated purpose of the legislation was: “to provide a mechanism for per diem cost sharing between counties and municipalities.”

As passed, however, the legislation enacted a new per diem rate of \$54.48 to be effective July 1, 2023. The State Budget Office is to adjust this rate annually based on the most recent three years of the costs of operating “jail facilities and units” by the Division of Corrections and Rehabilitation (“DCR”).

Also beginning July 1, 2023, the DCR Commissioner is to determine the “pro rata share of inmate days by county.” The calculation is to be .52 times a county’s population based on the 2020 Census data. This calculation is to be done every ten years with a new census.

The county will pay, as its per diem cost, 80% of the per diem rate for the first 80% of its pro rata share of inmate days; 100% of the per diem rate for the billed inmate days between 80% and 100% of its pro rata share of inmate days; and 120% of the per diem rate for the billed inmate days exceeding its pro rata share.

The DCR Commissioner is to post on the DCR website, for each county: (i) the pro rata share of inmate days; (ii) the base number of pro rata days; and (iii) the information regarding payments of the per diem rate.

Finally, the legislation addresses the issue for which it was introduced originally. By memorandum of understanding between the county and a municipality with a population in excess of 4,000, the county may seek reimbursement from the municipality for one day of per diem costs relating to incarceration by municipal police of an individual for a charge other than a municipal violation.