

## INTRODUCTION TO BILL DRAFTING IN WEST VIRGINIA

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### I. INTRODUCTION

Lawyers play important roles in the legislative process in the United States. Lawyers are often elected members and officers of their respective bodies, but they also serve as counsel, advisors, clerks, and staff for members. Further, lawyers also represent government agencies, private companies, nonprofit entities, trade associations, and other participants in the legislative process working as lobbyists, legal advisors, and staff.<sup>1</sup> While not all bill

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<sup>1</sup> David C. Hardesty, Jr., *Leading Lawyers—Lawyers in Leadership Roles: Implications for the Profession*, THE W. VA. LAW., Oct.–Dec. 2009, at 37.

drafting is done by lawyers, almost all bills eventually are reviewed, edited, amended or otherwise passed upon in some fashion by lawyers in a variety of positions.

This Article suggests an approach to bill drafting in West Virginia. For more experienced drafters, the Article may serve simply as a checklist when drafting. For others, the Article may offer a step-by-step process or analytical framework for approaching the bill drafting process.

Here, we use the definition of a bill that is set forth in the Manual of the House of Delegates and Senate, which defines it as “a proposal for the enactment of a new law, the amendment or repeal of an existing one, or appropriation of public money.”<sup>2</sup> Hopefully, this Article will help those involved in drafting other forms of changes in policies. Lawyers drafting resolutions, administrative rules, and local ordinances will find that many of the same concepts and stylistic requirements are similar.

Playing a sport requires practice and a game strategy. Cooking a fine meal requires extensive preparation and setting the table. Traditional legal advocacy requires research, thought, and practice. So it is with bill drafting. There is much to be done before introduction of a bill, or even attempting to write the first draft, so thinking ahead saves time and energy, and ensures a greater chance of success. To successfully negotiate the bill drafting process in West Virginia, a drafter should be mindful of the myriad of policy and legal issues and be ready to face them head-on.

## II. THINK ABOUT POLICY ISSUES

For several years, Dr. L. Christopher Plein<sup>3</sup> has admonished law students enrolled in the bill-drafting course at the West Virginia University College of Law that they ought to consider several policy issues before beginning to draft their bills. A companion Article by Dr. Plein is published with this Article. In it, he covers many of the policy issues the bill drafter confronts. It is useful to summarize the main policy issues here.<sup>4</sup>

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<sup>2</sup> MANUAL OF THE HOUSE OF DELEGATES AND SENATE, LEGIS. OF W. VA. 485 (82d Legis. ed. 2015–2016) [hereinafter MANUAL OF HOUSE & SENATE], <http://www.legis.state.wv.us/educational/publications/manual2015.pdf> (defining “bill”).

<sup>3</sup> Dr. Plein is an Eberly Professor of Outstanding Public Service, Rockefeller School of Politics and Policy, Eberly College of Arts and Sciences, West Virginia University. The ideas set forth in the text are explained further in Dr. Plein’s, *A Policymaking Checklist for the Legislative Process*, 118 W. VA. L. REV. ONLINE 83 (2016), published as a companion to this Article. Professors Hardesty and Dr. Plein have collaborated in teaching bill drafting and policy making in West Virginia for nearly 20 years.

<sup>4</sup> The following points are the summarizations of the policy issues raised in Dr. Plein’s Article, and this author has used italics for emphasis. *Id.*

1. How do you frame the question(s) or *define* the issue(s) you are addressing?
2. Why is (are) the issue(s) important *now*?
3. Is legislative action the *best means* of addressing the matter(s)?
4. What is the *intent or purpose* of your proposal?
5. Can your proposal be informed by *comparable actions taken* on this or similar issues in *this state or other jurisdictions*?
6. Are there potential negative spill-over effects or unintended consequences of your proposal that can be identified and addressed now?
7. What is your *time frame* for realizing the policy?
8. Does your proposal take into account the committee system, rules, politics, and traditional *realities of the legislative arena*? When is the best time to *compromise* on tough political issues?
9. Does your proposal complement existing policies, *institutional arrangements, and traditional practices*?
10. What types of findings, sanctions, remedies, and other *tools* will be used to encourage the changes you would like to see adopted?
11. What *objectives and benchmarks* will be used to allow for future policy review and assessment?
12. Is your particular policy proposal superior to *other proposals* designed to achieve similar concerns?

Dr. Plein's policy questions will help the drafter discover the policy implications his or her bill may or should raise. In any event, it is almost impossible to begin drafting without knowing how you will address policy issues. So, in the words of one author, "begin with the end in mind!"<sup>5</sup>

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<sup>5</sup> STEPHEN R. COVEY, THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE 105 (Simon & Schuster 2013).

## III. THINK ABOUT LEGAL ISSUES

When addressing legal issues related to bill drafting, the drafter will find that having easy access to several resources will prove very helpful. These include (1) the Manual of the House of Delegates and Senate, which contains both the federal and state constitutions and the rules of both houses and their joint rules;<sup>6</sup> (2) the West Virginia Bill Drafting Manual (“bill drafting manual”),<sup>7</sup> which contains legal insights, stylistic rules,<sup>8</sup> and useful examples of completed drafts of various bills and resolutions;<sup>9</sup> (3) a copy of current West Virginia statutory law, preferably one with an index or even a search engine;<sup>10</sup> and (4) the West Virginia Legislature website.<sup>11</sup>

Also, it is important to note that West Virginia’s *Official Code* was last codified in 1931.<sup>12</sup> Subsequently, all passed bills have been framed as deletions, amendments, or additions to the “Code of West Virginia, 1931, as amended.”<sup>13</sup> This language appears in both the title and enacting clause of every bill, which are described in further detail later in this Article.<sup>14</sup>

Once drafters are ready to proceed, the following steps may prove helpful. First, drafters must determine the code placement of the bill’s provisions, including the primary chapter or section that is to be repealed, amended in, and added to the Code, the sections that will need to be conformed

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<sup>6</sup> MANUAL OF HOUSE & SENATE, *supra* note 2. All rules are also available online under the *Senate Rules*, *House Rules*, and *Joint Rules*, W. VA. LEGIS., <http://www.legis.state.wv.us/index.cfm> (last visited Jan. 12, 2016).

<sup>7</sup> HOUSE CLERK’S OFFICE ET AL., WEST VIRGINIA LEGISLATURE BILL DRAFTING MANUAL 7 (Jan. 2006), [http://www.legis.state.wv.us/legisdocs/code/Drafting\\_Manual.pdf](http://www.legis.state.wv.us/legisdocs/code/Drafting_Manual.pdf) [hereinafter BILL DRAFTING MANUAL]. Frequent references are made herein to the West Virginia Legislature Bill Drafting Manual (2006). The bill drafting manual is currently being revised and updated by the West Virginia Legal Institute. In the future, drafters should take care to consult the latest version of the bill drafting manual.

<sup>8</sup> See ROBERT J. MARTINEAU ET AL., LEGAL, LEGISLATIVE, AND RULE DRAFTING IN PLAIN ENGLISH 64, 75 (Thomson/West 2005) [hereinafter MARTINEAU, LEGAL DRAFTING] (describing the importance of proper punctuation and capitalization). See generally BILL DRAFTING MANUAL, *supra* note 7, at 13–38 (describing in detail the West Virginia language components, such as capitalization, spelling, frequently confused words, dates and numbers, punctuation, and strike-throughs, etc.).

<sup>9</sup> See generally BILL DRAFTING MANUAL, *supra* note 7, at 103–30.

<sup>10</sup> *West Virginia Code*, W. VA. LEGIS., <http://www.legis.state.wv.us/WVCODE/Code.cfm> (last visited Jan. 12, 2016).

<sup>11</sup> W. VA. LEGIS., <http://www.legis.state.wv.us/index.cfm> (last visited Jan. 12, 2016). The West Virginia Legislature website is a useful reference tool to drafters because it provides rules from both houses, the Code, useful examples of drafted bills, etc.

<sup>12</sup> 1 LEXISNEXIS, MICHIE’S WEST VIRGINIA CODE ANNOTATED CONSTITUTIONS TABLES xviii (Matthew Bender & Co., Inc., 2013 repl. vol. ed., 2013) [hereinafter MICHIE’S WEST VIRGINIA CODE].

<sup>13</sup> *Id.* at xviii (emphasis added).

<sup>14</sup> See *infra* text accompanying notes 32–35.

to the primary changes, and other possible references to the existing Code. Second, drafters should understand the law related to several parts of a bill, which includes the West Virginia Constitution, the Code, the Rules of each house, and the traditional bill format, including the various parts of a bill. Third, drafters should recognize that the West Virginia Constitution may mandate the form of a bill or limit its content. This Article explains the importance of reviewing the state's constitution for compatibility with the bill's substantive changes to the Code. Fourth, drafters must observe both the legal and traditional stylistic mandates during the bill drafting process. This Article introduces the various stylistic considerations drafters should be aware of while drafting a bill. Finally, drafters should have their bill reviewed by the sponsor(s) and subject matter experts after completing a bill. Drafters will greatly benefit from taking these various legal issues into consideration during the drafting process.

*A. Determine Code Placement of the Sections that Will Contain the Primary Policy Changes, Needed Conforming Amendments, and Possible References to Other Sections of the Code*

Since most bills either repeal, amend, or add to the Code, or do all three, a critical step in bill drafting is identifying which Code chapters, articles, or sections the drafter's bill will repeal, amend, or add to. This thought process is sometimes called "code placement," indicating that there is often a choice to be made as the new language can often be placed in several different areas of the code.

In determining code placement, the initial consideration should be whether there is "an existing statute pertaining to the . . . subject matter involved."<sup>15</sup> If the same or similar subject matter is already covered in a chapter, article, or section of the Code, a bill should be set out to amend the already existing law. If the subject matter has not been covered within the Code, a new chapter, article, or section might be required.<sup>16</sup>

As a practical matter, the issue of code placement often becomes a pragmatic, tactical, and political decision. It is common for drafters to encounter a situation where the interested parties are content with the drafter's proposed language in a bill that would amend an existing code section. However, some or all of the interested parties do not want to offer the policy change as an amendment to existing code language. The reason is that doing so will "open up"—make germane for amendment purposes—a section of the code that is controversial and politically charged. The most common solution to

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<sup>15</sup> *HOLC Guide to Legislative Drafting*, OFFICE OF THE LEGISLATIVE COUNSEL, [https://legcounsel.house.gov/HOLC/Drafting\\_Legislation/Drafting\\_Guide.html](https://legcounsel.house.gov/HOLC/Drafting_Legislation/Drafting_Guide.html) (last visited Jan. 9, 2016).

<sup>16</sup> See ROBERT J. MARTINEAU, *PLAIN ENGLISH FOR DRAFTING STATUTES AND RULES* 74 (Matthew Bender & Co., Inc. 2012) [hereinafter MARTINEAU, *PLAIN ENGLISH*].

this challenge is to draft a new code section, which frequently avoids political debate, delay, and the risk of failure to change the targeted policy. One result of this practice is the continuing expansion of the West Virginia Code, like the accumulation of sedimentary rock over time.

Note that there may be a choice as to the appropriate “vehicle” to be chosen to insert the changes into the Code. There are many ways to initiate a policy change.<sup>17</sup> The most common are an independent bill,<sup>18</sup> a committee amendment to another bill currently under consideration,<sup>19</sup> a committee substitute,<sup>20</sup> and a floor amendment to a bill under consideration.<sup>21</sup> It is important to remember all amendments to a bill must be germane.<sup>22</sup>

The policy change may also suggest the need for what are called “conforming amendments to the Code.”<sup>23</sup> These are amendments to other code provisions that should be changed to accomplish the major change or at least avoid conflict and confusion with existing Code provisions. For example, a new agency name in the proposed bill might need to be mentioned in one or more lists of agencies found elsewhere in other parts of the Code. This tedious, but important, process creates what has been referred to as conformity in the Code. Conformity has remained important to the West Virginia’s legislature, since the legislature passed an act in 1921 that required members of the Code Commission to arrange all the statutes in an understandable and logical fashion.<sup>24</sup>

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<sup>17</sup> Although these are the most commonly used, there are other rules embedded in both the Rules of the House of Delegates and Senate.

<sup>18</sup> BILL DRAFTING MANUAL, *supra* note 7, at 64–65 (showing examples on amending chapter in the code by adding new article and amending code by adding new chapter).

<sup>19</sup> The House of Delegate and Senate rules make several references to opportunities to amend to bills under consideration. *See, e.g., Rules of the House, in* MANUAL OF HOUSE & SENATE, *supra* note 2, R. 95b, at 184, 224.

<sup>20</sup> *Rules of the House, in* MANUAL OF HOUSE & SENATE, *supra* note 2, R. 95 at 184, 222; *Rules of the Senate, in* MANUAL OF HOUSE & SENATE, *supra* note 2, R. 29, at 260, 271.

<sup>21</sup> *See, e.g., Rules of the House, in* MANUAL OF HOUSE & SENATE, *supra* note 2, Rs. 105, 114, at 184, 228, 232.

<sup>22</sup> Syl. pt. 3, *City of Huntington v. Chesapeake & Potomac Tel. Co.*, 177 S.E.2d 591, 593 (W. Va. 1970) (“The act therefore may contain many parts germane to the title, but they must be such that when traced back will lead the mind to the object expressed in the title as their generic head.”). Germaneness is “the relevance and appropriateness of amendments or subtitles.” MANUAL OF HOUSE & SENATE, *supra* note 3, at 488 (defining “germane”).

<sup>23</sup> MICHIE’S WEST VIRGINIA CODE, *supra* note 12, at ix.

<sup>24</sup> MICHIE’S WEST VIRGINIA CODE, *supra* note 12, at ix. The July 1, 1921, section states, “[t]hey shall arrange all the statutes under proper titles and chapters, and divide the whole code into sections . . .” The Report of Code Commission further explains, “[n]o one unfamiliar with the confused jumble of compiled legislative acts which had served as substitutes for codes of laws for almost seventy years will appreciate the study and effort required to bring order out of confusion and to arrange in some systematic manner the statute laws of the State, and to revise them ‘and make the code of statute laws, as existing at the close of their work, as complete as possible.’”

In addition, the bill drafter may wish to make reference to other existing code provisions when drafting a bill. For example, chapter two, article two, section ten (“§ 2-2-10”), subsection (g), of the Code, states, “Justice or justices as used in article one [§§ 51-1-1 et seq.], chapter fifty-one of this code and in other references to a member or members of the supreme court of appeals shall mean and apply to a judge or the judges of said court as provided for in the Constitution of the State.”<sup>25</sup> In this example, the drafter made reference to another section of the Code in this proposed policy change, thus incorporating the existing language by reference.

Finally, the drafter should note that the legislature has already enacted sections of the Code to cover situations that are frequently encountered when drafting. Examples include laws related to promulgation of rules and regulations,<sup>26</sup> the severability of code provisions when challenged in the courts,<sup>27</sup> the presumption of prospective application,<sup>28</sup> and many definitions.<sup>29</sup>

*B. Master the Law Related to Several Parts of a Bill and Their Constitutional, Statutory, and Traditional Underpinnings*

The West Virginia Constitution,<sup>30</sup> the West Virginia Code, the Rules of each house, and stylistic tradition mandate bill format. The traditional parts of a bill are (1) *the heading*, (2) *the title*, (3) *the enacting clause* and *the enacting section*, (4) *the chapter, article and section headings*, (5) *the body of the bill*, and (6) *the explanatory note*.

First, the *heading* of a bill contains general reference information: the originating house, the sponsor(s), the date of introduction, and the committee(s) the bill will be or has been referred to. This information is added by the presiding officer and the legislative staff at the time of introduction. Most bill drafters supply blank spaces for the appropriate information; others simply leave space for the heading.

Second, a *title* for the bill is constitutionally mandated.<sup>31</sup> The title announces to all readers the “object” or subject matter of the bill and the code

<sup>25</sup> W. VA. CODE ANN. § 2-2-10(g) (LexisNexis 2015) (internal quotation marks omitted).

<sup>26</sup> See generally W. VA. CODE ANN. § 29A-3B (LexisNexis 2015).

<sup>27</sup> W. VA. CODE ANN. § 2-2-10(cc) (LexisNexis 2015) (stating, “That if any such section, article or chapter of this code has its own severability clause, then such severability clause shall govern and control with respect to such section, article or chapter in lieu of the provisions of this subdivision.”). See MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 74.

<sup>28</sup> W. VA. CODE ANN. § 2-2-10(bb) (LexisNexis 2015).

<sup>29</sup> *Id.* at § 2-2-10. Many such provisions and definitions are found in this section of the Code.

<sup>30</sup> All references or citations to the “constitution” are to the West Virginia Constitution unless otherwise noted.

<sup>31</sup> W. VA. CONST. art. VI, § 30 (explaining this section mandates that “[n]o act hereafter passed shall embrace more than one object, and that shall be expressed in the title.” The section also specifies the default effective date of every bill and the manner for changing the default date.).

sections being amended.<sup>32</sup> The constitution also limits the subject matter of each bill to “one object,” thus giving rise to the so called “one object rule,” which is frequently seen as a prohibition against “log rolling” and “riders,” i.e., the passage of a bill with amendments unrelated to the object originally announced.<sup>33</sup>

The constitutional mandates for a bill’s title frequently have been enforced by both the executive and judicial branches.<sup>34</sup> Governors customarily veto bills when their titles are defective. Typical vetoes have addressed cases, for example, where the title on the engrossed<sup>35</sup> or final version has not been adequately rewritten in order to reflect an expanded object when new matters have been incorporated as amendments.<sup>36</sup> Other vetoes have been occasioned by violation of the one object rule when the governor’s judgment about the subject matters differs from that of the legislature.<sup>37</sup>

The judicial branch has also invalidated bills based on title defects.<sup>38</sup> In title defect cases, the entire bill may not fail. The constitution provides, “If any object shall be embraced in an act which is not so expressed, the act shall be void only as to so much thereof as shall not be so expressed.”<sup>39</sup> Thus, a defective title may limit the scope of a bill, but it may not broaden it.<sup>40</sup>

The current bill drafting manual notes that “[i]f a bill is to amend and reenact a statutory provision . . . then only the new matter or change proposed by the bill need be reflected in the title.”<sup>41</sup> However, the inadequacy of titles to

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<sup>32</sup> See *McCoy v. VanKirk*, 500 S.E.2d 534, 546 (W. Va. 1997) (explaining that the purpose of having sufficient specificity in the title is to give sufficient notice to the reader of the purpose of the act).

<sup>33</sup> W. VA. CONST. art. VI, § 30; *Rules of the House*, in *MANUAL OF HOUSE & SENATE*, *supra* note 2, R. 113, at 232 (explaining that the “one object rule” is enforced in the rules of both houses by requiring that amendments be germane); *Kincaid v. Mangum*, 432 S.E.2d 74, 79 (W. Va. 1993).

<sup>34</sup> W. VA. CONST. art. VI, §§ 1, 30; see *Allphin v. Oh. River Co.*, 306 S.W.2d 94, 95–96 (Ky. 1957) (explaining that an “amendment to a part of a section of Kentucky statutes is an amendment of the entire section,” but there is an exception when an amendment to a subsection is by itself a complete law. Therefore, an entire subsection must be set forth.).

<sup>35</sup> *Senate Glossary*, UNITED STATES SENATE, <http://www.senate.gov/reference/glossary.htm> (defining “engrossed bills” as those bills that have been passed by one house and “enrolled” bills have been passed by both houses) (last visited Jan. 13, 2016).

<sup>36</sup> *Kincaid*, 432 S.E.2d at 79 (discussing the general purpose of the “one-object” rule).

<sup>37</sup> W. VA. CONST. art. VII, § 14.

<sup>38</sup> *City of Wheeling ex rel. Carter v. Am. Casualty Co.*, 48 S.E.2d 404, 410 (W. Va. 1948) (finding that, “[t]he test of the sufficiency of the title to a statute is whether it will impart a person interested in its subject matter enough information to provide a reading of the act and to restrict its scope to a single topic”). However, as long as the title reflects the principle object of an act and other principle objects *incidental* or *auxiliary* to the stated object of the act, then the title is sufficient. See *State ex rel. City of Charleston v. Bosely*, 268 S.E.2d 590, 593–94 (W. Va. 1980).

<sup>39</sup> W. VA. CONST. art. VI, § 30.

<sup>40</sup> *BILL DRAFTING MANUAL*, *supra* note 7, at 7.

<sup>41</sup> *Id.* at 7.



previous bills that enacted the existing law may be tested upon judicial review of the constitutionality of a bill, as title defects may be raised at any time. Thus, careful drafters sometimes review the titles of prior titles associated with the enactments that created existing law as they draft the title for current amendments. The bill drafting manual's authors suggest that "[b]ecause it takes less time to prepare a title to cover the bill without regard to former titles than it does to locate and analyze the adequacy of former titles, each title should be prepared so that it can stand alone."<sup>42</sup>

All of this leads to the question of what the title should contain.<sup>43</sup> A title has several segments. First, the title opens with the traditional words "[a] bill to . . . ." repeal, amend, or reenact sections of the Code listed in that order and set forth in the order found in the Code.<sup>44</sup> Second, the drafter should set forth the actual sections that are repealing, amending, or adding to the Code.<sup>45</sup> The final words of this section are always "relating to . . . ," or in the case of multiple amended sections, "all relating to . . . ."<sup>46</sup> Third, the description of the bill's subject matter follows. A properly drafted bill must have all of these segments.

The title should give fair and reasonable notice of the bill's content and purpose, or as the manual states, the bill's "nature, scope and consequences."<sup>47</sup> Special attention should be paid to criminal penalties,<sup>48</sup> administration remedies, civil causes of actions, and other consequences that would alter the rights of persons subject to the bill's mandates.

Third, the West Virginia Constitution requires the *enacting clause* and provides its form, which states, "Be it enacted by the Legislature of West

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<sup>42</sup> *Id.* at 7.

<sup>43</sup> It may be difficult to understand the bill drafting issues through written description only. Fortunately, for drafters there are samples of bill available both on the online source and in the bill drafting manual.

<sup>44</sup> BILL DRAFTING MANUAL, *supra* note 7, at 3.

<sup>45</sup> "Sections in the title and enacting clause are to be listed in the following order: All sections that are repealed are listed *first* and in order as they appear in the Code; and All other sections included in the bill are listed in the order that they appear in the Code, except when there are sections that are amended and reenacted as well as added in the same article the clause containing the sections that begin with the section number that would appear first in the Code is listed first in the title and enacting section." *Id.* at 51 (emphasis added).

<sup>46</sup> *Id.* at 3. The bill drafting manual has made a distinction between a bill that amends only one section and a bill that amends more than one section by the language used in the title. For example, when a drafter is amending one section, it is represented with the language, "relating to . . . ." whereas, when there are more than one sections amended, it is "all related as follows . . . ."

<sup>47</sup> *Id.* at 7.

<sup>48</sup> State ex rel. Myers v. Wood, 175 S.E.2d 637, 643 (W. Va. 1970). "The courts in this and other states are strict in their decisions involving criminal matters or penalties with regard to requiring the object of the Act to be contained in the title in order to advise the public of the intention of an act passed by the legislature." *Id.*

Virginia.”<sup>49</sup> Following the enacting clause, the *enacting section* provides similar provisions of the title, and in most bills it will somewhat mirror the language of the title,<sup>50</sup> as it will identify the chapters, articles, or sections the bill is intended to repeal, amend, or add to. The final phrase in the bill enacting section states, “all to read as follows.”<sup>51</sup> Collectively, the enacting clause and the enacting section show the intentions to change the law and formally expresses the legislative sections to be added to, amended, or deleted.<sup>52</sup> A bill is not constitutional without the enacting clause and sections, and therefore, “a motion to strike out the enacting clause has the effect of killing a bill.”<sup>53</sup>

Fourth, the *chapter, article, and section headings* are also important, as these direct the reader’s attention to the chapters, articles, sections being repealed, amended, or added to the Code. It is important to remember that changes to the chapter, article, and section headings do not change the law and are inserted only to give guidance to those consulting the law in West Virginia.<sup>54</sup> The *chapter headings* are not included in the bills, unless more than one chapter is being amended, the drafter is adding a new chapter, or the chapter heading is changed.<sup>55</sup> In contrast, the *article headings, section headings, and section numbers* are set forth in all bills.<sup>56</sup> Bills amending the code should directly follow the numbering format of that code section. If the bill creates a new section, the new numbers should follow the same “logical sequence at the proper place of insertion of the code.”<sup>57</sup>

Fifth, and most important, the *body* of the bill contains the language that would, if enacted, actually change the law by repealing, amending, or adding to existing law. A section is the minimum unit required for a bill.<sup>58</sup> For

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<sup>49</sup> W. VA. CONST. art. VI, §1; BILL DRAFTING MANUAL, *supra* note 7, at 8. See TOBIAS A. DORSEY, LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE 161 (TheCapital.Net, Inc. 2006) (explaining the Senate and House of Representative of the United States of America in Congress but it is also applicable here). The *enacting clause* is specific language in the West Virginia Constitution and it remains the same in all bills originating in both the House and the Senate.

<sup>50</sup> BILL DRAFTING MANUAL, *supra* note 7, at 30.

<sup>51</sup> *Id.* The bill drafting manual has made a distinction between a bill that amends only one section and a bill that amends more than one section by the language used in the title. For example, when a drafter is amending one section, it is represented with the language, “to read as follows,” whereas, when there is more than one section amended, the language reads “all to read as follows.”

<sup>52</sup> MANUAL OF HOUSE & SENATE, *supra* note 2, at 488 (defining “enacting clause”).

<sup>53</sup> *Id.* at 493 (defining “strike out (motion to)”).

<sup>54</sup> MICHIE’S WEST VIRGINIA CODE, *supra* note 12, at xviii.

<sup>55</sup> BILL DRAFTING MANUAL, *supra* note 7, at 8.

<sup>56</sup> *Id.* at 8–9.

<sup>57</sup> *Id.* “Should the new section need to be added between existing sections as between §1-2-3 and §1-2-4, the new section would be numbered §1-2-3a.” *Id.* at 9.

<sup>58</sup> See W. VA. CONST. art. VI, § 30; see also MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 74.

example, if a drafter wants to add a new definition to a law containing several other definitions, the drafter must set forth the section of the law containing definitions in its entirety in the body of the bill. The bill language should then insert the new definition in alphabetic order and renumber for remaining definitions. For this reason, bills making relatively small changes in substantive law can be quite long if the amended section is lengthy.

The body may include (1) a *short title*<sup>59</sup> or common name assigned to the bill, which often refers to the subject matter or a tragedy, person, or event seen as a motivator for passage; (2) *findings and declarations*, presumably offered to give interpretive guidance to the agency responsible for implementation and courts; (3) *definitions*;<sup>60</sup> (4) *severability provisions*;<sup>61</sup> (5) *special assignments or instructions for agencies or officers* responsible for administering the law; and (6) a *special effective date*.<sup>62</sup>

Also, care should be taken to ensure that adding findings, declarations, and definitions do not compete with existing code sections or unnecessarily confuse the resulting state of the law after enactment. If possible, existing Code definitions should be used.<sup>63</sup> Moreover, because changing circumstances may make findings and declarations less useful over the years, some drafters disfavor them and rely on the words in the bill directly related to changes in the law. Finally, a few subjects, such as appropriations, may require consulting with experts or simply asking a committee clerk to share current style and practice.<sup>64</sup>

Sixth, and finally, an *explanatory note* follows the body.<sup>65</sup> It should be seen as complementary to the title in that it offers an explanation of the changes set forth in the body of the bill, but in terms that are more readily understood by those without specialized knowledge of the bill's subject matter. The note does

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<sup>59</sup> “[A]n abridged description of a bill.” MANUAL OF HOUSE & SENATE, *supra* note 3, at 493 (defining “short title”). Many short titles can be found in the Code. *See, e.g.*, W. VA. CODE ANN. § 46-1-101 (LexisNexis 2015) (stating that sections short title as “Uniform Commercial Code”). *See* MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 73.

<sup>60</sup> W. VA. CODE ANN. § 2-2-10 (LexisNexis 2015).

<sup>61</sup> *Id.* at § 2-2-10(cc); MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 74.

<sup>62</sup> W. VA. CONST. art. VI, § 30 (explaining effective date is 90 days after passage). Bills may specify another effective date. *Bill Effective Dates*, STATESCAPE, <http://www.statescape.com/resources/legislative/bill-effective-dates.aspx> (last visited Jan. 14, 2016). The 90 day requirement is a default rule in West Virginia. *Id.* To create an effective date earlier than 90 days from passage requires a supermajority vote of both issues. This is typically done at the time a bill is passed by each house, as a separate vote from the vote for passage of a bill.

<sup>63</sup> *See, e.g.*, W. VA. CODE ANN. § 2-2-10 (LexisNexis 2015).

<sup>64</sup> BILL DRAFTING MANUAL, *supra* note 7, at 101 (recommending drafters of appropriation bills to contact respective finance committees: House of Delegates Committee on Finance and Senate Committee on Finance).

<sup>65</sup> H.W. DODDS, PROCEDURE IN STATE LEGISLATURE 35 (Am. Acad. of Political & Soc. Sci. ed. 1918).

not change the law and should only be relied upon to help the reader determine the nature of the bill. Background facts and circumstances giving rise to the bill and comparative information are sometimes set forth in the note.

*C. Review the Constitution for Compatibility with the Bill's Substantive Changes to the Code*

The West Virginia Constitution both mandates and limits the form and content of a bill. Drafters must consult the state Constitution in order to ensure their bill is in compliance and consistent with the Constitution's provisions.<sup>66</sup> A drafter's failure to understand the form and language requirements, along with the constitutional limitations, could result in complications with the bill's enacting process or potential court challenges.<sup>67</sup> To prevent challenges to the constitutionality of the bill, drafters must take the time to understand the constitutional provision that might affect a drafter's bill, including mandatory bill provisions and constitutional limitations.

Among the more important provisions are the "one object rule" for titles<sup>68</sup> and the required language for the enacting clause, including the enacting section.<sup>69</sup> West Virginia courts and governors have seriously considered these procedural requirements and have struck down or vetoed many bills for invalid titles and enacting clauses. Therefore, it is crucial for the drafter to understand that "[e]ven though these requirements may seem extremely technical, following them is mandatory."<sup>70</sup>

Our federal and state constitutions also impose substantive limitations on the legislature's actions. These constitutional limitations create limitations on drafting, enacting, and enforcing laws. As a result, drafters should consider the constitutional limitations and understand their constraints in bill drafting. While the many substantive limitations on legislative power are beyond the scope of this Article, the prudent drafter will consider, in advance, how constitutional issues might be avoided.

*D. Draft the Bill Observing Legal and Traditional Stylistic Mandates*

Once the preparatory work is done, it is time to move on with the actual drafting of the bill. A traditional order in which the bill might be drafted is the body, note, title, enacting clause, and headings. Drafter should pay special attention to three issues during the drafting process: the complexity of the language used in the bill, existing provisions of the code that may be

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<sup>66</sup> See LEGISLATIVE COUNSEL COMM. STATE CAPITAL, BILL DRAFTING MANUAL 2.4, 9.16, 17.1 (16th ed. 2012), [www.lc.state.or.us/pdfs/draftingmanual.pdf](http://www.lc.state.or.us/pdfs/draftingmanual.pdf).

<sup>67</sup> See MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 66.

<sup>68</sup> W. VA. CONST. art. VI, § 30.

<sup>69</sup> W. VA. CONST. art. VI, § 1.

<sup>70</sup> MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 66.

applicable to the subject matter, and the implementation process that will follow enactment.

First, there is some debate about how “plain” or “complex” the language of the body should be.<sup>71</sup> Some argue that the times are complex and may require complex language.<sup>72</sup> Others, asserting a more modern and accepted view, believe the language used in a bill should be plain English and easily understood by the reader.<sup>73</sup> Our experience teaches that while confusion during enactment, vigorous debate, and hurried compromises often lead to vague and complex language, bills in West Virginia should initially be drafted to be understood by as wide an audience as possible. Ambiguity and complexity are to be tolerated only when necessary.<sup>74</sup>

Second, as mentioned above, over time, the West Virginia Legislature has added provisions to the Code that offer frequently used definitions and default outcomes related to legislation, such as common definitions,<sup>75</sup> effective dates,<sup>76</sup> severability of provisions if the bill is constitutionally challenged,<sup>77</sup> and rule making authority.<sup>78</sup> The drafter should review such provisions in order to determine the extent to which they might be relevant to the bill. If so, a reference to them might indicate the willingness to follow existing law on those particular matters or new language might be needed in order to make sure that such provisions are not “read into the bill” in unintended way by the judiciary or the executive.

Drafters also should take care to give appropriate attention to implementation when drafting the body of the bill. Normally, the major changes in the law receive attention from the drafter, but details that will foster or ensure a strong implementation of the bill’s mandates are often overlooked. Detailed implementation provisions include different effective dates for different provisions, special instructions for agencies that will implement the bill, and provisions requiring the establishment of related agencies or commissions for executive departments.

The current bill drafting manual contains stylistic requirements to which the bill should conform, including rules related to capitalization, word processing formats, heading spacing, dates and numbers, punctuation, grammar, preferred words and phrases, strike-through punctuation rules, subsection and division custom, special drafting rules, use of agency and

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<sup>71</sup> MARTINEAU, LEGAL DRAFTING, *supra* note 8, at 10–11.

<sup>72</sup> *Id.* at 10.

<sup>73</sup> *Id.* at 11.

<sup>74</sup> *Id.* at 10.

<sup>75</sup> *See, e.g.*, W. VA. CODE ANN. § 2-2-10 (LexisNexis 2015).

<sup>76</sup> *See* W. VA. CONST. art. VI, § 30. *See generally* MARTINEAU, PLAIN ENGLISH, *supra* note 17, at 75.

<sup>77</sup> *See* W. VA. CODE ANN. § 2-2-10(cc) (LexisNexis 2015); MARTINEAU, PLAIN ENGLISH, *supra* note 17, at 74.

<sup>78</sup> W. VA. CODE ANN. § 29-3-1 (LexisNexis 2015).

subdivision names, and much more. The manual should be consulted after the idea for the bill is firmly in mind, but probably before actual drafting takes place. Careful attention to style detail is a hallmark of a skillful drafter. The bill drafting manual contains many conventions and protocols that are foreign to most lawyers, and indeed fundamentally at odds with styles typically used in drafting contracts and corporate documents.

*E. Have the Bill Reviewed by the Sponsor and Subject Matter Experts*

Given the complexity of the undertaking, even experienced bill drafters or a team of lawyers need extra pairs of eyes to look over the proposed bill. “[T]he drafting process does not usually end with the first draft.”<sup>79</sup> First, subject matter experts can offer comments related to the object of the bill and its relationship to existing code sections, or even to other bills that are likely to be introduced or carried over to the next session. Second, and importantly, sponsors will want to make sure the bill carrying their name fits within their political and policy frame of reference. Presenting the bill to experts and sponsors can be especially helpful if a “white paper” explaining the bill and written testimony supporting the bill is presented at the same time.

#### IV. CONCLUSION

The importance of good drafting should not be underestimated. A small minority of bills introduced in the West Virginia Legislature pass each year.<sup>80</sup> For example, in the 2015 regular legislative session, only 15% of the bills introduced were passed.<sup>81</sup> There are many reasons why this is so. Legislative sessions normally are limited in time,<sup>82</sup> and committees’ busy agendas often require sponsors to fight for attention for their bills. Supporters of the proposed policy change may prefer executive action or judicial remedies, arguing that legislation should be a last resort. Building consensus in order to achieve required votes takes time. “Friendly amendments” intended to improve a concept may in fact make it more complicated and therefore require more time for consideration. Political opposition typically slows the enactment process. Further, compromise and politics are part of the legislative process. Bills reversing executive action and judicial decisions require investigation and

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<sup>79</sup> MARTINEAU, PLAIN ENGLISH, *supra* note 16, at 15.

<sup>80</sup> See *Bill Status—2015 Regular Session*, W. VA. LEGIS., [http://www.legis.state.wv.us/bill\\_status/Bills\\_all\\_bills.cfm?year=2015&sessiontype=rs&btype=bill](http://www.legis.state.wv.us/bill_status/Bills_all_bills.cfm?year=2015&sessiontype=rs&btype=bill) (last visited Jan. 14, 2016).

<sup>81</sup> See *id.*

<sup>82</sup> See W. VA. CONST. art. VI, § 22; see also *Legislative Session Length*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/about-state-legislatures/legislative-session-length.aspx> (explaining that legislative session length can be limited and may be found in constitution, statute, or chamber rule) (last visited Jan. 14, 2016).

debate. By its very nature, therefore, law making by the legislature is most often termed “deliberative,” or even “slow.”<sup>83</sup>

Furthermore, the Legislative Services review every bill for form and style and provides helpful “subject matter” advice prior to bill introduction, which can consume additional time.

For these reasons, drafters should play close attention to bill drafting requirements in order to avoid extended delays in bill introduction. A well-drafted bill should and will assist the enactment process,<sup>84</sup> and often can make the difference between a bill that becomes law, and one that fails to achieve passage.

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<sup>83</sup> GARY LEE MALECHA & DANIEL J. REAGAN, *THE PUBLIC CONGRESS: CONGRESSIONAL DELIBERATION IN A NEW MEDIA AGE* 143 (Routledge, Taylor & Francis 2012).

<sup>84</sup> To better understand the bill drafting process from start to finish, drafters should reference *Bill Status—2016 Regular Session*, W. VA. LEGIS., [http://www.legis.state.wv.us/Bill\\_Status/bill\\_status.cfm](http://www.legis.state.wv.us/Bill_Status/bill_status.cfm) (last visited Jan. 14, 2016). Here, drafters can search for bills in various way, such as bills affecting the code, subject, sponsor(s), etc.