

How an Idea Becomes a Law — the Politics of Politics

By Mark Ashton and Lawrence “Skip” Persick

Just about all of us were subjected to “democracy” courses attempting to inform us how the legislative process works. This article will not attempt to inflict upon the reader another recitation of how a bill is enacted in a procedural sense. Too boring. Rather, it is an effort to describe what really happens in Harrisburg.

Pennsylvania has 203 state representatives and 50 senators. They all have offices in Harrisburg and in their districts equipped with telephones that permit any of our state’s 12,800,000 residents to phone in with their unique list of legislative “must haves.” These lists include both the ridiculous as well as the sublime. If the legislator is moved by the entreaties of a constituent, he or she will draft and submit a bill. PBA gets the bills as soon as they are submitted and scans them to see whether anyone in our legal community (sections, committees, or leadership) would have an interest. Those so identified are notified, although this is an imperfect system. There are times when a bill has implications for family law that are not apparent at first reading. There are also times when different committees and sections have conflicting views about the merits of a bill or the language used to draft it. There is also the issue of myopia. Every section and committee tends to think its legislative concerns are PBA’s only concerns.

While in our Government 101 course, every bill was deemed to be evaluated on its merits, this does not occur outside the classroom. Within the legislature, the names of the co-sponsors telegraph a lot of information about a bill’s future. There may be 250 gorillas in the Harrisburg jungle, but despite the fact they each have a single vote, not all gorillas weigh the same. Moreover, as we know from the annual budget process in Harrisburg, there are many rumbles in the jungle and the gorillas are divided into two packs defined by party affiliation. Currently the Republicans run the jungle, and bills submitted by Democrats are viewed with skepticism. This is not to say bi-partisanship is completely dead. Even Democrats can succeed in finding Republican co-sponsors if the legislation involves a target everyone likes to hit (e.g. criminals).

In practical terms, this is where the process develops a kind of submarine aspect. A bill is submitted. The first step is to see who submitted and co-sponsored it. From that, we can handicap the bill’s prospects for passage. Few sponsors, minority party sponsors, or sponsors perceived to “not play ball” with the majority leadership are often earmarked as “DOA” (dead on arrival). But, as the bill gets a committee assignment, or anytime during the legislative session, it can suddenly find new sponsors. In Government 101 class, new sponsors are the product of the merit in the legislation--not necessarily so here. As we write this there could be a bill sleeping in Harrisburg concerning utility regulation. On July 13, 2019 somebody hit the “off” switch at Con Ed’s power transmission center in Manhattan such that the lights went off on Broadway and a few hundred thousand New Yorkers went three hours without power. If that sleeping utility regulation bill in Pennsylvania could show our citizens that the General Assembly is making damn sure that power will never be interrupted in Pennsylvania, that bill could have 30 new sponsors next week and be set for expedited hearings. Very few legislators favor power interruptions. And, be certain that the lobbyists for Pennelec, Penn Power & Light, as well as PECO were dispatched to walk the floors of Harrisburg on the following Monday to assure any worried legislators that what happened in New York was not going to happen in our mighty Commonwealth.

Of course, outside events are not the only thing that moves legislation that we perceive as stymied by weak parentage. Senator "A" is a member from an agricultural district. He's in the majority party and viewed as "solid" by leadership, meaning that he votes with the caucus unless he risks ticking off the powerful who reside in his district. A weak colleague from the evil (minority) side of the party submits a bill. It has thin sponsorship and is headed for oblivion (no hearings, no action). The bill concerns domestic violence. Now, again, the forces in the Senate who condone or approve of domestic violence are rather thin. But this bill was submitted by the minority party and the majority leadership has plenty of other stuff to do. So, it has no future until Senator A gets a phone call from the head of his county's farm bureau who happens to also be on the county's Republican Central Committee. The constituent calls Senator A and tells him that his daughter living in Pittsburgh was just beaten up by her fiancé and that the law needs to be changed to stop this domestic violence nonsense.

Now the wheels of Senate Bill 102 will start to move. Senator A is going to ask his staff, "what's in the hopper that is going to help me show my constituent that I am responsive and no friend to men who beat women." Staff responds that there is such a bill but it has no legislative legs. "Who's the sponsor?" Well it's Senator B from Philadelphia. "That punk, I hate him and I hate the city he comes from. But I need to show my peeps that I'm effective so call him up and tell him that I'll not only co-sponsor the bill but I'll get at least five other Republicans to join me. And if he comes my way on next week's vote to support my agriculture bill, I'll get leadership to schedule hearings."

From a legislative viewpoint, we aren't notified when the domestic violence occurred in Pittsburgh, and no one told us about the call to Senator A or his staff member's conversation with the senator who submitted the bill. What we may catch is that suddenly this bill is getting bi-partisan co-sponsorship from people who matter within the Senate. Obviously when things are put on a hearing calendar, we do know and that's usually when PBA will reach out to our section and say "this bill is not just on a radar, it actually may get on the flight deck." A couple weeks before, this was in the hangar with no expectation it would ever emerge to go anywhere. Not every bill gets a hearing. Also, bills that are not passed in a two-year legislative session die and need to be resubmitted. We have seen many bills important to the Family Law Section die multiple deaths over many years. Some even got as far as a hearing and seemed "on the way" to passage but never made it as the legislature went on to other tasks. Bills can also pass without any hearings as we saw occur in the U.S. Congress when it passed the 2017 tax reform. It happens in Harrisburg as well, often because a former version of the bill was already vetted in a prior session of the assembly.

Once a bill begins to "run," meaning that it starts to move towards a floor vote, PBA can track its status closely, typically by checking with sources close to leadership. However, the legislative process is not a conveyor belt. We are currently tracking a bill (H.B. 1397) that proposes to presume shared custody unless clear and convincing reasons are presented to reject such arrangements. That bill was slated for hearings this summer, but they were postponed while the assembly wrestles with the budget. This bill is a tricky one because lots of fathers' groups like it and the coalition of groups that might resist it is somewhat diffuse. PBA has taken a position against this bill but our position is one that many will discard on the basis that "lawyers want more custody litigation, not less." This kind of bill is not really a legislative priority so it might "run" with another piece of litigation. It is likely that our legislative representatives will call the section chair (Michael Bertin) one day and tell him that the bill is going to the floor for passage. There is no set procedure concerning when or how bills come to the floor except that they don't get there without approval of majority leadership. Ironically H.B. 1397 seemed to be on a fast track to "run" just a couple weeks after it was introduced. But, saner heads prevailed, and it appears that there will be hearings.

It also merits noting that a bill that seems to have traction and is headed for passage can often be derailed. Recall our example of how Senator A suddenly gave a boost to an otherwise moribund bill submitted by a powerless minority member. That boost could stall out in mid-flight because the coalition of majority support that Senator A had organized for the bill starts to dissipate. That could be related to the bill itself (e.g. “we can’t support the bill without amendments” or “the addition of a firearms regulation in the bill means withdrawal of majority support.”). Or, it could be related to a fight by bill supporters over a completely unrelated subject. Many coalitions in support of a bill fracture over sometimes minor details. Senator A may have garnered support from his fellow Republicans for the domestic violence bill only because he had agreed to support them on matters for which they wanted his support. Sometimes our legislative team can track this closely. Sometimes, the fight is so deep in the party caucus that it becomes invisible. In the end, many bills die quiet deaths for reasons too obscure to divine.

It is a challenging yet exciting task and we have an astute team of observers in Fred Cabell and Ashley Murphy. The proof of this is delivery of our long-sought reduction in the length of divorce separations from two to one year in 2016 and our quick response to the Supreme Court ruling in 2016 on standing in custody matters that produced a new statute within a year. We have the resources to do good, but it is not the process you were taught in high school.