**Board of Governors Special Meeting**
**WSBA Conference Center**
**February 15, 2018**
**12:00 pm – 2:00 pm**

***WSBA Mission: To serve the public and the members of the Bar, to ensure the integrity of the legal profession, and to champion justice.***

**Public Session Conference Call Information:**
**Dial 1.866.577.9294**
**Code 52810 (followed by #)**

# AGENDA

**12:00 P.M. – EXECUTIVE SESSION**

**12:30 P.M. – PUBLIC SESSION**



**2:00 P.M. - ADJOURN**

The WSBA is committed to full access and participation by persons with disabilities to Board of Governors meetings. If you require accommodation for these meetings, please contact Kara Ralph at karar@wsba.org or 206.239.2125.

WASHINGTON STATE
BAR ASSOCIATION

MEMO

To: WSBA Board of Governors

From: Chris Meserve, Chair, BOG Legislative Committee; Sanjay Walvekar, WSBA Outreach and Legislative Affairs Manager

Date: January 31, 2018

Re: Civil Rights Law Section Request to Make Public Comments in Support of SB 6052

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**ACTION:** Consider the Civil Rights Law Section's request to make public comments in support of legislation to eliminate the death penalty in Washington State (SB 6052).

The BOG Legislative Committee met on January 26, 2018, to discuss a January 23, 2018, memo from the Civil Rights Law Section proposing that the Section make public comments in support of SB 6052 (An Act Relating to reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder).

The Committee followed a two-step analysis to consider this proposal. First, the Committee discussed whether the legislation is within the scope of GR 12.1. Second, the Committee discussed whether it is appropriate to seek input from the full Board of Governors. At its January 26th meeting, the Committee voted as follows:

(1) The legislation is within the scope of GR 12.1.
(2) Discussion should be postponed until the Board of Governors is able to consider this issue, as permitted by WSBA Bylaws allowing the Committee to determine that major or novel legislative issues be referred to the Board of Governors for consideration.

# WSBA LEGISLATION AND COURT RULE COMMENT POLICY

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*(Amended November 13, 2015 Board of Governors Meeting)*

**Purpose:** This policy governs Section, Panel, Committee, Division or Council (hereinafter collectively referred to as 'Entity') authority to comment publicly on state and federal court rules and legislation, and clarifies the conditions under which such Washington State Bar Association (WSBA) entities can comment publicly on state and federal court rules, legislation, executive orders, administrative rulemaking, and international treaties. For purposes of this policy, to "comment" means to take a position (for example, expressing support, concerns, or opposition) with or without accompanying statements explaining the position; it also means to provide input (for example, suggested amendments, recommendations, analysis, or comments to the media) without taking a position.

**Policy:** The Board of Governors, the Executive Director, the WSBA Legislative Committee, the Board of Governors Legislative Committee, and the Legislative Affairs Manager, are authorized to refer legislative proposals (including bills, initiatives, referenda, and resolutions) or proposed court rule changes[1] to Entities of the WSBA for their consideration. Entities are authorized to appear before or otherwise publicly comment on legislation to the Legislature or Congress, or a committee of the Legislature or Congress, or to publicly comment on any proposed state rule change pursuant to Washington Supreme Court General Rule (GR) 9(f), or to publicly comment on any federal proposed rule change, only under the following conditions:

1. The Entity may not comment publicly on federal legislation or federal court rules without prior written authorization of the Board of Governors, and such authorization may be subject to limitations established by the Board of Governors.

2. The Entity may not publicly comment unless: (a) at least 75% of the total membership of the Entity's governing body has first determined that the matter under consideration meets GR 12; and (b) after determining that the matter meets GR 12, that the comments are the opinion of at least 75% of the total membership of the governing body of the Entity. A subcommittee or other subset of an Entity may not publicly communicate its comments on proposed legislation or court rules. For purposes of commenting on legislation and court rules, subcommittees and subsets of a Section may serve in an advisory capacity to the Section's governing body; however only the Entity's governing body or an entity member who has been expressly authorized by the Entity's governing body may publicly comment on legislation and court rules.

[1] The WSBA Court Rules and Procedures Committee routinely vets proposed Court Rules to various WSBA Entities, scrubs those proposals, and then either supports or opposes having the Board of Governors recommend those proposals to the Supreme Court Rules Committee. This process continues to be permitted under this Policy.

3. The Entity shall not publicly communicate comments on a legislative or rule proposal that are in conflict with or in opposition to decisions or policies of the Board of Governors or Board Legislative Committee, including GR12 analyses.

4. The Entity shall seek authorization from the Legislative Affairs Manager or the Board Legislative Committee Chair prior to publically communicating with anyone. If authorization is granted, Entities must clearly state that their comments are solely those of the Entity, and not the official comments of the WSBA. In order to officially comment on behalf of the WSBA, the Entity must have the prior written approval of the Board of Governors, and any comments will be subject to limitations established by the Board of Governors. Entities are not permitted to comment on local or municipal policies or legislation.

5. The Entity is responsible for advising the Executive Director, the Board of Governors, the Board of Governors Legislative Committee, and the Legislative Affairs Manager, on an ongoing basis, regarding decisions, comments, and actions of the Entity. The Entity shall advise the Legislative Affairs Manager of any proposed action intended to publicly communicate its comments on legislation in advance of taking such action. Unless otherwise authorized by the Executive Director, the Board of Governors, or the Board of Governors Legislative Committee, the Entity shall follow the advice, guidance, and recommendations of the Legislative Affairs Manager in taking any action.

6. In all cases, the Entity representatives shall cease to publicly communicate the comments of the Entity if requested to do so by the Executive Director, the Board of Governors, the Board of Governor's Legislative Committee, or the President of the Bar; and, in the case of comments on legislative proposals, the Entity representatives shall also cease to publicly communicate the comments of the Entity if requested to do so by the Legislative Affairs Manager.

7. Entities are prohibited from joining or affiliating with groups or associations whose legislative advocacy reaches beyond the areas allowable under GR 12.

WSBA

Washington State Bar Association

**GENERAL RULE 12.1(C) ANALYTICAL STATEMENT**
Adopted by the Board of Governors 10/22/04

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## I. PURPOSE

The Washington State Bar Association is frequently requested to take a position on political or social issues and/or proposed or pending legislation. This always raises the question of whether, pursuant to general Rule 12.1, the Washington State Bar Association is allowed to take a position on such matters. Specifically, GR 12.1(c) outlines activities of the bar association that are not authorized. While GR 12.1(c)(1) and (3) are straightforward, GR 12.1(c)(2) often raises questions. The purpose of this policy statement is to address those issues.

GR 12.1(c) reads as follows:

> **(c) Activities Not Authorized.** The Washington State Bar Association will not:
> (1) Take positions on issues concerning the politics or social positions of foreign nations;
> **(2) Take positions on political or social issues which do not relate to or affect the practice of law or the administration of justice**;
> (3) Support or oppose, in an election, candidates for public office.

This same prohibition is stated in Article I of the Bylaws of the Washington State Bar Association.

This memorandum is not intended to be definitive work on this issue, but rather to provide some guidance for future issues that come before the BOG.

## II. THIS IS NOT A *KELLER* ISSUE ALTHOUGH THAT CASE SHEDS SOME LIGHT ON GR 12.1(C)'S MEANING

In the case of Keller v. State Bar of California 496 U.S. 1 (1990), a group of California attorneys challenged the state bar's use of their dues for political or ideological

activities. They argued that as members of an integrated or mandatory bar it was a violation of their First Amendment right of free speech. The Supreme Court disagreed. The Court held:

> Here the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services. The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity. The difficult question, of course, is to define the latter class of activities.

The court further ruled that some mechanism would have to be put in place where members would not be compelled to pay that portion of their dues that financed activities not germane to regulating the legal profession and improving the qualities of legal services. Washington has implemented such a system.

The one issue that Keller did not address was whether or not it was a violation of the First Amendment to ever take a position on anything of a political or ideological nature when members of the bar are forced to be members. They stated:

> In addition to their claim for relief based on respondent's use of their mandatory dues, petitioners' complaint also requested an injunction prohibiting the State Bar from using its name to advance political and ideological causes or beliefs. . . . This request for relief appears to implicate a much broader freedom of association claim than was at issue in *Lathrop [v. Donohue, 367 U. S. 820 (1961)].* Petitioners challenge not only their "compelled financial support of group activities," but urge that they cannot be compelled to associate with an organization that engages in political or ideological activities beyond those for which mandatory financial support is justified under the principles of *Lathrop* and *Abood [v. Detroit Board of Education, 431 U. S. 209 (1977)].* The California courts did not address this claim, and we decline to do so in the first instance. The state courts remain free, of course, to consider this issue on remand.

It appears that under Keller, it is acceptable to engage in activities of a political or ideological nature, as long as the members do not have to pay for activities not related to "regulating the legal profession and improving the quality of legal services." But that does not conclude the issue of GR 12.1(c), which dictates that the WSBA cannot take positions on "political or social issues which do not relate to or affect the practice of law or the administration of justice."

The activities that were at issue in Keller were described as follows:

> Some of the particular activities challenged by petitioners were

described in the complaint as follows:

> (1) Lobbying for or against state legislation prohibiting state and local agency employers from requiring employees to take polygraph tests; prohibiting possession of armor-piercing handgun ammunition; creating an unlimited right of action to sue anybody causing air pollution; creating criminal sanctions for violation of laws pertaining to the display for sale of drug paraphernalia to minors; limiting the right to individualized education programs for students in need of special education; creating an unlimited exclusion from gift tax for gifts to pay for education tuition and medical care; providing that laws providing for the punishment of life imprisonment without parole shall apply to minors tried as adults and convicted of murder with a special circumstance; deleting the requirement that local government secure approval of the voters prior to constructing low-rent housing projects; requesting Congress to refrain from enacting a guest-worker program or from permitting the importation of workers from other countries;
>
> (2) Filing *amicus curiae* briefs in cases involving the constitutionality of a victim's bill of rights; the power of a workers' compensation board to discipline attorneys; a requirement that attorney-public officials disclose names of clients; the disqualification of a law firm; and
>
> (3) The adoption of resolutions by the Conference of Delegates endorsing a gun control initiative; disapproving the statements of a United States senatorial candidate regarding court review of a victim's bill of rights; endorsing a nuclear weapons freeze initiative; opposing federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing. App. 9-13.

So which activities are of a political or ideological nature? Here is the answer given by Keller:

> Precisely where the line falls between those State Bar activities in which the officials and members of the Bar are acting essentially as professional advisers to those ultimately charged with the regulation of the legal profession, on the one hand, and those activities having political or ideological coloration which are not reasonably related to the advancement of such goals, on the other, will not always be easy to discern. But the extreme ends of the spectrum are clear: Compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid constitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession.

## III. THE PROBLEM PHRASES IN GR 12.1

### A. "ADMINISTRATION OF JUSTICE"

The phrase that gives most people some trouble is "the administration of justice." The term "justice" in and of itself can invoke all sorts of opinions on what "justice" requires. Every proponent of a legislative bill or resolution claims that "justice" demands its passage, and the opponents equally claim that "justice" requires its defeat. If we viewed the term "justice" in and of itself, then it would appear that there are no limits on what the Washington State Bar could do.

However, the phrase is not just the word "justice," but "the administration of justice." First, relying solely on dictionaries, the term "administration" is defined in the Oxford English Dictionary as:

> **1.** The action of administering or serving in any office; service, ministry, attendance, performance of duty. *Obs.* in general sense.
> **2.** Performance, execution
> **3.** Management (*of* any business).
> **4.** *ellipt.* The management of public affairs; the conducting or carrying on of the details of government; hence, sometimes, used for *government*.
> **5.** The executive part of the legislature; the ministry; now often loosely called the 'Government.'
> **6.** *Law*. The management and disposal of the estate of a deceased person by an executor or administrator. *spec.* As opposed to *probate*, The authority to administer the estate of an intestate, as conferred by *Letters of Administration* granted, formerly by the Ordinary, now by the Probate Division of the High Court of Justice.
> **7.** The action of administering something to others: **a.** Dispensation (of a sacrament, of justice, etc.). **b.** Giving or application (of remedies). **c.** Tendering (of an oath).

Black's Law Dictionary defines "administration" as follows:

> **Administration:** Management or conduct of an office or employment; the performance of the executive duties of an institution, business or the like. In public law, the administration of government means the practical management and direction of the executive department, or of the public machinery or functions, or of the operations of the various organs or agencies. Direction or oversight of any office, service, or employment. Greene v. Wheeler, C.C.A. Wis., 29 F.2d 468, 469. The term "administration" is also conventionally applied to the whole class of

> public functionaries, or those in charge of the management of the executive department.

The dictionary definitions leave little room for arguing that "administration" means anything more than the functional administration of the justice system. That would be everything from court rules to court funding to the operations of the courts.

There is no case law defining the "administration of justice" as it is used in GR 12.1. However, there is one case that is closely related, In Re Staples, 105 Wn.2nd 905 (1986). In a judicial disciplinary proceeding, petitioner Judicial Qualifications Commission charged the respondent judge with violating judicial ethics under former Code of Judicial Conduct Canon 7(A)(4) by campaigning for relocation of a county seat. The commission recommended that he be admonished.

When a new justice center was constructed in Kennewick, the courthouse in Prosser, the county seat, became underutilized. Disagreeing with the decision to update the old courthouse, the judge initiated a campaign to relocate the county seat to Kennewick. He circulated petitions, made campaign speeches, organized a committee, and ran ads in local newspapers -- but he did no fund-raising. The commission charged him with violating Canon 7(A)(4) which provided that "A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice." It recommended a private admonishment, but the judge refused to accept its ruling. On review, the Supreme Court dismissed the charge without discipline. It explained that activities of the judge fell within the exception in Canon 7(A)(4), regarding political activities designed for the improvement of the administration of justice. The court held that the commission's interpretation of Canon 7(A)(4) was too narrow.

The Court rejected any kind of interpretation of the "administration of justice" that would only ". . . include measures directly relating to the actual administering of the law (*i.e.,* court rules, procedure), and not measures such as this which would have a significant effect on the way in which justice is administered." Staples, at 909.

The Court concluded at 910 as follows:

> Furthermore, judges have specifically been allowed to enter political activity designed for the better administration of justice. This provision exists because "of the important and sometimes essential role of judges in legal reform." *Reporter's Note,* at 97. If judges would have to remain silent, with their necessary expertise in matters of improving the law, then beneficial legal reform would be seriously impaired. Furthermore, a judge does not lose his rights as a citizen by assuming the bench.
>
> The Commission has held that Judge Staples' actions nevertheless do not fit within the "administration of justice" exclusion. We disagree. All the judges of Benton County agreed that duplicate courthouses would effectuate duplicate costs and time delays, and greatly inconvenience the majority of taxpayers. Furthermore, Judge Staples, with his

> experience in the judicial system, would necessarily have an added awareness of the difficulties of such parallel courthouses. We conclude it would be contrary to the purpose of the exclusion provided in Canon 7 to prohibit a judge from attempting reform under such circumstances.

This case could be read narrowly or expansively. The facts of the case seem to make it fall within the definitions of "administration" as set forth in dictionaries. That is, duplicative courthouses would be an "administrative concern." On the other hand, when the Court uses language like "the important and sometimes essential role of judges in legal reform," then one wonders how far this point could be pushed.

Other cases that use the term "administration of justice" also tend to use it in the more narrow sense. The court in In the Matter of the Application for a Writ of Habeas Corpus of Ross R. Miller, v. B. J. Rhay, as Superintendent of the State Penitentiary, 1 Wn.App. 1010 (1970), was concerned about the effect the retroactive application of a law would have on the administration of justice. Another court held that: "It is certainly necessary to the due administration of justice that a defendant be tried by a fair and impartial tribunal." The State of Washington, on the Relation of Edward M. McFerran, v. Justice Court of Evangeline Starr, 32 Wn.2d 544 (1949). The court may continue a trial date beyond the speedy trial rule when the administration of justice requires it. State v. Dorsey , 72 Wn. App. 85 (1993).

### B. "AFFECT THE PRACTICE OF LAW"

GR 12.1(C) (2) also uses the phrase "affect the practice of law." Here again is a phrase that could be read narrowly or expansively. On the one hand, it could be read as being limited to issues such as bar admissions, the bar exam, disciplinary measures, and the like. On the other hand, one could say that the passage of "tort reform" would affect the practice of medical malpractice lawyers, as opposed to raising or lowering the drinking age, which would not directly affect anyone's practice.

January 23, 2018

**TO:** Board Of Governors Legislative Committee
**FROM:** WSBA Civil Rights Law Section

**RE:** CRLS Public Comment Supporting the SB 6052 (An Act Relating to reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder)

## I. Proposal for Action:

Washington legislators in the 2018 legislative session are considering a bill (SB 6052) that would replace the death penalty with a sentence of life imprisonment without possibility of parole as the sentence for aggravated first degree murder.1 SB 6052 is hereinafter referred to as "the Bill." On January 10, 2018, the Executive Committee of the WSBA Civil Rights Law Section (CRLS) reviewed the Bill and the required super-majority (75%) unanimously voted as follows:

a. **The Bill, if passed, would have a significant positive impact on the administration of justice and**

b. **The CRLS Executive Committee will make public comments in support of the Bill in accordance with GR 12.1 and the WSBA Legislation and Court Rule Comment Policy.**

## II. Description of the Bill and Reasons for Supporting It

### A. What the Bill Would Do

The Bill would eliminate the death penalty as a sentencing option in Washington for individuals convicted of the crime of aggravated first degree murder, amending RCW 10.95.030. These individuals instead would be sentenced to life imprisonment without possibility of release or parole. The Bill would also repeal the provisions at RCW 10.95.030(2) authorizing a sentence of death, and repeal other sections of RCW 10.95 related to special sentencing proceedings for the death penalty.[2]

### B. Background

Prior to becoming a Section, for many of the reasons that are discussed below, the WSBA Civil Rights Law (CRL) Committee had abolition of the death penalty in Washington State as a priority issue. The WSBA CRL Section agrees with the former Committee that this issue involves important civil rights issues that satisfy the Section's mission and justify its support for the Bill.

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[1] *See* http://app.leg.wa.gov/billsummary?BillNumber=6052&Year=2017

[2] Specifically, the Bill repeals the following: RCW 10.95.040, 10.95.050, 10.95.060, 10.95.070, 10.95.080, 10.95.090, 10.95.100, 10.95.110, 10.95.120, 10.95.130, 10.95.140, 10.95.150, 10.95.160, 10.95.170, 10.95.180, 10.95.185, 10.95.190, 10.95.200, and 10.95.900.

Moreover, as discussed in section C. below, the Section believes support for the Bill satisfies the requirements of GR 12.1.

The Bill is a bipartisan effort, and supporters give many different reasons for endorsing the Bill, including court costs, concerns for victim's families, and ethical or religious objections.

Some supporters are interested in improving the administration of justice and saving costs by not wasting large amounts of scarce resources on the few cases where the death penalty is sought, and the costly and lengthy mandatory appeal process when it is imposed. A 2015 study showed that in Washington death penalty cases cost an average of $1 million more to prosecute than comparable cases where the death penalty is not sought.[3] Three King County death penalty cases cost taxpayers almost $10 million just in trial preparation costs.[4] Prosecutors in several counties have acknowledged publicly that their counties cannot afford to pursue the death penalty.

Others support the Bill because it better serves the needs of murder victims' families by reducing delays in the infliction of the punishment. Delays in certain punishment in death penalty cases prolong the pain of victims' family members and may cause secondary trauma. Perversely, in the death penalty cases the public focus to be on the perpetrators, turning them into media celebrities while the murder victim and the needs of family members are forgotten. Repealing the death penalty and requiring the offender to serve a sentence of life in prison would give victims' families swift and certain justice.

Still others have social concerns about the imposition of the death penalty due to geographic and racial disparities in the way the death sentence is imposed, flawed convictions, and the lack of proportionality in its imposition. A recent study showed that jurors in Washington are three times more likely to recommend a death sentence for a black defendant than a white defendant in a similar case.[5] Numerous national studies have also shown that the death penalty is sought more often against people who kill white victims than black or Hispanic victims.[6] Another telling statistic the implicates both costs and the needs of murder victims' families is that in nearly 80% of cases in Washington where a death sentence was imposed since 1981, excluding those currently on death row whose cases are still being litigated, the death sentence ended up being reversed for some form of legal error.[7] In those cases of reversed sentences, a large amount of money was wasted seeking the death penalty, only to result in long delays, prolonged pain for victims' families, and, eventually, a sentence of life without the possibility of parole.

There are also grave ethical concerns about imposing the ultimate sentence of death for defendants who may have been wrongly convicted. 161 people nationwide have been exonerated from death

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[3] *See* https://www.seattleu.edu/artsci/departments/criminal/center-for-the-study-of-crime-and-justice/death-penalty-cost-study/

[4] *See* https://deathpenaltyinfo.org/node/5938

[5] *See* https://deathpenaltyinfo.org/node/5696

[6] *See* http://www.ncadp.org/pages/race-of-the-victim

[7] *See* https://www.seattleu.edu/artsci/departments/criminal/center-for-the-study-of-crime-and-justice/death-penalty-cost-study/ (of the 24 cases that have completed their appellate review, 18 resulted in either the conviction and/or the death sentence being reversed).

row since 1973.[8] One of those cases occurred in Washington.[9] The CRLS Executive Committee is aware of evidence showing numerous exonerations of wrongly convicted defendants based on DNA or other evidence, including those on death row. The Committee is also aware of widely publicized recent problems in carrying out executions, in which gruesomely botched executions occurred.

Moreover, there is no evidence that the death penalty deters crime; in fact there are studies indicating that states without the death penalty have lower murder rates.[10]

Finally, there are religious, moral, and humanitarian concerns about imposition of the death penalty. In 1948 the United Nations (the UN) adopted, without dissent, the Universal Declaration of Human Rights. The Declaration proclaims the right of every individual to protection from deprivation of life. It also states that no one shall be subjected to cruel or degrading punishment. The death penalty violates both of these fundamental rights. Since then, the UN has passed 10 other protocols or resolutions regarding limitations on death sentences, moratoriums on executions, and abolition of the death penalty. Currently, over two-thirds of the countries in the world – 139 – have now abolished the death penalty in law or practice. Nationally, the trend shows more states are also declining to use the death penalty. 19 states and the District of Columbia have now abolished the death penalty, and 40 states have not carried out an execution between 2013 and 2017. In February 2014, Governor Inslee announced a moratorium on the death penalty in Washington State, explaining that capital punishment was being used inconsistently and unequally.

For these reasons the WSBA CRL Section has voted to take a position of "Support" regarding the Bill.

### C. Why the Civil Rights Law Section's Public Comment Supporting the Bill Satisfies GR 12.1(c)

The CRLS Executive Committee considered the requirement of GR 12.1(c)(2) and determined that the Bill is directly related to the administration of justice. First, the exorbitant costs of the death penalty and its diversion of significant resources from other needs of the legal system, with no proof of concrete benefits, when our State is particularly strapped for resources, directly impacts the administration of justice. Second, arbitrariness and inequities in the death penalty system in Washington and elsewhere show that the death penalty system is irreparably broken, another clear impact on the administration of justice. Third, delays in the death penalty system harm the victims' families and add uncertainty to the punishment, undermining respect for the law and thereby impacting the administration of justice. Fourth, the death penalty causes the aforementioned harms without deterring crime or improving public safety. Finally, delays and uncertainty for murder victims' families, prolonged legal proceedings for imposition and appeals of death sentences, legal errors, and botched state executions of persons convicted of murder raises serious moral, ethical, and humanitarian concerns about how justice, it is most fundamental sense, is administered in

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[8] *See* https://deathpenaltyinfo.org/innocence-and-death-penalty

[9] *See* https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3282

[10] *See* http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates; http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state#MRord

Washington State. For all these reasons, the WSBA Civil Rights Law Section has determined that the administration of justice in Washington would benefit by repealing the death penalty.

## III. Conclusion

The Legislation and Court Rule Comment Policy is satisfied by CRLS taking a public position supporting the Bill because, as described above, we have reviewed the Bill, carefully considered it, and obtained a supermajority vote the Act impacts the administration of justice and that we should support it.

Z-0646.1

# SENATE BILL 6052

**State of Washington 65th Legislature 2018 Regular Session**

**By** Senators Walsh, Carlyle, Kuderer, McCoy, Pedersen, Billig, Dhingra, Cleveland, Liias, Darneille, Keiser, Hunt, Wellman, Chase, Miloscia, Saldaña, and Hasegawa; by request of Attorney General

Prefiled 12/22/17. Read first time 01/08/18. Referred to Committee on Law & Justice.

AN ACT Relating to reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder; amending RCW 10.95.030; and repealing RCW 10.95.040, 10.95.050, 10.95.060, 10.95.070, 10.95.080, 10.95.090, 10.95.100, 10.95.110, 10.95.120, 10.95.130, 10.95.140, 10.95.150, 10.95.160, 10.95.170, 10.95.180, 10.95.185, 10.95.190, and 10.95.200.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec. 1.** RCW 10.95.030 and 2015 c 134 s 5 are each amended to read as follows:

(1) Except as provided in subsection((~~s~~)) (2) ((~~and (3)~~)) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A person sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or commuted by any judicial officer and the indeterminate sentence review board or its successor may not parole such prisoner nor reduce the period of confinement in any manner whatsoever including but not limited to any sort of good-time calculation. The department of social and health services or its successor or any executive official may not

permit such prisoner to participate in any sort of release or furlough program.

(2) ((~~If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death. In no case, however, shall a person be sentenced to death if the person had an intellectual disability at the time the crime was committed, under the definition of intellectual disability set forth in (a) of this subsection. A diagnosis of intellectual disability shall be documented by a licensed psychiatrist or licensed psychologist designated by the court, who is an expert in the diagnosis and evaluation of intellectual disabilities. The defense must establish an intellectual disability by a preponderance of the evidence and the court must make a finding as to the existence of an intellectual disability.~~

~~(a) "Intellectual disability" means the individual has: (i) Significantly subaverage general intellectual functioning; (ii) existing concurrently with deficits in adaptive behavior; and (iii) both significantly subaverage general intellectual functioning and deficits in adaptive behavior were manifested during the developmental period.~~

~~(b) "General intellectual functioning" means the results obtained by assessment with one or more of the individually administered general intelligence tests developed for the purpose of assessing intellectual functioning.~~

~~(c) "Significantly subaverage general intellectual functioning" means intelligence quotient seventy or below.~~

~~(d) "Adaptive behavior" means the effectiveness or degree with which individuals meet the standards of personal independence and social responsibility expected for his or her age.~~

~~(e) "Developmental period" means the period of time between conception and the eighteenth birthday.~~

~~(3)~~))(a)(i) Any person convicted of the crime of aggravated first degree murder for an offense committed prior to the person's sixteenth birthday shall be sentenced to a maximum term of life imprisonment and a minimum term of total confinement of twenty-five years.

(ii) Any person convicted of the crime of aggravated first degree murder for an offense committed when the person is at least sixteen years old but less than eighteen years old shall be sentenced to a

maximum term of life imprisonment and a minimum term of total confinement of no less than twenty-five years. A minimum term of life may be imposed, in which case the person will be ineligible for parole or early release.

(b) In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S.Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated.

(c) A person sentenced under this subsection shall serve the sentence in a facility or institution operated, or utilized under contract, by the state. During the minimum term of total confinement, the person shall not be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release authorized under RCW 9.94A.728, or any other form of authorized leave or absence from the correctional facility while not in the direct custody of a corrections officer. The provisions of this subsection shall not apply: (i) In the case of an offender in need of emergency medical treatment; or (ii) for an extraordinary medical placement when authorized under RCW 9.94A.728((~~(3)~~)) (1)(c).

(d) Any person sentenced pursuant to this subsection shall be subject to community custody under the supervision of the department of corrections and the authority of the indeterminate sentence review board. As part of any sentence under this subsection, the court shall require the person to comply with any conditions imposed by the board.

(e) No later than five years prior to the expiration of the person's minimum term, the department of corrections shall conduct an assessment of the offender and identify programming and services that would be appropriate to prepare the offender for return to the community. To the extent possible, the department shall make programming available as identified by the assessment.

(f) No later than one hundred eighty days prior to the expiration of the person's minimum term, the department of corrections shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the

probability that the person will engage in future criminal behavior if released on conditions to be set by the board. The board may consider a person's failure to participate in an evaluation under this subsection in determining whether to release the person. The board shall order the person released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the person will commit new criminal law violations if released. If the board does not order the person released, the board shall set a new minimum term not to exceed five additional years. The board shall give public safety considerations the highest priority when making all discretionary decisions regarding the ability for release and conditions of release.

(g) In a hearing conducted under (f) of this subsection, the board shall provide opportunities for victims and survivors of victims of any crimes for which the offender has been convicted to present statements as set forth in RCW 7.69.032. The procedures for victim and survivor of victim input shall be provided by rule. To facilitate victim and survivor of victim involvement, county prosecutor's offices shall ensure that any victim impact statements and known contact information for victims of record and survivors of victims are forwarded as part of the judgment and sentence.

(h) An offender released by the board is subject to the supervision of the department of corrections for a period of time to be determined by the board. The department shall monitor the offender's compliance with conditions of community custody imposed by the court or board and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440.

(i) An offender released or discharged under this section may be returned to the institution at the discretion of the board if the offender is found to have violated a condition of community custody. The offender is entitled to a hearing pursuant to RCW 9.95.435. The board shall set a new minimum term of incarceration not to exceed five years.

NEW SECTION. **Sec. 2.** The following acts or parts of acts are each repealed:

(1) RCW 10.95.040 (Special sentencing proceeding—Notice—Filing—Service) and 1981 c 138 s 4;

(2) RCW 10.95.050 (Special sentencing proceeding—When held—Jury to decide matters presented—Waiver—Reconvening same jury—Impanelling new jury—Peremptory challenges) and 1981 c 138 s 5;

(3) RCW 10.95.060 (Special sentencing proceeding—Jury instructions—Opening statements—Evidence—Arguments—Question for jury) and 1981 c 138 s 6;

(4) RCW 10.95.070 (Special sentencing proceeding—Factors which jury may consider in deciding whether leniency merited) and 2010 c 94 s 4, 1993 c 479 s 2, & 1981 c 138 s 7;

(5) RCW 10.95.080 (When sentence to death or sentence to life imprisonment shall be imposed) and 1981 c 138 s 8;

(6) RCW 10.95.090 (Sentence if death sentence commuted, held invalid, or if death sentence established by chapter held invalid) and 1981 c 138 s 9;

(7) RCW 10.95.100 (Mandatory review of death sentence by supreme court—Notice—Transmittal—Contents of notice—Jurisdiction) and 1981 c 138 s 10;

(8) RCW 10.95.110 (Verbatim report of trial proceedings—Preparation—Transmittal to supreme court—Clerk's papers—Receipt) and 1981 c 138 s 11;

(9) RCW 10.95.120 (Information report—Form—Contents—Submission to supreme court, defendant, prosecuting attorney) and 1981 c 138 s 12;

(10) RCW 10.95.130 (Questions posed for determination by supreme court in death sentence review—Review in addition to appeal—Consolidation of review and appeal) and 2010 c 94 s 5, 1993 c 479 s 3, & 1981 c 138 s 13;

(11) RCW 10.95.140 (Invalidation of sentence, remand for resentencing—Affirmation of sentence, remand for execution) and 1993 c 479 s 4 & 1981 c 138 s 14;

(12) RCW 10.95.150 (Time limit for appellate review of death sentence and filing opinion) and 1988 c 202 s 17 & 1981 c 138 s 15;

(13) RCW 10.95.160 (Death warrant—Issuance—Form—Time for execution of judgment and sentence) and 1990 c 263 s 1 & 1981 c 138 s 16;

(14) RCW 10.95.170 (Imprisonment of defendant) and 1983 c 255 s 1 & 1981 c 138 s 17;

(15) RCW 10.95.180 (Death penalty—How executed) and 1996 c 251 s 1, 1986 c 194 s 1, & 1981 c 138 s 18;

(16) RCW 10.95.185 (Witnesses) and 1999 c 332 s 1 & 1993 c 463 s 2;

(17) RCW 10.95.190 (Death warrant—Record—Return to trial court) and 1981 c 138 s 19; and

(18) RCW 10.95.200 (Proceedings for failure to execute on day named) and 1990 c 263 s 2, 1987 c 286 s 1, & 1981 c 138 s 20.

**--- END ---**

**WACDL** Washington Association of Criminal Defense Lawyers

**Patricia Fulton**
President

**Teresa Mathis**
Executive Director

February 5, 2017

TO: WSBA Board of Governors

FROM: Colleen O'Connor & Mark Larranaga
WACDL Death Penalty Committee Co-Chairs

RE: SB 6052

WACDL as an association supports Senate Bill 6052 and abolition of capital punishment in the State of Washington. Several of our members (ourselves included) are qualified for appointment for representation of capital defendants and have worked on aggravated homicide cases across the state.

Geography, race, economics, and other irrelevant or impermissible factors continue to drive capital sentencing in Washington. The result is a failed system, one that is neither reliable in its imposition nor meaningful in the penological results it attempts to achieve. There are several inherent flaws in the application of the death penalty in Washington.

First, and most egregious, recent studies show that the imposition of the death penalty is arbitrary and strongly affected by the legally irrelevant factors such as race and ethnicity. Three out of the eight men on Washington's death row are black men, whereas black people comprise only 5% of the state's total population. Jurors in Washington are three times more likely to recommend a death sentence for a black defendant than for a white defendant in a similar case. *See, e.g.*, Katherine Beckett & Heather Evans, "The Role of Race in Washington State Capital Sentencing, 1981-2012," available online at https://soc.washington.edu/research/reports/role-race-washington-state-capitol-sentencing

Second, geography plays a key role. In recent years, the prosecuting attorneys in just three counties (King, Pierce and Snohomish), have sought the death penalty, while those in smaller counties have cited costs as a primary reason for not seeking the death penalty. (See Satterberg op ed at https://www.seattletimes.com/opinion/king-countys-prosecuting-attorney-we-dont-need-the-death-penalty/)

Third, the constitutional flaws of capital punishment are starkly revealed by the rate of reversals in the appellate courts. Out of the 32 death sentences imposed since the penalty's reinstatement in 1981, there have been just five executions, and three were "volunteers". In 2006, the WSBA issued a report, noting at that time, of the 270 convictions for aggravated murder since 1981, the death penalty was sought

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79 times, resulting in 30 death sentences; several sentences were overturned on appeal, and most of those reversals resulted in life without parole sentences. *See,* WSBA, *Final Report Of The Death Penalty Subcommittee Of The Committee On Public Defense*, at 12 (December 2006). Clearly, it cannot fairly be said that the death penalty is necessary to protect the public.

Fourth, the death penalty exacts an emotional toll on our citizens. From those who are subpoenaed to jury duty and asked to decide whether a fellow citizen should live or die, to the citizens serving as corrections officers who are asked ultimately to end another person's life. No one, individually or as a state, should have the power to end human life as a function of government.

Finally, in terms of costs, aggravated murder cases in which the death penalty is sought cost over twice as much money and take more than twice as long to resolve than aggravated murder cases in which death is not sought. *See, e.g.*, P. Collins, et al., "*An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State*," Seattle University, September 5, 2016.[1] Capital litigation imposes substantial financial burdens on police departments, crime labs, and the judicial system.

[1] available online at https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?referer=http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwjE7Iai2-TYAhUI9GMKHdNGAMoQFgg6MAM&url=http%3A%2F%2Fdigitalcommons.law.seattleu.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D1832%26context%3Dsjsj&usg=AOvVaw0NJIzE73V90A4rw8gvPYAA&httpsredir=1&article=1832&context=sjsj

WASHINGTON STATE BAR ASSOCIATION

# Civil Rights Law Section

February ___, 2018

RE: Senate Bill 6052
An Act Relating to reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder

Dear Honorable Senators,

I am writing on behalf of the Civil Rights Law Section of the Washington State Bar Association (WSBA), which supports the passage of Senate Bill 6052, An Act Relating to reducing criminal justice expenses by eliminating the death penalty and instead requiring life imprisonment without possibility of release or parole as the sentence for aggravated first degree murder. This letter is written solely on behalf of the Civil Rights Section of the Washington State Bar Association. This does not express the views of the Washington State Bar Association, nor its Board of Governors.

SB 6052 ("the Bill") would eliminate the death penalty as a sentencing option in Washington for individuals convicted of the crime of aggravated first degree murder, amending RCW 10.95.030. These individuals instead would be sentenced to life imprisonment without possibility of release or parole. The Bill would also repeal the provisions at RCW 10.95.030(2) authorizing a sentence of death, and repeal other sections of RCW 10.95 related to special sentencing proceedings for the death penalty.

**The Civil Rights Law Section is taking a position in support of SB 6052 for a number of reasons, including the following:**

- The Bill better serves the needs of victims' families by reducing delays in the imposition of punishment. Requiring the convicted offender to serve a sentence of life in prison without the possibility of parole would give victims' families swift and certain justice.
- The Bill will save significant costs that are currently expended in the lengthy trial and appeal process. A recent study showed that in Washington death penalty cases cost an average of $1 million more to prosecute than comparable cases where the death penalty is not sought. Further, in many of the cases where the death sentence is imposed, it is ultimately reversed for some form of legal error, again wasting money and resources.
- The Bill addresses racial and social inequities in the criminal justice system. Numerous studies, including some from this State, have demonstrated that jurors are more likely to recommend a death sentence for a black defendant and that the death penalty is sought more often when the victim is white as opposed to black or Hispanic.
- The death penalty is administered in an arbitrary and inconsistent manner, undermining respect for the law and trust in the justice system. As an example, many counties in Washington do not have the resources to fund a death penalty case and therefore will not seek it.
- An innocent person may be executed for a crime he or she did not commit. Nationwide, more than 160 people have been exonerated from death row since 1973. Repealing the death penalty does not prevent wrongful convictions but does allow the opportunity for those wrongful convictions to be remedied.
- There is no compelling evidence that the death penalty deters crime; in fact, there are studies indicating that states without the death penalty have lower murder rates.
- There are serious civil rights and humanitarian concerns with the way the death penalty is carried out. Nationally, there have been widely publicized problems in carrying out executions that violate constitutional rights to be free

from cruel and unusual punishment. As noted above, there are also significant concerns with racial disproportionality in terms of how the death penalty is applied.

- Nationally, the trend shows more states are declining to use the death penalty. 19 states plus the District of Columbia have now abolished the death penalty and 40 states have not carried out an execution since 2013. Internationally, over two-thirds of the countries in the world have now abolished the death penalty in law or practice. Washington should be in line with this trend.

For these reasons, it is our sincere hope that you will move SB 6052 out of committee and work for its passage.

Sincerely,

La Rond Baker
Chair, WSBA Civil Rights Law Section

**WASHINGTON STATE**
**BAR ASSOCIATION**
Office of General Counsel
Sean M. Davis, General Counsel

To: The President, President-elect, Immediate Past President, and Board of Governors

From: Sean M. Davis, General Counsel

Date: February 12, 2018

Re: Implementation of September 30, 2016, Bylaw Amendments

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**FIRST READING**: Consideration of amending the WSBA Bylaws to clarify the initial terms of the three new at-large members of the Board of Governors (BOG) approved by the BOG on September 30, 2016.

On September 30, 2016, the BOG amended the WSBA Bylaws calling for the expansion of the Board by three additional at-large governors: two community members and one limited licensed professional. The community members must be individuals who have never been licensed to practice law and the limited licensed professional must be a WSBA member who is either a limited license legal technician or limited practice officer. The expansion of the BOG adopted on September 30, 2016, remained in abeyance, pending action by the Washington Supreme Court. The Court reviewed the Bylaw amendment expansion and on January 4, 2018, the Court issued an order expanding the BOG. See attachment 1.

The Bylaw provisions actualized by the Court's order on January 4, 2018, add one member to each class of Board members:

*C. ELECTION OF GOVERNORS*

*1. Election of one Governor from each Congressional District and for the at-large positions will be held every three years as follows:*

*Third, Sixth, Eighth Congressional Districts and the North region of the Seventh Congressional District and two At Large Governors (one lawyer and one community representative) – 2014 and every three years thereafter.*

*First, Fourth, Fifth Congressional Districts and the South region of the Seventh Congressional District and two At Large Governors (one from nominations made by the Young Lawyers Committee and one LLLT/LPO) – 2015 and every three years thereafter.*

*Second, Ninth and Tenth Congressional Districts and two At Large Governors (one lawyer and one community representative) – 2013 and every three years thereafter.*

The BOG could proceed with the terms as currently delineated. Presently the Bylaws outline which class of Governors each new Board member would join. Thus, as currently stated In the Bylaws, the inaugural elected limited licensed member would receive a three-year term, one community member would receive a two-year term, and the second community member would receive a one-year term. The community member serving a one-year term would be permitted to seek a second term under the current Bylaws.

If the BOG would like to codify this staggering, they could adopt the following amendments:

*C. ELECTION OF GOVERNORS*

*1. Election of one Governor from each Congressional District and for the at-large positions will be held every three years as follows:*

*a. Third, Sixth, Eighth Congressional Districts and the North region of the Seventh Congressional District and two At-Large Governors (one lawyer and, after initial election in 2018 of a community representative to serve a two-year term, one community representative) – 2014 and every three years thereafter.*

*b. First, Fourth, Fifth Congressional Districts and the South region of the Seventh Congressional District and two A- Large Governors (one from nominations made by the Young Lawyers Committee and, after initial election in 2018 of a LLLT or LPO one LLLT/LPO) –2015 and every three years thereafter.*

*c. Second, Ninth and Tenth Congressional Districts and two At-Large Governors (one lawyer and, after initial election in 2018 of a community representative to serve a one-year term, one community representative) – 2013 and every three years thereafter.*

The BOG could also adopt language clarifying the initial election dates of the three new at-large governors with different election dates providing each with a three-year term.

Attachment: January 4, 2018 Washington Supreme Court Order No. 25700-B-283

# THE SUPREME COURT OF WASHINGTON

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| IN THE MATTER OF THE APPROVAL OF AMENDMENTS TO WSBA BYLAWS REGARDING MEMBERS OF THE BOARD OF GOVERNORS | NO. 25700-B-583<br><br>**ORDER** |

The Washington Supreme Court has plenary authority over the practice of law in Washington. The Washington State Bar Association (WSBA) serves as an arm of the Court in regulating and administering licenses to practice law in Washington and effectuating other purposes and functions as set forth in General Rule (GR) 12 and 12.1-12.5. The Court's control over the WSBA extends to ancillary administrative functions as well, including the administration of the organization.

By prior order and rule of this Court, the WSBA has been directed to administer the regulation of the practice of law by Limited Practice Officers (LPOs) (in Admission and Practice Rule (APR) 12 and related rules) and Limited License Legal Technicians (LLLTs) (in APR 28 and related rules).

The Court is aware of and has reviewed amendments to the WSBA Bylaws adopted by the WSBA Board of Governors on September 30, 2016. Amendments to WSBA Bylaws Article IV.A.1 and Article VI.A.2.c and d., and other provisions related to those articles, changed the size and makeup of the Board of Governors to include two community representatives/public Governors and one Governor to be selected from among LPOs and LLLTs (made members of the WSBA by amendments to Article III.A.1. and related provisions).

The Court recognizes that by adoption of these amendments of the WSBA Bylaws, the WSBA Board of Governors voted to change the size and specific makeup of the WSBA Board of Governors from that specified in the State Bar Act, specifically RCW 2.48.030 and .035. The Court finds that these changes in the size and makeup of the WSBA Board of Governors appear necessary to provide for the proper administration of the WSBA, for the consideration of the viewpoints of all members and of the public, and for the accomplishment of the regulatory objectives identified in GR 12.1 and the purposes and functions of the WSBA identified in GR 12.2.

The Court determined, by majority, at its January 3, 2018, En Banc Conference that the amendments should be approved.

Now, therefore, it is hereby

ORDERED:

That the WSBA Bylaws Amendments as described above, increasing the size of the WSBA Board of Governors and changing the makeup as described in those Bylaws, are approved by this Court and shall be given full force and effect. Specifically, this Court approves an increase in the size of the WSBA Board of Governors to a maximum of 18 members, including the President, and that those members shall be elected as provided in the WSBA Bylaws as adopted on September 30, 2016.

DATED at Olympia, Washington this 4th day of January, 2018.

Fairhurst, CJ
CHIEF JUSTICE