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VIA EMAIL (ARothrock@SCHWABE.com)

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Averil Rothrock
Chair, Mediation Subcommittee, WSBA Civil Rules Drafting Task Force
Schwabe Williamson & Wyatt
US Bank Centre
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101

Re: Draft Superior Court Rule Requiring Early Mandatory Mediation of Certain Civil Cases

Dear Averil:

Thank you the opportunity to review and comment on the Washington State Bar Association Civil Rules Drafting Task Force's updated and revised Draft Superior Court Rule Requiring Early Mandatory Mediation of Certain Civil Cases. We continue to serve as the ACLU of Washington Foundation's ("ACLU") Cooperating Counsel with respect to this matter. In that capacity, we have reviewed the updated text of the proposed rule, as well as materials relating to the recommendations by the WSBA's Taskforce on the Escalating Costs of Civil Litigation ("ECCL"), from which the current proposed rule arose.

Without repeating the comments in our letter of January 30, 2018, the ACLU's primary consideration continues to be the extent to which the proposed rule would impact access to justice for unrepresented litigants and those of limited means. It remains our view that the proposed rule—notwithstanding the more flexible approach set forth in the revised proposal—may disproportionately affect plaintiffs and unsophisticated or unrepresented litigants, who are more likely than defendants to have a reasonable and good-faith reluctance to mediate before discovery. Indeed, for those litigants, who often face an information and leverage imbalance prior to discovery, mandatory early mediation may result in pressure to settle their claims before they have sufficient information to value their claims accurately.

Similarly, we note that the ECCL's Final Report to the WSBA Board of Governors, dated June 15, 2015, recommended that parties be obligated to engage in mediation before the close of discovery—but not necessarily before discovery has commenced. (ECCL Final Report, at 40.) Although the revised rule would mandate the exchange of initial disclosures prior to mediation and would allow for a discretionary 60-day extension of the mediation deadline, we remain concerned that the default restriction on discovery will have a negative impact on access to justice.

We also noted in our prior letter that requiring early mediation seemed at least potentially inconsistent with the voluntary nature of mediation. The proposed rule allows for some flexibility in the format of the required mediation, including directing that the mediator consult with the parties regarding "their needs, preferences, and recommendations for a successful process." While this is also a step in the right direction, we remain concerned that imposing the potentially

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significant costs of mediation prior to discovery will inure most often to the benefit of defendants that start the case with greater resources and better access to relevant information.

Finally, among the most important factors in our consideration of any proposed revisions to court rules are the views of those constituencies that will be impacted by the change—including but not limited to the larger access-to-justice community, the civil plaintiffs bar, and superior court judges. We are not aware of any formal comments from those constituencies on the proposed rule, but would welcome the opportunity to review and consider any such comments if you are able to provide them to us.

For all of these reasons, we cannot support the proposal at this time. However, we continue to appreciate your efforts to keep us apprised of revisions to the proposed rule, and more generally keeping us informed regarding the Task Force's anticipated process going forward.

Sincerely,

COOLEY LLP

Chris Durbin

cc: Emily Chiang, Legal Director, ACLU of Washington Foundation (via email)
Nancy Talner, Senior Staff Attorney, ACLU of Washington Foundation (via email)

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