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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 Ms. Rothrock:

Thank you for requesting that the ACLU of Washington Foundation ("ACLU") review and comment on the Washington State Bar Association Civil Rules Drafting Task Force's Draft Superior Court Rule Requiring Early Mandatory Mediation of Certain Civil Cases. Working with the ACLU as Cooperating Counsel with respect to this matter, we have reviewed the text of the proposed rule carefully and have considered in particular the potential impact the rule might have on access to justice, particularly for indigent, unsophisticated, and pro se litigants.

At the outset, we certainly understand and appreciate that early settlement efforts should be encouraged—as the proposed rule recites, early settlement can "reduce litigation costs . . . before extensive discovery and pre-trial work occurs." That said, the concept of "mandatory mediation" seems inherently in conflict with the nature of mediation as a voluntary settlement process. Imposing attendance at mediation by court order, especially on an opposed motion, may not be an effective or efficient way to increase access to justice or reduce litigation costs. Litigants may be reluctant to mediate at the outset of a case for any number of valid reasons, and compelling them to do so may actually increase costs (even if the mediator serves pro bono) without a corresponding increase in the likelihood of settlement. We are also concerned that the proposed rule may disproportionately affect plaintiffs, who may reasonably be reluctant to mediate before the opportunity to conduct any discovery.

To be clear, we are not definitively opposed to the proposed rule. We simply think it merits greater study and consideration vis-à-vis potential alternatives. For example, we would be interested to know whether the Task Force has considered whether a mandatory settlement conference—*e.g.*, an hour or two with a judge not assigned to the case simply to explore the possibility of early resolution—as a less imposing and costly alternative.

More broadly, we would be interested to learn whether the Task Force has studied other jurisdictions in which a comparable requirement has been imposed. Assuming there are other jurisdictions that have done so, we believe an important step in the Task Force's consideration of the proposed rule would be to study the impact such rules have had on access to justice in the "real world." Among other steps, the Task Force could seek comments from judges, mediators,

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and practitioners in those jurisdictions and study any available objective data (*e.g.*, procedural requirements, percentage of cases settled, types of cases settled, and average costs of mediation process) to better understand and anticipate how the proposed rule might affect access to justice in Washington.

Finally, we would appreciate it if you could advise as to the Task Force's anticipated process, particularly with respect to additional comment collection, before issuing its recommendations to the Board of Governors in May 2018.

Again, thank you for the opportunity to comment on this matter. We look forward to hearing from the Task Force regarding its further consideration of the proposed rule.

Sincerely,

COOLEY LLP

Christopher B. Durbin

cc: Emily Chang, Legal Director, ACLU of Washington Foundation
Nancy Talner, Senior Staff Attorney, ACLU of Washington Foundation

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