

To: Stakeholders and Interested Parties

From: Averil Rothrock, Civil Litigation Rules Drafting Task Force

Re: Draft Proposal to Create a New Civil Rule to Require Early Mandatory Mediation

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Please find enclosed for your review and comment a draft proposal to create a new Civil Rule to require early mandatory mediation in specific civil cases in superior courts. This draft proposal is not final, and your input is important and welcome.

This draft proposal comes from the WSBA's Civil Litigation Rules Drafting Task Force. The Civil Litigation Rules Drafting Task Force was formed to draft the language to implement the WSBA Board of Governors' recommendations coming out of the 2015 Final Report to the WSBA Board of Governors from the Task Force on the Escalating Costs of Civil Litigation ("ECCL"). The ECCL recommended that a new Civil Rule require mediation in superior court cases before completing discovery, and that other alternative dispute resolution practices be recommended. The Board of Governors adopted that recommendation.

The ECCL recommended that mediation be required before the eve-of-trial and in most cases before discovery is completed. The ECCL recognized that traditional "summit" mediations where the parties convene for an all-day effort are not always effective. Mediators are using different approaches that can include telephone calls and shorter meetings, or processes similar to a session with a settlement judge, for example.

The goal of the early mandatory mediation rule is to require an early effort at mediation through a process that, while mandatory, remains flexible and allows for different or innovative mediation models. This mediation rule will be presented with a new rule requiring initial case schedules for certain civil cases in superior courts. The proposed case schedule contemplates trial within one year of filing. The proposed case schedule will include a deadline for mandatory mediation. Commencement of mediation is required approximately 60 days after the parties exchange initial disclosures, which disclosures are proposed by another draft rule. This draft mediation rule includes a provision allowing the parties to seek a 60-day extension of the mediation deadline in the court's discretion if a party presents specific reasons for such an extension at the Initial Discovery Conference, a conference established by another draft rule.

Parties may agree to any mediator, or parties can receive assignment from the court. Qualifications of mediators establish minimum credentials, yet are intended to provide for an adequate pool of mediators. The parties satisfy the mediation obligation when the plaintiff certifies by the deadline that the parties commenced a mediation. It is not required that the mediation effort be completed, as the parties may wish to continue their mediation efforts as the action proceeds. A traditional "settlement conference" would satisfy the rule.

Additionally, the BOG approved development of recommendations for other alternative dispute resolution practices. A draft of recommendations is attached.

# WASHINGTON STATE BAR ASSOCIATION

As part of the drafting process, the Civil Litigation Rules Drafting Task Force seeks feedback about the draft language. Please feel free to distribute these materials within your organization or firms, or to other people or groups who may have an interest in weighing in. Stakeholder input is crucially important in the rulemaking process and assists the Civil Litigation Rules Drafting Task Force in making an informed decision.

Please provide any comments to Sherry Lindner at [CLTF@wsba.org](mailto:CLTF@wsba.org) by **May 21, 2018**.

For more information about the Civil Litigation Rules Drafting Task Force, please visit: <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Civil-Litigation-Rules-Drafting-Task-Force>

Please note that multiple proposals exist that are interrelated. This draft mediation rule directly interrelates with the proposed rules concerning Initial Case Schedules, Early Discovery Conferences and Initial Disclosures, which will be provided by separate correspondence.

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**Content for GR 9 explanation to go with proposed Early Mandatory Mediation Requirement:**

**The purpose of early mandatory mediation is to remedy current practices that put off negotiation and settlement efforts to the eve of trial and to increase access to justice and reduce litigation costs through the requirement that the parties engage in prompt mediation before extensive discovery and pre-trial work. This rule shall be construed liberally in favor of those goals. The mandatory mediation requirement shall not preclude earlier, later or more informal options to resolve disputes and narrow issues for litigation. The requirement encourages the mediator and the parties to shape a process that fits the needs of the action.**

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