WSBA

COURT RULES & PROCEDURES COMMITTEE

# SUPPLEMENTAL MATERIALS DISTRIBUTED AT THE OCTOBER 18, 2010 MEETING

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WSBA
WASHINGTON STATE BAR ASSOCIATION

**Paula C. Littlewood**
Executive Director

direct line: 206-239-2120
fax: 206-727-8310
e-mail: paulal@wsba.org

October 12, 2010

Honorable Barbara A. Madsen
Chief Justice, Washington Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

**RE: Annual Report of WSBA Court Rules & Procedures Committee**

Dear Chief Justice Madsen:

Pursuant to the schedule for review established by the Court under GR 9, during its 2009-2010 season the WSBA's Court Rules Committee focused its attention on the Criminal Rules (CrR) and the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ). Enclosed are the WSBA's suggested new CrR 4.11 (the "recording rule") and suggested amendments to MARs 3.2, 6.2, 6.3, 6.4, and 7.1. Both proposals have been vetted extensively with stakeholders and interested parties, and were approved by the Board of Governors for submission to the Court.

We previously submitted, under separate cover, a response to comments and suggested edit to a pending proposed amendment to CrRLJ 7.3 and a response to comments and edits to the WSBA's previously suggested amendment to CrR 4.8. These items were submitted in response to the Court's request. The Board of Governors also reviewed and voted not to comment on the Department of Licensing's pending proposed amendment to CrRLJ 6.13.

If you have any questions about the enclosed materials, please direct them to Ken Masters, Chair of the WSBA Court Rules and Procedures Committee, 241 Madison Avenue North, Bainbridge Island, WA 98110 (206-780-5033), or to Elizabeth Turner, WSBA Assistant General Counsel/Staff Liaison to the Court Rules Committee (206-239-2109; elizabetht@wsba.org).

Pursuant to the schedule established by the Court under GR 9, during the 2010-2011 season the Court Rules Committee will turn its attention to the Evidence Rules (ER) and Infraction Rules for Courts of Limited Jurisdiction.

Sincerely,

Paula C. Littlewood

Enclosure

cc (w/ enclosures):
Steven G. Toole, President, WSBA
Salvador Mungia, Immediate Past President, WSBA
Ken Masters, Chair, WSBA Court Rules & Procedures Committee
Elizabeth Turner, Staff Liaison, WSBA Court Rules & Procedures Committee
Nanette Sullins, Administrative Office for the Courts

# GR 9 Cover Sheet

## Suggested Amendment
## SUPERIOR COURT CRIMINAL RULES (CrR)
## [New] Rule 4.11 – Recording Witness Interviews

**Submitted by the Board of Governors of the Washington State Bar Association**

A. **Name of Proponent:** Washington State Bar Association.

B. **Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. **Purpose:** Changes to the Criminal Rules to permit recording of witness interviews were originally suggested by the Washington Association of Criminal Defense Lawyers in 2002. At the recommendation of the WSBA Court Rules and Procedures Committee, the WSBA Board of Governors approved a modified version of the suggested changes in January 2004 and submitted the suggested changes to the Supreme Court. The Court returned the proposal to the Court Rules and Procedures Committee and requested that the WSBA consider written comments received by the Court and work with other interested organizations in developing a revised rule. A revised version of the rule was submitted to the Court in 2006. The Court published the rule for comment, and several groups voiced strong opposition to the proposed rule. Since then, additional experience with voluntary audio recording of witness interviews has alleviated many of the concerns of those groups. Consequently, audio recording has become more widely accepted by practitioners in the criminal courts.

The purpose of the rule is to enable parties to preserve an accurate audio record of pretrial witness interviews in criminal cases. Because witness depositions are not permitted in criminal cases without the trial court's permission, witness interviews have traditionally been documented by handwritten notes of attorneys and private investigators. However, this method has proved less than satisfactory because of frequent disputes over what witnesses actually said and the accuracy of the notes. These disputes were difficult to definitively resolve because the finders of fact only had the words of the witnesses against private investigators and police.

The previous opposition to the recording rule was based on several concerns. The first was that electronic recording violated witnesses' rights under the Washington State Privacy Act. However, upon further consideration, most stakeholders now believe that the Privacy Act is not violated by recording witness interviews because the Act only prohibits the non-permissive electronic recording of "private" conversations. Given that one of the major purposes of these interviews is for impeachment at trial if the witnesses' testimony changes, and there are often several people present at the interviews, the interviews are not considered to be private within the meaning of the Privacy Act.

Second, some felt that electronic audio recording of witness interviews, especially of putative victims, without their permission, would be traumatic or intimidating to victims. However, additional experience with electronic audio recording has shown that it is the interviews themselves, rather than the recording of those interviews, that can be upsetting to witnesses.

It is now more widely believed that recording interviews can provide a benefit to witnesses and opposing parties because it can prevent misunderstandings or misrepresentations of what witnesses said in their interviews. Additionally, because audio recording records the interviewers as well as the witnesses, it encourages a professional atmosphere in the interviews.

Lastly, it has been suggested that because participation in witness interviews is entirely voluntary, so too should be a witnesses' decision to permit recording. However, it is recognized that defendants have the constitutional right to have their counsel or investigators interview material witnesses in preparation for trial. Indeed, defense counsel have the ethical and professional obligation to conduct these interviews. Since material witness interviews will usually take place for matters that proceed to trial, creating accurate records of these interviews can only enhance the court's truth finding function.

The Committee, including some former opponents of the proposed rule, believe that the positive benefits of having accurate records of witness interviews outweighs many of the perceived negatives. The proposed recording rule has been carefully drafted and revised so as to not change any other discovery rights and obligations concerning witness interviews and statements that currently exist under the Criminal Rules. The disclosure and use of electronically recorded interviews is confined to the parties and only what is necessary to conduct the parties' cases. Possession of electronic recordings of witness interviews will continue to be governed by CrR 4.7(h), which provides that they cannot be given to defendants without the agreement of prosecutors or by court order.

In recognition of the sensitivity of the interview content, the proposed rule now contains a specific prohibition on dissemination of the audio recording or transcripts except where required to satisfy the discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or as reasonably necessary to conduct a party's case. Objections to taking a statement or the protocol for recording are expressly subject to oversight of a superior court judge pursuant to the protective order provisions of CrR 4.7(h).

The rule prescribes information that must be provided on the tape/recording at the commencement of the interview. It also provides that the person interviewed and all parties are entitled to copies of the interview.

In summary, the concerns of many who originally opposed proposed CrR 4.11 have been alleviated by additional years of experience with electronic audio recording of witness interviews. Consequently, given the many benefits of having accurate records of pretrial witness interviews, the Board believes it is appropriate to submit this new version of the rule to the Court for consideration.

**D. Hearing.** A hearing is not requested.

**E. Expedited Consideration:** Expedited consideration is not requested.

**F. Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# CRIMINAL RULE (CrR)
## RULE 4.11 RECORDING WITNESS INTERVIEWS

**(a) Recording of Witness Interviews.** Counsel for any party, or an employee or agent of counsel's office, may conduct witness interviews by openly using an audio recording device or other means of verbatim audio recording, including a court reporter. Such interviews are subject to the court's regulation of discovery under CrR 4.7(h). Any disputes about an interview or manner of recording shall be resolved in accordance with CrR 4.6(b) and (c) and CrR 4.7(h). This rule shall not affect any other legal rights of witnesses.

**(b) Providing Copies.** Copies of recordings and transcripts, if made, shall be provided to all other parties in accordance with the requirements of CrR 4.7. If an interview is recorded by a court reporter, and is discoverable under CrR 4.7, any party or the witness may order a transcript thereof at the party's or witness's expense. Dissemination of audio recordings or transcripts of witness interviews obtained under this rule is prohibited except where required to satisfy the discovery obligations of CrR 4.7, pursuant to court order after a showing of good cause relating solely to the criminal case at issue, or as reasonably necessary to conduct a party's case.

**(c) Preliminary Statement.** At the commencement of any recorded witness interview, the person conducting the interview shall confirm on the audiotape or recording that the witness has been provided the following information: (1) the name, address, and telephone number of the person conducting the interview; (2) the identity of the party represented by the person conducting the interview; and (3) that the witness may obtain a copy of the recording and transcript, if made.



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

# GR 9 COVER SHEET

## Suggested Amendment
## SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)
## Rule 3.2 – Authority of Arbitrators

(Establishing a uniform rule giving the arbitrator the authority to award costs and attorney fees as authorized by law)

**Submitted by the Board of Governors of the Washington State Bar Association**

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**A. Name of Proponent:** Washington State Bar Association.

**B. Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

**C. Purpose:** The MARs do not specifically address the authority of the arbitrator to award costs and attorney fees. Several counties have rules stating that the arbitrator decides requests for costs and attorney fees, but there is inconsistent authority from county to county.

The suggested amendment to MAR 3.2(a) would add consistency by clearly stating this authority in a state-wide rule. This amendment would not expand the substantive availability of fees, as arbitrators would be authorized to award costs and attorney fees only as "authorized by law." This authority would then be a foundation to the concurrent proposals to amend the procedures in MAR 6.4 and 7.1 relating to costs and attorney fees. For more information, please see the statements of purpose for the concurrent suggested amendments to MAR 6.3, 6.4, and 7.1. The amendment would also provide an "and" that was likely inadvertently omitted from the current list in MAR 3.2.

A new section (b) would: (1) restate the current rule that only the court may decide motions for involuntary dismissal, to change or add parties, and for summary judgment; and (2) clarify that, notwithstanding the express authority of the arbitrator to award costs and attorneys fees "as authorized by law," the court retains the authority to

consider cost and attorney fee issues "if those issues cannot otherwise be decided by the arbitrator." The latter clarification is intended as a "catch-all" provision to ensure that the rule does not prevent the otherwise justified award of costs and attorney fees in some mandatory arbitration actions. For example, some appellate case law holds that it is improper for the trial court to make an attorney fee award pursuant to RCW 4.84.250-.280 when an MAR arbitrator had the authority under local rules to award attorney fees but was not asked to do so. *Trusley v. Statler*, 69 Wn. App. 462, 464-65, 849 P.2d 1234 (1993). However, attorney fee awards under RCW 4.84.250-.280 are determined through offer-of-settlement procedures, and the offer cannot be communicated to the trier of fact until after the judgment. See RCW 4.84.280; *Hanson v. Estell*, 100 Wn. App. 281, 290-91, 997 P.2d 426 (2000). Because the trial court rather than the arbitrator enters judgment, some might conclude that, when the arbitrator has been authorized to decide the issue of costs and attorney fees, neither the arbitrator nor the court may make an award of costs and attorney fees pursuant to RCW 4.84.280 in a mandatory arbitration case. The proposed amended language is designed to avoid this and similar incongruous results.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is not requested.

F. **Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# MANDATORY ARBITRATION RULES (MAR)
## Rule 3.2 – Authority of Arbitrator

**(a) Authority of Arbitrator.** An arbitrator has the authority to:

(1) Decide procedural issues arising before or during the arbitration hearing, except issues relating to the qualifications of an arbitrator;

(2) Invite, with reasonable notice, the parties to submit trial briefs;

(3) Examine any site or object relevant to the case;

(4) Issue a subpoena under rule 4.3;

(5) Administer oaths or affirmations to witnesses;

(6) Rule on the admissibility of evidence under rule 5.3;

(7) Determine the facts, decide the law, and make an award;

(8) Award costs and attorney fees as authorized by law; and

(9) Perform other acts as authorized by these rules or local rules adopted and filed under rule 8.2.

**(b) Authority of the Court.** The court shall decide:

(1) Motions for involuntary dismissal, motions to change or add parties to the case, and motions for summary judgment ~~shall be decided by the court and not by the arbitrator~~; and

(2) Issues relating to costs and attorney fees if those issues cannot otherwise be decided by the arbitrator.



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

# GR 9 COVER SHEET

## Suggested Amendment
## SUPERIOR COURT MANDATORY ARBITRATION RULES
### MAR 6.2 – Filing of Award

(Authorizing party to seek order directing arbitrator to file award if not otherwise done in a timely manner)

**Submitted by the Board of Governors of the Washington State Bar Association**

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A. **Name of Proponent:** Washington State Bar Association.

B. **Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. **Purpose:** This suggested amendment would clarify that a party may seek an order from the court directing the arbitrator to file and serve the arbitration award should the arbitrator fail to do so within the period required by the rule. This situation is analogous to that described in the similar concurrent amendment to MAR 6.4. For more information, please see the statements of purpose for the concurrent suggested amendment to MAR 6.4.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is not requested.

F. **Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# MANDATORY ARBITRATION RULES (MAR)
## Rule 6.2 – Filing of Award

**Filing and Service of Award.** Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service ~~of a copy on~~ upon each party. On the arbitrator's application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days for the filing and service of the award. If the arbitrator fails to timely file and serve the award and proof of service, a party may, after notice to the arbitrator, file a motion with the court for an order directing the arbitrator to do so by a date certain. Late filing shall not invalidate the award. The arbitrator may file with the court and serve upon the parties an amended award to correct an obvious error made in stating the award if done within the time for filing an award or upon application to the superior court to amend.



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

# GR 9 COVER SHEET

## Suggested Amendment
## SUPERIOR COURT MANDATORY ARBITRATION RULES
### MAR 6.3 – Judgment on Award

(Clarifying the period that must pass before the prevailing party may present a judgment on the award)

**Submitted by the Board of Governors of the Washington State Bar Association**

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A. **Name of Proponent:** Washington State Bar Association.

B. **Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

C. **Purpose:** This suggested amendment would clarify that the 20-day period that must pass before the prevailing party may present a judgment on the award in Superior Court is dictated by MAR 7.1. For more information, please see the statements of purpose for the concurrent suggested amendments to MAR 6.4 and 7.1.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is not requested.

F. **Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# MANDATORY ARBITRATION RULES (MAR)
## Rule 6.3 – Judgment on Award

**Judgment.** If within ~~20 days after the award is filed~~the 20-day period specified in rule 7.1(a) no party has properly sought a trial de novo ~~under rule 7.1~~, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

# GR 9 COVER SHEET

## Suggested Amendment
## SUPERIOR COURT MANDATORY ARBITRATION RULES
### MAR 6.4 – ~~Witness~~ Costs and Attorney Fees ~~and Costs~~

(Establishing a uniform rule for awards of costs and attorney fees)

**Submitted by the Board of Governors of the Washington State Bar Association**

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**A. Name of Proponent:** Washington State Bar Association.

**B. Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

**C. Purpose:** This suggested amendment would provide a procedure and a timeline for a request to an arbitrator for costs and attorney fees.

The concurrent proposal to amend MAR 3.2 to expressly authorize arbitrators to award costs and attorney fees as authorized by law provides a foundation for this proposal. Suggested MAR 6.4 then outlines a procedure to follow and a timeline for requests for costs and attorney fees. It requires the arbitrator to decide the request within 14 days. If the arbitrator fails to do so, a party may, after giving notice to the arbitrator, seek an order from the court directing the arbitrator to do so by a date certain. It is intended that the required notice to the arbitrator could be formal or informal.

This suggested amendment to MAR 6.4 is a necessary predicate to the concurrent proposal to amend MAR 7.1 to remove any ambiguity about when the 20-day period within which to request a trial de novo commences. For more information, please see the statements of purpose for the concurrent suggested amendments to MAR 3.2, 6.3, and 7.1.

**D. Hearing:** A hearing is not requested.

**E. Expedited Consideration:** Expedited consideration is not requested.

**F. Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# MANDATORY ARBITRATION RULES (MAR)
## Rule 6.4 – ~~Witness~~ Costs and Attorney Fees ~~and Costs~~

**(a) Request.** Any request for costs and attorney fees shall be filed with the arbitrator and served upon all other parties no later than seven days after receipt of the award. Any party failing to timely file and serve such a request is deemed to have waived the right to an award of costs and attorney fees, unless a request for a trial de novo is filed.

**(b) Response.** Any response to the request for costs and attorney fees shall be filed with the arbitrator and served upon all other parties within seven days after service of the request.

**(c) Hearing.** The arbitrator has discretion to hold a hearing on the request for costs and attorney fees.

**(d) Decision.** Within 14 days after the service of the request for costs and attorney fees, the arbitrator shall file an amended award granting the request in whole or in part, or a denial of costs and attorney fees, with the clerk of the superior court, with proof of service upon each party. If the arbitrator fails to timely file and serve the amended award or denial and proof of service, a party may, after notice to the arbitrator, file a motion with the court for an order directing the arbitrator to do so by a date certain. Late filing shall not invalidate the decision.

~~Witness fees and other costs provided for by statute or court rule in superior court proceedings shall be payable upon entry of judgment in the same manner as if the hearing were held in court.~~



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539

# GR 9 COVER SHEET

## Suggested Amendment
## SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)
## Rule 7.1 – Request for Trial De Novo

(Clarifying filing and service requirements and time deadlines for requests for trial de novo)

**Submitted by the Board of Governors of the Washington State Bar Association**

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**A. Name of Proponent:** Washington State Bar Association.

**B. Spokespersons:**

Salvador A. Mungia, President, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 253-620-6500)

Ken Masters, Chair, WSBA Court Rules and Procedures Committee, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-780-5033)

Elizabeth A. Turner, Assistant General Counsel, Washington State Bar Association, 1325 4th Ave., Ste. 600, Seattle, WA 98101-2539 (telephone 206-239-2109)

**C. Purpose:** The suggested amendment eliminates the requirement that a party requesting a trial de novo file proof of service of the request prior to expiration of the 20-day period within which the request itself must be filed and served. Furthermore, along with concurrent proposals to amend MAR 6.3 and 6.4, this amendment clarifies when the 20-day period begins to run.

In 2005, the WSBA suggested that the Supreme Court amend MAR 7.1 to eliminate the requirement that a party requesting a trial de novo serve the request and file proof of service of the request within 20 days after the arbitration award is filed with the court. In November 2006, the Court decided not to adopt that amendment. In a letter referring the matter back to the WSBA, the Court suggested that any such change to MAR 7.1 should be made in conjunction with changes to the rules regarding the filing of arbitration awards.

The current proposal follows that suggestion. Amended MAR 7.1(a) would change the result in *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 811-12, 947 P.2d 721 (1997), and its progeny, in part. *See, e.g., Alvarez v. Banach*, 153 Wn.2d 834, 840, 109 P.3d 402 (2005); *Roberts v. Johnson*, 137 Wn.2d 84, 91, 969 P.2d 445 (1999). *Nevers* and

subsequent case law have held that timely service and timely filing of proof of service are mandatory; a failure to strictly comply with these requirements prevents the Superior Court from conducting a trial de novo. This is a harsh result.

Considering the amount of litigation and appellate review devoted to this issue, the rule in its present form represents a trap for the unwary. It is not necessary that both service and proof of service be accomplished within 20 days. The statute authorizing mandatory arbitration requires only that the request be filed within that period. *See* RCW 7.06.050(1)(b) (within 20 days after entry and service of an arbitrator's decision, "any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held . . . .").

The suggested amendment to MAR 7.1 would require that the request be filed and served within 20 days, but would set no specific deadline for the filing of proof of service. The first two sentences of amended MAR 7.1(a), along with a new section (c), would accomplish this change. New section (c) would expressly state that failure to file proof of service of the request for a trial de novo shall not void the request. Thus, if proof of service is not filed, the court could conduct a trial de novo if the court deems it appropriate to do so in the interests of justice, and could impose terms it deems appropriate under the circumstances of the case.

The second sentence of amended section (a) would clarify that a request for trial de novo should be served in accordance with CR 5. Although MAR 1.3(b)(2) already provides that all papers should be served in accordance with CR 5 "[a]fter a case is assigned to an arbitrator," whether MAR 1.3(b)(2) continues to apply to a request made to the trial court might be subject to debate.

The second sentence of amended section (a) also would remove ambiguity about when the 20 days to request a trial de novo begin to run. This sentence works in conjunction with existing MAR 6.2 (setting timelines for the filing of an award and of an amended award to correct obvious errors made in stating the award) and the concurrent proposal to amend MAR 6.4 (setting timelines for the filing of an amended award including costs or attorney fees or denial of same). The proposal is consistent with case law holding that the 20-day period runs from proof of service, if that date is later than filing. *See Roberts v. Johnson*, 137 Wn. 2d 84, 92, 969 P.2d 446 (1999). For more information, please see the statements of purpose for the concurrent suggested amendments to MAR 3.2 and 6.4.

The second and third sentences of amended section (a) would ensure that a request for a trial de novo is still valid if filed (or served, as applicable) on a date that is after the award is announced, but before the 20-day period began to run. This prevents needless repetition when, for example, a party promptly seeks a trial de novo only to have the other party prolong the proceedings before the arbitrator by filing a request for costs and/or attorney fees. This situation is analogous to a premature notice of appeal from a superior court judgment, which is timely even though filed before final judgment

is entered. *See* RAP 5.2(g).

Amended section (b) would clarify that an award of costs and attorney fees is part of the "amount of the award" that should not be mentioned in a request for a trial de novo.

D. **Hearing:** A hearing is not requested.

E. **Expedited Consideration:** Expedited consideration is not requested.

F. **Supporting Material:** Suggested rule amendment.

# SUGGESTED AMENDMENT
# MANDATORY ARBITRATION RULES (MAR)

**Rule 7.1 – Request for Trial De Novo**
**[single redline is as compared to current rule;**
**double redline is as compared to July 2010 proposal]**

**(a) Service and Filing.** ~~Within 20 days after the arbitration award is filed with the clerk,~~ ~~any~~Any aggrieved party not having waived the right to appeal may ~~serve and file with the clerk a written~~ request ~~for~~ a trial de novo in the superior court ~~along with proof that a copy has been served~~. Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case~~.~~ within 20 days after the arbitrator files proof of service of the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees. A request for a trial de novo is timely filed or served if it is filed or served after the award is announced but before the 20-day period begins to run. The 20-day period within which to request a trial de novo may not be extended.

**(b) Form.** The request for a trial de novo shall not refer to the amount of the award, including any award of costs or attorney fees, and shall be ~~in~~ substantially in the form set forth below:

**[Form unchanged.]**

**(c) Proof of Service.** The party filing and serving the request for a trial de novo shall file proof of service with the court. Failure to file proof of service within the 20-day period shall not void the request for a trial de novo.

**(~~b~~d) Calendar.** When a trial de novo is requested as provided in section (a), the case shall be transferred from the arbitration calendar in accordance with rule 8.2 in a manner established by local rule.



Washington State Bar Association
1325 Fourth Ave - Suite 600
Seattle, WA 98101-2539