

CRIMINAL MEDIATION COMMITTEE MINUTES

December 5, 2011

Present: Senior Judge Barry Wood, Chair; Senior Justice Linda Cople Trout, Judge Jeff Brudie, Professor Maureen Laflin, Roger Bourne, and Cathy Derden. Tony Geddes, with the Ada County Public Defender's was unable to attend but emailed that he voted in favor of the proposals.

At the October Criminal Mediation training several suggestions were made for amendments to the new I.C.R. 18.1 and I.J.R. 12.1, as well as to the rules of evidence pertaining to mediation. The proposed changes to the rules on criminal mediation were discussed and the Committee voted in favor of recommending the following amendments:

Amend the introductory section as follows: "In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of the all-parties. Not all defendants in a multi-defendant case need join in the request or in the settlement conference/mediation. Decision making authority remains with the parties and not the mediator."

Criminal cases may include numerous defendants. All defendants do not have to join in the request or in the settlement conference /mediation. The proposed language allows the mediation to proceed with those participants that wish to join in the process. The other proposed change clarifies that the parties have decision-making authority, not the mediator.

Amend (4) as follows: "Role of the Mediator. The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any future aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case."

The insertion of the word "future" clarifies the role of the settlement conferencing judge in any subsequent proceedings.

Amend (5) as follows: "Persons to be Present at Mediation. Participants shall be determined by the attorneys and the mediator. The government attorney participating in the settlement discussions shall have authority to agree to a disposition of the case."

The proposed language emphasizes the need for the government attorney to have settlement authority.

Amend (6) as follows: “Confidentiality. This section should be read in conjunction with the provisions of I.R.E. 507. Mediation proceedings shall in all respects be privileged and not reported or recorded. . . . The mediator shall not discuss any matter that comes up within the mediation with anyone other than the parties and defense counsel ~~and shall advise the assigned court only as to whether the mediation was successful and, if so, the agreed upon terms.~~

The rule currently states there is to be no communication between the assigned judge and the mediating judge but some communication may be necessary such as whether the assigned judge is open to certain terms as part of a plea negotiation. The proposed amendment also makes the rule consistent with Rule 11 on pleas and subsection (8) of this rule as proposed, currently subsection (9).

Delete subsection (8) as follows: ~~Agreements Reached. Any agreement reached by the parties is subject to approval by the court and is not final until the court agrees to the terms.~~

This subsection is unnecessary as this is governed by I.C.R. 11 on pleas. It also creates consistency in the rule regarding communications between the settlement conference judge and the judge assigned to the case. The rest of the subsections will be renumbered.

Evidence Rules

The Committee also voted to recommend that I.R.E. 410 and 507 be amended. The recommendation will be sent to the Evidence Rules Advisory Committee for further review.

I.R.E. 410 is entitled “Inadmissibility of pleas, plea discussions, and related statements” and the committee proposed that this rule be amended to reference criminal mediations taking place under the specific rules on mediation. The proposal is to amend I.R.E. 410 by adding a new subsection (a)(5) as follows:

(a) Inadmissibility. Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(5) any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.

The proposed amended clarifies any potential ambiguity arising from statements made during a criminal mediation. The amendment provides that statements and communications made in a criminal mediation conducted under I.C.R. 18.1 or I.J.R. 12.1 are not admissible under I.R.E. 410. It was also noted that the spelling of perjury in subsection (b)(2) needs to be corrected

I.C.R. 18.1 and I.J.R. 12.1 both reference I.R.E. 507 on “conduct of mediations” and mediator privilege.

The proposal is to amend I.R.E. 507 (5)(b) by adding a new subsection (3) as follows:

(5) Exceptions to privilege.

(b) There is no privilege under subpart 3 if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony or misdemeanor; or

(2) except as otherwise provided in subsection (c), a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(3) This exception to privilege does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.

I.R.E. 507(5) (b) creates a balancing test to determine whether mediation communications are admissible in felony or misdemeanor proceedings. As written, the rule is inconsistent with the express language in I.C.R. 18.1 and I.J.R. 12.1 which states: "Mediation proceedings shall in all respects be privileged and not reported or recorded. No statement made by any participant at the mediation shall be admissible at trial of any defendant in the case or be considered for any purpose in the sentencing of any defendant in the case....". The proposed amendment makes I.R.E. 507 consistent with I.C.R. 18.1 and I.J.R. 12.1 by inserting 507(5)(b)(3) which provides that the exception to the privilege rule under IRE 507 and the UMA does not apply if the statement was made during a criminal mediation.

Legislation

In addition, to make the Uniform Mediation Act consistent with the justification above, I.C. §9-806(2) should be amended with the addition of a new subsection (2)(c) to provide that communications in a criminal mediation are privileged.

9-806. Exceptions to privilege.

(2) There is no privilege under section 9-804, Idaho Code, if a court, administrative agency or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(a) A court proceeding involving a felony or misdemeanor; or

(b) Except as otherwise provided in subsection (3) of this section, a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

(c) This exception to privilege does not apply to any statement made in the course of a criminal mediation under Rule 18.1 of the Idaho Rules of Criminal Procedure or Rule 12.1 of the Idaho Juvenile Rules.

This recommendation will be forwarded to the Administrative Director of the Courts for proposed legislation.

Proposed Rule 18.1 and 12.1:

Rule ____ . Mediation in criminal cases.

In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of the all-parties. Not all defendants in a multi-defendant case need join in the request or in the settlement conference/mediation. Decision making authority remains with the parties and not the mediator.

(1) *Definition of "Mediation"*. Mediation under this rule is the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing options, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case. Unless otherwise ordered, mediation shall not stay any other proceeding.

(2) *Matters Subject to Mediation*. All misdemeanor and felony cases shall be subject to mediation if the court deems that it may be beneficial in resolving the case entirely. Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 agreements, the handling of restitution and continuing relationship with any victim, are all matters which may be referred to mediation.

(3) *Selection of Mediator*. The court shall select a mediator from those maintained on a roster provided by the Administrative Office of the Courts, after considering the recommendations of the parties. That roster will include senior or sitting judges or justices who have indicated a willingness to conduct criminal mediations and who have completed 12 hours of criminal mediation training within the previous two years. If the selected mediator is a senior judge or justice, the mediator will be compensated as with any senior judge service, and approval from the trial court administrator must be obtained by the court prior to the mediation.

(4) *Role of the Mediator*. The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any future aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case."

(5) *Persons to be Present at Mediation.* Participants shall be determined by the attorneys and the mediator. The government attorney participating in the settlement discussions shall have authority to agree to a disposition of the case.”

(6) *Confidentiality.* This section should be read in conjunction with the provisions of I.R.E. 507. Mediation proceedings shall in all respects be privileged and not reported or recorded. No statement made by any participant at the mediation shall be admissible at trial of any defendant in the case or be considered for any purpose in the sentencing of any defendant in the case. No statement made by a defendant in the course of mediation shall be reported to the prosecuting attorney. Any written statements submitted to the mediator by either party as a part of the mediation process shall remain confidential and shall not be disclosed by the mediator to anyone. Any confidential statements or notes taken by the mediator shall all be destroyed at the conclusion of the mediation. The mediator shall not discuss any matter that comes up within the mediation with anyone other than the parties and defense counsel.—and shall advise the assigned court only as to whether the mediation was successful and, if so, the agreed upon terms.

(7) *Mediator Privilege.* Consistent with I.R.E. 507, a mediator may not be compelled to provide evidence of a mediation communication under this rule.

~~(8) *Agreements Reached.* Any agreement reached by the parties is subject to approval by the court and is not final until the court agrees to the terms.~~

~~(8 9)~~ *Communications Between Mediator and the Court.* The mediator and the court shall have no contact or communication except that the mediator may, without comment or observation, report to the court:

- (a) that the parties are at an impasse;
- (b) that the parties have reached an agreement. In such case, however, the agreement so reached shall be reduced to writing, signed by the prosecuting attorney, the Defendant and defense counsel, and submitted to the court for approval;
- (c) that meaningful mediation is ongoing;
- (d) that the mediator withdraws from the mediation.

~~(9 10)~~ *Communications Between Mediator and Attorneys.* The mediator may communicate in advance of the mediation with the attorneys regarding matters of procedure and to become better acquainted with the current state of negotiations and the issues to be resolved in the mediation. This communication may be conducted separately with each of the attorneys and without the presence of the Defendant, so long as the discussions are limited as above and do not include substantive information about the facts of the case.

~~(10 11)~~ *Termination of Mediation.* The court, the mediator, or any party may terminate the mediation at any time if further progress toward a reasonable agreement is unlikely or concerns or issues arise which make mediation no longer appropriate.