

## CRIMINAL MEDIATION COMMITTEE MINUTES

February 28, 2012

Present: Senior Judge Barry Wood, Chair; Senior Justice Linda Copple Trout, Judge Jeff Brudie, Professor Maureen Laflin, Roger Bourne, and Cathy Derden. Also attending: Judge Karen Lansing, Chair of the Evidence Rules Advisory Committee, and Merlyn Clark.

At the February Administrative Conference the proposed amendments to the criminal mediation rule and to I.R.E. 507 were reviewed and an additional question was raised as to whether the criminal mediation rule accounted for the duty to report child abuse pursuant to I.C. § 16-1605. The purpose of this meeting was to again review the sections on confidentiality and privilege set out in the criminal mediation rule. It was also to address any conflict with I.R.E. 507 regarding the exceptions to privilege.

The Committee had previously proposed amending I.R.E. 507(5)(b) to state that particular exception did not apply to any statement made in the course of a criminal mediation. However, there are other exceptions to the mediator privilege that are set out in I.R.E. 507(5)(a). Professor Laflin stated that the amendment to 507(5)(b) was not intended to imply that the exceptions to privilege in 507(5)(a) were not applicable to criminal mediations. The Committee agreed this was not clear from the criminal mediation rule.

The Committee discussed the difference between confidentiality and privilege. The Committee also discussed the difference between the duty of the mediator to report statements regarding child abuse or neglect and the separate duty to testify when it came to these same statements.

I.R.E. 507(5)(a)(7) currently provides that there is no privilege for a mediation communication that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the mediation. This language mirrors the Uniform Mediation Act. The mediator could be compelled to testify as to the statement in a Child Protection Proceeding but not in a divorce or criminal case. Maureen explained the idea is that if the mediator has a duty to report and does so and it results in an investigation, then any testimony relating to abuse can be obtained through that source.

Currently subsection (6) in the criminal mediation rule addressing confidentiality fails to take into account the duty to report under I.C. § 16-1605. The Committee reviewed this subsection and decided the statements in it were not necessary and that some of them were confusing confidentiality with privilege. The following amendment was proposed:

6) *Confidentiality.* ~~This section should be read in conjunction with the provisions of I.R.E. 507. Except as provided in I.C. § 16-1605, mediation proceedings shall in all respects be privileged confidential 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.~~

The Committee also recommended amending subsection (7) of the criminal mediation rule to read:

~~(7) Mediator Privilege. Mediator privilege is governed by Idaho Rule of Evidence 507. Consistent with I.R.E. 507, a mediator may not be compelled to provide evidence of a mediation communication under this rule.~~

This amendment would ensure that the privilege in this rule is consistent with the exceptions set out in I.R.E. 507(5)(a) and does not change the earlier recommendation to amend I.R.E. 507(5)(b).

The Committee also discussed the fact that the exception for mediator privilege set out in I.R.E. 507(5)(a)(7), regarding statements sought to prove child abuse, is stated differently than in the other rules of evidence regarding privilege. This subsection reads that there is no exception for statements:

(7) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the public agency participates in the mediation.

However, in other privilege rules this subsection reads:

“Child related communications. There is no privilege under this rule in a criminal or civil action or proceeding as to a communication relevant to an issue concerning the physical, mental or emotional condition of or injury to a child, or concerning the welfare of a child including, but not limited to the abuse, abandonment or neglect of a child.”

As noted, the exception in Rule 507 on mediator privilege mirrors the language in the Uniform Mediation Act, I.C. 9-806 (1)(a)(g). The Committee believed it would be helpful to have the history of why the privilege is different in the case of a mediator, as opposed to other persons who hold privileges, and Professor Laflin offered to supply notes on that discussion.

Minutes will be circulated along with history regarding the UMA and another meeting will be set.