I.R.E. 507. Conduct of Mediations.

Idaho Rules of Evidence Rule 507. Conduct of Mediations.

(1) Definitions. In this Rule:

(a) 'Mediation' means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(b) 'Mediation communication' means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(c) 'Mediator' means an individual who conducts a mediation.

(d) 'Nonparty participant' means a person, other than a party or mediator, that participates in a mediation.

(e) 'Mediation party' means a person that participates in a mediation and whose agreement is necessary to resolve the dispute.

(f) 'Person' means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(g) 'Proceeding' means any proceeding referenced in Idaho Rule of Evidence 101(c).

(h) 'Record' means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(i) 'Sign' means:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(2) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate a record; or

(3) to assent on a record with the present intent to authenticate a record.

(2) Scope.

(a) Except as otherwise provided in subsection (b) or (c), this Rule applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator or the mediation is provided by a person that holds itself out as providing mediation.

(b) The Rule does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that the Rule applies to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(A) a primary or secondary school if all the parties are students or

(B) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of proceeding reflects agreement by the parties, that all or part of a mediation is not privileged, the privileges under subparts 3 through 5 do not apply to the mediation or part agreed upon. However, subparts 3 through 5 apply to a mediation communication made by a person that has not received actual notice of the agreement before the communication is made.

(3) Privilege against disclosure; admissibility; discovery.

(a) Except as otherwise provided in subpart 5, a mediation communication is privileged as provided in subsection (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by subpart 4.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

(4) Waiver and preclusion of privilege.

(a) A privilege under subpart 3 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person that discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under subpart 3, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under subpart 3.

(5) Exceptions to privilege.

(a) There is no privilege under subpart 3 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under the Idaho Open Records Act or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subsection (c), sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(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.

(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. 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.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in subsection (a)(6) or (b)(2).

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(6) Application to existing agreements or referrals.

(a) The privileges created in this rule apply to communication made in the course of a mediation pursuant to a referral or an agreement to mediate made on or after the effective date of this Rule.

(b) On or after one year following the effective date, the privileges created in this rule apply to any mediation regardless of when the referral or agreement to mediate was made.

Adopted June 26, 1991, effective September 1, 1991; amended June 12, 1996, effective July 1, 1996) Rescinded and NEW RULE 507 ADOPTED January 3, 2008, effective July 1, 2008; amended April 27, 2012, effective July 1, 2012).

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