

EVIDENCE RULES ADVISORY COMMITTEE MINUTES

January 26, 2012

Present: Judge Karen Lansing, Chair; Senior Judge Barry Wood, Judge Terry McDaniel, John Janis, Ken Jorgensen and Cathy Derden, By Telephone: Professor Maureen Laflin, Tim Gresback, Doug Mushlitz, Steve Smith, Fred Hoopes, Professor Alan Williams, Judge John Stegner.

The purpose of the meeting was to consider a recommendation by the Criminal Mediation Committee that I.R.E. 410 and 507 be amended. Senior Judge Barry Wood, who chairs the Criminal Mediation Committee, was present along with member, Professor Maureen Laflin, to help answer any questions. At the beginning of the meeting, Professor Laflin announced that she and Judge Wood had agreed to withdraw the proposal relating to I.R.E. 410, as that rule on plea negotiations is not applicable to criminal mediation. Thus, only the proposed amendment to I.R.E. 507 was addressed.

The Criminal Mediation Committee proposed that I.R.E. 507(5)(b) be amended by adding a new sentence to subsection (b) 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.

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.

The explanation offered by the Criminal Mediation Committee was that 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(5)(b) consistent with I.C.R. 18.1 and I.J.R. 12.1 by inserting a sentence that states the exception to the privilege rule under I.R.E. 507(b) and the UMA does not apply if the statement was made during a criminal mediation.

The question was raised whether creating an absolute privilege in criminal cases was consistent with the defendant's rights if the defendant wanted to use something said during mediation in his or her own defense. Professor Laflin first explained that in criminal mediation the defendant and the prosecutor are not in the same room, though this could be possible in the situation where the defendant has already admitted guilt. Thus, the chance of hearing anything said by the other side is very slim. It was also noted that when a defendant enters a guilty plea he waives many rights and this would be no different. There is no constitutional right that cannot be waived by participating in criminal mediation, though it is important to advise the defendant that by participating in mediation he or she is waiving the right to use anything said during mediation in a later trial.

Judge Wood and Professor Laflin both stressed that parties would be reluctant to participate in mediation unless it was confidential and that most judges indicated they would not participate as mediators if there was a possibility they could be later compelled to testify as to anything said during mediation.

It was suggested that the Criminal Mediation Committee consider amending the subsections in I.C.R. 18.1 and I.J.R. 12.1 addressing confidentiality to include an advisory to the defendant that he or she is waiving the right to use anything said at mediation during a later trial, and Judge Wood indicated the committee would consider doing so.

It was also noted that even if the proposed amendment to Rule 507(5)(b) is adopted, Rule 507 will still be in conflict with I.C.R. 18.1 and I.J.R. 12.1 because Rule 507(5)(a) includes other exceptions to the privilege that are not found in Rules 18.1 and 12.1. Judge Wood and Professor Laflin agreed that the Criminal Mediation Committee needs to develop amendments to the latter two rules to resolve this remaining conflict.

The Committee voted in favor of recommending the proposed amendment to I.R.E. 507(5)(b).