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Criminal Mediation Has Taken Root in Idaho's Courts

Maureen Laflin
University of Idaho College of Law, mlaflin@uidaho.edu

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With the growth of criminal mediation comes controversy, questions, and uncertainty. The Idaho Supreme Court's 2011 criminal mediation rules, Idaho Rule Criminal Procedure 18.1 ("Rule 18.1") and Idaho Juvenile Rule 12.1 ("Rule 12.1") provide some guidance. Rule 18.1 and Rule 12.1 are nearly identical, only differing as to the age of the defendant. To enhance readability, this article will cite primarily to Rule 18.1. This article provides an overview of the Rules, a brief history of how we got here, and then touches upon some of the thornier issues.

We are on the cusp of real change in the criminal system and criminal mediation has begun to take hold for minor and serious crimes alike as well as at all stages – pre-arraignment, pre-trial, pre-sentencing, and post-trial. Criminal mediation runs the gamut and manifests itself in a variety of different ways. The criminal mediation spectrum encompasses restorative and retributive justice. Rule 18.1 covers all criminal mediations, however, it was enacted in response to long trials and overcrowded dockets. As such, the Rule focuses primarily on case management mediation or facilitated plea bargaining, which are settlement driven in order to save counties money and reduce burgeoning dockets. Criminal mediations provide closure for the participants and reduce risks for the defendant.[1]

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How we got to the present

The path to where we are now began with the initial meetings of the Idaho Supreme Court's ADR Committee in 1994.[2] The late Monte Carlson was a pioneer of criminal mediation in Idaho. He served as a district court judge in the Fifth Judicial District from 1998 to 2007. During his tenure on the bench, he mediated a broad spectrum of criminal cases ranging from murder and rape to malicious destruction of property.[3] By spring 2001, he had mediated seven homicides, six of which resulted in a plea agreement. In fact, the use of criminal mediation started spreading so quickly that lawyers reported that some judges "in the early part of this century strongly encouraged mediation, treating it as a 'prerequisite to trial' for many cases on their criminal calendars."[4]

In May 2001, the Idaho Supreme Court created an ad hoc Criminal Mediation Committee and requested that it draft a rule for criminal mediations in felony, misdemeanor and juvenile matters. After several drafts, the Court decided to maintain the status quo and not promulgate a rule.[5] The criminal bar had raised concerns about whether a court should be allowed to order the parties into a criminal mediation, the role of the victim, and confidentiality and privilege. These same issues confronted the Idaho Supreme Court's reconstituted Criminal Mediation Committee in 2010. However, by this time, the bench and the bar were ready to confront the issues and the Court adopted Rule 18.1 and Rule 12.1.

Privilege/confidentiality and Idaho Rule of Evidence 507

In order to encourage full participation, parties to a mediation must have assurance that mediation communications are both confidential and privileged. The need for this assurance, however, came at a cost. In 2008, Idaho adopted the Uniform Mediation Act, which is found at Idaho Rule Evidence 507 ("Rule 507"). Under Rule 507, the parties, the mediator, and the non-party participants all hold the privilege.[6] Two issues came to the forefront: (1) the scope of the mediator's privilege; and (2) the admissibility of mediation communications in subsequent criminal proceedings.

Scope of mediator privilege

The criminal defense bar raised the concern that if a defendant claimed ineffective assistance of counsel after the mediation, the mediator could not be forced to testify in that action. Rule 507(3)(b)(2) provides that "A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator." Thus, neither the court nor defense counsel can require the mediator to testify about what happened in a mediation.[7] Nonetheless, the mediator may testify if he or she wishes. Truth be told, most mediators will not remember the details of a mediation three or four years later; unless something egregious occurred, at which point the mediator probably terminated the mediation.

Admissibility of mediation communications

The 2008 version of Rule 507 provided a balancing test to determine whether mediation communications were admissible in subsequent criminal cases.[8] This simply left too much uncertainty.[9] Rule 507 had to be amended to restrict the balancing test to civil mediations. In 2012, Rule 507(5)(b) was amended to provide that the balancing test "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 addition removes all uncertainty — mediation communications from a criminal mediation in Idaho are privileged in subsequent criminal proceedings unless waived.

Who are the mediators in criminal mediations?

Most of the cases mediated under Rule 18.1 and Rule 12.1 are judicial settlement conferences or assisted plea bargaining sessions. The mediators are senior or sitting judges or justices who conduct these mediations without cost to the parties. The judicial mediators have completed twelve hours of criminal mediation training and their names are maintained on a roster kept by the Administrative Office of the Courts. To date over thirty members of the judiciary have been trained in criminal mediation.[10]

Although the Rules establish who can be on the court's roster, nothing requires the parties to select someone from the roster. The Idaho Supreme Court and the Criminal Mediation Committee wanted to offer the parties the ability to participate in a criminal mediation without costs. Thus, the Rules provide a compromise position — the parties can use a mediator from the roster without costs or pay for someone else if they choose.

Who may initiate a criminal mediation?

The Rules are very clear — mediation cannot be imposed on the parties. Under Rule 18.1, "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." U.S. Magistrate Judge Kelley Arnold of the Western District of Washington has said at each of the criminal mediation trainings in Idaho, it is important to give either or both parties the option of asking the court to initiate the process, thus not making it appear that one side is overly eager to resolve the case.[11] The Rule goes on to clarify that participation in criminal mediations is voluntary and that the mediation will not occur unless the parties agree. As Judge Arnold stated at the May 2012 training, there is "no reason to mediate unless both sides are agreeable to mediation. If either side is ambivalent or reluctant, don't push it."[12] The Rule also states, that decision-making rests with "parties not the mediator."[13] Thus, while the court can initiate or propose the idea, it cannot order parties into criminal mediation. It is very important that there be a record supporting the defendant's voluntary participation.

Guidelines for communications between the mediator and court

Communications between the court and the mediator is a hot button issue that touches on Idaho Criminal Rule 11 ("Rule 11"), past practices, and issues of expediency. As such, the issue consumed countless hours of deliberation and debate to finally arrive at the current rule. Rule 11 differs from Federal Rule of Criminal Procedure 11 in one significant wayIdaho allows the court to participate in plea discussions (Rule 11(f)), whereas the federal rule expressly precludes the court from participating in plea discussions (Fed. R. Crim. P. 11(c)(1)). In both state and federal courts, the judicial mediator is not the trial judge and cannot take the plea.[14]

Rule 18.1, however, does not allow the mediator to serve as the ambassador for the parties or to defend the proposed plea with the court.[15] This is noteworthy because prior to the Rule, in some judicial districts in Idaho, when the parties were close to a deal, the judicial mediator would share the proposed resolution with the trial judge to test the waters. Idaho's criminal mediation rule now expressly precludes such discussions. Now, if the parties are concerned about whether the trial judge will accept the proposed mediated plea, the attorneys can talk with the trial judge. This is consistent with the current practice of attorneys floating potential pleas by the trial judge outside of mediation.

While some have argued that victims have a right to participate in criminal mediations, no Idaho court has ruled on this issue.

Role of the victim

Another controversial topic involves the role of the victim in the criminal mediation process. Neither Rule 18.1 nor the Idaho's Victim Rights Statute, Idaho Code § 19-5306, definitively answers this question. Rule 18.1(5) states that the attorneys and the mediator decide who can be present during mediations.[16] The Victim Rights Statute provides that victims may be present at "all criminal proceedings;"[17] will be allowed to be heard "at all justice proceedings considering a plea of guilty;"[18] and in certain types of crimes, will "be advised of any proposed plea agreement by the prosecuting attorney prior to entering a plea agreement."[19] While some have argued that victims have a right to participate in criminal mediations, no Idaho court has ruled on this issue. The Rules do make it clear that the victim does not have veto power over a plea agreement.

What is important is that victims are heard if they wish to be, their concerns are understood, they fully understand the process, the risks, and other considerations, and they understand that they can address the court at sentencing. Yet, victims often need closure and allowing them to participate in the mediation process allows this to happen.[20] A judicial mediator from Kentucky, discussing victims' involvement, stated:

> By being directly involved with the negotiations, the victims obtain ownership over the plea agreement, and come out not feeling like they have been co-opted. This is a win-win for everyone, and it allows prosecutors and judges to avoid the criticism they often receive in plea agreements where victims do not feel like they have had meaningful input into the process.[21]

Some prosecutors want the victims to be present so that they better understand how the parties came to a particular agreement. Others fear that they will lose too much control if the victim is in the room and want to maintain the maximum flexibility.[22] Some defense attorneys echo this concern and worry that the presence of the victim may make the prosecutor reluctant to make a reasonable offer.[23] Others worry that the presence of the victim will lengthen the process as the prosecutor will have to negotiate with both defense counsel and the victim.[24]

Some prosecutors and mediators regulate the role of victims by controlling their location. Some victims are present during the mediation – either in the room with the prosecutor or in his or her own room. Some victims are available by phone. Other victims' desires are communicated to the prosecutor or the victim advocate before the process begins.

Whether the victim is present at the mediation, by phone, or through prior conversations with staff at the prosecutor's office, the mediator and the prosecutor need to ensure the victim's voice and desires are heard. In the end, the role the victim plays must be determined on a case by case basis recognizing the personalities of the parties and the mediator, the facts of the case, and the particular victim.

Although there may be a desire to insert "restorative justice" into a case-management criminal mediation, Judge Arnold maintains that it would be unwise to allow the defendant and the victim to sit together with the mediator during the proceeding. The potential for an outburst, loss of confidentiality, and/or loss of control of the proceeding are potential consequences too great to risk.

Constitutional issues

Civil mediations often involve money and the distribution of assets. In contrast, criminal mediations concern a defendant's liberty interest and the other protections provided under both state and federal constitutions. For this reason, criminal

mediations must be completely voluntary. The judicial mediator must safeguard the voluntariness of the process by paying special attention not to exert undue influence or pressure.

Conclusion and takeaway

Case management mediation provides an opportunity for both sides to engage in "risk assessment" with a neutral third party — a sitting or senior judge other than the assigned judge. A mediated agreement provides closure, certainty, and efficiency, and is more cost effective. At the same time, the process only works if the players stay mindful of defendants' constitutional rights.

Endnotes

1 *See generally* Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation*, 40 IDAHO L. REV. 571 (2004).

2 Maureen E. Laflin, *Dreamers and Visionaries: The History of ADR in Idaho*, 46 IDAHO L. REV. 177, 213 (2009).

3 *Id.* at 213.

4 *Id.*

5 *Id.* at 214.

6 I.R.E. 507(3)(b).

7 I.R.E. 507(5)(c).

8 I.R.E. 507(5)(b)(1) provides in part:

> 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 . . . ;

9 *See* Maureen E. Laflin, *The Mediator as Fugu Chef: Preserving Protections Without Poisoning the Process*, 49 S. TEX. L. REV. 943 (2008) (addressing the mediator's need to allow parties to reap the benefits of mediation without harming them in subsequent criminal litigation).

10 U.S. Magistrate Judge Kelley Arnold, Western District of Washington, and Professor Laflin taught the two judicially sponsored criminal mediations trainings.

11 Notes from the Oct. 6-7, 2011 and May 24-25, 2012 trainings are on file with author.

12 Notes from the May 24-25, 2012 training are on file with the author.

13 I.C.R. 18.1.

14 On January 4, 2013, the United States Supreme Court agreed to hear *United States v. Davila*, 664 F.3d 1355 (11th Cir. 2011), *cert. granted* (U.S. Jan. 4, 2013) (No. 12-167). The Court's decision in that case may preclude criminal mediations in federal cases. The issue before the Court is "Whether the court of appeals erred in holding that any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant." *See* http://www.scotusblog.com/case-files/cases/united-states-v-davila/.

15 I.C.R. 18.1(8).

16 I.R.C. 18.1(5).

17 I.C. §19-5306(b).

18 I.C. §19-5306(e).

19 I.C. §19-5306(f).

20 Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation, supra* note 1 at, 573.

21 Bill Mains, *Observations of Senior Judge and Mediator, Hon. Bill Mains*, Kentucky's Year End Report 2010, Court Services Strategies Plan (a copy on file with author).

22 Maureen E. Laflin, *Remarks on Case-Management Criminal Mediation, supra* note 1 at, 573, 595.

23 *Id.* at 593.

24 *Id.* at 597.

About the Author

Maureen E. Laflin, *Professor of Law and Director of Clinical Programs at the University of Idaho College of Law, has been on the faculty since 1991. She has written extensively on criminal mediation, mediation privilege, and mediation ethics. She has served on three Idaho Supreme Court Committees exploring criminal mediation and helped draft the mediation privilege rule in Idaho.*