

New Mexico Law and Mediation

By what authority does OSE conduct mediations?

The New Mexico **Governmental Dispute Prevention and Resolution Act** authorizes state agencies to use alternative dispute resolution (ADR) procedures, including mediation "to resolve any dispute, issue or controversy involving any of the agency's operations, programs or functions, including formal and informal adjudications, rulemakings, enforcement actions, permitting, certifications, licensing, policy development and contract administration." NMSA 1978, § 12-8A-3 (2000).

The **Mediation Procedures Act** defines scope, procedures, confidentiality and other aspects of mediation as offered by New Mexico administrative agencies. NMSA 1978, §§ 44-7B-1 to 44-7B-6 (2007). The Act "applies to all mediators, nonparty participants, mediation parties, and a mediation" that arises from referral to mediation by the State Engineer. *Id.* § 44-7B-3.

In referring or ordering parties to mediation, the OSE hearing examiner acts within his authority "to regulate all proceedings before him" NMSA 1978, § 72-2-12 (1965). By OSE regulation, that authority includes encouraging parties to settle prior to formal hearing. 19.25.2.15 NMAC.

Who may participate in mediation sessions?

The parties to mediation are the applicant, protestants (if any), and the OSE Water Rights Division. As at an administrative hearing, an applicant or protestant may participate on his or her own behalf or be represented by an attorney. The New Mexico **Government Conduct Act** prohibits former OSE employees from representing persons before OSE, including at OSE-facilitated mediations, for a period of one year following their departure from OSE. NMSA 1978, § 10-168(C) (1993).

Are mediation sessions confidential?

Yes. The parties to mediation and the mediator should, within requirements of applicable law, maintain confidentiality. In particular, the Mediation Procedures Act and New Mexico rules of evidence provide for confidentiality of mediation sessions.

The Mediation Procedures Act defines a "mediation communication" as "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." NMSA 1978, § 44-7B-2(B). With certain exceptions, mediation communications "are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding." *Id.* § 44-7B-4. The mediator is obligated to protect confidentiality of mediation proceedings and "shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communication." *Id.* § 44-7B-5(C).

Rules of evidence also protect confidentiality. OSE administrative hearings are conducted according to New Mexico rules of evidence. NMSA 1978, § 72-2-17 (1965). Those rules provide protection for settlement discussions. Parties should, of course, be aware of the limitations of that

protection. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution. NMRA Rule 11-408.