



New Mexico Governor Signs New Mediation Confidentiality Law

By Justin Kelly, ADRWorld.com

(3.30.2007) New Mexico Gov. Bill Richardson recently signed into law legislation that creates new confidentiality protections for mediation communications and guarantees the enforceability of mediated settlement agreements.

[H.B. 192](#), the Mediation Procedures Act, introduced by Rep. Gail Chasey (D-18th) and signed by Richardson March 13, establishes minimum confidentiality protections for mediation communications, but offers mediation participants the ability to agree, to opt out of the law prior to commencing the process, and agree to additional or different confidentiality protections.

David Levin, co-chair of the New Mexico State Bar Committee on Alternative Methods of Dispute Resolution, said, "I'm very pleased it was signed because there has been no default protection for mediation communications and now there is."

The new law "should make a big difference," he said, because "we were starting to see subpoenas for information from mediators and there was nothing to address how confidential information should be protected. From the feed back I've received, the mediation community is pleased and relieved."

Levin suggested that there is a national trend of increasing challenges to mediation confidentiality. He said this law will enable New Mexico "to get ahead of the ball" and protect from disclosure communications made in mediation.

While the legislation closely tracks the terms used in the Uniform Mediation Act, it does not include the UMA's "confidentiality privilege" against disclosure of protected mediation communications. Instead, it establishes that mediation communications are confidential and barred from use in future proceedings of any kind.

The reason is, according to Levin, is that, in New Mexico, only the state Supreme Court can establish a privilege. But that court made clear in a ruling that the legislature may pass laws creating confidential processes. "We drafted the bill to be consistent with that ruling," Levin said.

The new mediation law provides, "Except as otherwise provided in the Mediation Procedures Act or by applicable judicial court rules, all mediation communications are confidential, and not subject to disclosure and shall not be used as evidence in any proceeding."

It also provides, "Mediators shall not be required to make disclosure, either through discovery or testimony at trial or otherwise, of any matter related to mediation communications."

There are exceptions to confidentiality, some of which are for settlement agreements reached through mediation, disclosures required by law, threats of violence or bodily harm, and information used to disprove a claim of malpractice.

Levin cited an administrative exception. "[T]here were legitimate concerns about how [this type of] information could be obtained," he said, so the new law also excepts the collection of information about the referral to mediation, who the participants are, whether the mediator was paid, and whether the case settled.

Evidence otherwise admissible in court is not excluded from disclosure simply because it was used in mediation. The new law also does not prevent "the gathering of information for research or educational purposes or for the purpose of evaluating or monitoring the performance of a mediator; provided that the mediation parties or the specific circumstances of the dispute of the mediation parties are not identified or identifiable."

The new law applies to all parties, participants, and mediators involved in cases ordered to mediation by a court, an administrative agency, or by a statute. It also applies to private mediation, i.e., where the parties and the mediator agree in writing to mediate a dispute.

The opt-out provision allows mediation participants and government and judicial mediation programs to agree that the Mediation Procedures Act shall not apply to a mediation. Levin said this provision was included to "respect the ability of people to make their own decisions about the process" and to "allow mediation programs to set up their own policies and procedures."

The law also says nothing in it shall prevent, "a court or court agency, a government or governmental subdivision, agency or instrumentality of this state or a tribal court, government or agency, when conducting a mediation program under its auspices, from ordering prior to the mediation that different or additional rules of confidentiality shall apply to the mediation; or mediation parties from agreeing in writing to additional or different confidentiality protections prior to the mediation."

The statute also includes a provision allowing for challenges to confidentiality in an action based on a settlement agreement. It provides for an "in camera" hearing, at which a challenging party can attempt to show that there is "good cause" for disclosure and that "the evidence is not otherwise available." But this provision does not authorize a court to require the mediator to testify as to any mediation communications.

If mediation results in a written settlement, that agreement can be enforced like any other contract. "The agreement shall not affect any outstanding court order unless the terms of the agreement are incorporated into a subsequent order," the new law says.

The new law takes effect on July 1, 2007.

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