

Advisory Opinion of the NC Dispute Resolution Commission

Opinion Number 07-04

(Adopted and Issued by the Commission on March 18, 2004.)

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and decertification shall be conducted through the Dispute Resolution Commission, established under the Judicial Department.” On August 28, 1998, the Commission adopted an Advisory Opinions Policy encouraging mediators to seek guidance on dilemmas that arise in the context of their mediation practice. In adopting the Policy and issuing opinions, the Commission seeks to educate mediators and to protect the public.

Concern Raised

Mediator was ordered to conduct a family financial mediation. After the case was scheduled, one of the parties filed for bankruptcy. Mediator asks whether he should proceed to conduct the mediation.

Advisory Opinion

A filing of a petition for bankruptcy under section 301, 302, or 303 of Title 11 of the United States Code results in an automatic stay of **any judicial**, administrative, or other action or proceeding that was or could have been commenced against the debtor prior to the filing of the petition (see 11 U.S.C. 362(a)(i)). This stay may preclude the holding of the mediation conference ordered by the district court. After a mediator learns that a bankruptcy petition has been filed, it is the better practice for the mediator to notify the parties that the mediation cannot proceed until the stay has been lifted. If one or both of the parties wish to proceed with the mediation, a “Motion for Relief of Automatic Stay” or other relief may be sought through the bankruptcy court pursuant to 11 U.S.C. 362(d).

Subsection (b) lists exceptions to the stay including one for the establishment or modification of an order for alimony, maintenance, or support (see 11 U.S.C. 362(b)(2)(A)(ii)). However, even if the parties agree that only issues of alimony, maintenance, or support will be discussed in the mediation, the Commission believes it is still prudent and the better practice for the mediator to advise the parties to contact the bankruptcy court or the bankruptcy trustee, if one has been appointed, and request permission to proceed. Issues of equitable distribution are not covered by this exception.

Parties that seek to proceed with mediation after a bankruptcy petition is filed may face sanctions under 11 U.S.C. 362(h). Subsection (h) provides that any individual injured by any willful violation of the stay shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.

Upon learning that a bankruptcy petition has been filed in the case, the mediator shall report to the court that the bankruptcy has been filed and shall request that the court clarify the duty of the mediator.