

Advisory Opinion of the NC Dispute Resolution Commission

Advisory Opinion No. 26 (2013)

(Adopted and Issued by the Commission on May 17, 2013)

N.C. Gen. Stat. §7A-38.2(b) provides, “[t]he administration of mediator certification, regulation of mediator conduct, and certification 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 assigned to conduct a mediated settlement conference in a superior court case and worked with the parties to schedule a date for mediation. Thereafter, the mediator received a notice of appeal of an order denying the defendant’s motion to dismiss, which raised the doctrine of sovereign immunity. The attorney for the defendant contacted the mediator and asked to have the mediation conference postponed due to the pending appeal. The attorney insisted that the filing of the appeal immediately divested the trial court of its jurisdiction in the matter and that, as such, the mediation ordered by the court should not proceed.

The mediator contacted the plaintiff’s counsel and was advised that the plaintiff wanted the mediation to go forward as scheduled. The mediator contacted the defendant’s attorney to advise him that unless the attorney obtained an order of the court either staying the case or postponing the mediation, the mediator intended to hold the conference as scheduled. Defense counsel insisted that he and his client would not appear for mediation, if held. The mediator contacted the Commission for guidance.

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N.C. Gen Stat. §1-294 provides that a timely notice of appeal stays all further proceedings in the court below on the judgment appealed from or upon the matter addressed therein, but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. Once a party gives notice of appeal, the trial court is divested of its jurisdiction if the appeal is an immediately appealable interlocutory order. However, when a party appeals a non-appealable interlocutory order, such appeal does not deprive the trial court of jurisdiction and the trial court may proceed with trying the case. RPR & Associates, Inc. v. The University of

North Carolina-Chapel Hill, et al., 153 N.C. App. 342 (2002), appeal dismissed and disc. review denied, 357 N.C. 166 (2003).

An interlocutory order that affects a substantial right is immediately appealable, and it is the trial court that has the authority to determine whether its order affects a substantial right of the parties or is otherwise immediately appealable. (A party may apply to the appellate court for a stay if the trial court chooses to proceed with the matter.) Accordingly, a trial judge would need to determine on a case-by-case basis whether the matter is stayed or if the court still has jurisdiction, which would allow the mediation to proceed.

Upon learning that an appeal has been filed and that the mediator's duty to hold the conference has been called into question, the mediator should look to the trial court for guidance. While it remains the responsibility of the parties to seek clarification from the court, if they do not, the mediator should seek guidance from the court, through court staff, as to whether the matter is stayed upon appeal or whether the case, including mediation, will proceed through the trial court.

A mediator should not make a determination as to whether to proceed with mediation; it is up to the trial judge to decide whether the interlocutory order is appealable. Moreover, mediators should avoid being drawn into disputes between attorneys over such legal issues and making such determinations, which would only serve to undermine the neutrality of the mediator.