

## THE QUESTION:

This is in response to a recent issue of the mediation newsletter. It concerns the ethics opinion on the case where the mediator raised the question given a threat from one party to the other. The decision rendered was that there should be no reporting because that would violate confidentiality.

I'd like to raise another ethics concern. In the American Psychological Association Code of Ethics, as well as the licensing requirements for many of the member health professionals, we have a "Duty to warn" in the event of a threat of hard [sic] to self or others. We are supposed to warn not only the intended victim, if possible, but also whoever constitutes the appropriate authority, to build in some protection. This ruling seems to place many mental health professionals who practice mediation in jeopardy with their own professional Codes of Ethics. I wonder if you could follow up and have an opinion rendered on this conflict.

{Last paragraph omitted.}

Sincerely,

Certified Family Mediator  
Southern Division

## Authority Referenced

Florida Rules for Certified and Court-Appointed Mediators - 10.030(b).

Florida Statutes - Sections 44.102, 455.2415, 490.0147, and 491.0147.

MQAP Opinion 96-005.

Case Law - Boynton v. Burglass, 590 So.2d 446 (Fla. 3d DCA 1991); Green v. Ross, 691 So.2d 542 (Fla. 2d DCA 1997).

American Psychological Association's Ethical Principles of Psychologists and Code of Conduct - Section 5.05.

## Summary of the Opinion

There is no conflict between the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct and the Florida Rules for Certified and Court-Appointed Mediators in relation to a psychologist mediator's obligation to warn an individual of a threat which becomes known to the psychologist mediator during confidential mediation proceedings.

## Opinion

Pursuant to rule 10.030(b), the mediator code of conduct does not “replace, eliminate, or render inapplicable relevant ethical standards, not in conflict with [the rules for certified and court-appointed mediators], which may be imposed upon any mediator by virtue of the mediator’s professional calling.” The American Psychological Association’s Ethical Principles of Psychologists and Code of Conduct specifically address the psychologist’s responsibility in maintaining confidentiality. In section 5.05, the code specifies that “psychologists disclose confidential information without the consent of the individual only as mandated by law, or where permitted by law for a valid purpose, such as . . . to protect the patient or client or others from harm.” The panel does not believe that there is a conflict.

The Florida Legislature and courts have dealt with the issues of confidentiality and the duty to warn as these issues relate to psychiatrists, psychologists, and other mental health professionals. Section 455.2415, Florida Statutes, provides, in relevant part, that while psychiatrists shall hold confidential communications with a patient, a psychiatrist may disclose communications to the extent necessary to warn any potential victim (or law enforcement) of an actual threat of physical harm to an identifiable victim if the psychiatrist makes a clinical judgment the patient has the apparent capability to commit such an act and it is more likely than not the patient will commit such an act. Similar provisions exist in Florida Statutes in relation to psychologists, section 490.0147, and mental health professionals, section 491.0147. While there is a slight variation in terminology between chapter 490 and chapter 491, psychologists and mental health professionals are also allowed to disclose only when there is a “clear and immediate probability of physical harm to the patient or client, to other individuals, or to society...” See sections 490.0147(3) and 491.0147(3), Florida Statutes.

The courts have been confronted with the question of whether a waiver of confidentiality may be mandatory, that is, whether there is a duty to warn. In Boynton v. Burglass, 590 So.2d 446 (Fla. 3d DCA 1991), the court held that section 455.2415 does not require a psychiatrist to warn a third party of the threat of harm, but rather, only permits the psychiatrist to do so. Similarly, the court in Green v. Ross, 691 So.2d 542 (Fla. 2d DCA 1997), interpreting section 491.0147, held that “the *permissive* language waiving confidentiality in sections 455.2415 and 491.0147 does not equate to the legislative creation of a cause of action not previously recognized in Florida.” at 543.

It therefore appears that the main premise of the question is inaccurate since there is not under Florida Statutes and case law a “duty to warn.” In addition, psychologists are allowed to disclose information “only as mandated by law,” which law includes section 44.102, Florida Statutes, prohibiting such disclosure of communications occurring during mediation proceedings. Thus it does not appear that there is any conflict between the American Psychological Association’s Code and the Florida Rules for Certified and Court-Appointed Mediators. A certified mediator who is also a psychologist therefore may adhere to both codes of conduct.

In an earlier advisory opinion, MQAP 96-005, the Panel opined that under the rules and statutes governing court-ordered mediation, a mediator had no duty to warn because the circumstances raised in that question did not rise to the level of imminent harm. The panel has not yet offered an opinion based on a situation in which there is a realistic threat of imminent harm during the mediation session.

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Date

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Charles Rieders, Panel Chair