

February 21, 1991

x

465-3603

William T. Cotton
Executive Director
Alaska Judicial Council
1029 W. Third Avenue, Suite 201
Anchorage, AK 99501

Re: Confidentiality of mediation
conferences
Our file: 663-91-0286

Dear Mr. Cotton:

You ask several questions regarding whether mediators hired to work in the child visitation mediation pilot project are required to report child abuse and neglect under AS 14.17. You state that the council is seeking guidance in establishing a policy on the confidentiality of mediation conferences held as part of the pilot project.

The grant of confidentiality to mediation proceedings under this project does not eliminate the duty to report suspected

child abuse and neglect under AS 47.17.020. 1/ To the extent a

1/ AS 47.17.020 provides:

Persons required to report. (a) The following persons who, in the performance of their occupational duties, have reasonable cause to suspect that a child has suffered harm as a result of child abuse or neglect shall immediately report the harm to the nearest office of the department:

- (1) practitioners of the hearing arts;
- (2) school teachers and school administrative staff members of public and private schools;
- (3) social workers;
- (4) peace officers, and officers of the Department of Corrections;
- (5) administrative officers of institutions;
- (6) child care providers;
- (7) paid employees of domestic violence and sexual assault programs, and crisis intervention and prevention programs as defined in AS 18.66.900;
- (8) paid employees of an organization that provides counseling or treatment to individuals seeking to control their use of drugs or alcohol.

(b) This section does not prohibit the named persons from reporting cases that have come to their attention in their nonoccupational capacities, nor does it prohibit any other person from reporting a child's harm that the person has reasonable cause to suspect is a result of child abuse or neglect. These reports shall be made to the nearest office of the department.

(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the

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mediator falls within any of the categories designated in AS 47.17.020, he or she is still a mandatory reporter.

I will respond to your specific questions in the order in which you asked them.

1. Are mediators practitioners of the healing arts for purposes of the reporting requirements of AS 47.17.020?

Mediators are not practitioners of the healing arts merely because of their involvement in the mediation process. Some of the mediators, due to their professions or occupations, may fall under the definition of practitioners of the healing arts found at AS 47.17.290(13), which provides:

(13) "practitioner of the healing arts" includes chiropractors, mental health counselors, dental hygienists, dentists, health aides, nurses, nurse practitioners, occupational therapists, occupational therapy assistants, optometrists, osteopaths, naturopaths, physical therapists,

(..continued)

child, the person shall make the report to a peace officer. The peace officer shall immediately take action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department.

(d) This section does not require a religious healing practitioner to report as neglect of a child the failure to provide medical attention to the child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination.

...

(g) A person required to report child abuse or neglect under (a) of this section who makes the report to the person's job supervisor or to another individual working for the entity that employs the person is not relieved of the obligation to make the report to the department as required under (a) of this section.

physical therapy assistants, physicians,
physician's assistants, psychiatrists,
psychologists, psychological associates,
audiologists licensed under AS 08.11, hearing aid
dealers licensed under AS 08.55, religious healing
practitioners, acupuncturists, and surgeons[.]

Those mediators who come under the definition are required to report child abuse and neglect in accordance with AS 47.17.010 et seq. Although the listing of occupations found in AS 47.17.290(13) is not exclusive, mediators do not appear to be among the types of professionals intended to be covered by the legislature.

2. If mediators are practitioners of the healing arts, are all project mediators required to report suspicions of child abuse/neglect in accordance with AS 47.17.020?

Not all mediators are practitioners of the healing arts. Only those mediators who are practitioners of the healing arts or who fall under some other category found in AS 47.17.020 are under a statutory duty to report child abuse and neglect.

3. If mediators are **not** practitioners of the healing arts, are the project's mental health counselors and social workers nevertheless bound by the reporting requirements of the statute?

The project's social workers and mental health counselors, as well as other mediators whose professions are listed in AS 47.17.020 or AS 47.17.290(13), are under a duty to report child abuse and neglect. This response assumes that these professionals consider their mediation services constitute the performance of their occupational duties as professionals. I understand that there are four mediators who professionally or occupationally do not fall under AS 47.17.010 et seq. as mandatory reporters and who are not attorneys. These four mediators do not have a mandatory duty to report.

4. If the project's counselors and social workers [or other mediators] are not bound by the reporting requirements of the statute, could they nevertheless make a report of child abuse/neglect, given the confidentiality provision of the Mediation Pilot Project's authorizing legislation?

The social workers and mental health counselors are required to make reports under AS 47.17.020. Mediators who are

not covered by AS 47.17.020 do not have a statutory duty to report under the child abuse and neglect reporting requirements.

However, even those mediators who have no statutory duty to report abuse and neglect may have a duty to warn to protect third parties. The duty to warn or to protect may include contacting state or local government authorities or foreseeable victims.

Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986).

The council may decide to have a policy that the mediators who are not mandatory reporters should nonetheless consider disclosures regarding child abuse or neglect as triggering a duty to warn. The council may also wish to formulate a policy that all mediation clients must agree prior to the onset of mediation to waive the confidentiality provision in a situation where a mediator has reasonable cause to suspect child abuse or neglect.

The council would inform clients that although the mediation sessions are confidential, the mediators will report suspected child abuse or neglect.

5. Could the project's lawyers report abuse/neglect?

Any person, including attorneys, may report suspected child abuse and neglect to the Department of Health and Social Services or to a law enforcement agency. 2/ However, a

2/ Good faith reporters are granted civil and criminal immunity under AS 47.10.050. AS 47.17.050 provides:

Immunity. (a) Except as provided in (b) of this section, a person who, in good faith, makes a report under this chapter, permits an interview under AS 47.17.027, or participates in judicial proceedings related to the submission of reports under this chapter, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report or permitting the interview, except that a person who knowingly makes an untimely report is not immune from civil or criminal liability based on the delay in making the report.

(b) Notwithstanding (a) of this section, a person accused of committing the child abuse or neglect is not immune from civil or criminal liability for the child abuse or neglect as a result of reporting the child abuse or neglect.

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determination as to whether attorney-provided mediation gives rise to an attorney-client privilege needs to be considered by the attorneys involved in the project. ^{3/} If no attorney-client relationship exists, an attorney would have no bar to reporting suspected child abuse and neglect other than the confidentiality provision applicable to the mediation project in general. When there is no attorney-client relationship, the same comments regarding duty to warn would apply to an attorney mediator as to other mediators.

I would suggest that some of the concerns and questions which have arisen already and which may arise in the future regarding confidentiality and its limits can be handled more comprehensively in a training session with the mediators than in a legal memorandum. My office would be willing to provide training regarding confidentiality issues, if requested.

If there are further questions which arise, please feel free to contact this office. Also, as the mediators are independent contractors, they may wish to discuss these matters with their own attorneys.

Sincerely,

CHARLES E. COLE
ATTORNEY GENERAL

By:

Elizabeth L. Shaw
Assistant Attorney General

ELS/bap

^{3/} The council or an individual attorney may wish to consult with the bar association and request an ethics opinion regarding whether mediation services in this context constitutes the practice of law which may give rise to the attorney/client relationship.