

**FLORIDA SUPREME COURT  
Mediator Ethics Advisory Committee**

Opinion Number: 2017-010

Date Issued: December 6, 2017

**The Question**

I practice in elder mediation. I recently heard about a situation from a colleague. It is generalized here.

Situation: Mr. Jones is having some memory problems. One of his children thinks there needs to be formal intervention (the judicial determination that dad is incapacitated and needs a guardian.) The other son believes that is not necessary and opposes any court action. The family seeks a mediated settlement prior to filing a court action. The following questions revolve around the question of whether dad can exercise self-determination.

Questions:

1. Mr. Jones is represented by counsel of his choosing. If his attorney is OK with Mr. Jones participating in the mediation and making some agreements, does the mediator have an ethical obligation to question Mr. Jones' ability for self-determination?
2. If the agreements in mediation are limited to those for which Mr. Jones has capacity, can he participate? For example, assume the substantive decisions are between the sons and dad doesn't give up anything.
3. If Mr. Jones agrees in the mediation that he lacks capacity and needs a guardian, doesn't that demonstrate he cannot exercise self-determination to make that agreement?
4. What difference does it make if the mediation occurs after the court action is filed and the examining committee reports recommend a finding of incapacity?

Florida Supreme Court Certified County and Family Mediator  
Central Division

## Authorities Referenced

Rules 10.310 and 10.420(b)(3), Florida Rules for Certified and Court-Appointed Mediators

### Summary

Elder mediations offer the opportunity for elderly parents and their children to find common ground and solutions regarding provisions for the elderly parents' health and well-being. The Florida Rules for Certified and Court-Appointed mediators may apply and the capacity of the elderly parents is paramount if they are to be signatories to any agreement. If a parent is judicially determined to be incapacitated, then a guardian appointed by the court will represent the parent's interests in disputed matters.

### Opinion

Initially, it is important to note that the Florida Rules for Certified and Court-Appointed Mediators apply if the mediation is conducted by a Florida Supreme Court certified mediator, the case mediated has been filed with the court, or the parties agree the rules apply. Therefore, in questions one through three the MEAC presumes the mediator is a Florida Supreme Court certified mediator.

Answer to Question 1:

If the mediator believes Mr. Jones is unable or unwilling to participate meaningfully in the mediation process, including being unable to exercise self-determination under rule 10.310, the mediator has an ethical obligation under rule 10.420(b)(3), Rules for Certified and Court-Appointed Mediators, to adjourn or terminate the mediation.

Mr. Jones's attorney's consent to Mr. Jones's participation is not sufficient in and of itself as a determinative factor in whether Mr. Jones can exercise self-determination. Mediators may take into consideration information offered by the attorney in making their decision as to Mr. Jones's ability to exercise self-determination, but the ultimate decision as to a party's ability to exercise self-determination is made only by the mediator.

Answer to Question 2:

There is no partial legal capacity. Mr. Jones either has capacity or is incapacitated, and if he lacks capacity, Mr. Jones cannot sign a settlement agreement pursuant to rule 10.420(b)(3). Due to the nature, concepts and procedures of elder mediation, it is possible for a party to participate in a mediation and not be a signatory to the agreement.

Answer to Question 3:

If Mr. Jones believes that he lacks capacity to meaningfully participate in the mediation process and needs a guardian, then he cannot sign the agreement. He may exercise his right of self-determination to decide whether or not he can meaningfully participate in the process.

Question 4:

The Inquirer provides no information as to who the examining committee is or what power they have in determining capacity. The committee's recommendation is another piece of information that the mediator must consider when determining if Mr. Jones is able to exercise self-determination and meaningfully participate in the process under rule 10.420(b)(3). As stated above, Mr. Jones may still participate in the mediation process if the other parties think it is beneficial, but he cannot be a signatory to any agreement.



12/6/17

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*Signed and Dated by Susan Dubow, MEAC Committee Chair*