


# WHAT ABOUT THE VACUUM CLEANER?

## RESOLVING TRUST AND ESTATE DISPUTES

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Gutter Chaves  
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# I. INTRO TO TRUST AND ESTATE DISPUTES

## A. What are we fighting about?

- a. Lack of capacity
- b. Undue influence
- c. Fiduciary issues – accounting, breach of duty



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# I. INTRO TO TRUST AND ESTATE DISPUTES (CONT'D)


## B. What are we REALLY fighting about?

a. Sibling rivalry

b. Children versus second (third? fourth?)  
spouse

c. Business ownership

d. Emotional attachment to objects, places,  
people



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## II. PRE-MEDIATION PROCESS

### A. When Should You Start *Thinking* About Mediation?

- a. Immediately (Along With Everything Else You Are Thinking About)
- b. Continuously (Evaluatively)

### B. When Should You Start *Talking* With Your Client About Mediation?

- a. Almost Immediately
  - i. Lawyer-Client Relationship Issues
  - ii. But ... Lawyer-Client Relationship Issues

### C. When Should You Start Talking With *The Other Side* About Mediation?

- a. See A. and B.
- b. Looking Weak / Acting Strong
- c. Client-Driven

## II. PRE-MEDIATION PROCESS (CONT'D)

- D. Compelling Mediation vs. Voluntary Mediation vs. Mediation By Scheduling Order
- E. Mediating Florida-Style (vs. Other Jurisdictions)
  - a. Hint: Here, It's Real
- F. Selecting A Mediator
  - a. Probate/Trust Lawyer ... or Not
  - b. Numbers-Passer Or More
  - c. Remember, Some Mediators Get Tired And Cranky Too
- G. Know The Mediation Rules
  - a. Rule 1.700, 1.710, 1.720, 1.730 and Chapter 44, Florida Statutes
    - i. Certification of Authority
  - b. Privilege
  - c. But Know The Non-Rules Too

## II. PRE-MEDIATION PROCESS (CONT'D)

### H. Letter To The Mediator

- a. Does The Other Side Get To See It Or Not
- b. Be Clear And Concise, But Provide Everything ... And Offer More
- c. Before You Send It, Review And Discuss With Your Client

### I. Converse With The Mediator Before The Mediation

- a. *Ex Parte* Conversations Are A Beautiful Thing
- b. He/She May Not Read Your Very Well-Written Statement With As Much Focus As You'd Like



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## II. PRE-MEDIATION PROCESS (CONT'D)

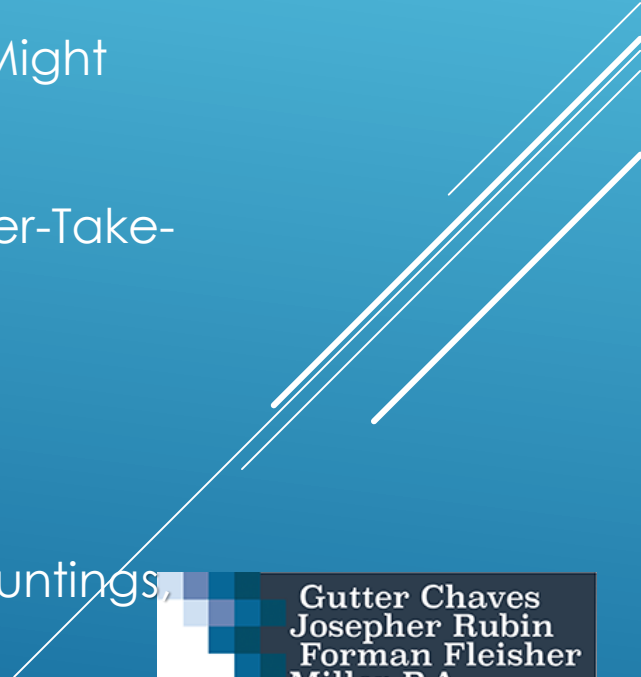
### J. Preparation With Your Client

- a. What To Expect (and how many snacks and books to bring)
- b. Late Night Or Not
- c. "Divorce" Or Not
- d. Where Will You Start, Where Will You End Up, And All The Places You Might Travel In Between
- e. Who Makes The First Offer/Demand – Anchoring
- f. Lots More Like That – Win/Win or Principled Negotiation; BATNA; Winner-Take-All; etc.

### K. Bring Tax Counsel Or Have Them Available To Consult

### L. Have Your Docs Prepared Ahead Of Time

- a. Think Through Everything (e.g., satisfactions of claims, waiver of accountings, etc.)
- b. Impress The Client and Save Yourself Time



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# III. DURING MEDIATION

## A. Arriving

- a. Do you say hi to the other side?
- b. Do the parties greet each other?

## B. Opening

- a. Opening Session
  - i. Introduction by Mediator
- b. Opening Statements by Lawyers
  - i. Pros and Cons
  - ii. Type
  - iii. Style



# III. DURING MEDIATION (CONT'D)

## C. The Process

### a. Prepare Your Client


- i. Expectations

### b. Caucus With Client and Mediator

- i. Let Client tell their story
- ii. Let Client ask Mediator questions
- iii. Use Mediator as a resource

### c. Have Creative Settlement Ideas Ready

- i. Draft of Settlement Agreement Ready
- ii. Laptop
- iii. Quick money for party who needs it
- iv. Tangible personal property
- v. Tax benefits



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## III. DURING MEDIATION (CONT'D)

### C. The Process (cont'd)

#### d. Modification/Reformation of Trust

- i. Use Florida Statutes

#### e. Annuities/Life Insurance Policies/Promissory Notes

#### f. Conflicts and Court Approval

#### g. Apologies/Acknowledgments/Other Personal Gestures

- i. Mediator meet with clients alone; put the parties in a room together



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# IV. THE SETTLEMENT/IMPASSE/POST-MEDIATION

## A. Keep Going or Impasse?

- a. Break for the Evening and Re-schedule
- b. Settle Piecemeal
- c. Throwing in the Towel

## B. Settlement Agreement

- a. Remember: The youngest lawyer (or most computer savvy) will often end up being the draftsman
- b. Term Sheet versus Full Agreement
  - i. Drafting Disputes
  - ii. It's Midnight, You're Tired- Someone Will Make a Mistake
  - iii. Buyer's Remorse



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# IV. THE SETTLEMENT/IMPASSE/POST-MEDIATION (CONT'D)

## B. Settlement Agreement (cont'd)

### c. The Parties

- i. Qualified Beneficiaries
- ii. Virtual Representation
- iii. Ad Litem
- iv. Signing in relevant capacities

### d. Important Terms

- i. Releases- General or Specific?
- ii. Indemnification
- iii. Enforcement
- iv. Deadlines
- v. Confidentiality and Non-Disparagement – Know your client!



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# IV. THE SETTLEMENT/IMPASSE/POST-MEDIATION (CONT'D)

## B. Settlement Agreement (cont'd)

### e. Other Important Considerations

- i. Language about what the clients are relying on (CYA!)
- ii. The Elephant in the Room: The IRS
  1. Make it clear whether you are providing tax advice

## C. Post-Mediation

### a. Dispute Resolution

- i. Consider asking Mediator to settle disputes

### b. To Do List

- i. Assign tasks, deadlines, who does what
- ii. Consider who will be paying for the preparation of certain documents, taxes, closing costs, etc.

### c. Enforcement



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