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- So even with all the rules and the court trying to level the playing field, how come it doesn't become a GIANT EXPENSIVE ADVERSARIAL BONANZA every time?
- That's really down to the lawyers...
- What does that mean?
 - Fight really hard
 - Win at all costs
 - Be mindful of impact of above on client
 - Be aware of their interests
 - Try to help the work out ways to achieve their interests
 - Explain the difference between "see you in court" and other options
 - Try to minimize costs
 - There is so much more to litigation than what is presented in the TV series – and the clients will hate the lawyers for the unnecessary stress placed on them. Never push litigations to them.
- Ethics and litigation¹
 - Dilemmas in litigation:
 - Should we do 'anything' and 'everything' for our clients?
 - Do we owe duties to others?
 - What kind of relationships should we have with our clients, our opponents, fellow practitioners, and the courts?
 - Do we have a duty to try to settle?
 - How hard to we have to try to persuade our clients to avoid court?
 - How imaginative can we be?
 - How do we reconcile our personal convictions with our role as lawyers?
 - How sneaky, devious, deceptive, can we be?
 - Can we trick lie to or bully the other side?
 - Is it ok to "deep pocket" adversaries?
 - Can we use the court process to our own advantage?

¹ Rule in the Professional Conduct Rules that will give you an answer about what rule basically say you can't do everything that they ask you.

Alternative Dispute Resolution in DRE

- Alternative Dispute Resolution in civil disputes: Practice and theory
- ADR agreements / good faith
- Ethical duties: negotiation
- Commencing proceedings: pre litigation considerations

Human needs theory²³

- Safety and security
- Belonging
- Self Esteem
- Personal fulfillment
- Identity
- Cultural security
- Freedom
- Distributive justice
- Participation

Preliminary choices – balancing litigation and dispute resolution on the same spectrum

- WHO to sue
- WHAT cause/s of action
- TIME LIMITS
- JURISDICTION
- Are Defendants solvent?
- Is there a better way than going to court?

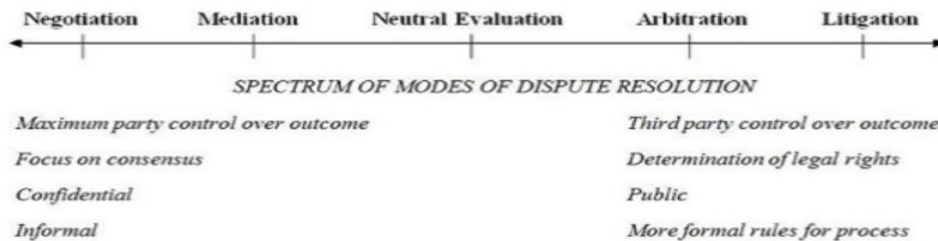
ADR choices

- Litigate
- Mediate
- Negotiate
- Other ADR processes that are more like litigation (ie arbitration) or more like mediation (ie conciliation).
- How do you (and your client) know what to choose?
- Solicitors Conduct Rule 7

² Tom Tyler – extensive research in the USA demonstrating that people are overwhelmingly more satisfied with ADR process whatever the outcome

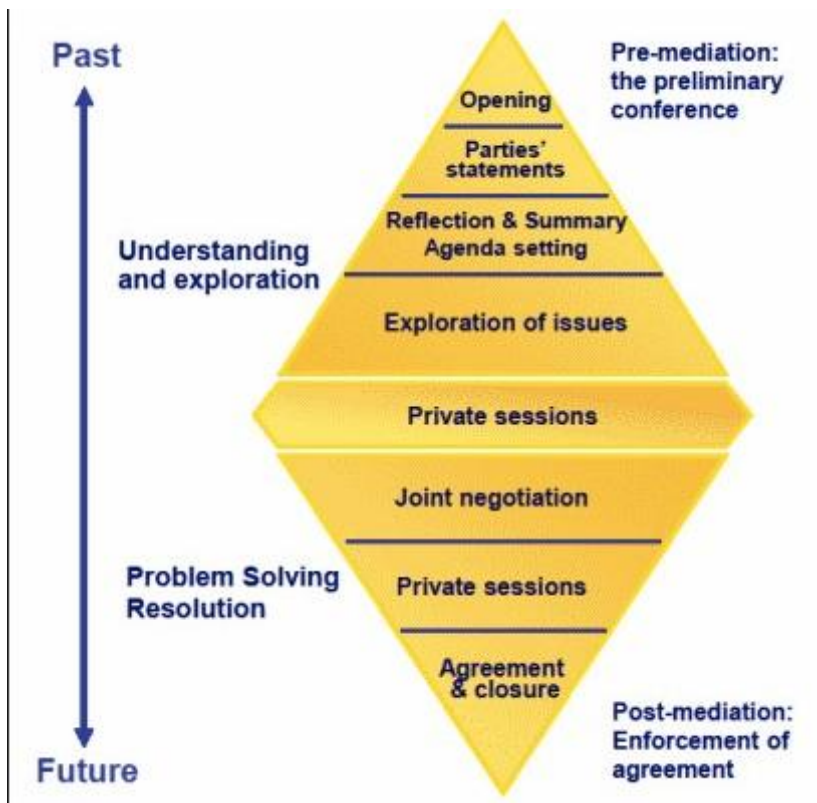
³ ADR is a non combative non adversarial (mostly) process that is designed to meet human needs.

- Conduct Rule 7 gives obligation to advise about alternatives to litigation – not just that I heard about it, nope. You need to convince the clients that there is a range of options that we can go through that we think might work for you



Mediator – TPN

- The process by which participants, together with the assistance of a neutral person, systematically isolate disputed issues in order to understand the impact of those issues, develop options, consider alternatives, and reach an agreement that meets both of their needs.
- Usually many non legal issues to be explored (ie how people behaved in the past, how they felt about it) and decided on (most disputes involve more than a legal issue).
- In business/construction the main issues may be how to move forward with project/opportunities.
- The mediator is neutral and has no decision making authority (this includes direct as well as indirect)
- The parties are encouraged to reach an agreement “they can live with”.



- Mediation diamond – used by mediators in order to achieve the human needs that we have been talking about. General structure of what is going to be discussed in the mediation, priority of issues that will be discussed
- Client interviewing theory – validation of what occurred via communication
- Convert mediation practice into client interview practice (principle negotiation roleplay)
- Theory and practice
 - Tell story
 - Be heard
 - Be listened to
 - See other side's perspective
 - Look for solutions that work for the parties
 - Have control over outcome
 - A.05 – A.140 TEXT BOOK
 - READ IT. ALL. You will understand it better than anything else we do in this course. And you will use it in day to day life AND in group work AND in future practice/professional work.

Mediation//Principled Negotiation⁴

- Persuasive negotiators explain the reasons for their view and they provide justification for them.
- This means convincing the other side that you have a GOOD argument for what you are asking for.
- This might mean referring to evidence that you have, to supportive court decisions, to legal argument.
- So you don't start with \$, you start with ISSUES
- They also rely heavily on the “meeting human needs” strategies used in mediation to build rapport, trust and communication with the other side.
- Process of diamond theory
 - Meet and greet. Make a positive statement about what you want to achieve today
 - Hear both parties' perspectives
 - Focus on both parties' interests
 - Try to find common ground
 - Try to work out the issues
 - Find a way to move forward
- MAKE AN AGENDA – creates a structure and a “roadmap” for what could be long convoluted discussions
- ASK don't TELL
- Model good listening
- Be imaginative
- Be polite approachable and reasonable
- Take time to think before retorting to outrageous comments or demands and rehearse what you want to say in your head

Conciliation – a mix of mediation and arbitration; mediator does not have a determinative role whereas the conciliator both mediates and gives advice to resolve, e.g. workers' jurisdiction in SA – talk about everything with the conciliator suggesting the consequences or likelihood of it happening. Giving the party an idea about what the legal picture might be.

Neutral evaluation allows the third party advices to crack the client's stubbornness

Arbitration – pick and choose topics and issues, rarely legal focus

⁴ READ A 1.50 – A 3.25 Seriously you will get practical useful applicable skills from really paying attention to these chapters that you will use for the rest of your life.