

# Dispute Resolution and Ethics Notes

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# Topic 1: Introduction to Ethical Dispute Resolution

## Lecture:

### Introduction to Civil Dispute Management

- How to deal with clients:
  - Ethical duties:
    - Client's best interests – they decide what's in their best interests.
    - Act on client's informed instructions – you have to help them decide by knowing the context of the dispute in terms of their life/business/ambitions/relationships, etc.
    - Alternatives to litigation – despite a client's desire to go to court, this might not be in their best interests.
    - Treat the client's communications as confidential.
    - Avoid any conflict with the client's best interests.
  - Ask the right questions:
    - What is the issue about?
    - What exactly happened?
    - Is there a legal issue?
    - What does the client want?
    - Are there legal avenues/options?
    - Are there other (non legal) avenues/options?
    - Ask:
      - Have you talked to the other side?
      - Have you tried to negotiate?
      - Can WE think of some options to try and sort this out?
      - How do you feel about them?
      - Have you thought about what you'd settle for/what you'd do to make this go away?
      - What do you want to achieve?
      - Where do you want to be in 3-6-18 months?
      - What's most important to you?
  - You can set the tone of the communications/engagement:
    - With the client
    - With the other side
    - With the court.
- First contact:
  - Should be 'let's have a talk about this and see if we can work something out'.
- Overriding principles of court rules:
  - Promote the JUST determination of litigation
  - Dispose EFFICIENTLY of the court's business
  - Maximise EFFICIENT use of judicial and court resources
  - Facilitate the TIMELY disposal of business at a cost AFFORDABLE to parties
  - Fair, efficient, timely, affordable.
- Courts and Case Management:
  - Make sure parties give NOTICE of their claim
    - Fair.
  - Make sure parties comply with time limits

- Efficient.
- Make sure parties don't OVERWORK the case
  - Cost effective.
- Make sure parties are mindful of costs
  - Affordable.
- Make sure parties don't cause delay
  - Timely.

## Starting the Case: Commencing Litigation

- Several phases:
  - Establishing jurisdiction: **EXAM.**
    - Finding the right court for the case.
      - **Test: Jurisdiction over where the cause of action arose or the residence of the parties.**
    - SA Supreme Court has jurisdiction over anything that happens in SA (Territorial Jurisdiction) or anyone who resides in SA or is in SA at any time. In Common Law and Statutes created in SA.
      - Exception: Statute can give jurisdiction to the states.
        - Look to the statute that creates the cause of action.
      - Common law – contract, tort, property, equity
      - Statute – trade practices, consumer – wherever a statute says “a person can TAKE ACTION against another person for breach of this section or act...”.
    - Parliament also limits Court Jurisdiction by:
      - Prescribing the Time Limits to take legal action
        - If the time limit has expired, the Court does not have jurisdiction
        - Can be proscribed by statute or Limitations of Actions Act.
      - Limiting the \$ amount that different courts can deal with
      - Limiting the type of matter that courts can deal with
      - Limiting the type of remedy that courts can give
      - Specifying which court certain types of matter can go to
    - Supreme Court has jurisdiction to order prerogative writs, District Court does not.
    - Who chooses jurisdiction?
      - Plaintiff as they issue the Summons. Defendant can challenge on the basis that there is no legitimate connection with the chosen jurisdiction, or another jurisdiction is better (challenging and moving jurisdiction is consider later).
      - Different jurisdictions may offer advantages to the Plaintiff or Defendant:
        - Better damages in some states
        - Can call witnesses
        - Jury trials for civil matters
        - Statutory limitations in one jurisdiction and not another
        - Primarily convenience
      - Avoiding forum shopping:
        - The substantive law of the jurisdiction in which the cause of action arose governs the case, wherever it is heard.
          - Time limits are a part of the substantive law.
        - The procedural law of the court that the plaintiff choose governs court process
  - Pre Action Protocols
    - Summons won't be accepted by court unless steps have been taken to resolve the issue first.
  - Issuing a Summons

- Pleading the case
  - (= telling the story and making the legal claim)
- Disclosure and exchange of relevant documents
  - AKA Discovery
  - Finding all of the directly relevant documents to the dispute in relation to the pleadings.
  - Provide access to these documents to the other side.
- Pre Trial information processes
- Conferences and ADR
  - Comes much earlier in the process and throughout.
  - Certainly give it a good shot before court.
- Trial
- Litigation – the first steps:
  - Find a Court with Jurisdiction
  - Check that your action is within time
  - Decide who to sue
  - Check that the Court can offer the REMEDY that you want
  - Read the Court Rules and find out what you have to do to issue proceedings:
  - ARE THERE PRE CONDITIONS TO ISSUING A SUMMONS?
- Pre-action Requirements:
  - SA – Rule 33 – pre-action requirement: offer of settlement before action
    - Detailed procedures as to how the parties go about making preliminary offers.
  - SA Supplementary Rules Division 2
    - Designed to get parties to discuss case before they sue to encourage settlement
    - Costs penalty/stay if you don't do it.
  - Construction disputes and medical negligence actions:
    - Different rules are contained in the supplementary rules.
    - Expedited due to the nature of the business – can't spend too much time on it.

## Litigation Ethics

- Obligations of legal practitioners:
  - To the law/society/the court > to clients > to others.
- Duty to clients:
  - Loyalty:
    - No conflicts of interest.
  - Zeal:
    - Pursue every reasonable argument.
  - Confidentiality.
- Adversarialism:
  - Prioritises client interests
    - The lawyer must exploit every loophole, take advantage of any tactic, argue any legal point to the best of their ability regardless of wider concerns.
    - Principle of partisanship: Lawyers must use all resources at their disposal in the client's best interests.
    - Principle of non-accountability: lawyers are not accountable for the actions of their clients, or the methods used in order to achieve the best outcome for the client.
  - Limit: they must not break the letter of the law
  - Advantages
    - Emphasis on the need to act in the best interests of the client

- Good fit with criminal defence work
  - Provides straightforward answers to ethical questions
- Dangers
  - Obligation to adhere only to the letter of the law allows advocate to exploit loopholes
  - Dangers for clients: Escalating costs, delays, breaks down relationships
  - Assumption:
    - All clients have lawyers who act as their adversarial advocates
    - Courts act as the guardians for justice
- Independence of lawyers and lawyer/client confidentiality are vital parts of our legal system
  - Places responsibilities on lawyers
    - Advise clients what can and can't do
    - Be aware, and guard against dangers of adversarialism
    - Evaluate whether duty to the court or duty to the client is more important in particular cases
    - Adversarial/combative conduct is often NOT in the client's best interests
- *White and McCabe:*
  - Lawyers not permitted to use the court processes for an ulterior process.
  - *White Industries v Flower & Hart:* purpose was to delay a commercial event from occurring, not that there was a legal case.
    - Developer was building a shopping centre using builder, White Industries. In order to delay contractual payments, Flower and Hart advised him to sue for fraud.
      - Held: Goldberg J found that a solicitor had initiated proceedings with no substantial prospects of success.
      - The solicitor's purpose was not to vindicate a right of the client, but to postpone payments by his client under a building contract
      - By seeking to effect an object beyond what the legal process offered the solicitor's action was an abuse of process.
  - *McCabe v British American Tobacco:*
    - Rolah McCabe sued BAT after contracted lung cancer
    - At first instance the Victorian Supreme court struck out BAT's defence as they had destroyed so many documents critical to Mrs McCabe's case that there was no possibility of a fair trial
    - Clayton Utz had advised BAT on their 'Document Retention' policy that had sanctioned the document destruction
- If you're using court process, you are only allowed to use it for the purpose of a legitimate justiciable dispute.

## Navigating the Supreme Court Rules:

- Go to [courts.sa.gov.au](http://courts.sa.gov.au): website for the courts – most up to date place.
- Go to tab for lawyers > rules, forms and fees
  - Shows Supreme, district, mag, etc
- Rules in place when the action commenced govern the action for life.
- Supreme Court Rules:
  - Almost identical to District Court Rules.
  - Mag simpler than above. When silent, look to Supreme Court Rules.
  - We're only interested in the Civil Rules:
    - Supreme Court Civil Rules 2006
      - Contents:
        - Set out by topic.
        - Concerned with Chapter 3, 4 (not much time), 5 (Part 2 – Defining issues. Particularly important), 6, 7 (Part 3 important).
      - Go to the index and see what you need to do to resolve the challenge you have going on.
      - Definitions: Part 3 Interpretation
        - Will only ever mean what the interpretation says it means.
      - Rule 33:
        - Every party has to make and respond to an offer of settlement.
        - Process of doing so.
      - Rule 98:
        - Pleadings – what is and is not contained in pleadings. Roadmap to produce a statement of claim.
      - Rule 136:
        - Disclosure and production of documents – obligation to disclose documents.
      - Part 5: Rule 147
        - Provisions to gather evidentiary material.
        - Have to ask permission.
      - Rules tell you what tests must be met.
    - Supplementary Rules
      - AKA Practice Directions.
      - Help apply primary rules.
      - Don't link well – have to find yourself.
    - Fast track rules:
      - Simpler and different rules.
      - Dealt quickly or not very complex, use these rules.



## Readings:

### Chapter 1: Introduction to Civil Disputes

- Interests based approach to dispute resolution:
  - Look to what the parties want or need to get out of the dispute and try to craft a resolution that meets those needs and desires.

### Court Rules

- Application:
  - Permissive rules – assists parties in preparing effectively:
    - The rules are designed to minimize cost and delay, and promote early dispute resolution: SCR 3.
    - The rules permit the court to apply the rules flexibly so that they can be adjusted to the particular needs of the case if that would be fair: SCR 10.
  - Punitive:
    - Penalise breaches: The rules give the court the power to dismiss an action or set aside any step in an action if a procedural irregularity occurs in the conduct of the case by a party.
    - Impose fines: The rules permit the court to punish a party by awarding costs against the party or against their solicitor.

### Sources of Procedural Law

- Key resources:
  - The Act setting up the relevant court which sets out jurisdictional limits and provides for appointment of judges, management of the court.
  - Court Rules which provide detailed step-by-step structures for the preparation and presentation of cases.
  - Practice Directions which are provided by the court as supplementary instructions for the conduct and management of cases.
    - In the Supreme Court of SA, practice directions have been replaced with “Supplementary rules” which provide guidance and detail on the substantive rules.
  - “Loose leaf services” such as Lunn’s Civil Procedure South Australia. Practitioner guides with detailed commentary.
- Primary sources of procedural law:
  - South Australian Supreme Court Act (“SCA”) and Rules (“SCR”).
  - South Australian District Court Act (“DCA”) and Rules (“DCR”).
  - South Australian Magistrates Court Act (“MCA”) and Rules (“MCR”).
  - Federal Court Act (“FCA”) and Rules (“FCR”).
- Note:
  - Court rules are almost always discretionary. Can be varied or adapted depending on the needs of the particular case.
  - Failure to follow the rules can result in your case being struck out or in significant costs penalties to the party or to the lawyer.
  - If the Magistrates Court Rules are silent on an issue, the Magistrates’ Court will look at the Supreme Court Rules for guidance.

### Outline of Process in SA:

- Steps in a litigious dispute:
  - Pre-action communication between parties
  - Initiating proceedings (choice of jurisdiction, cause of action, parties)
  - Pleading the case or defence

- Disclosure of documents
- Access to information
- Investigation, expert reports, witnesses
- Preserving the status quo
- Case management
- Dispute resolution
- Costs
- Enforcement
- Appeals
- Steps in Proceedings:
  1. Notice of Claim: SCR 33
    - a. SCR 33 requires that a party provide formal notice of claim to the other party (usually by letter, outlining the case in detail), and a formal response by the other party.
    - b. The letter and the response *must* contain an offer of settlement, and must be completed before litigation is commenced.
  2. Pleadings: SCR 92-97
    - a. These steps are called the pleadings. They explain the basis of the issues between the parties, showing where they agree, disagree and clarify the key factual and legal issues in the dispute.
      - i. Parties are limited to what they have said in their pleadings, and cannot bring up additional allegations of facts later on if they do not appear in pleadings.
        1. They are, however, permitted to amend their pleadings as the case goes on and more legal issues/information comes to light.
    - b. If the case is not settled as a result of the exchange of SCR 33 letters, the Plaintiff issues and serves (filed with the court, producing a court certified document) a Summons (SCR 34) and Statement of Claim (SCR 91).
      - i. The Statement of Claim is a written statement of the facts of the case, and a written statement of the legal consequences of those facts.
    - c. The Defendant files and serves a Defence in response to the Statement of Claim (SCR 92).
      - i. Defence may include a Counter Claim against the Plaintiff.
      - ii. The Plaintiff may file and serve a Reply to the Defence.
      - iii. The reply may include a Defence to any Counter Claim by the Defendant.
  3. Conferences and Litigation Plans:
    - a. Parties and their lawyers are required to organize a Settlement Conference approximately one month after the main pleadings are filed, to discuss the issues in dispute and attempt resolution.
      - i. Parties are not allowed to engage in other court processes until after this conference.
    - b. Litigation Plans: explore the issues, the prospects of settlement, and the preparation and investigation that will be needed to resolve the matter.
      - i. Plan must be prepared after the Settlement Conference (if the case does not settle) and before the first meeting with the Court to determine the progress of the case (the Initial Directions hearing).
    - c. Initial Directions Hearing: the court and the parties review a range of issues, including the litigation plan, and the judge or master will set dates and parameters for the steps to be taken in preparation for trial, and may also set the trial date. Parties are expected to follow this timetable.
  4. Disclosure and Production of Documents: SCR 136, 140 and 141
    - a. Disclosure/Discovery: 21 days after the Settlement Conference the parties must provide each other with a written list of all the documents that they have that are directly relevant to the case.
      - i. Each party must then allow the other to have access to and to inspect those documents.

- ii. This process is largely dependent upon the honesty of the party and the ethics of their lawyer.
- 5. Gathering of Evidentiary Material by Parties: SCR 146-186
  - a. Through various means, including questioning parties pre-trial, examining witnesses, medical testing, scientific testing of things, and other investigatory processes.
  - b. Parties have a duty to keep their pleadings 'up to date' as more information becomes available.
    - i. Once disclosure has been completed, leave of the court is necessary to amend pleadings, whereas in the earlier stages, amendments are not restricted.
- 6. Listing Conference: SCR 120
  - a. If the trial date has not been set per the litigation plan, the parties are required to provide a certificate certifying that they are ready to proceed to trial: SCR 120.
- Phases of Litigation:
  - First Phase:
    - The process of resolving the case before it starts – exploring settlement options and other ways to remedy the dispute.
  - Second Phase:
    - Articulating the problem or dispute in a legally relevant manner – pleading.
  - Third Phase:
    - Gathering the evidence to prove the allegations of fact made in the pleadings.

### The Lawyer Client Relationship

- First steps:
  - Find out what the dispute is about and what the client wants to achieve.
  - Inform client about ADR options. Failure to explore ADR options is a breach of a solicitor's duty of care.
- Identifying preliminary legal issues: parties, jurisdiction, cause of action
  - Preliminary issues to consider:
    - Who is the client? Are they capable of instructing you?
    - Who is the other party? Are they capable of being sued?
    - What does your client want?
    - What is the cause of action? Is it within time?
    - What is the remedy sought? Is it available?
    - In what jurisdiction can the proceeding be issued?
  - Joinder of parties:
    - The process of suing parties is called joinder.
  - Third (other or additional) parties:
    - Where a Defendant considers that another person is partly or wholly responsible for the Plaintiff's loss, the Defendant can issue a notice to join the other person as a Third Party.
      - Third Party joins the action alongside the Defendant and is treated as a defendant except for costs.
  - Jurisdiction:
    - A court with jurisdiction not only has the power but also the duty to adjudicate upon cases brought before it and to render judgment.
    - Determined by the following:
      - The time limit to institute proceedings
      - The place in which the cause of action arose
      - The residency of one or more parties
      - The statutory conferral of jurisdiction

- The occurrence of proper service of process/summons
- The amount in issue
- The nature of the remedy sought.
- Forum Shopping:
  - A State court will usually have jurisdiction over a matter if:
    - The cause of action arose in the state; or
    - The plaintiff resides in the state; or
    - The defendant resides in the state.
    - Although a relevant connection between the law and the State is required, the test of relevance is applied liberally: *Mobil Oil Australia*.
  - General rule is that the substantive law that will be applied is the law of the place where the cause of action arose, but the procedural law of the court in which the proceeds are brought will apply.

## Ethical Duties in Civil Litigation

- Ethics and Morals:
  - Ethics are broadly applied social standards for what is right or wrong in a particular situation, or a process of standards for what is right or wrong in a particular situation, or a process for setting those standards.
  - Morals are individual and personal beliefs about what is right and wrong.
- There are three fundamental duties that a lawyer must observe:
  - Duty to the client to act with zeal, confidence, competence and loyalty (no conflict)
  - Duty to the profession to engage with them using courtesy, fair dealing, and not to bring profession into disrepute
  - Duty to the court which consists of a duty to the administration of justice and a duty not to mislead the court.
- None of the above duties override any other.
- Instructions that would require the lawyer to act in a way contrary to the duty to the court, or the law, cannot be acted upon: SA SCR 17.1 – the practitioner must exercise forensic judgment in managing litigation.
- Only in the most exceptional circumstances can lawyers act against a client they have previously represented: *Wan v McDonald; Carindale Country Club v Astill*.
  - *Astill*: If a reasonable observer would think that there was a real as opposed to theoretical possibility that confidential information given by the client in the first case might be passed on or used by the solicitor to advance the interests of the second client, then he could not act.
    - The risk of passing on or using information can be innocent and inadvertent, rather than deliberate – a look, a gesture, an unwitting remark.
  - *Astill* confirmed in *Mallesons Stephen Jaques v KPMG Peat Marwick*:
    - Is there a real and sensible possibility that the interests of the solicitor in advancing the new client's case might conflict with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of a former client.
      - Risk is too great if there is at least a subconscious influencing of the conduct of the case.
  - *National Mutual Holdings v Sentry Corp*: the mere fact that there were offices in different countries did not make them separate or distinct entities.
- The burden of establishing that there is no unacceptable risk is upon the law practice: *Village RoadShow v Waldron*.
  - To show clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur and in applying the principle it may not be possible for the client to point to a specific item of confidential information.

- A person may seek an injunction to prevent a lawyer acting for another person against them.
- A lawyer who does not feel they can give the client their best in all aspects of legal representation should not represent that client: SA PCR 4.1.
- Exceptions to the expectation of confidentiality: SA PCR 9.2
  - Where the client consents
  - Where the information is in the public domain
  - Where the law requires disclosure
  - To other members of the firm
  - To avoid the probable commission or concealment of a felony.
  - Where the proposed conduct is not felonious (perjury in a civil matter) the most a lawyer can do is withdraw from the case (cease to act) to avoid being in a position of further deceit of the court or abuse of process.

### Sources of Professional Responsibility

- Breaches of the professional rules are categorized as:
  - 'Unprofessional conduct or practice' or 'unsatisfactory professional conduct':
    - This category includes less serious breaches, such as 'serious neglect or undue delay', 'the charging of excessive fees or costs' and 'failure to maintain reasonable standards of competence or diligence'.
  - 'Professional misconduct':
    - This covers the most serious breaches; such as attempts by a solicitor to improperly influence a witness or misappropriation of trust account funds.
  - A breach of the rules of conduct does not confer a private cause of action on a client.

### Specific Duties Owed by Legal Practitioners

- Duty to the administration of justice.
- Duty to promote access to justice and to provide pro bono services.
- Duties owed to the client:
  - Duty of representation
  - Duty to inform, advise and act on instructions
  - Duty to consider settlement
  - Duty to continue to act
  - Duty of competence and diligence
  - Duty of loyalty (and to avoid conflict of interests)
    - Between practitioner and client
    - Between new clients and an existing client; or clients (concurrent representation)
    - Between a new client and a former client (successive representation).
  - Duty of confidence:
    - Practitioners must never disclose to any person any information which is confidential to a client and acquired by the practitioner in his or her professional capacity.
    - Exceptions:
      - Client authorizes disclosure
      - Practitioner is permitted or compelled by law
      - Practitioner discloses information in circumstances in which the law would probably compel its disclosure and the disclosure is for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence

- The lawyer obtains the information from another person who is not bound by the confidentiality owed by the practitioner to the client and who does not give the information confidentially to the practitioner.
- Three privileges. If a communication falls within the scope of one of the privileges, a lawyer and his or her client may refuse to comply with lawful demands for disclosure from a court or similar body:
  - Legal professional privilege.
  - Privilege against self-incrimination.
  - Public interest privilege.
- General public policy exception: solicitors may disclose otherwise confidential information where, in the practitioner's opinion, the disclosure of the information is required to prevent imminent serious physical harm to the client or to another person: SA Rules of Professional Conduct and Practice 3.1.6.
- Communications relating to past offences and unlawful acts:
  - Protected by lawyer/client confidentiality. Duty bound.
- Continuing or future offences:
  - Confidentiality can only be breached in exceptional circumstances where the public interest might demand it.
  - Disclosure could be made if, in the practitioner's opinion, it was required to prevent imminent serious physical harm to the client or to another person. SA Rules of Professional Conduct and Practice 3.1.6.
- Perjury:
  - A legal practitioner may inform the client that he or she will not act for the client, but cannot inform the court of the client's lie unless authorized by the client.
  - Nor can the practitioner warn the next practitioner who acts for the client as this would amount to a breach of the duty of confidentiality.
  - Once judgment has been given in a case, there is nothing a legal practitioner can do to expose the lie.
- Contravention of court orders:
  - Where there is a court order, and the practitioner believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety, the practitioner may inform the court and the opponent.

## Chapter 2 (2.170-2.330): Dispute Resolution Strategies and Practice

- The task for lawyers is to assist clients to resolve conflict effectively – in ways that reduce the costs and increase the benefits of conflict, whenever possible.
- Disputes consist of variables such as:
  - The number of parties to the dispute
  - The issues involved – substance of dispute
  - Level of hostility between the parties
  - Duration of the conflict
  - History of the conflict

### Causes of Conflict

- Cause of conflict often the most significant variable:
  - A conflict is caused by a perceived or actual conflict of interests or a perceived or actual conflict of values:
    - Interests are the needs (in/tangible) of a party:
      - Substantive: those needs an individual has for particular tangible objects, such as money or property.
      - Procedural: the way in which a party prefers to go about doing things – EG discuss their differences with others and the manner in which they prefer a solution to be implemented.
      - Psychological interests are the emotional and relationship needs of a party – EG the need to be treated with respect, the need to feel secure and the need to feel appreciated.
    - Values are the beliefs or principles that are important to an individual:
      - Come into conflict when parties use different standards for evaluating various ideas or behaviours, or when they place importance on different ways of life, ideology, religion or goals.
    - Often, the interests and values of parties in conflict are not always in fact incompatible, but are only perceived to be so.
      - This may be due to a lack of information, incorrect information, different views on the accuracy of information, and a different interpretation of information.
      - Additionally: strong emotions, poor communication and repetitive negative behaviour (relationship problems). Structural problems: unequal control, ownership or distribution of resources; unequal power and authority; or geographical, physical or environmental factors that hinder cooperation.
- Non-exhaustive diagnostic checklist:
  - Do the parties have different interests, and if so, what are they? Look for:
    - Substantive needs: are they seeking tangible objects, such as money or property?
    - Procedural interests: do they like to talk write, listen, have another person talk for them; do they like informality or more formal procedures; are they happy to conclude matters on a handshake or do they like everything in writing?
    - Emotional and relationship needs: do they feel insecure, resentful, angry, loved, needed and so on?
  - Do the parties have different values?
    - Find out what beliefs or principles are important to them.
    - Do they give high/low priority to values such as the importance of education, religion, discipline, respect for others, and independence?
    - Do they place importance on wealth, power or reputation?
    - How do they rank matters such as honesty, integrity, loyalty to family and friends?

- Are interests and values actually incompatible or merely different?
  - If interests are different but not incompatible, perhaps they can be dovetailed (brought together).
  - If the values are merely different, why do the parties see things differently? Consider:
    - Information: do they have all necessary information; do they have correct information; are they interpreting the same information in the same way?
    - Patterns of interaction: How do they relate to each other? What happens when they talk to each other, assuming they do?
    - What intervention (EG more information, different information, another method of communication) might assist the parties to see that differences can be accommodated?
- How are the parties placed relative to each other? Consider:
  - What resources, information, power and authority do they have available? Do they each have 'equal' access to lawyers and courts? How do time constraints impact on them?
  - Should power differentials be altered and if so, how? You may not be able to assist with financial resources, but you are often times in a position to make a difference by providing necessary information.

### Responses to Conflict

- Includes:
  - Endure, exit, or avoid. Resort to self-help, gossip and ridicule, or physical violence.
  - Negotiate without third party assistance, with assistance from non-professional third parties, or third party professionals.
  - Appoint an umpire or arbitrator to adjudicate or seek adjudication by an umpire appointed by the state.
- Most effective:
  - Unassisted negotiation.
  - Assisted negotiation.
  - Adjudication (either by an arbitrator appointed by the parties or by a judge appointed by the state).



Table 7.1: Summary of process characteristics

Characteristic	Unassisted negotiation	Assisted negotiation	Arbitration	Litigation
Selection of third party	No third party intervener	Parties choose third party to assist in negotiations	Third party generally selected by parties to make and impose a decision	Third party selected by the State to make and impose a decision on the parties
Type of forum	Conducted in private; parties can agree that content and outcome are confidential	Conducted in private, parties can agree that content and outcome are confidential	Conducted in private, parties can agree that content and outcome are confidential	Conducted in public, proceedings and outcome are on the public record
Time and place	Held at time and place to suit the parties	Held at time and place to suit parties and third party	Held at time and place to suit parties and third party	Held at time and place to suit court
Right to participate	Possible for all interested parties to participate	Possible for all interested parties to participate	Right to participate is limited by agreement to arbitrate	Participation limited to parties with legal standing to appear
Basis of participation	Participation is voluntary	Participation is generally voluntary	Participation is generally by agreement	Participation may be compulsory
Control of process	Parties control the process	Third party may control the process	Parties may have some control over the process	Parties have no control over the process
Control of content	Parties control the content	Parties control the content	Parties have control over the matters referred to arbitration	Parties have little control over the content
Control of outcome	Parties control the outcome	Parties control the outcome	Parties have no control over the outcome	Parties have no control over the outcome
Status of outcome	Not automatically binding or enforceable but can be made so in limited circumstances	Not automatically binding or enforceable but can be made so in some circumstances	Outcome is binding and enforceable	Outcome is binding and can be enforced
Appeal and review procedure	No provision for appeal or review of outcome	No provision for appeal or review of outcome	Outcome may be subject to appeal or review	Outcome may be subject to appeal or review

## Chapter 13 (736-743, 768-776): Litigation Ethics

### Lawyer as an Officer of the Court

- To the extent that the duty to the court conflicts with a duty to the client, the former duty must prevail.

### Enforcing the Lawyer's Duty to the Court

- Court's jurisdiction to restrain a lawyer from acting:
  - The relevant enquiry is whether a fair-minded reasonably informed person would find it subversive to the administration of justice to allow the representation to continue.
  - However, it does not follow as a matter of course from the presence of potentially conflicting duties – there is a curial reserve in exercising this jurisdiction.
    - Described as: extraordinary and protective (*Woodgate v Leonard*); of an exceptional nature (*T J Board & Sons v Castello*); to be applied only in a clear case (*Brandson v Gilbert*).

### Independence

- A lawyer's duty is to do right by their clients and right by the court (*Lougheed Enterprises v Armbruster*) which requires taking all legal points deserving of consideration.
  - Obligated to put any argument that might reasonably be open to the client: *Queensland Law Society v Stevens*.
  - The lawyer's duty to the court is to avoid a misuse of court time and the associated cost, by refraining from advancing arguments that are not reasonably open.
    - A lawyer pressed by clients to make every point conceivable and inconceivable without judgment or discrimination (*Ashmore v Corporation of Lloyd's*) must exercise professional judgment so as not to use public time in the pursuit of submissions which are really unarguable (*Richardson v R*).
    - This does not mean refraining from pursuing points unlikely to succeed, but that the lawyer must determine those points that are reasonably arguable and jettison the rest.
- Independence threatened by a lawyer's relationships:
  - Client:
    - To pursue personal or even business (*R v White*) relationships with clients risks objectivity and independence.
    - Too close a professional connection: *Henderson Borough Council v Auckland Regional Authority*.
    - Friend or relative: *Legal Practitioners Complaints Committee v Chang*.
  - Opposing lawyer:
    - Even based on appearance – the concern is confidential information may be divulged, even inadvertently.

### Abuses of Process

- The court has the inherent power to prevent misuse of its procedure in a way that, though not inconsistent with a literal application of its procedural rules, nonetheless would be manifestly unfair to a litigant or otherwise bring the administration of justice into disrepute: *Hunter v Chief Constable of the West Midlands Police*.
- Allegations of fraud should not be made lightly: *Saltoon v Lake*.

## Seminars:

### Seminar 1:

#### General Notes:

- Skye: [Schunke@adelaide.edu.au](mailto:Schunke@adelaide.edu.au) (Friday). Kristie: [Kmolloy@legoechambers.com.au](mailto:Kmolloy@legoechambers.com.au) (Wednesday).
- Suggested Structure:
  - What is the ethical issue/principle?
  - What considerations must you take into account (ethical, legal, factual, moral)?
  - What ethical rules apply here? Find and apply any cases
  - Reach a conclusion and explain your reasons for that conclusion.
- Lawyers need to be aware of client's interests, and indeed, should explore with their clients their interests, goals and aspirations with respect to the intended litigation.
  - There is little point pursuing a case to trial and getting a judgment for a personal injury if what your client really wants is to be able to work again, and little point in pursuing damages for defamation if your client really only wants an apology.
  - It is also very important to be open to considering the other party's interests, because in that way you might be able to structure offers of settlement that meet their interests, rather than focusing solely on legal outcomes.
- Case Summary Number:
  - 14.
- Potential issues:
  - Reputation; compensation; validation; revenge; justice; principle
  - Business; personal; emotional.

### Exercise 1 – Identifying Interests

#### Scenario 1: Robyn

- Consider the following:
  - Who are the stakeholders?
    - Robyn, Robyn's family, Robyn's second child Liam, the doctor, the hospital generally, Robyn's employer (investment bank).
  - What is the "problem" for each stakeholder?
    - Robyn: Impaired child, pain and suffering, loss of opportunity to continue to work, costs associated with raising a child that requires full time medical care.
    - Liam: Quality of life.
    - Robyn's family: As above.
    - Doctor/Hospital: Potential liability, reputation, license, victim.
    - Employer: Loss of an employee.
  - What are their short and long term interests?
    - Short:
      - Robyn/family: Damages as compensation, to help provide for the full time care the child needs, relieving stress,
      - Doctor/Hospital: Mitigating liability; learn from mistakes.
      - Employer: Finding a new employee.
    - Long:

- Robyn/family: compensation, arrangements to care for the child; return to work if possible.
- Doctor/hospital: Learn from mistakes, reputation.
- Are there legal issues? Who are the parties to any legal issues?
  - Potential negligence claim: Parties are Robyn/child and Doctor/hospital.
- How would legal action meet short and long term interests?
  - It would provide financial assistance to the family towards raising the child.
  - Validation: Allocation of fault.
  - Short term goals unlikely to be met at trial.
  - Trial likely to augment stress.

### *Scenario 2: Sports Association*

- Consider the following:
  - Who are the stakeholders?
    - Redwood Sports Association (RSA); ACorp; Absconded director; ASIC; other investors; similar funds.
  - What is the "problem" for each stakeholder?
    - Redwood Sports Association (RSA):
      - Lost funds. Absconded director.
    - ASIC:
      - Regulating.
    - ACorp:
      - ASIC investigation, director absconded, substantial assets stolen, reputation diminished.
    - Other investors:
      - Lost funds.
    - Similar investment consultants:
      - Reputation may suffer by association/due to similar business.
  - What are their short and long term interests?
    - Redwood Sports Association (RSA):
      - Short:
        - Recover funds.
      - Long:
        - Recover funds, make sound investments.
    - ASIC:
      - Successful case.
    - ACorp:
      - Short:
        - Survive ASIC investigation and remain a going concern, reputation control.
      - Long:
        - Better management practices and business structure, build reputation.
    - Other investors:
      - Recover funds, make better investments.
    - Similar investment consultants:

- Rebuild reputation if affected; capitalize on competitor's demise and poach clients.
- Are there legal issues? Who are the parties to any legal issues?
  - RSA and ACorp: Insider trading, insolvency, theft, breach of director duties.
- How would legal action meet short and long term interests?
  - May not be sufficient to meet the need to recover funds depending on the remaining assets and that which can be recovered from the absconded director.

### *Scenario 3: Eco Development*

- Consider the following:
  - Who are the stakeholders?
    - Luther, Ready Build, Owners/Renters, Renata, City Council, Award givers.
  - What is the "problem" for each stakeholder?
    - Luther:
      - Reputation, commercial success.
    - Ready Build:
      - Reputation, capital outlay fixing issues.
    - Owners/Renters:
      - Discomfort, opportunity cost (living elsewhere).
    - Renata:
      - Reputation, the Award
    - City Council:
      - Resources investigating a compliance order and the project in general.
    - Award givers:
      - Reputation.
  - What are their short and long term interests?
    - Short term:
      - Increase comfort of owners/renters; win the award; ensure compliance with relevant state regulations.
    - Long term:
      - Good business relations; reputation in tact; who's to blame.
  - Are there legal issues? Who are the parties to any legal issues?
    - Breach of contract (Luther v RB):
      - Delayed construction
      - Tenant agreements
    - Negligence.
  - How would legal action meet short and long term interests?
    - Mediation: how much everything will cost; moving forward; proper inspection; what needs to be fixed; then decide what to do based on that information.
    - Monetary compensation for the failed developments which have impacted reputations.



## Exercise 2 – Litigation Ethics

- Notes:
  - Ethical duties:
    - Administration of justice: refers to the court system and making sure you follow the right processes and do the right thing.
    - 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
    - 4.1.2 be honest and courteous in all dealings in the course of legal practice;
    - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
    - 4.1.4 avoid any compromise to their integrity and professional independence; and
    - 4.1.5 comply with these Rules and the law.
  - Conflict of interest:
    - You can't properly do your job because of competing interests.
    - Can act with consent of the clients with competing interests.
      - Or where the interests don't conflict.
  - Confidentiality:
    - Exceptions:
      - Informed consent
      - Risk of imminent serious harm
      - Compelled by law
      - To avoid the commission of a serious offence
      - Purpose of obtaining confidential advice.
  - Questions when unsure:
    - Someone senior in the firm
    - A barrister. Barrister's ethical committee.
    - Someone you know about the ethical problem
    - Law society (may result in some sort of investigation)

### Problem 1: Building Owner

- What ethical duties arise here?
  - Maintaining client confidentiality.
- Do you have a duty to warn anyone about the state of the building?
  - Exception to the confidentiality duty is where information is disclosed to avoid the probable commission of a serious criminal offence (not reporting it), or to prevent imminent serious physical harm to the client or another person.
- What are your options?
  - As the building remains untenanted, there is no risk of imminent serious physical harm to anyone.
  - Ask your client if you can tell your friend.
- Can you tell your friend?
  - Consider whether there is a risk of imminent serious physical harm.
    - Consider the word 'imminent', 'serious', 'physical' and 'harm'.
  - Contracting it in the first instance is the harm, despite the slow development of the condition.
  - Ask client to report it as per legal requirements.
  - Suggest an inspection to be prudent.

### Problem 2: Senior Partner

- What ethical duties arise?
  - ASCR 4. Other fundamental duties of solicitors: 4.1 A solicitor must

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;
  - 4.1.2 be honest and courteous in all dealings in the course of legal practice;
  - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;
  - 4.1.4 avoid any compromise to their integrity and professional independence; and
  - 4.1.5 comply with these Rules and the law.
- ASCR 5. Dishonest and disreputable conduct:
  - Lack of integrity, dishonest, deceitful conduct: *Sahade*.
- Duty to the client to act with zeal, confidence, competence and loyalty (no conflict)
- Duties owed to the client:
  - Duty of representation
  - Duty to inform, advise and act on instructions
  - Duty to consider settlement
  - Duty to continue to act
  - Duty of competence and diligence
  - Duty of loyalty (and to avoid conflict of interests)
    - Between practitioner and client
    - Between new clients and an existing client; or clients (concurrent representation)
    - Between a new client and a former client (successive representation).
  - Duty of confidence.
- ASCR 7. Communication with client
  - Be honest.
- ASCR 8. Client instructions:
  - A solicitor must follow a client's lawful, proper and competent instructions.
- What are the consequences of complying with the partner's request.
  - Contravention of the ASCR.
  - Client may not resolve the matter expediently and cost-effectively. Litigation may be required which is very costly. It may diminish the client's relationship with the other party further. Does not comply with the pre action protocols.
- Are there ethical consequences if you comply?
  - Not complying with client's instructions, not acting with competence and diligence.
  - Contravenes SA SCR's outlined above.
- Are there procedural consequences?
  - SCR 33.7: In awarding costs of the action, the Court may take into account—
    - A) whether the parties have complied with their obligations under this rule.
- Who would you approach to seek advice about this dilemma?
  - Speak to the partner about it.
    - Discuss rules.
  - Law Society.

### Problem 3: Property Development

- Are you obliged to take the case for the developer?
  - No, the 'cab rank' rule only applies to barristers. Solicitors may refuse potential clients.
- Ethical reservations?
  - ASCRs:
    - 10. Conflicts concerning former clients:
      - 10.1 May be in possession of information which is confidential to a former client.
    - 11. Conflict of duties concerning current clients:

- 11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients.
- 12. Conflict concerning a solicitor's own interests:
  - 12.1 A solicitor must not act for a client where there is a conflict between the duty to serve the best interests of a client and the interests of the solicitor.

#### Problem 4: Defamation

- ASCR 16A. Legal Assistance:
  - A practitioner has an obligation to inform clients as to their eligibility for legal aid either by way of assistance from the Legal Services Commission or the Litigation Assistance Fund, and/or any other scheme for delivering aid or legal assistance to members of the community where that practitioner has reason to believe that such a client may be so eligible.
- ASCR 20. Delinquent or Guilty Clients:
  - 20.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:
    - 20.3.1 advise the client against that course and warn the client of its dangers;
    - 20.3.2 not advise the client how to carry out or conceal that course; and
    - 20.3.3 not inform the court or the opponent of the client's intention unless:
      - (i) the client has authorised the solicitor to do so beforehand; or
      - (ii) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.
- ASCR 21. Responsible use of court process and privilege:
  - 21.1 A solicitor must take care to ensure that the solicitor's advice to invoke the coercive powers of a court:
    - 21.1.1 is reasonably justified by the material then available to the solicitor;
    - 21.1.2 is appropriate for the robust advancement of the client's case on its merits;
    - 21.1.3 is not made principally in order to harass or embarrass a person; and
    - 21.1.4 is not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.
  -

#### Exam Revision

Write a short answer to the following problem as if it were an exam question. You should refer to Solicitors Conduct Rules and relevant cases (Textbook).

You have been approached by a fuel company to represent it in proceedings brought against it by the Australian Competition and Consumer Commission for restrictive trade practices in the form of collusion with other fuel companies in price setting. The case will probably run for 6 months and you have set aside all other work for that time, and put a deposit on a small but sporty BMW.

Some weeks later a new equity partner (ie she has bought into the firm) joins your firm. You discover that she used to work for a firm that frequently acted for the ACCC. Although she never acted against your client, or indeed in any claim involving the fuel industry, she is very familiar with the operations of the ACCC, and conducted many similar cases on its behalf.

How should you proceed?

- Potential conflict of interest: ASCR 10.
  - 10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.



- 10.2 A solicitor or law practice who or which is in **possession of information which is confidential** to a former client where that information might reasonably be concluded to be material to the matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:
  - 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or
  - 10.2.2 an effective information barrier has been established.
- Consider: *Re a firm of Solicitors* – Confidential Information
  - The expression “confidential information” is not defined in the Rules. For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, Lightman J said:
    - “[t]he law is concerned with the protection of information which
      - (a) was originally communicated in confidence,
      - (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and
      - (c) relevant to the subject matter of the subsequent proposed retainer.
    - “Classes of information that may be confidential for the purposes of former client conflicts include:
      - (a) information of a former client that is directly related to a matter for an existing client, for example information belonging to an insurer concerning a potential claim, in circumstances where the solicitor is asked to accept instructions to act for the claimant;
      - (b) information of relevance to a competitor, such as product pricing or business models; and
      - (c) in some circumstances, particularly intimate knowledge of a client, its business, personality and strategies: *Yunghanns v Elfic*.
- Whether information falling within the third category can be said to be truly confidential is a question of fact and likely to depend on the client.
  - Individuals or small organisations, may have a close and enduring relationship with a solicitor who will consequently obtain much confidential information concerning these more personal factors, and who would have difficulty demonstrating that he or she could act against that client.
    - **This is unlikely to be the case for a large corporation or government body, or where there is regular turnover of management with the passage of time, particularly where business practices and strategies are so well-known that they do not constitute confidential information.**
  - There may be a conflict of duties because the Equity Partner may have an intimate knowledge of the ACCC based on her many years of taking instructions from her in relation to its matters.
  - However, the ACCC’s strategies and decision-making in similar cases are likely to be well-known amongst fuel companies and would not constitute confidential information.
- Case Theory – 50 Word Summary:
  - The Defendant supplied a generator to the Plaintiff. The generator was faulty. The generator caught fire because of the faults and set fire to the Plaintiff’s house. The defendant is in breach of its contract to provide a generate that met with relevant safety standards, and is negligent in failing to check the safety of the generator.

## Seminar 2:

### Notes:

- Case summary number: 14.
- Need to know what has led to the loss.
- Interview notes:
  - Note, lawyer satisfying the professional conduct rules?
    - Rule 4: Fundamental ethical duties
      - Best interests, being honest and courteous, delivering services diligently etc, not compromising integrity or professional independence.
    - Rule 7:
      - 7.1 assist client to understand relevant legal issues and make informed choices about action to be taken during the course of a matter.
      - 7.2 Inform clients of alternatives to litigation.
    - Rule 8: following client's lawful, proper and competent instructions
    - Rule 9: confidentiality
      - Everything discussed is covered by confidentiality.
    - Rule 10-12: consider potential conflicts.
- Did the lawyer follow the ethical rules:
  - Confidentiality earlier. Seemed like he forgot.
  - Fees: used to be an obligation to set out fee structure – no longer in the rules.
    - Do have an obligation to manage expectations re fees.
    - 16A: Other legal assistance (pro bono, legal aid).
      - Did mention she can do some work herself.
    - Pressured her to sign the contract before reading or understanding.
    - Could have given an idea of what would happen next – what each would do, an indication of the time and cost associated.
- The case:
  - Info missing:
    - Was Andy high when he was installing equipment?
      - What does Andy being 'illegal' mean?
      - What qualifications does he actually have?
      - Did he supply anything that may have contributed?
    - MS Fire Report:
      - Wiring found and needed further investigation.
    - Know the representations BS has made about the equipment.
      - Four-star, emission compliant, energy efficient, 'green'.
    - Provisions in the contract:
      - Variations to agreement?
      - Supply of a different generator.
  - Questions:
    - Expert to look at the technicalities of the installation and what went wrong.
  - Conflicting information:
    - The cost of the generator and the discount.
- Case theory:
  - 50-word summary of the case. Now required on the statement of claim.
  - What happened, why, why is the defendant liable?

- Succinct idea of what the case is about.

## Donna Donner's Case:

- Foundational Information:
  - Prepare a timeline or chronology that sets out the events in this case:
    - October 2009:
      - 18<sup>th</sup>: DD signed contract to purchase land from BSHD.
        - 77 Nirvana Way on the "Blue Skies Estate" in Aldinga
        - BSHD a national property development co with a focus on ecologically friendly housing development.
          - Locations in SA: Aldinga and Dublin; in NSW.
      - BSHD offer access to off grid electricity creation equipment at cost price, on favourable terms. Safety approved, purchased from ecologically friendly suppliers with four star accreditation from the Australasian Clean Energy Commission (ACEC).
        - DD took up this offer.
    - 2010:
      - Sometime: took up offer and ordered a solar powered generator.
      - Couple months after order, DD told could not be fulfilled due to supply problems.
        - Instead advised to use ordinary electric power.
        - Costs of connecting home to grid deducted when equipment provided to her.
    - 2011:
      - solar generator provided.
        - Invoiced \$32,000.
        - Installed by friend and neighbor, AL, a retired electrician. Paid in cash.
      - Discovered that generator is not safety approved, purchased from ecologically friendly suppliers with four star accreditation
        - Bought from Samstrat Co, no stars, breach in emissions standards, third world labour.
      - House burnt down: (27 Oct per fire investigation report). Approx. 11pm.
        - Generator identified as the cause by SA Metro Fire Dept. Faulty.
      - 29 October:
        - ceiling collapsed.
        - Fire investigation report confirms source of fire likely to be generator.
        - Generator did not meet minimum standards (contrary to representation).
          - Castings (were not ceramic but instead resin) and insulation (should be carbon fibre but was something of lesser quality).
  - What information is missing? Make a note of it and consider where you might get that information.
    - Section 32(2)(a)-(b) of Supreme Court Civil Rules:
      - Court may make an order imposing a person to disclose the location of or produce relevant documents.
    - Report from S Greipel Metropolitan Fire Service dated 30/11/11
      - Metropolitan Fire Service.
    - Blue Skies Flyer about energy efficient accredited equipment for sale
      - If not DD, BSHD.
    - Copy invoice for supply of Samstrat 1000 Solar Generator dated 24/9/11
      - BSHD or Samstrat.
    - Copy contract for sale of land 77 Nirvana Way Aldinga
      - If not DD, BSHD.
  - What are Donna's interests?
    - Misrepresentation of the green energy/ethical credentials of the generator
    - The generator causing her house to burn down

- Homeless. Doesn't want to live with sister.
  - Rebuild the eco friendly house.
  - Vindication – feels she's been lied to from the 'green' advertisements.
  - Protect her friend Andy.
- Will protracted litigation meet these interests?
  - Unlikely.
- What evidence would you need to prove what Donna says is true?
  - 1. Property purchased.
  - 2. Off grid electricity creation equipment purchased from BSHD as per property purchase offer.
  - 3. The following representations
    - Advertisement: Safety approved, purchased from ecologically friendly suppliers with four-star accreditation from the Australasian Clean Energy Commission (ACEC).
  - 4. Report confirming cause of fire.
- What causes of action arise on the facts given by Donna? What are the elements?
  - Breach of contract:
    - Elements:
      - Valid offer and acceptance; consideration. Variation provisions?
      - Onerous terms?
      - Implied terms?
        - Supply of goods. Installation requirements. Goods will be fit for purpose, provided on time.
    - Not supplied with generator on time – relied on on the grid electricity.
    - Not supplied with the generator specified.
    - Fitness for purpose?
      - Resin casings used instead of ceramic, Carbon fiber not used, Insulation not proper.
  - Negligence:
    - Duty of care owed, breach, and damages occurring as a direct result of that breach.
    - BS's knowledge of supplier, and what they ought to have known – the star rating.
      - Up to Australian standards?
    - Faulty generator.
  - Breach of Australian Consumer Law – misleading and deceptive conduct.
    - Generator supplied is not the kind advertised.
    - Cth consumer law applies to companies.
      - SA fair trading act for state.
    - Misrep as to the quality of the goods sold; or goods not fit for purpose.
      - Same facts for BoC and Misrepresentation go towards establishing these.
    - ACL would apply.
      - Not looking at this any further in the course.
  - Misrepresentation
    - Inducement, and an act in reliance of that inducement.
      - Green representations are the inducements to enter into the contract. Show she entered into the contract based on that inducement.
    - Not looking at this further in the course.
- What evidence would you need to prove those causes of action? Where/how would you get it?
  - Section 32(2)(a)-(b) of Supreme Court Civil Rules. The wiring, insulation, generator.
- In what jurisdiction would the causes of action lie? The more convenient forum the most appropriate.
  - South Australia. If company, it's where the registered offices of the company are located.
    - Max in Magistrates is \$100k. Anything over can be brought in either district or supreme court. Neither have limits.

- More expensive, rules are more complex.
- District Court:
  - Little cheaper than Supreme Court. Filing fees etc more expensive in SC.
  - Scale of costs received is less than SC.
- Purposes of this course, we go to SC because we look at SCCRs.
- Do you think Donna should litigate her claim? What other options does she have?
  - Litigation is lengthy and costly. Supreme Court Civil Rules have built in ADR processes.
  - Arbitration.
- Develop a strategic plan of how to proceed taking into account Donna's interests and the requirements of litigation, including pre action protocols and obtaining documents and evidence (ref SCR 32 and 33).
- Case Theory:
  - Note:
    - *The Case Theory is a summary of what the party believes happened that logically fits with all the evidence that is expected to be presented to the court and which will lead to the conclusion that the party desires. In other words, it is a narrative that should convey the whole story that the lawyer wishes to advance.*
    - *A Case Theory should be simple and clear. Think of it as a summary you would tell a lay person to convince them they should be on your side.*
    - *The Case Theory should guide the lawyer at every step of preparing the case, including trial strategy. Without a theory of the case, there is no real unifying strategy at trial and nothing for the trial judge to follow. It leaves the case entirely to chance and the lawyer will not be able to control the direction of the case and so will not be able to lead it to the desired conclusion.*<sup>1</sup>
  - In 50 - 100 words, explain what Donna's case is about: what happened, the legal cause of action, and remedy.
    - Donna purchased some land from BHSD and took up their offer to also purchase some eco-friendly electricity generator. Subsequently, Donna received a generator with different safety and emission standards to the kind advertised. Due to faults in its design, it caused a fire which burnt down her house according to an investigation by the fire department. The legal cause of action is breach of contract against BSHD for the wrong generator being provided and the on the grid electricity costs associated with the delay in receipt. Also misleading and deceptive behavior due to the false representations made about the generator. Claim of negligence against Samstrat for the faulty generator which caused the house fire. Remedies: costs for electricity, correct generator, damages for loss of house, costs associated with relocation.
  - Assume that Donna will sue Samstrat. In 50-100 words, explain what Donna's case is about: what happened, the legal cause of action, and remedy.
    - Donna received a generator that was made with inferior parts, which did not meet Australian safety standards. The origin of a fire which burnt down Donna's house was traced to this generator's inferior composition. Samstrat owed Donna a duty of care to provide a generator that was in line with Australian safety standards(?). This duty was breached due to the inferior parts used in its design. As a result of this breach, Donna's house has burnt down. Donna will want compensation for the destruction of her house.
  - Try starting with a simple, plain English, statement of what the case is about.
    - A brief summary of what happened (the facts).
    - A statement of why the other party is legally at fault.
    - The remedy sought.

<sup>1</sup> [http://en.wikibooks.org/wiki/Canadian\\_Criminal\\_Trial\\_Advocacy/Developing\\_a\\_Theory\\_of\\_the\\_Case](http://en.wikibooks.org/wiki/Canadian_Criminal_Trial_Advocacy/Developing_a_Theory_of_the_Case)