

Bond Dispute Resolution News

7-12 January	Taught Mediation Course at Southern Methodist University in Dallas, Texas
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BOBETTE WOLSKI	
24 October	Queensland Law Society CLE Bond Breakfast - "Drafting Affidavits Made Easy" – over 82 people attended
6-8 December	Bond Mediation Course at the Marriott Resort, Gold Coast

Marriott Mediation Course: Gold Coast

This popular course was again oversubscribed – 33 participants plus 3 instructors and 10 coaches. This course has now been offered over 100 times over the last 11 years around the planet. Surprisingly, demand does not seem to abate. Participant feedback was again uniformly enthusiastic. For example –

- *Thank you! It was an inspiring course and the content and instructors were excellent.*
- *Instructors from Bond and outsiders (coaches) gave "war stories" – excellent and always encouraged questions.*
- *I had been given great comments on this course by other experts in the industry and it lived up to my expectations. Excellent work by the two lecturers – well worth the money. The scheduling of the sessions was great – just the right length of time for all the days.*
- *The instructors had a good grasp and application of adult learning theory. Plus they were human and personable. The coaches did a good job at encouragement and helpful criticism.*

Recent Publications of Bond Dispute Resolution Centre Staff

Book review

A perfect(ing) marriage

David Bryson

I am probably not alone as an ADR practitioner in finding much of the current literature on mediation skills somewhat superficial and irrelevant to real practice. It is like everything really important has been said some time ago and has not been improved on since. What is written about mediation skills often leaves the practitioner with a sense of misgiving that what he or she is doing in the penumbra of mediation may not be quite acceptable if exposed to sunlight.

It is therefore with genuine excitement that I have read Boulle's *Mediation Skills and Techniques* (Butterworths: Sydney, 2001), a worthy sequel to his seminal work *Mediation: Principles, Process, Practice* (Butterworths: Sydney, 1996). *Mediation*

Skills and Techniques speaks to today's practitioners in a way which is fresh and absorbing, effectively communicating a sophisticated amalgam of practice guidelines with multiple choices, different ways of thinking about what you might do and what the consequences of those choices may be. Together, the two books partner the current collective theory and practice of mediation.

Consider the way Boule deals with the thorny issue of mediator power or influence. He begins by dispelling the myth that the mediator is devoid of power. On the contrary, a mediator has many sources of influence, among them associational status (such as from court referrals), access to restricted information (through caucus), ability to control the process and transmit messages, apply moral pressure from a standpoint of independence, and in some situations, the ability to evaluate and sanction.

He then gives examples of where power is (often unwittingly) exercised. For example, as an 'agent of reality' (normally taught as a neutral, textbook intervention for mediators in order to encourage settlement) Boule exposes the many colours and hues of its operation in practice. So too, the provision of information or giving of an opinion can be delivered with varying strengths based on professional or personal perspective (from 'In mediation we first define the problem before considering options for its settlement' to 'Don't forget that while you are arguing over the sizes of the slices, the "cake" is getting smaller because of legal fees and other expenses').

Boule then introduces countervailing forces to enlighten the reading audience to problematic elements in any intervention (such as the dangers of a mediator encouraging settlement) and seeks in the end to provide guidance in achieving a balance (in relation to the mediator's use of power, it depends on the timing, stage of the process, and the disposition of the people involved).

This pattern of instruction characterises this book, so that:

- a mediation skill or issue is framed, more often than not in a slightly surprising way;
- varieties of that skill in practice are described (from one end of the 'abacus' to the other);
- problems with different approaches are suggestively, rather than doctrinally, discussed; and
- ways of achieving a balance appropriate to context are sketched (somewhere between 'strong intervention and benign neglect').

In line with step (1) an early surprise for me was Boule's definition of mediation itself — including 'all forms of decision-making in which the parties concerned are assisted by someone external to the dispute, the mediator, who cannot make binding decisions for them but can assist their decision-making in various ways'. The emphasis on decision-making, rather than on seeking agreement (with all the restorative meaning of that word), derives from one of Boule's self-confessed, distinctive contributions to the subject: that mediators are in the business of facilitating parties through a negotiation process and that making decisions is a critical part of effective negotiation.

Indeed, Boule considers this is one of the most undervalued aspects of mediation training and literature to date, particularly the absence of guidance for mediators when dealing with distributive (rather than interest based) bargaining. Boule's treatment of facilitating negotiations (Chapter 7) is therefore a 'must read'. It makes a worthy contribution to the neglected area of mediation by distributive bargaining. The text is sharp edged and practical, and punctuated with special techniques ('issue proliferation', 'shifting between principle and detail' and 'crossing the last gap').

Another subject that comes in for the similar treatment is Boule's deliberate attempt to introduce conflict theory into the mediator skills of diagnosing and defining the dispute, and then designing an appropriate mediation process. I would take issue with readers who may consider this chapter over-intellectualising dispute resolution. I have found its content liberating, shifting my thinking about old issues. A major problem for experienced mediation practitioners is the 'I have heard this before' syndrome. Boule offers a variety of methods for choosing how to understand and frame a dispute at the outset. This is no idle, academic task, for how you frame a problem will largely govern what possibilities you allow yourself for intervening. Boule argues that mediators 'need to assume a significant leadership role in the defining stage of mediation as it is a sophisticated art', one that is counter-intuitive to most parties.

While much of Boule's book demands a lot from his readers, he nevertheless covers the subject fundamentals for those who may be beginning their mediation careers. However, the fundamentals are rarely discussed without adding something searching to them. For example, the simple intervention of *inviting an opening statement* from a party becomes full of possibilities: 'Tell me the history and facts in this case as you see them...' (facts based); 'Tell me what you are here for, what would you like to achieve in the mediation ...' (positional); 'Tell me what happened and what effect it had on you ...' (narrative); 'Tell me what decisions need to be made today ...' (problem solving); 'Tell me first how you thinking we should go about resolving the problems that we are dealing with ...' (procedural); 'Tell me what your concerns are today ...' (interest based). All of these approaches are legitimate at different times.

Boule's legitimation of variety and choice governs his teaching of other fundamental skills. *Listing issues* for discussion on a whiteboard (an 'apparently simple function') is not a 'one size fits all' technique: rather, Boule suggests that a mediator can list the issues to reflect the dynamics in the room or the subject matter in dispute. *Reframing*, like the joke teller who reframes to achieve laughter, is the mediator's way of creating a problem solving language and culture, but there are choices as to how to reframe and what consequences result. *Questions* are described in all their variety, but with indications of the circumstantial suitability of each one.

Boule's substantial knowledge of the ADR field is reflected in his comprehensive coverage of the variations of the mediation process (chapter 9) and the practicalities of establishing a mediation practice (chapter 12). Special issues in mediation (chapter 10) — including violence, absent parties, expert opinions, terminating mediation — are all tackled with a sure touch. The appendices are a mediator's kit bag of best practice documents: agreements, guidelines, standards and debriefing forms.

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The book is structured so that each chapter concludes with a summary of main issues, thoughtful exercises and further reading, making it a practical text for mediation training and students of dispute resolution. It is laced with droll humour, and replete with endlessly varied examples of spoken mediator interventions to enhance the text and provide a learning method for those of us who learn by verbal example.

There are some weaknesses with the text. Ironically, one of the least convincing chapters is on the mediation process itself (chapter 5). The discussion or exploration stage of mediation is described simply as 'useful in clearing the air, correcting misunderstandings and opening the way for dealing with ... issues'. Many mediators will see this as a minimalist view of a critical step in the process, but it occurs because of a deliberate choice of Boule's to avoid a linear, step by step approach to mediation skills. He has attempted and mostly succeeded in doing something more difficult: producing a book that reflects the dynamic interplay of the mediation event. However, this sophisticated approach may confuse or overwhelm baby mediators who need to walk before they run.

There are some unfortunate typographical mistakes, most regrettably in the early prologue to the book, whereby means of the Greek dramatic device, Boule attempts to create a metaphor for what follows. The graphics introducing each chapter appear rather ordinary in relation to a clever text. While apologetic about lists, Boule's many dot point lists sometimes overextend themselves and exhaust the reader. They appear to accentuate cerebral, rather than the more personal, fluid and intuitive, dispute management skills.

These are picky points about an otherwise splendid book. *Mediation Skills and Techniques* sets a high benchmark for a mediation text and for mediation practice. Boule has harnessed his significant experience as a mediator practitioner and teacher (reflecting the adventurous and innovative instructional contribution of the Bond University school of mediation over the past decade), to give practitioners the opportunity to become more reflective and effective mediators.

Mediation has been described as a practice in search of a theory. Together with his first book, Boule's mediation skills book forms a contemporary statement of how mediation theory and practice can be married successfully!

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