



# Book Review

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## Mediation Skills and Techniques 2<sup>nd</sup> ed

Boulle & Alexander

LexisNexis Australia

509 pp      \$88

Reviewed by Garth O'Rafferty

In 2010, Victorian Chief Justice Warren noted in a speech at the Supreme and Federal Court Judges' Conference, that "twenty-five years or so ago, mediation as a feature of the court system was unknown". Her Honour spoke of the Victorian Supreme Court's "Spring Offensive" in the 1990s when a large number of civil cases listed before individual judges were sent to mediation, and where the Victorian Bar and the profession proffered services as mediators, mostly free of charge, resulting in a dramatic settlement rate.

Alternative dispute resolution prior to civil trial is now a legislative requirement, and in the case of many Federal civil proceedings, genuine attempts at resolution of a dispute (including considering alternative dispute resolution) are also required prior to instituting proceedings.

Justice Hayne, in a speech entitled "The Vanishing Trial" given at the Supreme and Federal Court Judges' Conference in 2008, spoke of his "clear impression that over the last 15 or 20 years, perhaps longer, the number of civil cases tried to judgment in Australia's State and Territory Supreme Courts, and in the Federal Court of Australia, either has diminished, or at least not kept up with the increase in the number of judicial officers in those courts or the increase in the size of the population." Resisting the temptation to conclude that the vanishing trial (a) results from the emphasis on alternative dispute resolution and managerial judging techniques and (b) is a mark of success, His Honour noted that settlement of disputes may mark the failure of the system if cases are settling because the prospect of trial is "too horrid" for the parties to contemplate or managed to the point of exhaustion.

As an aside, the Law Council of Australia's 2011 Federal Court Case Management Handbook notes that of the range of effective early judicial case management strategies or techniques, simply fixing an early trial date for final hearing is by far the most significant, and does not affect litigant costs.

Boulle & Alexander's text aims to elucidate the skills, techniques and ethics of mediation, and proceeds on a philosophy that mediation is both art and science, mediators are made not born, and that mediation skills can be learned, practiced and improved. Part of learning those skills requires a familiarity with terminology - "micro-skills", "active listening", "reframing", "reflective learning", "intake", "screening", "streaming", and acronyms, WATNA - worst alternative to a negotiated agreement, ZOPA - zone of possible agreement.

Mediators will bring their various skills and techniques from various occupations. Boule & Alexander note that lawyers have the ability to refine facts to a narrow set of legal issues, but suggest that ability should be subordinated and replaced in mediation with a broader notion of relevance. In that context, while some lawyers may be prone to a legal and adversarial approach in mediation consistent with their duty of loyalty to their client, the discussion of mediator techniques of avoiding loss of face is a useful one, potentially providing a more impartial counter-balance and, in my view, may have the effect of instilling in the opposing client a certain uneasy confidence.

The book deals thoroughly with mediation skills, techniques and ethics consistent with the National Mediator Accreditation System Practice Standards and the Law Council of Australia's Ethical Guidelines for Mediators (both appended). It also contains suggested template terms of settlement for commercial and family disputes, and agreements to mediate and confidentiality agreements.

The authors are pre-eminent in the field, Professor Boule chairing the National Alternative Dispute Resolution Advisory Council from 1999 to 2003, and Professor Alexander a member of the National Alternative Dispute Resolution Advisory Council since 2007.