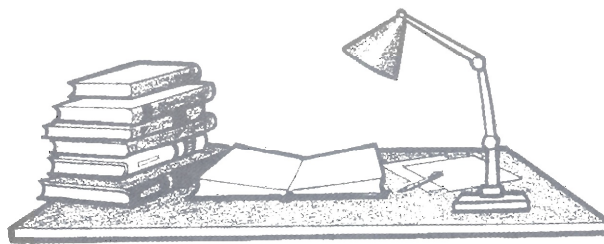


Reviews • Resensies



Mediation: Principles, Process and Practice

by Lawrence Boule and Alan Rycroft

Butterworths (1997)

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THE progressive-minded South African advocate in practice in 1998 will be conscious of the sea-change which is taking place throughout the length and breadth of our country and have his ears pricked up to measure its impact on the institutions of the law and of the law itself. The instances of change and adaption in the ethos of legal practice are multiple. One of them is a wholesome embrace of dispute resolution techniques whose aim is the building of consensus. The dramatic and romantic example of the constitutional talks leading to our democratic revolution were of course the great spur to this paradigm shift in our mindset. The alternative dispute resolution movement which had hitherto lurked in the shadows of the mainstream of practice found itself wooed by all and sundry. Legislation since 1994 has frequently built in conscious consensus-seeking dispute-resolution techniques, the leading examples of which relate to land claims prior to their being adjudicated upon in the Land Claims Court, and the conciliation process driven by the Commission for Conciliation, Mediation and Arbitration under the Labour Relations Act of 1995.

The scope of legal practice is broadening, and those of us who in years gone by were content to regard ourselves as officers of the court and to see litigation as central to our function and the service of our clients are now invited to see our role in a far broader, more socially conscious dimension as dispute resolvers. As a result a challenge is laid down to professional legal practitioners to develop skills in achieving consensus, which by and large in the past have been neglected. Negotiation skills now assume a central role in legal practice. Significantly, the role of the third party dispute resolver, in the guise of conciliator or mediator, is now frequently at centre stage. More and more, advocates in particular, because they stand free from any standing client relationship, have been called upon to perform the role not of litigator but of intervening mediator.

Apart from those who have had extensive experience in labour law and to a lesser extent in construction law, few South African advocates have until recently had the opportunity to practise mediation as an independent professional mediator. It is particularly those who are newcomers to the field who will welcome this publication by Lawrence Boule and Allan Rycroft. The authors are two South Africans, one now in Australia and there involved in dispute resolution practice, and the other exposed to mediation in the trenches of South Africa. The work which is offered is thus the work of those who have got their hands dirty and who have more than just a voyeur's perspective.

The book attempts to be a comprehensive textbook. Sometimes, unhappily, this leads to somewhat tedious passages which do little more than list data. This attribute is perhaps a virtuous vice as newcomers to the practice of mediation may appreciate that information more than those who are old hands.

There is a welcome section on what might be called the jurisprudence of mediation in which the authors offer certain thoughts in regard to the theory of mediation. This will be of interest to those seasoned mediators who, because they no longer have stars in their eyes, have many unanswered questions about the nature of the mediation process. Not all the answers are offered here but much of the old debate and some new aspects will be found to interest them. Regrettably the authors have not thought to include any socio-psychological dimension to their treatise on the nature of mediation but, in fairness, that would have been beyond the scope of their book. I, along with others who have skirmished on the field of mediation, will have to wait a little longer for the answer to the ultimate question, which is: why *does* mediation work?

In the analysis of the mediation process, the authors have offered an exposition of four distinct models of a mediation. These models are labelled as settlement mediation, facilitative mediation, therapeutic mediation, and evaluative mediation. I found this analysis both interesting and useful. The dynamic of labour mediation and the dynamic of family mediation are quite diverse. The explorations into commercial mediation, which are presently in their infancy in South Africa, offer other

problems which perplex even an experienced mediator from one of the other fields. Those who take the practice of mediation seriously will find useful material on this theme to help them formulate their own views.

The authors make reference to some Australian experience and Australian law on mediation. I was left with a sense of ambivalence concerning the utility of those references as, in the main, the expositions seem to be fillers rather than genuinely useful material for a South African practitioner. Nevertheless, the authors address some significant South African problems in mediation: more especially the ideological rifts, the problems of culture and language and, to a lesser extent, the ignorance of the process. In respect of functional aspects of mediation, the authors alert one to the difficulties of endeavouring to mediate within a group that is too large, to the difficulty of choosing the right timing to introduce a mediator into a dispute, and to the different styles of mediation which are often personality-driven rather than method-driven. Of particular importance to me was the recognition of the increasing need for the mediator to have expertise in the subject matter of the problem in respect of which he is called upon to assist. Until relatively recently, South African mediators were ahead of those who sought their services because they had a monopoly on process skills. With the increasing sophistication in the industrial relations community and the widespread presence of negotiation skills, mediators need to bring more than simply process skills to the party. In this second phase of the evolution of the practice of mediation in South Africa, mediators will be more and more challenged to have substantive knowledge of the circumstances in which the parties who are in dispute find themselves if they are to be truly useful and achieve successes.

This book is not always easy to read and does not always hold one's attention. It is, however, a significant contribution to the literature and will not be found wanting on our bookshelves.

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