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978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application

Omer Shapira

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A THEORY OF MEDIATORS' ETHICS

Many aspects relating to the conduct of mediation are left to mediator choice, but mediators often lack adequate guidance on how their discretion ought to be exercised. In this book, Omer Shapira identifies the ethical norms that govern mediators' conduct. Adopting a professional ethics perspective on the basis of role-morality and applying it to a core definition of mediators' role, Shapira argues that all mediators are placed in ethical relationships with mediation parties, the mediation profession, the public, and their employers or principals that produce ethical obligations. The book goes on to explore the legitimate expectations of these groups and analyses existing codes of conduct for mediators. Shapira constructs a theory of mediators' ethics that produces a *Proposed Model Code of Conduct for Mediators* – a detailed set of norms of mediators' ethics that can be rationally justified and defended with regard to mediators at large.

OMER SHAPIRA is Senior Lecturer in the Law Faculty at Ono Academic College, Israel.

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PREFACE

There is uncertainty among both mediation practitioners and theoreticians in Anglo-American countries as to the identity, content, and scope of mediation norms and the relationship between them. Mediation practice is under-regulated, and accreditation and licensing of mediators is mostly restricted to court-connected mediation programs or to voluntary grassroots initiatives. Mediation programs and voluntary associations of mediators have developed a large number of codes of conduct for mediators, and from time to time they issue ethical opinions that interpret the codes and offer guidelines for mediators' behavior. These codes and opinions vary in content. Furthermore, they formally apply only to mediators who are members of these programs and associations. In practice, however, most mediators are not subject to any written code of conduct, and those who are find the codes too abstract, general, and vague to offer them a sound guide on ethical mediation conduct. As a result, many aspects relating to the conduct of mediation are left to mediator choice, but mediators have inadequate guidance on how their discretion ought to be exercised. These issues need to be addressed for the benefit of mediators, mediation participants, mediator organizations, advisory bodies, policymakers, and teachers and students of mediation.

Rather than a textbook on mediation laws, this book is a monograph constructing *a general theory of mediators' ethics* that applies to mediators in the United States, United Kingdom, Canada, Australia, and other Anglo-American countries that share the definition of mediators' role suggested in the book. The theory identifies the *ethical* norms that govern mediators' conduct, describes their content and meaning, and explains how their meaning has been shaped. It does so by looking at the role of mediators from the perspective of *professional ethics*.

The professional ethics perspective assumes that holding a professional role comes with responsibilities, and that a theory of professional ethics can offer tools for identifying and interpreting these responsibilities. The main argument of the book is that mediators perform *a role* that

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has evolved and been shaped by the conduct, writings, and other public representations of mediation practitioners, mediation theorists, legislatures, and mediator organizations. The role of mediators has a *core meaning and definition* that mediators in Anglo-American countries share, notwithstanding the variety of mediator styles and types of mediation. This role places mediators in ethical relationships with mediation parties, the mediation profession, the public, and their employers or principals (when they are employed or conduct mediations on behalf of others), who expect mediators to act in accordance with their role definition. The ethical relationships of mediators produce ethical obligations, the content and meaning of which can be discovered by exploring the legitimate expectations of those who have ethical relationships with mediators and by looking into the relationships among these expectations. The inquiry produces a minimum set of detailed norms of mediators' ethics that can be rationally justified and defended with regard to mediators at large, whether they practice in California or Alabama, or in the United States or Australia, whether they are paid or not, practice in court-connected programs, community programs, or privately, and irrespective of mediation style. Mediators ought to conduct themselves in accordance with these minimal ethical norms irrespective of the *absence* of a formal code of conduct adopted by them or imposed upon them. Local laws of mediation and existing codes of conduct for mediators are used as a source for exploring the content of these norms. Where local laws or codes do exist, the professional ethics perspective and its products enable the book to expose the often implicit and unexplained rationales underlying their provisions, evaluate them, endorse their content, or suggest modifications.

Although dozens of books on mediation have been published, the volume and depth of the discussion of the ethics of mediators in these books is remarkably limited. Excellent books such as Carrie Menkel-Meadow, Lela Porter Love, and Andrea Kupfer Schneider, *Mediation: Practice, Policy and Ethics*, 2nd edn. (New York: Aspen, 2013), Kimberlee K. Kovach, *Mediation: Principles and Practice*, 3rd edn., (St. Paul, MN: Thompson West, 2004), and Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*, 4th edn. (San Francisco: Jossey-Bass, 2014) typically assign one chapter for the discussion of some ethical issues in mediation. None of them offers a comprehensive theory of mediator ethics. In fact, there is only one book to date that is exclusively dedicated to mediation ethics, titled *Mediation Ethics: Cases and Materials* (Ellen Waldman [ed.], Jossey-Bass, 2011). The book

presents thirteen illustrative ethical dilemmas that are commented upon by twenty-seven mediation experts. It provides a valuable resource for teaching mediation ethics and shows how prominent mediators handle ethical issues, but it lacks a uniform approach that is grounded in an explicit theory of mediator ethics. As a result, although the book is thought-provoking it does not offer a systematic step-by-step approach to dealing with ethical questions that arise in mediation practice. This is the case with refereed articles on mediation ethics as well. Hundreds of published articles touch upon various aspects of mediator ethics, such as neutrality, impartiality, party self-determination, and confidentiality, but none weaves them together into a single coherent theory. This book offers tools for guiding mediators' conduct in the absence of applicable codes of conduct, and for helping mediators who are subject to such codes to interpret them, fill up lacunas, criticize them, and resolve internal tensions between their provisions.

The first part of the book develops a general theory of professional ethics on the basis of which, in the second part, a theory of mediators' ethics is formulated. Chapter 1, titled 'Fundamental concepts,' presents professional ethics as an integration of morality and role; discusses the differences between duties and aspirations and between rules, principles, values, and ideals; clarifies the relationship between ethics and law; and highlights the main functions of professional ethics. Chapter 2, titled 'Ethical relationships,' discusses in detail the duties of professionals that follow from the meeting of role and morality towards their clients, their profession, the public, and their employers or principals when they have any. Part I draws upon literature on morality in general and on professional ethics in particular, and is especially influenced by the writings of Bernard Gert, Lon Fuller, Michael D. Bayles, Michael Davis, Daryl Koehn, and Michael S. Pritchard.

The second part of the book, titled 'A theory of mediators' ethics,' explores the content and meaning of the norms of mediators' ethics. Chapter 3 suggests a core definition of mediation and of the role of mediators. It then applies the theory of professional ethics that is the subject of Part I, in particular the concept of an ethical relationship, to mediators and the practice of mediation, and proposes a scheme of ethical obligations of mediators. The chapter concludes with an explanation of the method whereby the content and meaning of these obligations are to be ascertained in the remainder of Part II. Chapters 4–14 then explore mediators' duties of competence, conflict of interest, party self-determination, professional integrity, impartiality, diligence, respect and

dignity, honesty, confidentiality, fairness, maintaining the profession's standing, advancement of the profession, and their duties regarding advertising and solicitation, fees, and employers and principals. Each chapter concludes with a proposed ethical standard that summarizes the preceding discussion, and together they comprise a 'Proposed Model Code of Conduct for Mediators.' Part II of the book draws heavily on major codes of conduct for mediators in the United States, Canada, and Australia, and refers to the writings of mediation experts when appropriate.

The third part of the book illustrates the application of the theory of mediators' ethics to ethical questions that come up in mediation practice. Chapter 15 presents a recommended approach to ethical decision-making that draws upon the writings of Bernard Gert, Tom Beauchamp and James Childress, Julie Macfarlane, and Daniel Statman. The chapter discusses the possibility and utility of distinguishing between ethical and professional questions; offers a typology of easy cases, hard cases, and dilemmas; and suggests an ethical decision-making process that can be followed when confronting ethical questions, hard cases, and dilemmas in the practice of mediation. Chapter 16 concludes the book by providing illustrations of ethical analysis of real stories and cases that involve mediators' conduct. The chapter draws on my experience of sitting on a mediator ethics committee and drafting ethics opinions in response to mediator queries.

Mediation practice has continuously grown in the last two decades in the United States, Canada, Europe, and Australia. Many countries have adopted mediation programs alongside their court systems, and encourage the spread of mediation as a voluntary, peaceful method for resolving disputes between individuals, businesses, and groups. Mediation is practiced by many thousands of mediators around the world, in the public sector, in private settings, and in voluntary community service. The mediation process is utilized by mediators to address a great variety of disputes, including family, business, employment, neighbor, landlord-tenant, environment, and criminal disputes. In addition, mediation is being researched and taught in numerous academic and nonacademic dispute resolution programs, and thousands of people seek mediator training every year, or take ADR and mediation classes and seminars at both the undergraduate and graduate levels.

This book is the first to develop a novel theoretical basis for discussing and evaluating mediators' ethical conduct, and to provide a comprehensive and coherent theory of mediators' ethics. It is intended for all those

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who have a stake in the practice and study of mediation: *mediation researchers* of all disciplines who wish to familiarize themselves with the ethics of mediators or further develop it; *mediation teachers* who wish to upgrade their teaching of mediation ethics in both academic courses and mediator training courses, and their *students*; *mediators* who wish to conduct mediations ethically but are unsure what that means or how that can be achieved, and mediators who feel they know what the “right thing to do” is but want to test that feeling or be able to justify it for themselves or for others; *actual and potential mediation participants* who want information with regard to the ethical rights of mediation participants and the obligations of mediators toward them; *mediation organizations, program directors and staff, and policymakers* who wish to adopt guidelines for mediators that can be ethically defended and to review existing guidelines; and *ethical advisory bodies* who want to expand their resources for drafting reasoned ethical opinions on mediators’ conduct. I hope the book will attract interest within the growing ADR community and generate further discussion of mediation ethics. In particular, I hope the book’s *Proposed Model Code of Conduct for Mediators* will set a new benchmark for adopting new codes of conduct for mediators and a point of reference for reforming existing codes, in particular the very influential *Model Standards of Conduct for Mediators* (2005) that needs to be updated.

This book has grown out of many years of teaching and researching mediation ethics, discussing ethical questions with practicing mediators, and conducting mediations. I am grateful to the members of the Kiryat-Ono community mediation center’s ethics forum (committee), and in particular to Carmela Zilberstein, for helping me through fruitful discussions, and for their enthusiasm and support. I would like to thank my home institution, Ono Academic College, for providing the environment that made writing this book possible. In particular, my thanks go to the institution’s founder, Ranan Hartman, the Rector, Professor Dudi Schwartz, and the law school Dean, Professor Amichai Cohen. I am grateful to Professor Michal Alberstein for her continuous support and faith in me over the years. I would also like to thank Ruvik Danieli for stylistic contributions to the text, and Kim Hughes, Law Editor at Cambridge University Press, for her promptness and kind support. Finally, I thank my wife, Shirly, and my children, Matan and Daniel, for their love, support, and understanding. This book is dedicated to them.

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ABBREVIATIONS OF CODES OF CONDUCT

A

ADR Institute of Canada, Inc., Code of Conduct for Mediators (2011) available at www.adrcanada.ca/resources/documents/CodeOfConduct2012August30.pdf (ADR Canada Code)

Alabama Code of Ethics for Mediators (1995, amended 2013) available at www.alabamaadr.org/web/roster-documents/documents/med_2014_Mediator_Code_of_Ethics_updated.pdf (Alabama Code)

American Bar Association (ABA) Model Rules of Professional Conduct, available at www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (ABA Model Rules)

American Psychological Association (APA) Ethical Principles of Psychologists and Code of Conduct, available at www.apa.org/ethics/code/index.aspx (APA Ethical Principles and Code)

American Society of Civil Engineers (ASCE) Code of Ethics available at www.asce.org/code-of-ethics/ (ASCE Code of Ethics for Engineers)

Law Council of Australia, Ethical Guidelines for Mediators (2011) available at www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/EthicalGuidelinesforMediators.pdf (Australian Ethical Guidelines)

Australian National Mediator Accreditation Standards: Practice Standards (2012) available at www.msb.org.au/sites/default/files/documents/Practice%20Standards.pdf (Australian Practice Standards)

C

California Dispute Resolution Council (CDRC) Standards of Practice for California Mediators available at www.cdrc.net/adr-practice/mediator-standards/ (California-CDRC Standards)

California Rules of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases, California Rules of Court (Revised January 1, 2015) available at www.courts.ca.gov/cms/rules/index.cfm?title=three (California Rules)

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Code of Conduct for United States Judges available at www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges (Code of Conduct for United States Judges)
 Code of Ethics for Arbitrators in Commercial Disputes (2004) available at ethics.iit.edu/ecodes/node/4705 (Code of Ethics for Arbitrators in Commercial Disputes)

F

Family Mediation Canada Members Code of Professional Conduct available at fmc.ca/sites/default/files/sites/all/themes/fmc/images-user/Members%20Code%20of%20Professional%20Conduct_0.pdf (Family Mediation Canada Code)
 Model Standards of Practice for Family and Divorce Mediation (2000) available at www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf (Family Mediation Model Standards)
 A Guide for Federal Employee Mediators (2006) available at www.adr.gov/pdf/final_manual.pdf (Federal Employee Mediators Guide)
 Florida Rules for Certified and Court-Appointed Mediators (in ADR Resource Handbook January 2015) available at www.flcourts.org/core/fileparse.php/550/urlt/RuleBookletJanuary2015.pdf (Florida Rules)

G

Georgia Ethical Standards for Mediators (1994) available at www.godr.org/files/APPENDIX%20C,%20CHAP%201,%206-18-2013.pdf (Georgia Standards)

I

Mediation Council of Illinois (MCI) Professional Standards of Practice for Mediators (2009) available at www.mediationcouncilofillinois.org/sites/default/files/MCI%20Professional%20Standards%20of%20Practice.pdf (Illinois Standards)

K

Kansas Ethical Standards for Mediators Prefatory Comment, Rule 903 adopted by the Supreme Court of Kansas available at www.kscourts.org/rules/Rule-Info.asp?r1=Court+Rules+Relating+to+Mediation&r2=316 (Kansas Ethical Standards for Mediators)

L

Code of Professional Conduct for Labor Mediators, the Federal Mediation and Conciliation Service of the United States and the Association of Labor Mediation Agencies available at ethics.iit.edu/ecodes/node/3410 (Code of Labor Mediators)

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M

- Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners available at www.courts.state.md.us/macro/pdfs/standardsfinal.pdf (Maryland Standards)
- Michigan Standards of Conduct for Mediators (2013) available at courts.mi.gov/Administration/SCAO/Resources/Documents/standards/odr/Mediator%20Standards%20of%20Conduct%202.1.13.pdf (Michigan Standards)
- Model Standards of Conduct for Mediators (2005) available at www.americanbar.org/groups/dispute_resolution/policy_standards.html and in Appendix II (Model Standards)
- Montana Mediation Association Code of Ethics and Standards of Practice (2014) available at mtmediation.org/wp-content/uploads/2015/04/mtma-code-of-ethics-standards-of-practice-rev-2-13-14-reviewed-by-committee.pdf (Montana Association Code)

N

- National Association of Social Workers (NASW) Code of Ethics available at www.socialworkers.org/pubs/code/code.asp (NASW Code of Ethics for Social Workers)
- National Society of Professional Engineers (NSPE) Code of Ethics for Engineers available at www.nspe.org/resources/ethics/code-ethics (NSPE Code of Ethics for Engineers)
- Nebraska Office of Dispute Resolution Manual of Standards and Ethics for Center Mediators, Directors and Staff, available at supremecourt.nebraska.gov/5530/professional-ethics-mediators (Nebraska Standards)
- Standards of Conduct for New York State Community Dispute Resolution Center Mediators available at www.nycourts.gov/ip/adr/Publications/Info_for_Programs/Standards_of_Conduct.pdf (NY-CDRC Standards)
- North Carolina Revised Standards of Professional Conduct for Mediators (2011) adopted by the Supreme Court of North Carolina available at www.aoc.state.nc.us/www/public/html/pdf/SOC4_14.pdf (North Carolina Standards)

O

- Ontario Association for Family Mediation Code of Professional Conduct (2013) available at www.oafm.on.ca/membership/policies/standards-of-practice (Ontario Family Mediation Code)
- Oregon Mediation Association Core Standards of Mediation Practice (2005) available at www.omediate.org/pg61.cfm (Oregon Standards)