BOOK REVIEW

A THEORY OF MEDIATORS’ ETHICS
Foundations, Rationale, and Application*

by Omer Shapira

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1 In A Theory of Mediators’ Ethics: Foundations, Rationale, and Application (“A Theory of Mediators’ Ethics”), Omer Shapira brings a new, provocative and very useful perspective to the definition of mediators’ ethics. In part, this book is provocative because Dr Shapira situates mediators’ ethics into the larger theoretical contexts of general and professional ethics. Using these theoretical contexts, he demonstrates why the development of a set of ethics or norms for mediators benefits from considering both the “perspective from below” (what I would describe as an evidence-based or empirical perspective) and the “perspective from above” (involving the application of theory). In the US, we tend to develop both our legal and mediation ethics in response to challenges that have arisen in practice. Thus, we bring a common-law or evidence-based perspective to the task. Dr Shapira’s “perspective from above” offers a very different way of developing and analysing mediators’ ethics.

2 Similarly provocative and useful is Dr Shapira’s careful delineation of four major groups to which mediators owe ethical duties, that is, clients, the profession, the public, and employers or principals. Once again referencing the US, we have tended to focus on mediators’ ethical duties to their clients with an occasional mention of a duty to protect the integrity of the mediation process. Dr Shapira very convincingly argues for a duty to the mediation profession, further urging that this duty incorporates the obligation to protect the mediation process. He also is quite persuasive in noting that from a theoretical perspective, mediators should understand that they owe a duty to the public. Dr Shapira’s assertion of an ethical obligation to employers or principals is entirely new, and I must admit that I was not always certain that it would be wise to differentiate this duty from the duty owed to the profession as a whole. Nonetheless, the identification of the duties owed to each of these four groups sharpens and systematises the ethical analysis of difficult situations, as Dr Shapira demonstrates in several case illustrations.

3 Ultimately, A Theory of Mediators’ Ethics proposes a new model code of conduct for mediators (“Code”). In the chapters leading up to this

Code, Dr Shapira examines each of its provisions: party self-determination; mediator competence; conflicts of interest; mediator impartiality; professional integrity; diligence, respect, dignity and honesty; confidentiality; fairness; maintaining the profession's standing and advancement of the profession; advertising, solicitation, and mediator fees; and obligations to employers and principals. Each of these chapters is carefully constructed. Dr Shapira's thoughtful, nuanced analysis is particularly strong in his chapter on self-determination. This is a very important concept for mediators and for those of us studying mediation. Dr Shapira carefully identifies three conditions that must be met for parties to exercise self-determination: competence to make decisions; voluntariness or lack of coercion at the time of decision-making; and the availability of and understanding of the information relevant to decision-making. What if a party can meet only two of those conditions? In other words, what if he is competent to make decisions and does not feel coerced into making a decision, but he is unaware of information that would be relevant to his decision-making? Dr Shapira acknowledges that in this situation, the party has exercised autonomy and "formal self-determination". However, once Dr Shapira takes into account the duties owed to the clients, the profession and the public, he judges this exercise of self-determination to be of such low quality that it should be treated as unfair or unjust. Real or "substantive self-determination" demands more.

Self-determination is a core concept in mediation, and there is much in Dr Shapira's discussion that I value. I have focused much of my own scholarship on the relationship between procedural justice and self-determination. Quite simply, I have argued that if a process includes the elements found by empiricists to lead to perceptions of procedural justice (that is, the opportunity for voice, trustworthy consideration by the decision-maker, and respectful and even-handed treatment in a neutral forum), then it is much more likely that the process will be one that also enables the parties to exercise substantive self-determination. If a party is heard and respected, it is more likely (though not guaranteed, of course) that her perspectives and values will be considered and incorporated into a final mediated outcome; thus, she will exercise self-determination. If she perceives that the process was procedurally fair, she also is more likely to perceive the outcome as substantively fair even if it is not everything she wanted. Dr Shapira is arguing here that procedural fairness and perceptions are not enough to make a process truly fair. Parties must have the information they need. This is an important argument regarding the need for informed consent, particularly as we struggle to ensure that mediation offers real access to justice.

Dr Shapira's chapters on mediator competence and professional integrity also deserve special mention. At this point in the evolution of the field, there are many different models of mediation – and there are people described as "natural mediators". So, what does an ethical obligation of
mediator competence mean? First, Dr Shapira eviscerates the notion that “natural mediators” possess the competence required of professionals:1

People who are ‘natural mediators’ because they are great listeners or have excellent communication and negotiation skills are not competent mediators, in the same way that an extremely wise and supportive friend would not be considered a competent therapist, nor a persuasive person representing another’s case a competent lawyer.

According to Dr Shapira, anyone claiming competence as a professional mediator has an ethical obligation to be able to demonstrate a deep, high-level understanding of the theories and processes involved in mediation, as well as skills informed by theory. Regarding the various models of mediation that exist, Dr Shapira does a masterful job of explaining that the precise meaning of competence will be contextual and dependent upon the model at issue. He uses a core skill – listening – to explain how its meaning will vary among models of mediation, and thus will require different competencies:2

While the problem-solving mediator listens carefully in order to identify underlying needs and interests that can later establish common ground for a resolution, the transformative mediator listens for expressions of weaknesses that could be transformed by empowerment and for expressions of self-centeredness that could be transformed into recognition, yet the narrative mediator listens to the narratives of the parties in order to reveal the “positioning” or role that each party assumes for himself and assigns to the other, and later intervenes to destabilize these descriptions so that alternative descriptions or stories can develop. Thus, all mediators must have listening skills as part of their basic competence to mediate, but the meaning of this skill depends on the style of mediation they associate themselves with.

This is a very nice example of the way in which Dr Shapira acknowledges and incorporates the various models of mediation practice while also advocating for a single ethical provision.

With his chapter on professional integrity, Dr Shapira also focuses on the ethical duties that accompany the assumption of a professional role. As he notes, few existing ethics codes establish a duty to the mediation profession. In the US, for example, the Model Standards of Conduct for Mediators3 occasionally mention a duty to protect the integrity of the mediation process, but there is nothing regarding the profession. In contrast, the proposed Code in A Theory of Mediators’ Ethics includes a long and detailed provision regarding professional integrity. Among other


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things, this provision would require a mediator to terminate a mediation if she believes that the parties' mediated agreement “might harm a vital social interest”. But what about party self-determination? Despite the importance of this concept, Dr Shapira explains that a professional ethics perspective would require the mediator's duty to the parties to give way to other duties, that is, those owed to the profession and the public, because they will legitimately expect the mediator to “prevent process abuse or substantial defects in the process”. Dr Shapira skillfully uses one of the case illustrations to support his point.

7 I have a few quibbles with A Theory of Mediators' Ethics. Lawyers are important stakeholders who do not receive much attention in A Theory of Mediators' Ethics. Many mediators' primary relationships are with the lawyers who hire them. If mediators owe ethical duties to their employers or principals, do they also owe duties to these significant referral sources? I also wish that Dr Shapira had written a bit more about the ethics of evaluative mediation. He acknowledges the evaluative model of mediation early in the book, but later asserts that mediators should be ethically barred from giving parties professional advice or a professional opinion that applies professional (for example, legal) principles to the facts of the mediation case. Finally, Dr Shapira includes “dialogue” in his definition of mediation but does not list “dialogue” as a core element of the mediation process. This is important because so much mediation today is conducted entirely in caucus, or private sessions, with the mediator shuttling between the parties. There is no direct dialogue between the parties in these mediations. What ethics provisions should apply to mediators' use of caucus?

8 But these are indeed quibbles, and actually, Dr Shapira has given the reader the tools to conduct her own analysis of the ethics of each of these situations. A Theory of Mediators' Ethics is thoughtful, provocative and even magisterial in its examination of mediators' ethics. Its “perspective from above” – supported by realistic case illustrations – should be taken into consideration by all who are responsible for creating, revising, or complying with ethics codes for mediators.

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