

Introduction

Ethics is a vital element in the development of professional mediation practices and an important factor in gaining public trust in the emerging profession of mediation. Tens of thousands of mediators conduct mediations in numerous types of disputes and in various settings. Commercial, family, workplace, medical malpractice, and construction mediations are conducted across the United States, Europe, Australia, and East Asia in court-related disputes and in conflicts that have not been filed in court. They are mostly conducted by mediators who come from already established professions and occupations, many of whom are lawyers. These mediators need to develop a new professional identity and follow different rules of conduct than those applying to their other profession or occupation. Lawyer-mediators should be aware of the different values, goals, role definitions, skills, and techniques of legal practice and mediation. They must be flexible enough to move between these sometimes contradictory orientations when they take off the hat of a lawyer and put on the one of the mediator and vice versa.

This book is aimed at lawyer-mediators who care about their clients, professions, and the general public and want to conduct mediations ethically. It takes a practical, concise, and coherent approach to mediation ethics to make lawyer-mediators aware of their ethical obligations while serving as mediators. The book has been written by 15 leading mediation scholars, with special expertise in mediation ethics, each contributing a chapter on a topic within his or her expertise. Each chapter provides a careful examination of a topic related to the practice of mediation and suggests ethical guidelines grounded in ethical theory, codes of conduct for mediators, and mediator ethics advisory committees' (MEAC) opinions. The topics are arranged in four clusters:

Part I offers the readers the “Basics” required for ethical conduct. In Chapter 1, Omer Shapira discusses “What Mediators Need to Know to Mediate Ethically.” The chapter describes key concepts in professional ethics, identifies general principles of mediators’ ethics that can be applied to mediation practice, suggests specific guidelines to ethical conduct, and acquaints readers with a perspective of mediators’ ethics that will assist them in finding their way when ethical problems are encountered.

In Chapter 2, James Alfini contrasts “Lawyer Ethics and Mediator Ethics,” analyzes the similarities and differences between the two sets of

ethical standards, and demonstrates that although legal ethics and mediator ethics use similar terms for ethics standards (e.g., competence, conflicts of interest, confidentiality), the meaning of these terms is different and might require different conduct in the context of either a mediation or a client representation. In Chapter 3, Susan Nauss Exon gives the reader a better “Understanding of Codes of Conduct for Mediators and MEAC Opinions,” provides guidance regarding general themes found in mediation ethical codes of conduct and advisory opinions, and constructs a detailed source of state mediation codes of conduct and mediation ethical advisory opinions in the United States.

Part II takes the reader to the “Outset of Mediation.” In Chapter 4, titled “Accepting a Case or Refusing to Mediate: Ethical Considerations,” Ellen Waldman and Donna Erez-Navot consider the circumstances in which mediators ought to refuse a case or withdraw at the outset of mediation and the reasons for doing so. The chapter runs through key ethical principles and issues that mediators should be aware of and able to consider, including the mediator’s competence, integrity, and conflicts of interest and the ability of parties to exercise self-determination.

Part III takes the reader forward in time to the point of “Conducting Mediation” and looks at “Ethical Aspects in the Use of Mediator Techniques.” In Chapter 5, titled “Evaluating Ethically,” Kristen M. Blankley considers what it means to evaluate, how it is distinguished from common mediator techniques such as reality testing, and what are the ethical considerations surrounding the use of evaluative techniques. In Chapter 6, titled “Meeting the Parties Separately,” Elayne E. Greenberg looks behind the caucus door and highlights the ethical issues that mediators should address when they caucus. In Chapter 7, Sharon Press guides mediators on an ethical practice of “Making Proposals,” and in Chapter 8, Bill Eddy explores ethical ways of “Dealing with Difficult Parties,” addressing three issues: ethically communicating with difficult clients; reasons to turn down a case or withdraw because of concerns related to one or both parties’ behavior or mental capacity; and adaptations to the process when the parties are identified as difficult by a mediator.

Next, in Chapter 9, Jacqueline Nolan-Haley discusses “Lawyer Representation in Mediation.” She reviews the ethical duties of lawyers representing parties in mediation, both prior to and during the mediation; explains why lawyer representation in mediation should be deliberative and based on client informed consent; and describes the responsibilities of the lawyer-mediator who believes that a representational lawyer in mediation is engaged in unethical behavior or serious misconduct. In Chapter 10, Nancy A. Welsh describes the practice variations of med-arb,

reviews the ethical difficulties associated with these practices, and considers “The Ethical Choices Required to Protect Process Integrity” when mediators change roles after the mediation has begun.

Part IV situates the reader at the “Conclusion of Mediation and Its Aftermath.” As most lawyer-mediators try to assist the parties to reach an agreement, in Chapter 11, Fran Tetunic focuses on “The Mediated Agreement.” The chapter provides information on the qualities and requirements for mediated agreements; addresses the ethical obligation of the mediator to prevent the formation of illegal, unconscionable, and grossly unfair mediated agreements; and discusses mediators’ continuing ethical obligations in the event an agreement is not reached or following the agreement formation process.

In Chapter 12 on “Mediation Confidentiality: Mediators as Witnesses,” Ellen E. Deason delves into the ethical expectations of mediators who are subpoenaed to testify about issues that arose in the mediation, applying norms of confidentiality, privilege, and impartiality. The chapter examines disclosures a mediator might make outside a mediation session when serving as a witness in an adjudicatory proceeding and outside legal proceedings, such as to public officials or the mediation program that sponsors her work.

In Chapter 13, titled “Disciplining Mediators,” Michael Moffitt reviews several forms of accountability for mediators. He describes the avenues of possible civil action against mediators, assesses the prospects of institutional discipline, and looks at the accountability of mediators who are members of voluntary mediation organizations.

Part V concludes the book with the topic of “Developing Ethical Skills.” In Chapter 14, titled “Continuing Mediation Ethics Education,” Gregory Firestone addresses the extent to which continuing mediator ethics education is required in some U.S. jurisdictions and why it is necessary, explores how mediators can increase their professional ethics capacities and knowledge, makes recommendations for continuing mediator ethics education, and offers a sample of resources for pursuing it.

This book differs from and may supplement other available full-length books that cover mediation ethics. It focuses on specific ethical issues that arise in the mediation practice of lawyer-mediators. It addresses these issues in a developing order, from the beginning of the mediation to its end, enabling mediators to consult the topic relevant to them at any given point in time. It then provides concise ethical guidance through a diversified yet reasoned ethical approach grounded in ethical theory, codes of conduct for mediators, and ethics advisory opinions.

The book's primary audience is lawyer-mediators and mediators in general. It would also be useful to lawyers representing clients in mediation, administrative staff and mediators in ADR court programs, scholars and students in ADR academic programs, and mediator trainees and trainers.

I would like to thank the contributors for their commitment to produce high-quality works. Reading and commenting on their contributions and the discussions that followed have enriched my knowledge of mediation ethics as I am confident they will enhance our readers'. Special thanks go to Ellen Waldman and Sarah Craig, who were involved in the book project from its very start and offered their continued, kind, and thoughtful support along the way. Finally, I thank my wife Shirly and my children Matan and Daniel for their patience, support, and love.

Omer Shapira