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Citation

Dorcas QUEK ANDERSON. Book review: Mediation ethics: A practitioner's guide edited by Omer Shapira ed. (2022). *Asian Journal on Mediation*. 2022, 82-87.

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BOOK REVIEW

MEDIATION ETHICS: A PRACTITIONER'S GUIDE¹

Omer Shapira ed

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1 Mediation ethics have been consistently featured in mediation training courses and mediation ethical principles have also been encapsulated in mediation providers' codes of conduct for mediators. However, mediation ethics have probably inspired fewer publications and academic discussions than the popular topic of mediation skills. The tide has arguably shifted with the signing of the UN Convention on International Settlement Agreements Resulting from Mediation² (the "Singapore Convention") in 2018. Article 5(1)(e) of the Singapore Convention allows non-enforcement of a mediated settlement agreement if there is a "serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement". This development has brought to the fore the need for the mediation profession to have clarity in understanding mediation standards that are often framed in terms of mediation ethical principles.³

2 It is thus timely that Shapira has edited this publication focusing on mediation ethics. Published in 2021, this collection of reflections on mediation ethics has been written primarily for the American mediation profession, with frequent references made to the US Model Standards of Conduct for Mediators and to the mediation codes of several states. It is nevertheless very instructive for international mediators because fundamental ethical principles such as self-determination and mediator impartiality are common to many mediation traditions, including the

1 American Bar Association, 2021.

2 "United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the 'Singapore Convention on Mediation')" *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> (accessed 24 October 2022).

3 See Dorcas Quek Anderson, "A Matter of Interpretation: Understanding and Applying Mediation Standards for the Cross-Border Enforcement of Mediated Settlement Agreements" (2020) 28(1-2) *Conflict Resolution Quarterly* 27.

Code of Professional Conduct issued by the Singapore International Mediation Institute⁴ (“SIMI”).

I. The overall framework

3 Shapira’s introductory chapter establishes the overarching theoretical framework on mediation ethics that was comprehensively discussed in his earlier work, *A Theory of Mediators’ Ethics*.⁵ Notably, Shapira asserts that the core definition of mediation shared by many mediators across the globe – a process conducted by a third party who assists parties to communicate and make decisions regarding their dispute and reach an agreement when they wish to do so – obliges all mediators, regardless of plurality of styles, to satisfy one unitary set of moral obligations attached to their role.⁶

4 The chapters that follow this introduction have applied Shapira’s overall framework to the various phases and notable aspects of the mediation process, including:

- (a) accepting a mediator appointment;⁷
- (b) conducting mediation and using mediation techniques such as conducting an evaluation, making a mediator’s proposal, dealing with difficult parties, dealing with legal representation and conducting private sessions;⁸
- (c) concluding the mediation and dealing with post-mediation issues;⁹ and
- (d) the use of mediation in conjunction with arbitration.¹⁰

5 The book has been aptly named “a practitioner’s guide”. Each chapter has identified the mediation ethical principles to be considered in the relevant phase of mediation and has not shunned discussion of the

4 “Code of Professional Conduct” *Singapore International Mediation Institute* <<https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct>> (accessed 24 October 2022).

5 Omer Shapira, *A Theory of Mediation Ethics: Foundations, Rationale and Application* (Cambridge University Press, 2016).

6 Omer Shapira, “What Do Mediators Need to Know to Mediate Ethically?” in *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 1 at p 9.

7 *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 4.

8 *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) chs 5–9.

9 *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 11.

10 *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 10.

difficult tension between these principles. The candid and comprehensive analysis of the entire mediation process in light of mediation ethical principles has resulted in the creation of an invaluable resource for both early and experienced mediators. Furthermore, some chapters have recommended best practices to ensure compliance with mediation ethics. Many of these recommendations have been distilled from opinions written by the Mediation Ethics Advisory Committees (“MEACs”) of several US states, and thus provide practical guidance for mediation practitioners on a wide spectrum of matters.

II. The fundamental mediation ethical principles

6 While each chapter has been written by different mediators, several ethical principles have consistently emerged across all chapters. In this regard, the principles of self-determination, mediator impartiality and maintaining process integrity have often been discussed collectively. By way of illustration, Greenberg has considered the inter-relationship among these three principles and the principle of caucus confidentiality. This results in a rich discussion of the practical implications arising from the concurrent relevance of several principles. For instance, several MEACs in the US, drawing reference from the principles of party self-determination and process integrity, have recommended that mediators secure the express consent of a party to share particular pieces of confidential information, instead of stating a global blanket rule that the mediator may decide to disclose confidential information unless the party explicitly directs otherwise.¹¹ Greenberg further underscores the danger of mediators making *implicit* disclosure of confidential caucus communications through their reframing of caucus communications. Such disclosure made without obtaining party consent may compromise a party’s right to self-determination as well as threaten process integrity.¹² Greenberg also made insightful recommendations on how these principles impinge on the conduct of online mediation, including the importance of agreeing in writing on the confidential parameters of caucusing remotely, the need to provide virtual breakout rooms and the good practice of discouraging the use of virtual backgrounds to eliminate the possibility of the presence of undisclosed participants.¹³

7 Another insightful chapter by Tetunic elaborates on the salient principles to consider at the end of the mediation, a phase which mediators, include this author, are often tempted to overlook in their

11 Elayne Greenberg, “Meeting the Parties Separately” in *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 6 at p 134.

12 Elayne Greenberg, “Meeting the Parties Separately” in *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 6 at pp 135–138.

13 Elayne Greenberg, “Meeting the Parties Separately” in *Mediation Ethics: A Practitioner’s Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 6 at p 141.

eagerness to secure an agreement. Tetunic argues that while party decision making is a fundamental feature of mediation, mediators are also obligated to conduct a quality process, a principle which is encapsulated in Standard VI of the US Model Standards of Conduct for Mediators. He therefore asserts that having the parties settle at mediation is secondary in importance to the mediator conducting the process according to ethical standards.¹⁴ In elaboration, Tetunic stresses that party self-determination is not absolute, as seen by many codes of ethics obligating the mediator to terminate or postpone the mediation in circumstances of gross inequality of bargaining power, fraud, bad faith, duress or absence of bargaining ability.¹⁵ The chapter, together with the rest of the publication, very helpfully places foundational principles, such as party autonomy, alongside countervailing principles. Indeed, limits to party self-determination have also been implicitly affirmed by the Singapore Convention, which does not allow enforcement of mediated settlement agreements breaching the public policy of the relevant signatory state where enforcement is sought.¹⁶ In the same vein, the SIMI Code of Professional Conduct exhorts SIMI mediators to take steps to withdraw from a mediation if the mediation has assumed “an unconscionable or illegal character” or is likely to result in a settlement “that is against public policy or be of an illegal nature”.¹⁷

III. Situating mediation techniques within an ethical compass

8 As a practising mediator, I found two chapters on common evaluative techniques immensely beneficial: “Evaluating Ethically”¹⁸ by Blankley and “Making Proposals”¹⁹ by Press. Evaluative techniques implicate a plethora of principles including party self-determination, informed consent, mediator competence, mediator impartiality and integrity of the role of the mediator. Potential pitfalls were highlighted, such as running the risk of appearing biased when making evaluations and shifting from the role of a neutral mediator to one of a lawyer dispensing legal advice. To address the first pitfall, Blankley recommended that the evaluative mediator tell parties at the outset and throughout the mediation that the mediator will be engaging in difficult conversations with both

14 Fran Tetunic, “The Mediated Agreement” in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 11 at p 257.

15 Fran Tetunic, “The Mediated Agreement” in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 11 at p 258.

16 United Nations Convention on International Settlement Agreements Resulting from Mediation (GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018)) Art 5(2).

17 “Code of Professional Conduct” *Singapore International Mediation Institute* <<https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct>> (accessed 24 October 2022) at para 5.9.

18 *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 5.

19 *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 7.

sides.²⁰ With regard to the second pitfall of role integrity, both Press and Blankley suggest that an evaluative mediator will be on far steadier ethical ground by limiting opinions to a discussion of strengths and weakness of issues and options according to viewpoint of someone else (such as the court), instead of making predictions of outcomes based on the mediator's personal opinion.²¹

9 One major principle the evaluative techniques may compromise is that of party voluntariness. SIMI's Code of Conduct recognises this danger, advising mediators to "rigorously guard against prescribing solutions or offering any statement, suggestion or value judgment which may create an undue influence on any one party towards accepting a specific outcome".²² Notably, both Press and Blankley recommended that the most evaluative techniques, including the mediator's proposal, are best used late in the mediation process in order to give the parties the time and space to make informed and voluntary decisions. Press further highlights the danger of providing the option of a mediation proposal after mediation fatigue has set in, when "participants will do anything to get out of the mediation". Even after the mediator's proposal has been tendered, Press also suggested that parties be given a reasonable period of time to determine its acceptability and to deliver their confidential responses to the mediator.²³ These best practices provide helpful guidance to mediators who seek to respect the parties' self-determination while drawing upon their experience to assist the parties. More importantly, they shed light on the connection between specific mediation techniques and the mediator's ethical obligations.

IV. The importance of reflective mediation practice and continuing mediation education

10 The contributors' comprehensive analysis of the entire mediation process from the lens of mediation ethics has helped me to detect some blind spots and bad habits I have developed as a mediator. It has also shown the critical importance of self-awareness and reflection for the mediation practitioner. The final chapter "Continuing Mediation Ethics Education by Firestone" aptly concludes the book by discussing practical ways for mediators to nurture such self-awareness, including engaging in regular self-reflection and increasing awareness of one's own implicit

20 Kristen Blankley, "Evaluating Ethically" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 5 at p 117.

21 Kristen Blankley, "Evaluating Ethically" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 5 at p 118; Sharon Press, "Making Proposals" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 7 at pp 162–163.

22 "Code of Professional Conduct" *Singapore International Mediation Institute* <<https://www.simi.org.sg/What-We-Offer/Mediators/Code-of-Professional-Conduct>> (accessed 24 October 2022) at para 5.10.

23 Sharon Press, "Making Proposals" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 7 at pp 143–164.

biases. One notable suggestion involves regular self-assessment using guided tools, which could be made a form of continuing mediation education linked to renewed accreditation.²⁴ Peer consultation is another way to nurture reflective practice. Mediators could form a mediation ethics workgroup to discuss disputes raising interesting ethical issues whilst preserving anonymity of the parties.²⁵ These ways of satisfying continuing mediation education requirements are worth the consideration of mediation accreditation bodies.

11 I am grateful to the many contributors to this book for their insightful discussion of the implications of mediation ethics on practice. I well recall referring regularly to *Mediation Ethics: Cases and Commentaries*²⁶ as a young mediator. This latest publication has once again brought together established mediators to discuss pertinent ethical issues honestly. Like Waldman's text, this book has a treasure trove of insights and will be a critical resource for mediators for many years to come.

24 Gregory Firestone, "Continuing Mediation Ethics Education" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 14 at p 339.

25 Gregory Firestone, "Continuing Mediation Ethics Education" in *Mediation Ethics: A Practitioner's Guide* (Omer Shapira ed) (American Bar Association, 2021) ch 14 at p 338.

26 *Mediation Ethics: Cases and Commentaries* (Ellen Waldman ed) (Jossey-Bass, 2011).