CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

CONTENTS

List of figures *page* xix
List of tables xxi
Preface xxiii
Abbreviations of codes of conduct xxviii

PART I **A theory of professional ethics** 1

1 Fundamental concepts 3

1.1 Introduction 3
1.1.1 The meanings of ethics 3
1.1.2 Role-ethics and professional ethics 4
1.1.3 Mediators' ethics as professional ethics or role-ethics 5

1.2 Professional ethics: an integration of morality and role 8
1.2.1 Moral norms and ethics 8
1.2.1.1 A definition of moral norms 8
1.2.1.2 Distinguishing duties from aspirations: between rules, principles, values, and ideals 12
1.2.1.3 Rights and powers: permissive or power-conferring norms 19
1.2.1.4 Moral norms that are not norms of ethics 20
1.2.1.5 Ethical demands that exceed the demands of ordinary morality: unethical moral behavior? 20
1.2.1.6 Ethical demands that fall short of ordinary morality: immoral ethical behavior? 21
1.2.2 Delineating the limits of professional ethics: the element of role 22
1.2.2.1 Identifying professional roles and particular activities 23
1.2.2.2 Professional role norms 23

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

1.2.2.3 Ethical norms: a union of moral norms and professional norms 24
1.2.3 Ethics and law: legal norms that are both moral and professional 27
1.2.3.1 The application of law to professional activities 27
1.2.3.2 Legal norms that are norms of ethics and legal norms that are not 28
1.2.3.3 Distinguishing legal threshold from ethical threshold and ethical bar 30
1.3 Non-professional norms that complement professional ethics 32
1.3.1 Personal integrity or sense of morality 32
1.3.2 Religious belief 33
1.3.3 Other professional role norms 33
1.4 The functions of professional ethics 33
1.5 Conclusion 35
2 Ethical relationships 37
2.1 Introduction 37
2.2 Duties toward clients 38
2.2.1 Introduction 38
2.2.2 The normative basis of duties toward clients 38
2.2.3 Ethical duties toward clients 40
2.2.3.1 Competence 41
2.2.3.2 Disclosure of conflicts of interest 42
2.2.3.3 Client autonomy or self-determination 43
2.2.3.4 Professional integrity 46
2.2.3.5 Impartiality 49
2.2.3.6 Diligence 51
2.2.3.7 Respect and dignity 52
2.2.3.8 Honesty 54
2.2.3.9 Confidentiality 54
2.2.3.10 Fairness 55
2.2.4 Conclusion 56
2.3 Duties toward the profession 57
2.3.1 Introduction 57
2.3.2 The normative basis of duties toward the profession 58

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

2.3.3 Ethical duties toward the profession 60
2.3.3.1 A duty of fairness: following all the standards that apply to professionals 60
2.3.3.2 A duty to maintain the profession's standing 61
2.3.3.3 Helping the profession to fulfill its social role 63
2.3.4 Conclusion 64

2.4 Duties toward the public 65
2.4.1 Introduction 65
2.4.2 The normative basis of duties toward the public 66
2.4.3 Ethical duties toward the public 68
2.4.4 Conclusion 71

2.5 Duties toward employers and principals 72
2.5.1 Introduction 72
2.5.2 The normative basis of duties toward employers and principals 73
2.5.3 Ethical duties toward employers and principals 75
2.5.4 Conclusion 79

2.6 The rights of professionals 79

2.7 Conclusion 81

PART II **A theory of mediators' ethics** 83

3 Mediation, mediators' role, and mediators' ethics 85

3.1 Introduction 85

3.2 The nature of mediation and the role of mediators: a core descriptive definition 85

3.3 Shared professional ideals 95

3.4 Separate professionals ideals 97

3.5 Flexible and diverse practice 98

3.6 The shared normative features of mediators' conduct 101

3.7 From general ethics of roles to the ethics of mediators: the ethical relationships of mediators 105

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

3.8 The norms of mediators' ethics 114

3.9 The meaning of the norms: understanding the meaning of mediators' ethical duties and resolving tensions between duties 115

3.10 A proposed model code of conduct for mediators 121

3.11 A road map for the next chapters 122

4 Party self-determination 127

4.1 Introduction 127

4.2 The extent of party self-determination and the allocation of decision-making authority between mediators and parties 129

4.2.1 The normative sources of party self-determination 129

4.2.2 Justifying wide self-determination for mediation parties 132

4.2.3 Exercising wide self-determination through shared decision-making; Limitations on self-determination 134

4.3 The meaning of party self-determination: the elements and quality of self-determination 137

4.3.1 Distinguishing between the extent of self-determination and its elements 137

4.3.2 Competency to make decisions 138

4.3.3 Voluntariness and lack of coercion 140

4.3.4 Knowledge of relevant information 141

4.3.5 Summarizing the conditions for exercise of substantive self-determination 141

4.4 Waiver of self-determination 143

4.5 Mediators' duties regarding party self-determination 144

4.5.1 Duties regarding party competency 145

4.5.2 Duties regarding voluntariness 146

4.5.2.1 A duty to refrain from undermining voluntariness 146

4.5.2.2 A duty to prevent coerced decisions 148

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

4.5.3 Duties regarding the availability of relevant information 150
4.5.3.1 A duty to refrain from provision of inaccurate information 151
4.5.3.2 A duty to take measures to generate conditions for making informed decisions 151

4.6 Conclusion 159

4.7 A proposed standard of self-determination 159

5 Mediator competence 163

5.1 Introduction 163

5.2 A duty of competence to mediation parties 164

5.3 The profession's and public expectations of mediator competence: the professional and social interests in mediator competence 165

5.4 The meaning of mediator competence 166
5.4.1 Distinguishing between the expectations of particular parties and the expectations of reasonable parties 166
5.4.2 Basic competence 167
5.4.2.1 Knowledge and skills 167
5.4.2.2 A requirement for training and experience 171
5.4.2.3 The question of mediator qualities 173
5.4.3 Specific competence 174
5.4.3.1 An expectation of subject matter expertise due to role definition 174
5.4.3.2 An expectation of subject matter expertise due to case complexity and related factors 175
5.4.3.3 An expectation of subject matter expertise due to institutional rules 176
5.4.3.4 An expectation of cultural knowledge or language skills 177

5.5 Bridging competence gaps 177

5.6 Providing information regarding mediator competence 178

5.7 Maintaining competence 179

5.8 Conclusion 180

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

5.9 A proposed standard of mediator competence 182

6 Conflicts of interest 183

6.1 Introduction 183

6.2 The inevitability of mediator conflicts of interest 183

6.2.1 Mediator fees 184

6.2.2 Agreement as a goal 184

6.2.3 Psychological needs, prejudice, and bias 185

6.2.4 A duty to take action 185

6.3 Defining mediator conflicts of interest 186

6.4 The normative implications of mediator conflicts of interest 190

6.4.1 The legitimate expectations of parties in a conflict of interest situation 190

6.4.2 The legitimate expectations of the profession and the public in a conflict of interest situation 193

6.4.2.1 Serious conflicts of interest 194

6.4.2.2 Conflicts of interest subsequent to mediation 199

6.5 Conclusion 204

6.6 A proposed standard of conflicts of interest 204

7 Mediator impartiality 207

7.1 Introduction 207

7.2 The sources of mediators' duty of impartiality 208

7.2.1 The reasonable expectations of mediation parties 208

7.2.2 The reasonable expectations of the profession and public 208

7.2.3 A practical source 209

7.3 The meaning of the duty of impartiality 209

7.3.1 A legitimate expectation of parties of freedom from favoritism and bias 209

7.3.2 Internal and external impartiality: between ideal and duty 212

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

7.3.3 Avoiding perceived partiality or the appearance of it 213
7.3.4 Between impartiality and equality: substantive interpretation of impartiality 217
7.3.4.1 Legitimate expectations of parties for a fair process 218
7.3.4.2 Legitimate expectations of the profession and the public that mediators protect the process of mediation and the profession's standing 223
7.4 Refusal of cases and withdrawal 224
7.5 Criticism of impartiality 227
7.6 Conclusion 229
7.7 A proposed standard of impartiality 229
8 Professional integrity 231
8.1 Introduction 231
8.2 Mediators' duty to conduct mediation with integrity 234
8.2.1 Decision-making and the exercise of professional discretion 234
8.2.2 Separation of professional roles 236
8.2.3 Appropriateness of case to process 241
8.2.4 Prevention of process abuse or substantial defects in the process 243
8.2.4.1 Process abuse by mediators 243
8.2.4.2 Process abuse by other participants – the parties' expectations 244
8.2.4.3 Process abuse and prevention of substantial defects in the process – the professional and public aspects 245
8.3 Conclusion 252
8.4 A proposed standard of professional integrity 252
9 Diligence, respect and dignity, and honesty 255
9.1 Diligence 255
9.1.1 A duty to conduct mediation with diligence 255
9.1.2 The meaning of diligence in mediation 256

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

9.1.2.1 Attention to the parties and their case 256
9.1.2.2 Preparation for mediation? 256
9.1.3 Care 257
9.1.4 A proposed standard of diligence 258

9.2 Respect and dignity 258
9.2.1 Treating mediation parties with respect and dignity 258
9.2.2 Treating participants and nonparticipants with respect and dignity 260
9.2.3 Promoting respect among participants 261
9.2.4 The relationship between respect and other standards 262
9.2.5 Conclusion 263
9.2.6 A proposed standard of respect and dignity 263

9.3 Honesty 264
9.3.1 Honesty toward mediation parties 264
9.3.2 Honesty toward participants and nonparticipants 265
9.3.3 Honesty among participants 265
9.3.4 Legitimate exceptions to the norm of honesty 266
9.3.5 Conclusion 269
9.3.6 A proposed standard of honesty 270

10 Confidentiality 271

10.1 Introduction 271

10.2 Expectations of confidentiality 271
10.2.1 The parties' expectations of mediator confidentiality 271
10.2.2 The profession's and public expectations of mediator confidentiality 273
10.2.3 Participants' obligation of confidentiality 274
10.2.4 Knowledge about the scope of confidentiality 275

10.3 Defining the type of information that is subject to expectations of confidentiality 277

10.4 Justified grounds for disclosure 281
10.4.1 Disclosure with the parties' consent 283
10.4.2 Disclosure in claims between parties and mediators 285
10.4.2.1 Claims or complaints against mediators 285

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

10.4.2.2 A mediator claim for fees 285
10.4.3 Disclosure upon mediation program request of information relating to the appearance of parties and as to whether an agreement has been reached 286
10.4.4 Disclosure required or permitted by morality or law 288
10.4.4.1 Ethically required disclosure (a mediator duty to disclose) 288
10.4.4.2 Ethically permitted disclosure (information mediators may disclose) 290
10.4.4.3 A note on mediation privilege and court ordered disclosure 294
10.4.5 Disclosure for the purpose of research, teaching, evaluation or mediator training that protects the anonymity of parties 297
10.5 Conclusion 298
10.6 A proposed standard of confidentiality 300
11 Fairness 302
11.1 Introduction 302
11.2 Understanding the meaning of fairness in mediation 303
11.3 Mediators' duty of fairness 307
11.3.1 Fairness toward mediation parties: an expectation that mediation be conducted in accordance with its standards 307
11.3.2 Fairness toward the profession, the public, and an employer or principal: an expectation that mediation be conducted without causing harm to the institution of mediation, to important social interests, and to the standing of the employer or principal 308
11.4 Conclusion 309
11.5 A proposed standard of fairness 310
12 Maintaining the profession's standing and advancement of the profession 311
12.1 Maintaining the profession's standing 311
12.1.1 Introduction 311

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

12.1.2 The meaning of maintaining the standing of the profession 312
12.1.3 Implications of the duty to maintain the standing of the profession for the conduct of mediators 313
12.1.4 The duty to maintain the standing of the profession as a duty to the public 315
12.1.5 Conclusion 316
12.1.6 A proposed standard of maintaining the profession's standing 316

12.2 Advancement of the profession 317
12.2.1 The ideal of advancing the profession 317
12.2.2 The meaning of advancement of the profession 318
12.2.3 A proposed standard of advancement of the profession 319

13 Advertising, solicitation, and mediator fees 320

13.1 Introduction 320

13.2 Advertising and solicitation 321
13.2.1 The purpose of regulating mediator advertising and solicitation 321
13.2.2 The content of advertising and solicitation provisions in codes of conduct for mediators 322
13.2.3 A proposed standard of advertising and solicitation 324

13.3 Mediator fees 325
13.3.1 The purpose of regulating mediator fees and other mediation charges 325
13.3.2 The content of mediator fees standards in codes of conduct for mediators 326
13.3.3 A proposed standard of mediator fees 329

14 Obligations to employers and principals 330

14.1 Introduction 330

14.2 The obligations of court-connected mediators to the court 331

14.3 The obligations of volunteering mediators to the community mediation center 334

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

14.4 Conflicting duties 337

14.5 Conclusion 339

14.6 A proposed standard of obligations to employers and principals 339

PART III **Dealing with ethical problems** 341

15 Ethical decision-making 343

15.1 Introduction 343

15.2 On ethical decision-making 344

15.3 Ethical questions and ethical sensitivity 347

15.3.1 Ethical questions 347

15.3.2 Intention to take an action 348

15.3.3 Ethical sensitivity and awareness 348

15.4 Easy cases/questions 349

15.4.1 Clarifying the facts 350

15.4.2 Identifying the relevant ethical norms 350

15.4.3 Applying the norms to the facts and arriving at a conclusion 351

15.5 Hard cases/questions and dilemmas 351

15.5.1 Indeterminacy of *facts*: attempting to establish a clear set of facts where facts are unclear 351

15.5.2 Uncertainty as to the *identity* of the relevant ethical norms: attempting to identify relevant norms where multiple norms exist 352

15.5.3 Ambiguity of the norms' *content*: identifying alternative interpretations or meanings of the norms 352

15.5.4 *Conflicting* ethical norms or meanings: identifying ethical dilemmas 354

15.5.4.1 Ethical dilemmas 354

15.5.4.2 Non-ethical dilemmas 356

15.5.4.3 Dilemmas resulting from conflicting ethical and legal duties 357

15.5.5 Resolving hard cases: evaluating, ranking, and choosing between alternative courses of action 357

15.5.6 Dead-ends and creative solutions 360

15.6 Conclusion 362

© in this web service Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-1-107-14304-3 - A Theory of Mediators' Ethics: Foundations, Rationale, and Application
Omer Shapira
Table of Contents
More information

16 Case illustrations 364

16.1 Introduction 364

16.2 Case illustrations 365

16.2.1 The uninformed wife: *party self-determination (informed decision-making) and mediator impartiality* 365

16.2.2 Ziba and Ahmed's Iranian-American divorce: *party self-determination and professional integrity (unacceptable mediation outcomes and separation of professional roles)* 373

16.2.3 The probing judge and the ordering court: *confidentiality and disclosure of mediation information to court* 384

16.2.4 The emotional interrupting party: *party self-determination (party incompetency) and respect and dignity* 390

16.2.5 Post-mediation psychiatric treatment: *conflict of interest* 394

Appendix I A proposed model code of conduct for mediators 397

Appendix II Model standards of conduct for mediators (2005) 412

Bibliography 420

Index 433

© in this web service Cambridge University Press www.cambridge.org