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

vii
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
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
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
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.5.3 Duties regarding the availability of relevant information</td>
<td>150</td>
</tr>
<tr>
<td>4.5.3.1 A duty to refrain from provision of inaccurate information</td>
<td>151</td>
</tr>
<tr>
<td>4.5.3.2 A duty to take measures to generate conditions for making informed decisions</td>
<td>151</td>
</tr>
<tr>
<td>4.6 Conclusion</td>
<td>159</td>
</tr>
<tr>
<td>4.7 A proposed standard of self-determination</td>
<td>159</td>
</tr>
<tr>
<td>5 Mediator competence</td>
<td>163</td>
</tr>
<tr>
<td>5.1 Introduction</td>
<td>163</td>
</tr>
<tr>
<td>5.2 A duty of competence to mediation parties</td>
<td>164</td>
</tr>
<tr>
<td>5.3 The profession’s and public expectations of mediator competence: the professional and social interests in mediator competence</td>
<td>165</td>
</tr>
<tr>
<td>5.4 The meaning of mediator competence</td>
<td>166</td>
</tr>
<tr>
<td>5.4.1 Distinguishing between the expectations of particular parties and the expectations of reasonable parties</td>
<td>166</td>
</tr>
<tr>
<td>5.4.2 Basic competence</td>
<td>167</td>
</tr>
<tr>
<td>5.4.2.1 Knowledge and skills</td>
<td>167</td>
</tr>
<tr>
<td>5.4.2.2 A requirement for training and experience</td>
<td>171</td>
</tr>
<tr>
<td>5.4.2.3 The question of mediator qualities</td>
<td>173</td>
</tr>
<tr>
<td>5.4.3 Specific competence</td>
<td>174</td>
</tr>
<tr>
<td>5.4.3.1 An expectation of subject matter expertise due to role definition</td>
<td>174</td>
</tr>
<tr>
<td>5.4.3.2 An expectation of subject matter expertise due to case complexity and related factors</td>
<td>175</td>
</tr>
<tr>
<td>5.4.3.3 An expectation of subject matter expertise due to institutional rules</td>
<td>176</td>
</tr>
<tr>
<td>5.4.3.4 An expectation of cultural knowledge or language skills</td>
<td>177</td>
</tr>
<tr>
<td>5.5 Bridging competence gaps</td>
<td>177</td>
</tr>
<tr>
<td>5.6 Providing information regarding mediator competence</td>
<td>178</td>
</tr>
<tr>
<td>5.7 Maintaining competence</td>
<td>179</td>
</tr>
<tr>
<td>5.8 Conclusion</td>
<td>180</td>
</tr>
</tbody>
</table>
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
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
  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
10.4.2.2 A mediator claim for fees

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

10.4.4 Disclosure required or permitted by morality or law

10.4.4.1 Ethically required disclosure (a mediator duty to disclose)

10.4.4.2 Ethically permitted disclosure (information mediators may disclose)

10.4.4.3 A note on mediation privilege and court ordered disclosure

10.4.5 Disclosure for the purpose of research, teaching, evaluation or mediator training that protects the anonymity of parties

10.5 Conclusion

10.6 A proposed standard of confidentiality

11 Fairness

11.1 Introduction

11.2 Understanding the meaning of fairness in mediation

11.3 Mediators’ duty of fairness

11.3.1 Fairness toward mediation parties: an expectation that mediation be conducted in accordance with its standards

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

11.4 Conclusion

11.5 A proposed standard of fairness

12 Maintaining the profession’s standing and advancement of the profession

12.1 Maintaining the profession’s standing
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
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
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