



ARBITRATORS' AND MEDIATORS'
INSTITUTE OF NEW ZEALAND INC
Te Mana Kaiwhakatau, Takawaenga o Aotearoa



Code of Ethics

1 December 2011

AMINZ CODE OF ETHICS

INTRODUCTION

All members are expected to abide by the Code of Ethics (the Code). If a member is alleged to be in breach of this Code they may be subject to the provisions of the Arbitrators' and Mediators' Institute of New Zealand (AMINZ) rules dealing with professional misconduct and disciplinary matters.

This Code comprises 13 Ethical Statements. Each Ethical Statement is followed by a Commentary and Guidance sections. The AMINZ Code comprises the Ethical Statements, Commentaries and Guidance Sections. When interpreting and applying the Code, these 3 sections are to be given equal weight. Members are expected to know and understand the Code. If in doubt please follow the Guidance section under Ethical Statement 13.

ETHICAL STATEMENTS

ETHICAL STATEMENT 1

Prior to accepting an appointment a member should have undertaken training and have appropriate experience in the relevant dispute resolution process.

ETHICAL STATEMENT 2

A member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias.

ETHICAL STATEMENT 3

A member should uphold the integrity and fairness of the relevant dispute resolution process.

ETHICAL STATEMENT 4

A member should accept an appointment only if they have the ability to conduct the process in an efficient and timely manner.

ETHICAL STATEMENT 5

The process should be conducted with diligence.

ETHICAL STATEMENT 6

A member, subject to legal obligations or other recognised exceptions must observe the duty to protect the privacy of those participating in the process, and the confidentiality of all elements of the process.

ETHICAL STATEMENT 7

Confidential information received by a member as a third party neutral, or in some other role, in a process may not be:

- 1 used to the members personal advantage, or
- 2 in the absence of party consent, be used in other separate process involving one of the original parties and a third party.

ETHICAL STATEMENT 8

- 1 A member should not act with impropriety and should not give the appearance of impropriety.
- 2 A member should not harm AMINZ nor bring the reputation of AMINZ into ill repute.

ETHICAL STATEMENT 9

A member should recognise that mediation is based on the principle of self determination by the parties.

ETHICAL STATEMENT 10

A member should make decisions in a just, independent and considered manner.

ETHICAL STATEMENT 11

A member should fully disclose and explain the basis of fees and charges before accepting appointment.

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Advertising or promotion by a member must be factually accurate.

ETHICAL STATEMENT 13

A member has an ethical duty to uphold AMINZ Code of Ethics.

ETHICAL STATEMENT 1

Prior to accepting an appointment a member should have undertaken training and have appropriate experience in the relevant dispute resolution process.

COMMENTARY

Competency must be the starting point when considering appointment acceptance. A member should not practice in the field of the proposed appointment without having a sound knowledge of the process so as to ensure that they can uphold the integrity and fairness of that particular process.

Members must ask themselves whether or not by dint of training and experience they have the necessary competency to undertake the tasks requested of them. The test to apply is to ask yourself:

“How would my competence to undertake this task be judged by my peers?”

GUIDANCE

If in doubt discuss the proposed appointment with a senior colleague being a Fellow of AMINZ. Consider middle ground options such as accepting the appointment but with the support of a mentor or supervisor. *“Supervision”* here means a professional relationship between you and a senior colleague with experience in the work that you are undertaking and with whom problems and reflection can be discussed in strict confidence. See Ethical Statement 6 on Confidentiality in relation to discussing matters with a senior colleague and or supervisor.

ETHICAL STATEMENT 2

A member should disclose any interest or relationship likely to affect impartiality or neutrality or which might create an appearance of partiality or bias.

COMMENTARY

This is a fundamental duty of disclosure owed to the parties prior to accepting any appointment. It is an ongoing duty to disclose, which continues throughout the process. The question to ask yourself is not whether you believe your impartiality or neutrality might be affected through some interest or relationship held by you; rather:

“Would an objective observer with knowledge of the relevant facts think that you might be impartial, might be biased in some way, or might have your neutrality affected in some way?”

The duty to disclose is a high obligation continuously owed to the parties.

GUIDANCE

If in doubt, disclose. The mere fact of having doubt is a sufficient trigger to affirm the duty.

The disclosure ought to be given in writing at the earliest opportunity, and when given should be comprehensive so that the parties are fully and fairly informed of the relevant facts which might lead to a recusal request.

Be vigilant for the emergence of new facts during the course of the process which might oblige you to disclose. Do not delay with the discharge of this duty once the need for possible disclosure becomes apparent. It is for the parties to decide how to respond to your information about disclosure. It is never for you to decide to withhold the disclosure. Circumstances which might give rise to an appearance of partiality include familiarity with some of the participants in the process. This may include the fact that a particular party has frequently appeared before you. If you are a barrister, and the solicitor for one of the parties has previously briefed you, that too ought to be disclosed if you are being put forward in a third party neutral role. This same principle of disclosure for a barrister applies to like relationships. If you are in any doubt as to the need to disclose and yet have not disclosed, you

may be at risk of breaching this Ethical Statement. You are advised to urgently consult with a senior colleague of Fellowship status and to seek advice about your obligations under this Ethical Statement. Where reasonably practicable, when a member takes this step of consulting with a Fellow, both the member seeking advice and the Fellow giving it should record their understandings about that advice and exchange those understandings with each other prior to the member acting on that advice.

ETHICAL STATEMENT 3

A member should uphold the integrity and fairness of the relevant dispute resolution process.

COMMENTARY

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “*integrity*” to mean:

- 1 *“the condition of having no part or element taken away or lacking; undivided state; completeness*
- 2 *the condition of not being marred or violated; unimpaired or uncorrupted condition; original state; soundness*
- 3 **a** *freedom from moral corruption; innocence, sinlessness* **b** *soundness of moral principle; the character of uncorrupted virtue; uprightness, honesty, sincerity”.*

Parties may agree to any one of a broad range of processes, some of which objectively may have aspects to them breaching the normal understanding of natural justice. So long as the parties are independently represented or are both advised of the possible shortcomings of a proposed process, and if necessary by you, then your obligation is to uphold the integrity of the agreed dispute resolution process.

This will require an understanding of any relevant legislation applying to the particular process so that statutory requirements are adhered to. Additionally for all adjudicative processes there will generally be an expectation that natural justice, which includes fairness, will be observed – unless elements of that concept have been modified by party agreement, prior to the otherwise perceived breach happening.

“Fairness” must be assessed in the context of the particular dispute resolution process.

GUIDANCE

To be able to uphold the integrity of the process requires that the member be conversant with that relevant dispute resolution process.

Used in the context of this Ethical Statement, the member is required to uphold the soundness of the process so as to ensure that the process can be trusted by both the participants and by the public at large.

To fail to uphold the integrity of the relevant process is to let down AMINZ and its members. Only if the public have faith in the process will they use it and will the judiciary support it.

Sometimes parties seek a bespoke process such as “med-arb” where the one third party neutral first tries to mediate the dispute and if that fails then switches roles to arbitrate the disputes. This Ethical Statement requires of members that they understand the significance of modifying conventional processes, including the limitations on them to work freely in the particular role. See for example the judgment of Fisher J in *Acorn Farms Ltd v Schnuriger* [2003] 3 NZLR 121 for discussion on limiting a mediator’s conduct in a “med-arb” arrangement.

If you are asked by the parties to undertake a process which is foreign to you it will be prudent to explore with the parties what they are trying to achieve so as to discuss process options and how they might best be managed. This includes giving consideration to whether or not you should be accepting the appointment.

ETHICAL STATEMENT 4

A member should accept an appointment only if they have the ability to conduct the process in an efficient and timely manner.

COMMENTARY

The axiom "*Justice delayed is justice denied*" applies. One of the advantages of alternative dispute resolution processes promoted by AMINZ is speed of resolution. The Arbitration Act 1996 requires timeliness and efficiency of the arbitrator. See article 14 (1). Other legislation such as the Construction Contracts Act 2002 imposes strict time limits within which the adjudication must operate.

Mediators should not accept appointment unless they can deal with the matter in a timeframe that responds to party needs and does not jeopardise the process working as a consequence of delay.

GUIDANCE

Every matter is different and time expectations have to have regard for the nature of dispute, possibly its history, in any event, and the process being applied to its resolution.

Arbitrators have a statutory responsibility to positively drive the process through to a conclusion. This duty remains even in the face of an obdurate party pursuing delay. Just as the courts are now quite interventionist when it comes to setting timetables for the process, the arbitrator similarly should be setting timetables and insisting on adherence where reasonable to do so.

In as much as mediation is a cooperative process, nonetheless the mediator must be aware of any relevant statutory timetable limitations impacting on the process and ensure that the mediation does not prejudice the parties pre-existing timetabling in relation to external processes. If potential prejudice is an issue the management of it will need to be resolved in discussion with the parties. If the mediation is to take place in the midst of other external timetable directions or orders then availability to mediate must work around that timetabling.

Successful mediation is often a matter of timing. That is, the time is perceived by the parties or their counsel to be ripe for settlement. Delay can result in a lost settlement opportunity.

If a member cannot confidently meet required or expected time demands to ensure the efficient and timely discharge of the process then the member's obligation is to decline the appointment.

ETHICAL STATEMENT 5

The process should be conducted with diligence.

COMMENTARY

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “*diligence*” to mean:

- 1 *“careful attention; heedfulness, caution*
- 2 *the quality of being diligent; industry, assiduity*
- 3 *speed, dispatch, haste”.*

This Ethical Statement is an injunction for the member to at all times conduct the process with care and applying persistence and effort in doing so. A hallmark of professionalism is the application of diligence to the task.

Article 14(1) of the Arbitration Act 1996 provides that undue delay by the arbitrator can be a ground for terminating the appointment.

GUIDANCE

This Ethical Statement is in part linked to the requirement to have time to undertake the task. But even with time for the task there will always be an obligation to attend to the work with care, persistence both in understanding the various points of view and working towards an outcome along with the necessary effort to meet the “*care*”, “*timely*” and “*efficient*” obligations.

Diligence is also about preservation of standards. It includes ensuring that you have the knowledge and experience necessary to carry out the task.

ETHICAL STATEMENT 6

A member, subject to legal obligations or other recognised exceptions must observe the duty to protect the privacy of those participating in the process, and the confidentiality of all elements of the process.

COMMENTARY

There are privacy and confidentiality expectations in most dispute resolution processes. Some are given statutory recognition as in the Arbitration Act 1996 and the Construction Contracts Act 2002. Confidentiality protection and exceptions given by statute will prevail over the Code.

“*Privacy*” is defined in the Shorter Oxford English Dictionary Sixth Edition 2007 to mean:

- 1 *“the state or condition of being withdrawn from the society of others or from public attention; freedom from disturbance or intrusion; seclusion”*
- 2 *absence or avoidance of publicity or display; secrecy*
- 3 *a private or personal matter; a secret*
- 4 *The state of being privy to something, privity”.*

“*Confidential*” is defined to mean:

- 1 *“indicating private intimacy; inclined to impart confidences, confiding*
- 2 *spoke or written in confidence; not intended for public knowledge*
- 3 *enjoying another’s confidence; entrusted with secrets; charged with a secret task”.*

The right to privacy and confidentiality belongs to the parties.

Both of these duties are common to other professions including medicine and law. The approach to these duties taken by other professions can be a helpful guide as to how we as members of a professional Institute should apply these duties to ourselves.

The duty is an on-going duty from the time of appointment and continues on indefinitely after the appointment when the process has concluded. Where a participant dies then the duty is owed to their personal representative.

When disclosure is permitted

Disclosure is only permitted under the most limited of circumstances. Examples of such circumstances include:

- 1 Where disclosure is required by law, or by order of a court.
- 2 Where the member reasonably believes that disclosure is necessary to prevent a serious risk to the health, safety or welfare of any person.
- 3 Where the intention to commit a crime is disclosed, and the member has reasonable grounds for believing that the crime will be committed, the member then has a duty to report that intent to the appropriate authority.
- 4 Where a party has expressly authorised a disclosure to another and where that information is solely held by that party. Where the information is held by more than one party, then all parties having the information must authorise the disclosure.
- 5 Where it is necessary to protect the interests of a party where the member comes to appreciate that there are genuine incapacity issues applying to a party in the process.
- 6 Where disclosure is necessary to give effect to any insurance cover arrangements, or collection of unpaid professional fees and disbursements incurred in the course of the process.
- 7 Where disclosure is necessary to respond to or to defend a complaint, allegations, claim or other form of proceeding against the member brought by a party to the process. Disclosure is limited to matters solely concerned with the complainant party in the absence of written consent to waive confidentiality by any other participating party.

Where any of these circumstances apply the disclosure as an exception to this Ethical Statement is only allowed to the minimum extent reasonably necessary to discharge the exception.

GUIDANCE

The ethical duties concerning privacy and confidentiality are given powerful recognition in most alternative dispute resolution processes.

Any breach of these obligations by a member is likely to be viewed as a most serious issue for the member concerned.

If reliance is to be placed on any of the exceptions then the member is advised to discuss resort to the relevant exception with a member of AMINZ holding Fellowship status.

Two questions may need to be considered. First whether or not a particular exception really applies, and second, what should the parameters of the disclosure be so as to meet the needs of the relevant exception while endeavouring to preserve as much of the confidentiality duty as possible.

Where guidance is sought from a Fellow for the purpose of determining the proper course of professional conduct then both the member seeking guidance and the person giving advice are encouraged to make careful notes of the conversation and conclusions. These notes should be exchanged, each with the other prior to the advice being acted upon. If the notes exchanged reveal any uncertainty about the advice given then further discussion should take place.

While seeking advice will not necessarily discharge the member from responsibility for a breach, where the advice is given and followed, then being able to show that the advice was adhered to is likely to be treated as a mitigating circumstance.

In every instance, the member who seeks to apply an exception to this Ethical Statement must take ultimate responsibility for their own actions.

Because a particular process and its setting imply a lack of privacy and confidentiality, for example a marae based mediation, the member's assumption should always be that privacy and confidentiality still apply, but within the expanded parameters. In the example above, the rights to privacy and confidentiality would be held by those who participated in the process.

Good practice requires that parties and other participants to an arbitration or mediation understand the privacy and confidentiality expectations of the parties, and the law where appropriate. In relation to mediation that understanding is best evidenced by having the parties and other participants including legal counsel sign a confidentiality undertaking once they have read it and it has been explained to them.

ETHICAL STATEMENT 7

Confidential information received by a member as a third party neutral, or in some other role, in a process may not be:

- 1 used to the members personal advantage, or**
- 2 in the absence of party consent, be used in other separate process involving one of the original parties and a third party.**

A member may not put themselves in a position which might give the impression that they have relied upon or used confidential information gained in one process when acting as a third party neutral, or in some other role, in a second or subsequent unrelated process and whether or not one of the original parties is involved in the second or subsequent process.

COMMENTARY

This first part of this Ethical Statement is akin to a fiduciary relationship. A member may not use confidential information gained in the process to their personal advantage. The advantage extends to giving that advantage to a third party such as a spouse, other relative or friend.

The second part of this Ethical Statement effectively inhibits a third party neutral from again acting in that role where similar facts to a previous process apply and particularly where one of the parties in the second or subsequent process is common to the original process.

GUIDANCE

The duty not to profit from use of confidential information received by a member in the process is absolute. It applies to all members involved in the process, not just the third party neutral. The second element of this Ethical Statement is best managed, if reasonably practicable, by full pre-appointment disclosure to the parties of your involvement in the first process when being asked to take appointment in a subsequent similar fact and or similar party process. That duty might also require you to indicate that you are privy to certain confidential information which arose in the first process but which cannot be shared or used in the subsequent process. It will then be for the parties to decide whether or not to appoint you to the role. If disclosure is made after your appointment and the party objects to your remaining in the role you must step aside. A useful discussion on the appearance of impartiality issues relevant to this Ethical Statement may be read in the cases of: *Carter Holt Harvey Forests Limited v Sunnex Logging Limited* [2001] 3 NZLR 343 (CA); applied in *South Island Commercial*

(2004) Limited and another v Kiwi Green Island Club Limited, unreported, High Court Christchurch Registry, CIV 2008-409-000261, 15 December 2008, French J; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA); *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2010] 1 NZLR 35 (SC), and, *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2010] 1 NZLR 76 (SC).

ETHICAL STATEMENT 8

- 1 A member should not act with impropriety and should not give the appearance of impropriety.**
- 2 A member should not harm AMINZ nor bring the reputation of AMINZ into ill repute.**

COMMENTARY

“Impropriety” is defined in the Shorter Oxford English Dictionary Sixth Edition 2007 to mean:

- 1 *“incorrectness; inaccuracy”*
- 2 *“unbecomingness, unseemliness, indecency; improper conduct”*
- 3 *“unsuitableness, inappropriateness”*
- 4 *“an instance of improper conduct, language, etc”.*

These ethical obligations go beyond how members conduct themselves in relation to a particular dispute. A criminal prosecution unrelated to Institute affairs and leading to a conviction may result in a finding of impropriety. Not every crime will necessarily be treated as a breach of this Ethical Statement. It will depend on the nature of the crime, its gravity, impact on others, mitigating circumstances and possibly even the public awareness about and response to the event.

Behaviours which are judged to harm AMINZ or to bring its reputation into disrepute are likely to be behaviours incompatible with holding Institute membership.

GUIDANCE

The professional duty is at all times to act with propriety – meaning to apply a correctness of behaviour and standards to the way one lives one’s life.

Obviously within AMINZ there will be a range of views as to how behaviours ought to be judged. Some key indicators include how other professional bodies have responded to the particular event, for example by striking off a member for a standards breach, or perhaps through conviction for a particular crime followed by imprisonment or some other liberty imposition as a punishment.

ETHICAL STATEMENT 9

A member should recognise that mediation is based on the principle of self determination by the parties.

COMMENTARY

The voluntary nature of the process includes the right to walk away from it. Mediators must avoid coercive conduct in an effort to achieve an outcome.

Where parties are unrepresented the mediator has an even greater obligation towards the parties to protect the principle of self determinations. If that principle is lost through inappropriate process or mediator conduct it can bring the process of mediation into ill repute.

GUIDANCE

The Ethical Statement is not a call to redress power and balances. Rather the obligation is to ensure that the mediator creates an environment where the parties can exercise self determination particularly, but not only, when it comes to determining whether or not to settle.

Coercive behaviours may include:

- 1 Extending the time of the mediation beyond which parties should not be expected to make important decisions. In short, sitting too late or too long is unsafe.
- 2 Bullying behaviour including not controlling the process so as to prevent oppressive behaviours by one party against another.

ETHICAL STATEMENT 10

A member should make decisions in a just, independent and considered manner.

COMMENTARY

This Ethical Statement is fundamental to all decision making.

Under many of the determination processes the third party neutral is entrusted with very wide powers and typically there is no monetary jurisdictional limit imposed. For example see section 12 (1) (a) of the Arbitration Act 1996 which states:

- “(1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal –*
- (a) May award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court”.*

For the parties, whether or not the dispute involves a modest amount or something very significant the issue is all important and they generally have the right to expect that judicial decision making characteristics will be applied to their matter.

The Shorter Oxford English Dictionary Sixth Edition 2007 defines “*just*” to mean:

- 1 *“that does what is morally right, righteous*
- 2 *impartial in one’s dealings; giving everyone his or her due; fair, unbiased*
- 3 ***a** in accordance with the principles of moral right or of equity; equitable, fair; (of a reward, punishment, etc) deserved, merited. **b** In accordance with the law, lawful, rightful*
- 4 *having reasonable or adequate grounds; wellfounded*
- 5 *conforming to a particular standard; proper; correct, appropriate”.*

Unless the parties to an arbitration have agreed to give the member to decide on an general justice and fairness basis (see Arbitration Act 1996 article 28 (3)) moral judgment is irrelevant. Rather, in a legal context the word “*just*” embodies notions of fairness and observance of natural justice as understood and explained through the common law. Where the parties agree to dispense with certain natural justice requirements, others will still apply having regard to the particular circumstances of the case. “*Independence*” has already been discussed in the context of the Ethical Statement 2. It is

a keystone to judicial decision making and applies with equal vigour to arbitrators, adjudicators and all those in the position of having to determine issues between two or more parties in conflict.

The “*considered*” requirement of this Ethical Statement is a reminder that although members are charged with conducting the process in an efficient and timely manner there is an overarching duty to give the matter careful thought. There is an obligation to take into account and weigh the arguments advanced on behalf of each of the parties before making the determination.

GUIDANCE

Those entrusted with decision making powers are expected to exercise those powers applying well identified judicial making characteristics. On occasion however, that expectation will be altered by party agreement. For example, the parties might agree that an arbitrator with specialist expertise can read the relevant documents, apply their own knowledge to the issue without necessarily advising the parties of what parts of that expertise were relied upon and then deliver a brief award. Here the parties are entrusting the arbitrator with a process which breaches many of the natural justice requirements conventionally applied to judicial process and decision making.

Where the parties agree that their decision maker should depart from conventional judicial process and decision making characteristics that agreement should be recorded in writing. If the parties have not recorded it themselves then it must be recorded by a memorandum from the decision maker to the parties. While parties may waive their rights to challenge apparent bias (see Arbitration Act 1996 articles 12 and 13) actual bias or partiality can never be waived. If independent decision making is not possible then the member must either decline the appointment, or if appointed must give notice to withdraw.

If you are in doubt as to how this Ethical Statement might apply to you on the particular facts, you are encouraged to seek advice from and to discuss the issue with a senior colleague of Fellowship status. Where reasonably practical, notes of this discussion ought to be exchanged prior to the member coming to a final decision on how to act. If that exchange of notes demonstrates uncertainty as to what was decided further discussion should follow.

ETHICAL STATEMENT 11

A member should fully disclose and explain the basis of fees and charges before accepting appointment.

COMMENTARY

The basis for charging should be transparent and be readily understood by the public. Note that the Fair Trading Act 1986 and the Consumer Guarantees Act 1993 both apply to the provision of a member's services.

GUIDANCE

If you have a website you are advised to include the basis for charging as part of the information available on the web.

Members are encouraged to enter into written contracts with the parties and those contracts must include the basis for billing fees and disbursements. That information must be drawn to the attention of the parties or their legal advisers/representatives before they are asked to sign the contract.

ETHICAL STATEMENT 12

Advertising or promotion by a member must be factually accurate.

COMMENTARY

Both the Fair Trading Act 1986 and Consumer Guarantees Act 1993 apply. But in addition to the statutory obligations and consequence of breach there is also an ethical duty to ensure that advertising and promotion material is factually accurate.

The member is personally responsible for their own advertising in print or soft copy form. There is a high duty not to mislead the public or colleagues when publishing advertising and promotional material.

GUIDANCE

There can be a risk of hyperbole when setting out ones advertising and promotional material. The member is best positioned to test the accuracy of statements made and to ensure that the individual and collective statements fairly and appropriately state facts that are true in all respects.

ETHICAL STATEMENT 13

A member has an ethical duty to uphold AMINZ Code of Ethics.

COMMENTARY

This Ethical Statement makes the point that compliance with the Code is the responsibility of each and every member. Therefore, it is a requirement and expectation of AMINZ that all members of AMINZ are conversant with this Code of Ethics comprising the Ethical Statements, Commentary and Guidance provisions.

It is important to appreciate that the seeking of guidance from a Fellow of AMINZ will not of itself absolve a member from responsibility for breaching the Code, although following the advice given will very likely be accepted as a mitigating circumstance in the event of a breach and a complaint arising.

GUIDANCE

Where advice from a Fellow is sought to help the member to determine an appropriate course of professional conduct both that member and the advising Fellow where practicable prior to the advice being acted on ought to exchange their records of the discussion and advice in writing. In the event of conflict of understanding as to the advice given a further discussion should follow which again ought to result in an exchange of memoranda.