

**Promoting Professional Conduct, Ethics,**

**Integrity & Etiquette in ADR**

**Kariuki Muigua**

## *Promoting Professional Conduct, Ethics, Integrity & Etiquette in ADR*

**Kariuki Muigua\***

### **Abstract**

*The paper discusses the need for promoting professional conduct, ethics, integrity and etiquette in Alternative Dispute Resolution (ADR). It critically addresses some of the ethical concerns in ADR that can potentially hinder the efficacy of the various mechanisms. It then discusses attempts towards enacting rules of ethics in ADR by various institutions and national laws. The paper concludes by suggesting solutions towards promoting professional conduct, ethics, integrity and etiquette in ADR.*

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## 1.0 Introduction

The practice of Alternative Dispute Resolution has evolved and now encompasses various mechanisms including arbitration, mediation, adjudication, conciliation and traditional justice systems. ADR practitioners are increasingly viewing themselves as part of a distinct profession<sup>1</sup>. Despite the fact that most ADR practitioners are associated with other professions such as law, engineering and accounting and are subject to the professional standards of those professions, there is consensus that the practice of ADR raises its own distinctive concerns that may not be adequately addressed by the codes of individual professions<sup>2</sup>. Due to the multidisciplinary nature of the practice of ADR, codes of individual professions may not be applicable to some ADR practitioners. For example, requiring arbitrators to be guided by the code of conduct applicable to the legal profession may not be attainable since arbitrators can be members of other professions such as engineering and accounting thus not bound by such rules.

The extraterritorial nature of some ADR mechanisms further raises concern in respect of promoting a professional code of conduct. Some ADR mechanisms such as International Commercial Arbitration and International Commercial Mediation apply across jurisdictions which means that enforcement of national ethical codes applicable to different professions may not be suitable<sup>3</sup>. Further, differences in cultures, languages and

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<sup>1</sup> Feerick, J et al., 'Standards of Professional Conduct in Alternative Dispute Resolution' *Journal of Dispute Resolution*, Issue 1, 1995

<sup>2</sup> Ibid

<sup>3</sup> Rogers, C., 'Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration' *23 Mich. J. Int'l L.* 341 (2002).

legal traditions in such mechanisms means that ADR practitioners may abide by different ethical obligations which could potentially result in conflict of laws with respect to ethics in the practice of ADR<sup>4</sup>. This may necessitate regulation of such mechanisms at an international level to ensure uniformity and certainty<sup>5</sup>.

However, despite these concerns, there is need for regulations, rules and best practices to ensure that ADR is practiced appropriately towards attaining the ideal of Appropriate Dispute Resolution<sup>6</sup>. It is arguable that regulation of ADR through a code of conduct, ethics and etiquette will protect users of the various mechanisms from professional malpractices that may be perpetuated by practitioners<sup>7</sup>.

The paper critically looks at the need for a professional code of conduct, ethics, integrity and etiquette in ADR. It discusses the relevant sources of professional conduct and ethics in ADR. The paper also highlights the ethical concerns in ADR and suggests reforms towards promoting professional conduct, ethics, integrity and etiquette in ADR.

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<sup>4</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' 28 Fordham Urb. L.J. 979-990 (2001)

<sup>5</sup> Ibid

<sup>6</sup> Ibid

<sup>7</sup> Keli. J., 'Mediation as A Profession in Kenya: A Call for Regulation' (2018) 6(3) Alternative Dispute Resolution

## **2.0 Professional Conduct, Ethics, Integrity & Etiquette in ADR in Kenya**

Professional conduct, ethics, integrity and etiquette in ADR principles can be discerned from various sources. These sources are discussed below.

### **2.1 Constitution of Kenya 2010**

The Constitution of Kenya sets out national values and principles of governance that are to bind and guide all persons. These values and principles include integrity, transparency and accountability<sup>8</sup>. ADR practitioners in Kenya are thus bound by these principles and should ensure that their conduct is done in a transparent and accountable manner. Further, the Constitution also recognises the role of ADR mechanisms as tools of access to justice<sup>9</sup>. To this extent, the Constitution sets out certain principles to guide persons exercising judicial authority including ADR practitioners. Among these principles is fairness, the need for expeditious management of disputes and respect of the Constitution<sup>10</sup>. ADR practitioners should be guided these principles in discharge of their mandate. The Constitution of Kenya 2010 thus represents a good source of authority for professional conduct, ethics, integrity and etiquette in ADR.

### **2.2 Civil Procedure Act**

The Act provides for the management of disputes through ADR mechanisms such as arbitration and mediation<sup>11</sup>. The Act establishes the Mediation Accreditation Committee whose mandate is certification of mediators and maintaining a register of qualified

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<sup>8</sup> Constitution of Kenya, 2010, Article 10 (2) (c)

<sup>9</sup> Ibid, article 159 2 (c)

<sup>10</sup> Ibid

<sup>11</sup> Civil Procedure Act, Cap 21, Part VI

mediators<sup>12</sup>. The Committee is also mandated to enforce such code of ethics for mediators as may be prescribed and set up appropriate training programmes for mediators<sup>13</sup>. The Mediation Accreditation Committee established under the Civil Procedure Act is thus an important body in promoting professional conduct and ethics for mediators.

### **2.3 The International Bar Association Guidelines on Conflicts of Interest in International Arbitration**

One of the fundamental ethical concerns in International Commercial Arbitration is conflict of interest. The IBA Guidelines on Conflicts of Interest in International Arbitration seek to address this concern by stipulating a code of conduct on conflict of interest in international arbitration.<sup>14</sup> Among the salient provisions of the guidelines is the aspect of impartiality. The guidelines provide that every arbitrator shall remain impartial and independent of the parties at the time of appointment and shall remain so until the final award is rendered<sup>15</sup>. The guidelines further provide that an arbitrator shall decline to accept an appointment or refuse to continue to act where there is likelihood of conflict of interest<sup>16</sup>. There is also a requirement for arbitrators to disclose facts that may give rise to doubts as to the arbitrator's impartiality or independence<sup>17</sup>.

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<sup>12</sup> Ibid, S 59 A (4)

<sup>13</sup> Ibid

<sup>14</sup> International Bar Association, 'Guidelines on Conflicts of Interest in International Arbitration' available at <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> (accessed on 24/05/2022)

<sup>15</sup> Ibid, General Standard 1.

<sup>16</sup> Ibid, General Standard 2.

<sup>17</sup> Ibid, General Standard 3.

The IBA guidelines represent an attempt to formulate a code of conduct, ethics, integrity and etiquette in ADR at the international level. The guidelines have gained wide acceptance within the international arbitration community<sup>18</sup>.

#### **2.4 The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009**

The Code sets out professional and moral principles to govern the conduct of members of the Chartered Institute of Arbitrators while discharging their mandate. The Code requires members to maintain integrity and fairness of the dispute resolution process and withdraw if this is no longer possible<sup>19</sup>. The Code further requires members to disclose all interests, relationships and matters likely to affect their independence and impartiality before and throughout the dispute resolution process<sup>20</sup>. It further requires members to be competent and only accept appointments to manage disputes only when they are appropriately qualified or experienced<sup>21</sup>. The Code also requires members to ensure that parties are adequately informed of all the procedural aspects of the process<sup>22</sup>. It further requires members to maintain trust and confidence of the dispute resolution process<sup>23</sup>. The Code is therefore an important source of professional conduct, ethics, integrity and etiquette for members of the Chartered Institute of Arbitrators.

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<sup>18</sup> Ibid

<sup>19</sup> The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, 2009, Part 2, Rule 2, available at <https://www.ciarb.org/media/4231/ciarb-code-of-professional-and-ethical-conduct-october-2009.pdf> (accessed on 25/05/2022)

<sup>20</sup> Ibid, Rule 3

<sup>21</sup> Ibid, Rule 4

<sup>22</sup> Ibid, Rule 5

<sup>23</sup> Ibid, Rule 8

## **2.5 The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020**

The rules stipulate the expected code of conduct for arbitrators in respect of arbitration proceedings conducted under the auspices of the Chartered Institute of Arbitrators (Kenya). The rules provide for the independence and impartiality of an arbitral tribunal<sup>24</sup>. The rules require an arbitrator to disclose circumstances likely to give justifiable doubts as to the impartiality or independence of an arbitrator<sup>25</sup>. The rules further require arbitration proceedings to be private and confidential<sup>26</sup>. Arbitrators should thus not disclose proceedings unless by consent of the parties. The rules also require arbitrators to avoid conflict of interest<sup>27</sup>.

## **2.6 Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021**

The Code stipulates fundamental ethical guidelines for persons appointed to mediate disputes under the NCIA mediation rules. Among its fundamental ethical rules is independence and impartiality<sup>28</sup>. Before accepting an appointment to act, a mediator is required to disclose anything within his/her knowledge that may materially affect his/her impartiality<sup>29</sup>.

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<sup>24</sup> The Chartered Institute of Arbitrators (Kenya) Arbitration Rules, 2020, available at <https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf> (accessed on 24/05/2022)

<sup>25</sup> Ibid

<sup>26</sup> Ibid, Rule 134

<sup>27</sup> Ibid, Rule 8

<sup>28</sup> Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021, available at <https://ncia.or.ke/wp-content/uploads/2021/07/5.-NCIA-CODE-OF-CONDUCT-FOR-MEDIATORS-2021.pdf> (accessed on 25/05/2022)

<sup>29</sup> Ibid

The Code of conduct further requires a mediator to avoid conflict of interest or the appearance of a conflict of interest during and after mediation<sup>30</sup>. Conflict of interest in mediation can potentially arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and either of the participants in the mediation process.

The Code further requires a mediator to possess the necessary competence required to mediate effectively<sup>31</sup>. Competence in mediation can be acquired through training, experience and cultural understandings. In addition, the Code requires mediators to promote confidentiality, quality and fairness of the mediation process<sup>32</sup>.

## **2.7 The Alternative Dispute Resolution Bill**

The purpose of the Bill is to provide for an Act of parliament that will govern the settlement of civil disputes through ADR mechanisms and in particular conciliation, mediation and traditional dispute resolution mechanisms<sup>33</sup>. The Bill sets out certain guiding principles and ethical considerations to govern management of disputes through the stipulated ADR mechanisms. The Bill requires ADR practitioners to promote confidentiality in the process except in the case of traditional dispute resolution<sup>34</sup>.

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<sup>30</sup> Ibid, Principle 3

<sup>31</sup> Ibid, Principle 4

<sup>32</sup> Ibid, Principles 5 and 7.

<sup>33</sup> Alternative Dispute Resolution Bill, available at

<http://www.parliament.go.ke/sites/default/files/2021-06/34->

[The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf](http://www.parliament.go.ke/sites/default/files/2021-06/34-The%20Alternative%20Dispute%20Resolution%20Bill%2C%202021%20%281%29.pdf) (accessed on 25/05/2022)

<sup>34</sup> Ibid, Clause 5.

Further, the Bill requires ADR practitioners to facilitate expeditious determination of disputes taking into account the nature of the dispute<sup>35</sup>. ADR practitioners are also required to be impartial and disclose any conflict of interest that may arise during the process<sup>36</sup>. Finally, the Bill requires ADR practitioners to be competent in their respective fields before facilitating the management of disputes<sup>37</sup>. If enacted into law, the ADR Act will enhance professional conduct, ethics, integrity and etiquette in the practice of ADR in Kenya.

### **3.0 Ethical Concerns in Alternative Dispute Resolution**

The practice of ADR raises certain ethical concerns. These include:

#### **3.1 Confidentiality**

One of the fundamental attributes of ADR mechanisms is confidentiality. Confidentiality in ADR entails maintaining integrity of the process and not disclosing matters to third parties<sup>38</sup>. Confidentiality is central to ADR since it allows parties to freely engage in candid, informal discussions of their interests to reach the best possible settlement of their dispute without concerns of such information leaking to third parties<sup>39</sup>. The parties and

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<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

<sup>38</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' University of Miami Law Review, Volume 56, No.4

<sup>39</sup> Interagency ADR Working Group Steering Committee, 'Protecting the Confidentiality of Dispute Resolution Proceedings: A Guide for Federal Workplace ADR Program Administrators' (April 2006)

the neutral thus have a duty to maintain confidentiality and not disclose any information to third parties unless in situations where such disclosure is allowed<sup>40</sup>.

Confidentiality in ADR raises fundamental ethical concerns. Where this duty is breached, information pertaining the process may be leaked to third parties thus affecting the integrity of the process. The importance of confidentiality in ADR has seen various Codes of Conduct on ADR capturing it as an important ethical obligation<sup>41</sup>. However, there may be situations where confidentiality in ADR may be limited. This could be by consent of the parties; where prescribed by law or in situations where a crime may be committed<sup>42</sup>.

### **3.2 Conflict of Interest**

Conflict of interest is a major concern in the practice of ADR. The rules on conflict of interest in ADR are aimed at preventing bias in management of disputes which could arise due to involvement by a neutral with the subject matter of the dispute or relationship between the neutral and either of the participants in the ADR process<sup>43</sup>. This is in line with the principles of natural justice and the right to a fair hearing enshrined

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<sup>40</sup> Muigua. K., 'Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future' available at <http://kmco.co.ke/wp-content/uploads/2018/08/Regulating-ADR-Practice-in-Kenya-Kariuki-Muigua-June-2018.pdf> (accessed on 25/05/2022)

<sup>41</sup> The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members, Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, 2021 and the Alternative Dispute Resolution Bill among other laws and rules capture confidentiality as a fundamental ethical obligation.

<sup>42</sup> Muigua. K., Regulating Alternative Dispute Resolution (ADR) Practice in Kenya: Looking into the Future, Op Cit

<sup>43</sup> See for example the the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators, Principle 3

under the Constitution<sup>44</sup>. Conflict of interest concerns includes situations where the same individual performs multiple roles such as an arbitrator or mediator and later as a party representative<sup>45</sup>. It also includes situations where mediators and arbitrators practice in law firms with other advocates who may represent parties before such a mediator or arbitrator<sup>46</sup>. The rules on conflict of interest are aimed at addressing such situations and ensuring that there is fairness and integrity in the ADR process.

### **3.3 Competence**

Competence is critical for the success of all ADR mechanisms. Since most ADR mechanisms especially arbitration and mediation rely on courts for their enforcement, there is need for competence that may be exhibited through the writing of reasoned awards and mediation agreements<sup>47</sup>. Competence in ADR may also be exhibited through following due process, rules of conduct and evidence. Where this duty is breached, there may challenges against the outcome of the ADR process such as arbitral awards. In Kenya, the Arbitration Act provides recourse to the High Court against an arbitral award on grounds including where the award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration<sup>48</sup>. Competence is thus essential to ensure

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<sup>44</sup> Constitution of Kenya, 2010, Article 50.

<sup>45</sup> Meadow. C., 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' Op Cit

<sup>46</sup> Ibid

<sup>47</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

<sup>48</sup> Arbitration Act, No.4 of 1995, S 35 (2) (iv).

that arbitrators confine themselves within the scope of reference to arbitration. To address this concern, most Codes of conduct on ADR stipulate competence as fundamental ethical obligation<sup>49</sup>. Competence in ADR may be acquired through education, training and experience. Further to ensure competence, ADR institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration provides for a system of accreditation of their members.

### **3.4 Costs and Fees**

The issue of costs and fees raises ethical concerns in the practice of ADR. Such concerns involve the appropriateness and reasonableness of fees charged by ADR practitioner such as arbitrators and mediators<sup>50</sup>. In some instances, these practitioners have been accused of charging exorbitant fees thus defeating the essence of ADR of facilitating cost effective management of disputes. To guard against this, some ADR mechanisms such as arbitration allow parties to negotiate with the arbitrator over the scale of fees to be charged. Further, arbitral institutions such as the Chartered Institute of Arbitrators (Kenya) and the Nairobi Centre for International Arbitration have formulated fees schedules governing administrative costs and arbitral fees.

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<sup>49</sup> See for example the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Alternative Dispute Resolution Bill.

<sup>50</sup> Meadow. C., 'Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not' Op Cit

#### **4.0. Way Forward**

Various measures can be undertaken towards promoting professional conduct, ethics, integrity and etiquette in ADR. They include:

##### **4.1 Promoting Access to Justice through ADR**

The advantages of ADR mechanisms such as party autonomy, privacy, confidentiality, expeditious and cost effective management of disputes makes them viable mechanisms for management of disputes compared to other processes such as litigation<sup>51</sup>. There is therefore need to enhance access to justice through these mechanisms in order to benefit from their advantages. ADR practitioners such as mediators, conciliators and arbitrators should spearhead the principles inherent in these mechanisms in order to promote public confidence in their uptake. Enactment into law of the ADR Bill in Kenya will be an important step towards promoting access to justice through ADR.

##### **4.2 Promoting Standards and Accreditation of ADR Practitioners**

It is argued that promoting standards and accreditation in ADR will enhance accountability, efficiency and competence of ADR practitioners<sup>52</sup>. This can also serve the purpose of promoting public awareness and confidence in the use of ADR mechanisms. To achieve this goal, ADR institutions have developed various tools such as training of

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<sup>51</sup> See generally Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya' Glenwood Publishers Limited, 2015

<sup>52</sup> Aloo, L.O. & Wesonga, E.K., 'What is there to Hide? Privacy and Confidentiality Versus Transparency: Government Arbitrations in Light of the Constitution of Kenya 2010,' Alternative Dispute Resolution, Vol. 3, No. 2 (Chartered Institute of Arbitration- Kenya, 2015).

practitioners and maintaining a list of licensed individuals<sup>53</sup>. This is important towards promoting ethics and integrity in ADR since practitioners are expected to adhere to the rules of conduct stipulated by the respective institutions.

#### **4.3 Adhering to the Rules of Conduct, Ethics, Integrity and Etiquette by ADR Practitioners**

ADR practitioner should always adhere to the rules of conduct, ethics, integrity and etiquette while discharging their mandate. These rules include impartiality and integrity in management of disputes. ADR practitioners should thus avoid conflict of interest in order to promote the right to a fair hearing. They should also only accept appointments in situations where they are competent to manage the dispute in question. By adhering to such rules, it will be possible to enhance efficient management of disputes through ADR mechanisms.

#### **5.0 Conclusion**

Rules of conduct, ethics, integrity and etiquette are important in ADR. These rules ensure efficiency and viability of ADR mechanisms. There have been challenges in adopting and promoting such rules due to the multidisciplinary practice of ADR and the international nature of some ADR mechanisms such as international commercial arbitration and international commercial mediation. However, the success of ADR mechanisms calls for adoption of these rules. This has seen various ADR institutions adopting codes of conduct

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<sup>53</sup> See for example the training programme offered by the Chartered Institute of Arbitrators, Kenya Branch, available at <https://ciarbkenya.org/our-courses/> (accessed on 27/05/2022)

and ethics to govern such concerns<sup>54</sup>. There is thus need for promoting access to justice through ADR, promoting standards and accreditation for ADR practitioners and adhering to the rules stipulated by various ADR institutions. Promoting professional conduct, ethics, integrity and etiquette in ADR is an ideal which can be achieved.

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<sup>54</sup> These include the International Bar Association Guidelines on Conflicts of Interest in International Arbitration, the Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members and the Nairobi Centre for International Arbitration (NCIA), Code of Conduct for Mediators.

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