

Proposed Uniform Rules — Definition of Barristers' Work

Legal Services Council (LSC) and Australian Bar Association Bar Rules

Uniform Bar Rules are being formulated by the Legal Services Council and ABA, which Rules will take effect under the Legal Profession Uniform Law (expected to commence on 1 July 2015) to replace the Legal Profession Act 2004 NSW and Vic.

Only NSW and Victoria are participating in the Uniform Rules process through their Bar Associations.

One aspect of that work is the inclusion in the Uniform Bar Rules of a definition of "Barristers' Work".

Significant issues with the definition of Barristers' Work proposed by ABA¹ are:

- (a) it does not expressly recognise as "Barristers' Work", barristers acting as mediators, arbitrators or referees in ADR; and
- (b) it is unclear whether such work would be picked up by the definition at all.

That is, the proposed rule at best ignores, or at worst, excludes, a major and growing part of work done by barristers in fact, as being Barristers' Work.

The ABA proposed definition in the Rules is:

"15. Barristers' work consists of:

- (a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers." (*Emphasis added*)

Therefore, acting as an ADR provider (i.e. as arbitrator, mediator, expert, etc.) is not Barristers' Work, unless tucked under "*other work as is from time to time commonly carried out by barristers*" (sic): Rule 15(h).

A related rule is:

¹ See: www.nswbar.asn.au/docs/webdocs/Barrister_Legal_Practice_Rules.docx

"14. A barrister **may not use or permit the use of the professional qualification as a barrister for the advancement of any other occupation or activity** in which he or she is directly or indirectly engaged, or for private advantage, save where that use is usual or reasonable in the circumstances". (*Emphasis added*)

Apart from the issue of the apparent repudiation by the ABA (and through it, the NSW and Victorian Bar) of acting as an ADR provider being mainstream Bar work as a service to the general administration of justice, there are other issues.

If ADR services are not defined as part of Barristers' Work, or even left as arguably not (depending on what 15(h) means), issues arise such as, whether there is insurance cover for barrister/mediators, arbitrators, court appointed referees or experts under Bar policies; whether those ADR practitioners can describe themselves as barristers in connection with that practice; whether it is proper to use a Bar post nominal in relation to the work?

The position adopted under the proposed Rule 15 is an anachronism. As a Uniform rule, remarkably, it does not reflect the apparent position of either of the Bar Associations historic, and apparent current, position as to what is Barristers' Work.

The NSW Position:

From 20 June 1997 to August 2011 a barrister's work was effectively defined in NSW in the following terms:

- "74. A barrister must confine the barrister's professional work to:
- a. appearing as an advocate;
 - b. preparing to appear as an advocate;
 - c. negotiating for the client with the opponent to compromise the case;
 - d. representing the client in a mediation;
 - e. giving legal advice;
 - f. preparing or advising on documents to be used by the clients or by others in the client's affairs;
 - g. **acting as a referee, arbitrator or mediator;** and
 - h. carrying out work properly incidental to the kinds of work referred to in (a)-(g)".
- (*Emphasis added*)

In 2011 the ABA proposed the Uniform Rules and Rule 15, which did not include 74(g) or any other acknowledgement of work as an ADR practitioner.

In 2011, the NSW Bar thought that at least ABA Rule 15(d) ought to be amended to include the words "*or conducting*" after "*client*", in recognition of the extensive practices then in existence of mediating, arbitrating and conducting ADR generally.

That did not happen, for reasons that are quite unexplained, and inexplicable.

In August 2011, NSW adopted a rule reflecting the now proposed ABA Rule 15.

However, **In Brief** reported, on 13 December 2011:

“Bar Council resolution concerning the conduct of Alternative Dispute Resolution Proceedings

*At its meeting of 8 December 2011, the Bar Council resolved that it accepts that **conducting alternative dispute resolution proceedings such as mediations does constitute 'barristers work' for the purposes of Rule 15 of the New South Wales Barristers' Rules of 8 August 2011.**” (Emphasis added)*

Since 2011 the NSW Bar has frequently reaffirmed the position that the conduct of ADR processes is part of barristers' work and, indeed, work that may be evaluated for matters such as consideration for Silk.

In the Winter 2011 edition of **Bar News**, Coles QC, as President, after a review of the protocol for appointment as Silk, confirmed that it was not an impediment (to appointment) that an applicant practiced exclusively as a mediator (a “pure mediator”) or related ADR proceedings.

It is simply unarguable that, in NSW at least, being an ADR practitioner is part of, indeed may be ALL of, a barrister's work.

The NSW Bar Association has placed itself at the centre of that position in three respects:

First: It has created BarADR. *“BarADR is an initiative of the New South Wales Bar Association to provide solicitors, in-house counsel and members of the public with **access to barristers trained and accredited** in the alternative dispute resolution (ADR) processes of mediation, arbitration and expert determination.” (NSW Bar Website)*

Second: training and accreditation of ADR practitioners is something the NSW Bar Association has been actively engaged in, in the past and, as to accreditation, is still engaged in;

Third: the recognition that the quality of ADR service provided by a barrister can be the basis for significant professional recognition.

Mediation is a significant activity in NSW. The Supreme Court has gathered statistics on mediation in the Court, either by registrars or by referral to mediation outside.

Referrals to Mediation generally	2010	2011	2012	2013	2014
Total referrals recorded	1144	902	1092	1088	839
Mediation referral index	23.5%	19.4%	23.9%	23.7%	19%
"Index" is (referrals/cases suitable for mediation)					affected by change in base

Supreme Court of NSW Provisional Statistics as at 27 January 2015

The Victorian Position

After 2011 and the publication of the original ABA Uniform Rules, in 2012, the Victorian Bar published "Vic Bar Draft Practice Rules Part A & Part B- 26 July 2012", which, in Part B (the Victoria specific rules) addressed the ABA Rule 15 issue. It provided as a "Local Variation" (then permitted by the proposed national rules) to Rule 15:

"Barristers' Work

151. Without limiting the generality of Rule 15(h), work commonly carried out by barristers shall be taken to include **acting as an arbitrator, adjudicator, expert determiner, mediator, conciliator or otherwise in a role independent of a party, in any determinative or nondeterminative alternate dispute resolution process.**"

Again, that provision deals with the obvious position in reality.

The Victorian Bar mediator (not even ADR generally) statistics are impressive:

MEDIATION ACCREDITATION	VICTORIAN PRACTISING COUNSEL	%
Nationally Accredited Mediator	333	17%
Advanced mediator	35	2%

Table 6.1. Member Statistics Victorian Bar Inc, December 2014

Existing Uniformity as to what is "Barristers' Work"

As appears above, there is **complete uniformity** between NSW Bar and Victorian Bar as to what is included in Barristers' Work and has been from before 2011, both at the definitional level and the practical level. It is perfectly clear that it includes being an ADR provider.

Accordingly, one might have thought that a "uniform" rule made by and for those Bars ought to reflect that consensus or uniformity, unless the ABA has some compelling different view of the universe that justifies overriding the main national Bars' view. None has been identified or at least made known. The evidence is to the contrary of such a view existing.

The ABA position:

From the ABA web site, May 2015:

"What is a barrister?"

A 'barrister' is an independent specialist advocate and advisor. As a general rule, members of the public cannot brief a barrister directly through a solicitor. A simplistic analogy is to see the solicitor as a General Practitioner and the barrister as a specialist. You would need a referral to a specialist from the GP.

What do Barristers do?

A barrister is best known for their advocacy before the Courts but it is true to say that **their strength lies in Dispute Resolution, both judicial (before Courts or tribunals) and nonjudicial (through negotiation, mediation or arbitration).**

A barrister has the training and experience to anticipate the range of likely outcomes and to work with the solicitor and their client to choose the most appropriate path, so it is helpful to involve a barrister at the outset.

A barrister's advice at this time can help to clarify the management of the entire dispute resolution process and empower clients to make informed decisions.

Advice and Opinions

Because of a barrister's intimate knowledge of the Courts, their specialisation in advocacy and litigation and their ability to quickly identify the crucial points of a case, barristers are also valued for their advice and opinion work and they are often called upon to assist in this regard as soon as a dispute is indicated.

Early advice and skillful negotiations can obviate the need for costly litigation and a barrister can weigh up all considerations before advising on a course of action which involves litigation.

Advocacy/Litigation

If the case does proceed to trial, a barrister can provide effective representation and advocacy, with:

- Specialised knowledge of their area of law
- Detailed knowledge of the rules of evidence and their application
- Full understanding of litigation tactics
- The skills to identify the most appropriate case preparation
- The ability to persuade the client's adversary or the Court of the merits of the case.

Alternative Dispute Resolution ('ADR')

A growing number of barristers specialise in arbitration and alternative dispute resolution (ADR).

Arbitration is widely accepted as an alternative form of resolving commercial disputes, particularly in the context of international commercial transactions.

Increasingly, Australian barristers have expertise in domestic and international commercial arbitrations with many approved as arbitrators with national and international bodies. Other forms of ADR include mediation, expert determination and hybrid dispute resolution processes." (*Emphasis added*)

It is clear that the proposed Uniform Bar Rule 15 fails to describe what the ABA itself recognises is modern barristers' practice, including being an ADR provider as a specialist practice of some barristers.

Conclusion

Accordingly, what might have been (but wasn't, at least in NSW) true in 2011, certainly is not true in 2015. The adoption of Rule 15 in 2011 cannot be thought to speak to 2015 circumstances.

This particularly the case because the new Uniform Rule makes "local" variations or practices irrelevant, so, that which was done by NSW and Victorian Bar to ameliorate the 2011 adoption of Rule 15 will no longer be possible.

Therefore, **no** formal recognition of barristers as ADR practitioners will exist in the national scheme Rules.

The proposed Rule 15 ought to be amended **at least** to provide:

"15. Barristers' work consists of:

- (a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in **or conducting** a mediation or arbitration, reference or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- (g) carrying out work properly incidental to the kinds of work referred to in (a)-(f); and
- (h) such other work as is from time to time commonly carried out by barristers."

or, preferably

"15. Barristers' work consists of:

- (a) appearing as an advocate;
- (b) preparing to appear as an advocate;
- (c) negotiating for a client with an opponent to compromise a case;
- (d) representing a client in a mediation or arbitration or other method of alternative dispute resolution;
- (e) giving legal advice;
- (f) preparing or advising on documents to be used by a client or by others in relation to the client's case or other affairs;
- (g) **acting as a referee arbitrator or mediator;**
- (h) carrying out work properly incidental to the kinds of work referred to in (a)-(g); and
- (i) such other work as is from time to time commonly carried out by barristers."

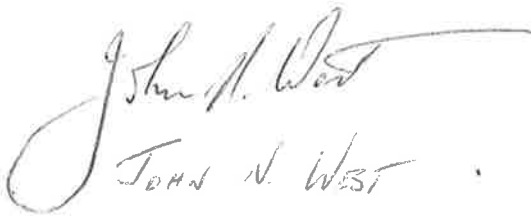
or a coherent and compelling reason given why not.

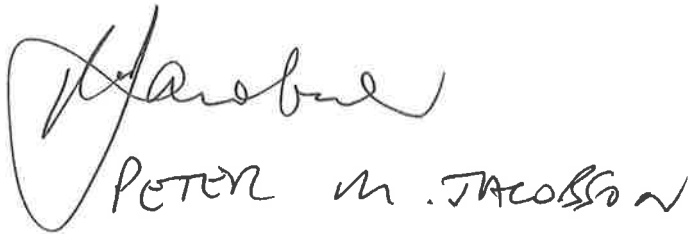
This is an urgent issue for the Bar, given the imminent possible adoption of the Uniform Rules.

It is not an answer to the omission of express reference to ADR from the definition of barristers' work to say that it is encompassed in the "other work" clause. If it is recognised by the Rules drafter that ADR is "other work" of barristers, then its importance as barristers' work, for barristers and the people and institutions affected by that work, means it ought to be recognised in the descriptive list.

There is simply no reason to omit it.

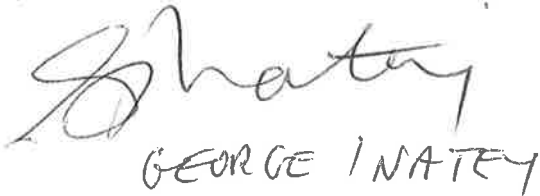
The irony of the relegation of ADR to "other work from time to time etc", is that it is occurring at a time when it is probably true to say that activities (a) to (f) is work of a type only done "from time to time" by a large number of barristers, as the opportunities for conducting trials diminishes and ADR proliferates, and, moreover, (a) to (f) work is commonly done by a range of people, that happens to include barristers, and only for only a part of it. That is, it is a romantic memory, not a present reality, that barristers predominately and constantly do the work (a) to (f). If the Rule is an aspirational statement, then one part of the aspiration of a modern Bar is that it be expert at, and recognised as expert at, ADR delivery.


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