MEET THE NEW LAWYER

THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (JULIE MACFARLANE). VANCOUVER, BC, UBC PRESS 2008

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I. INTRODUCTION

The publication of Professor Julie Macfarlane's solid and important book establishes a new, high water mark in the maturation of the alternative dispute resolution field. The author maintains, with strong support from research and interviews, that the legal profession is in a process of transformation, having taken on board many of the key principles and assumptions developed over the past three decades of ADR practice and scholarship. ADR has long since ceased to be "alternative" in the sense of novel or unorthodox, and Macfarlane argues that lawyers are increasingly being called upon to act, not as warriors in court battles, but as advocates for consensus and conflict resolution. While Macfarlane leaves little doubt that she sees this as a largely positive trend, her emphasis is on demonstrating that the alteration of law practice is inevitable and on exploring the implications of this emerging change. Mindful that doubting lawyers and law students are potentially a more important audience than the already-converted choir of ADR scholars and practitioners, Macfarlane is cautious not to reject tradition nor to disrespect existing norms. Indeed, if I have a concern with the book, it is whether, in her thoughtful effort to appeal to the mainstream of the legal profession, the author understates how dramatic and rapidly accelerating are the changes upon us, and how real and potentially counterproductive are the forces of resistance.

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II. CONTEXT

The primary thesis of *The New Lawyer* is that in this first decade of the millennium, the role of attorneys continues to change dramatically due to the proliferation of consensus-seeking dispute resolution processes and the increasing pressures to use these alternatives. For many lawyers, the settlement drive is based on pragmatic calculus: clients are demanding it, policymakers are mandating it, and judges are encouraging if not requiring it. For others, the move toward problem-solving is based on philosophical appeal: consensual conflict resolution, like peace and harmony, is seen as *per se* virtuous.

The field of ADR has been expanding for decades. It has challenged the traditional understanding that adversarial adjudication is central to maintaining social order in our modern society. Pioneers of ADR have long urged the legal profession to back off from emphasizing the use of courts as the vehicle for resolving conflict and to consider a broader range of problem-solving approaches. As Macfarlane and many others have pointed out, this movement reflects a certain reality: few lawsuits proceed to trial. It is, to say the least, ironic that the standard framework for legal strategy and negotiation has been "dominated by the anticipation of an event — a full trial — that will almost never occur."[1] The oft-noted phenomenon of the "vanishing trial" may have pre-dated the rise of ADR — as Macfarlane reminds us, "the number of full trials had been steadily declining for three decades" before the institutionalization of reforms designed to encourage early settlement — but surely the use of ADR is at least partly responsible for the rarity of trial in today's civil courts.[2]

III. CONVERGENCE OF COMBAT AND CONSENSUS

Macfarlane pointedly dismisses the possibility that the transformation of law practice she identifies represents a "paradigm change." This, she argues, is neither an accurate reflection of reality nor a desirable approach. Insistence on paradigm change is tan-

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[1] JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW 67 (University of Washington Press 2008).

[2] *See, e.g.*, Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 691 (2005).

tamount to "throwing out the baby with the bathwater."[3] Instead, Macfarlane insists, lawyers will continue "to use and build on their foundational skills of negotiation, information assimilation and analysis, advocacy, and advice giving."[4] The new lawyer, in Macfarlane's view, represents a convergence between the different cultures of litigation and consensus building.

The convergence process is one that Macfarlane identifies as evolutionary.[5] But if she is correct that there is no paradigm change going on, rather than a process of evolution, it might better be viewed as consistent with the pattern of reform, consolidation, calcification, and renewed reform in the history of social institutions. Reformers have, for centuries, fluctuated between constructing institutions and taking them apart and between calling for regulation and insisting on deregulation. This pattern is certainly familiar in twentieth century approaches to dispute resolution. Reformers in the early part of the century, for example, blamed the formal, legalistic and adversarial nature of courtroom proceedings for widespread dissatisfaction with the legal system. Roscoe Pound in 1920, for example, praised such innovations as conciliation courts for altering the "purely contentious conception of a judicial proceeding."[6] Macfarlane focuses on a number of more recent innovations outside the formal system, including therapeutic practice and interest-based bargaining. She uses her own substantial research into the collaborative law movement to chronicle the development of an approach where attorneys are specifically retained to help clients reach a consensual resolution and, in the event settlement efforts fail, must bow out and have the clients hire new counsel.

A characteristic of this historic pattern of reform is that efforts to create more informal approaches outside the traditional courtroom eventually result in processes that come to incorporate many of the very features that reformers sought to change. The alternatives gradually begin to resemble the legalistic procedures they have replaced. Indeed, Macfarlane acknowledges the concern that "mediation and settlement processes may be co-opted back into the adjudicative mode. . . ."[7] She cites Nancy Welsh for having

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[3] MACFARLANE, *supra* note 1, at 20.

[4] *Id.*

[5] *Id.*

[6] Roscoe Pound, *Book Review*, 33 HARV. L. REV. 621, 625 (1920); *see generally* CHRISTINE HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT 53–63 (1985)

[7] MACFARLANE, *supra* note 1, at 21.

demonstrated, through research data, "significant evidence of the assimilation of mediation into a model of adversarial litigation practice."[8]

Macfarlane urges that we not be passive in the face of the changes in legal practice around us. She underscores the importance of continuously assessing the need for new skills and knowledge.[9] Among those capabilities identified by Macfarlane as core dimensions of new lawyering are negotiation skills (with greater emphasis on problem-solving strategies), communication skills (including listening, explaining, questioning, and establishing rapport and trust), and a participatory approach to client relationships (focusing on making the client a partner in problem-solving).[10]

IV. CORE BELIEFS CAUSING RESISTANCE TO CONVERGENCE

Macfarlane astutely and convincingly pinpoints three core professional beliefs and values that continue to enjoy widespread acceptance and operate as a force of resistance to change. These three core beliefs are (1) a default to rights-based dispute resolution; (2) the view of justice as process; and (3) the assumption that the lawyer is in charge.[11]

With respect to the primacy of rights-based conflict resolution, Macfarlane notes that the model "assumes that the source of conflict is in all circumstances an uncompromisable moral principle or an indivisible good."[12] She quite correctly points out that so many of the disputes brought to lawyers "simply do not require, and are not suitable for, a rights-based argument or solution, and they may escalate unnecessarily if viewed exclusively through this prism."[13] She reminds us that "rights" are often strategically invoked as a smokescreen for a more aggressive approach or ideologically held as a demonstration of loyalty to the client.[14]

The concept of justice as process emphasizes the sacredness of formalized process as a way of assuring fairness and equality. The

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[8] *Id.* at 21–22, citing Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 101 (2001).

[9] MACFARLANE, *supra* note 1, at 22.

[10] *Id.* at 23–24.

[11] *Id.* at 47–65.

[12] *Id.* at 50.

[13] *Id.* at 53.

[14] MACFARLANE, *supra* note 1, at 52.

problem, as Macfarlane warns us, is that process becomes the "central public good of the legal system" and outcomes fail to receive adequate attention.[15] Perhaps more significantly, process becomes an avenue for gaming which, as Macfarlane acknowledges, is broadly tolerated in the legal community. It is worth noting, however, that ADR processes themselves are subject to gaming. Much as the civil discovery process, originally conceived of as a way to encourage early settlement through productive information exchange, has become a powerful tactical tool in the litigator's kit, so too can ADR mechanisms such as mediation be cynically manipulated by lawyers seeking to gain the upper hand.

In the traditional lawyer-client model, the client is passive and the lawyer is the managing agent "in charge" of the client's conflict. Macfarlane labels this as a "paternalistic" approach that "places a stronger emphasis on the expert judgment of the lawyer, which, combined with the emotional distance possible for a professional, enables the lawyer to be the better judge of the 'right' outcome for this client, no matter how removed are their own circumstances."[16] In large measure, this may be understood as the result of legal advice being an example of what economists call a "credence good" or service, one that is provided by an expert who determines the consumer's needs; the consumer, in turn, is unable to assess how much of the service is needed or the quality of the service actually provided.[17] Macfarlane recognizes that, at least in part, it is the lawyers' possession of the skills and knowledge that leaves their clients "with little choice but to trust them to take control."[18]

V. CONFORMING CORE BELIEFS

Macfarlane is at her very best in an inspired characterization of what she calls "conflict resolution advocacy," an alternative conception of legal advocacy which she asserts is "at the core of the professional identity of the new lawyer."[19] This approach to advocacy, she explains, requires adjustment of two of the core beliefs of

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15 *Id.* at 55–56.

16 *Id.* at 121.

17 *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 968 (2000).

18 MACFARLANE, *supra* note 1, at 126.

19 *Id.* at 108–09.

the "old" lawyer and extension of the third. Instead of the primacy of rights-based dispute resolution, lawyers must take a "more nuanced, multi-pronged strategic approach to both fighting and settling" that regards rights-based strategies as useful, but by no means exclusive, tools for solving problems.[20] At the same time, the lawyer is no longer left solely in charge as the client plays a much greater role in bringing personal, non-legal issues and potential solutions to bear in the process of planning and decision-making in the engagement of conflict.[21]

The core belief that, in Macfarlane's opinion, could use extension is the perspective of justice as process. She hits the nail on the head in suggesting that the lawyer's expertise in the importance of process can be effectively applied to "private ordering outside the legal system."[22] Elsewhere, Macfarlane recognizes private ordering as "one of the ways in which individuals exercise self-determination in a democratic society" and, indeed, that "the vast majority of conflicts are resolved privately rather than in court."[23]

VI. CONFLICT AND PRIVATE ORDERING

There is growing emphasis in the literature on the importance of private ordering to the field of ADR,[24] and Professor Macfarlane makes an important contribution to that discussion. One might have liked to see greater consideration of what follows from this, particularly the intense resistance bound to be caused by entrenched interests of the state and its judicial franchise in the face of increased emphasis on private ordering in conflict resolution. How can government and the legal profession (which, after all, has the state monopoly on conflict resolution) be expected to react to the creation of alternative forms of dispute resolution outside their power? In fact, bureaucrats and lawyers tend to resist creation of autonomous conflict resolution entities, co-opting those that are formed into the orbit of existing government entities, or reserving ADR for only those matters that are deemed trivial.

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20 *Id.* at 109.

21 *Id.*

22 *Id.*

23 *Id.* at 178.

24 *See, e.g.,* Robert A. Baruch Bush, *Alternative Futures: Imagining How ADR May Affect the Court System in Coming Decades,* 15 REV. LITIG. 455, 469 (1996); Arthur Pearlstein, *The Justice Bazaar: Dispute Resolution Through Emergent Private Ordering as a Superior Alternative to Authoritarian Court Bureaucracy,* 22 OHIO ST. J. ON DISP. RESOL. 739, 740 (2007).

The fault line between authoritarian and private ordering is one that will continue to broaden, and Macfarlane's understandably delicate treatment of anything that smacks of threat to entrenched interests of lawyers may reflect an overabundance of caution. On the other hand, her comments on the potential application in private ordering of lawyer expertise in process design and systems-based solutions[25] should be underscored as a way of reassuring lawyers that they can still play a major role in privately ordered approaches to handling conflict. No less of an authority than Professor Lon Fuller long ago described lawyers as specialists in the business of institutional design,[26] and there is no reason that expertise cannot be applied in the design of private institutions and processes for conflict resolution.

VII. CHANGE: WHAT TO WATCH FOR

The material in *The New Lawyer* that may be of greatest interest to scholars and practitioners in ADR is the chapter entitled, appropriately, "Where the Action Is: Sites of Change." Macfarlane identifies three areas with great potential to "bring forward and promote initiatives and innovations that will play an important part in the evolution of the new lawyer."[27] The action, she concludes, is in: (1) legal education; (2) the judiciary; and (3) inter-professional collaboration.

Despite the enormous changes underway, as chronicled in her book, Macfarlane observes that law schools have not caught up with the emergent reality. The lack of attention in legal academia to the practical work of real attorneys has long been noted, starting well before the advent of ADR. In more recent times, even where law schools have sought to make their offerings reflect the more practical side of the actual work of lawyers, too often what is presented suggests "constant trial work and heroic fights against oppression and wrongdoers."[28] Macfarlane is exactly on point when she writes that in law schools, the "long-time assumption of legal centralism, in which rights-based legal processes are primary

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25 MACFARLANE, *supra* note 1, at 109, 123.

26 *See* Robert G. Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1290 (1995).

27 MACFARLANE, *supra* note 1, at 223.

28 *Id.* at 225.

and preferred means of dispute resolution, is no longer either self-evident or realistic."[29] While acknowledging that a number of individual initiatives have recognized the relevance and staying power of "process pluralism" in handling disputes, she cautions that there is still a great deal of work to be done.

Macfarlane's discussion of "the new judge" focuses on the question of whether we will need whole new approaches on the bench to work with "new lawyers." She is far from the first to note that judges are increasingly taking on supervisory and managerial roles, particularly with respect to case management and settlement processes, and there are certainly those who see this as a positive trend. My own prejudice is that those of us in the field of conflict resolution should monitor these developments with suspicion. The increasing bureaucratization of the courts along with their embrace of ADR may very well weaken the efforts to expand productive private ordering initiatives in advancing conflict resolution.

Of the three "sites of change" examined by Macfarlane, perhaps the most intriguing is inter-professional collaboration. Too much of ADR has focused on the different ways that law handles conflicts. A much more productive perspective is to consider the various ways conflicts are engaged and resolved, with law simply representing one possible approach. This can only occur with an emphasis on a truly interdisciplinary approach to both the study and management of conflict. In analyzing the importance of developments in inter-professional collaboration and noting the trend toward a more "holistic" approach to client advocacy not limited to legal expertise, Macfarlane reminds us that "clients themselves are demanding different services and are sometimes dissatisfied with anything other than a comprehensive and integrated professional service. . . ."[30] Her focus in this section is on developments and challenges in having lawyers work on multidisciplinary teams, including issues of fee arrangements, conflicts of interest, privilege, referrals, professional competences and turf. Macfarlane's analysis contains rich insights and highlights important concerns for the practicing lawyer. One might have hoped that she would direct her perceptive insights to further examination of the interdisciplinary nature of the field of ADR generally, looping back to the discussion of legal education and probing in greater depth whether lawyers must be the primary gatekeepers of conflict resolution.

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[29] *Id.* at 232.

[30] *Id.* at 236.

VIII. The Hottest Action Spots

Beyond the sites of change, the author catalogs in looking at "where the action is" that there are at least two other major foci of transformation: the internet, and the reputation revolution. Macfarlane mentions these directly or indirectly elsewhere in the book, but due to their potential to dwarf other sites of change, we should be mindful of them in monitoring where the action is.

Macfarlane points to the World Wide Web as a major source of rising consumer self-empowerment and convincingly argues that this will play a major role in the transformation of the "lawyer-in-charge" model by feeding an "appetite for self-help" and compelling clients to be less deferential and more careful to demand value for their money.[31] Surprisingly, *The New Lawyer* does not address the near certainty that the internet will be an even greater site of change by virtue of its existence as an enormous open space in which privately ordered dispute resolution will dominate over traditional litigation. If "new lawyers" are to avoid missing the train, they need to pay very serious attention to their potential roles as conflict resolution advocates in dealing with the enormous range of disputes that develop in cyberspace.

The internet is also a key to the rapidly increasing availability of information about individuals and institutions that is helping to create a reputation revolution of immeasurable significance to the transformation of law practice. Reputation has long been a strong substitute for judicial enforcement in close-knit communities, enabling greater use of privately ordered conflict resolution in those environments: the effects of reputation induce disputants to abide by the results of private dispute resolution and the prospect of future dealings encourages cooperative behavior. The internet and associated new technologies will increasingly allow us all to be members of the reputational equivalent of close-knit communities. This effect is further compounded in the development of the new lawyer since, as Macfarlane underscores elsewhere, a "personal reputation for collaboration becomes a valuable resource when a critical mass within the community has embraced mediation and settlement processes as mainstream and reflective of 'good' lawyering."[32]

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[31] *Id.* at 129–30.

[32] *Id.* at 91.

IX. Conclusion

Overall, the book provides a major contribution to the ADR field as well as to the literature on the state of the legal profession. Interest in the issues raised by the author will only continue to grow as the inevitable changes she catalogs continue to transform the practice of law even in the face of strong resistance from entrenched interests. A valuable follow-up volume that Professor Macfarlane might consider is one that focuses on the most compelling sites of change and the exciting possibilities for lawyers and ADR professionals sure to become available in a post-litigation society.