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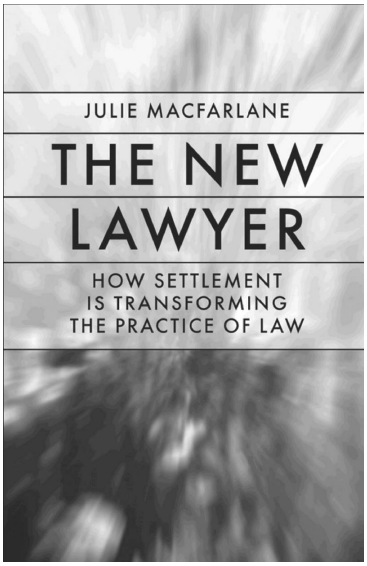

Emerging trends in ADR

The new lawyer: Moving from warrior to conflict resolver

Julie McFarlane

Legal practice is showing signs of the evolution of a new professional identity for lawyers which is responsive to new dispute resolution processes with an emphasis on just and strategic settlement. In an era of 'vanishing trials' — we know that between 95–98 per cent of civil claims end in a negotiated outcome short of a full trial — and sweeping civil justice reforms in both civil and family matters, effective negotiation and settlement skills are becoming increasingly central to the practice of law. Over the past 10 years I have conducted extensive empirical research on the changing role of lawyers in dispute resolution. My new book, *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, 2008) argues that changes taking place in legal practice and public culture as we enter the 21st century are driving the emergence of what I call the 'New Lawyer'. The New Lawyer builds on her traditional expertise as a legal technician and an advocate, but adapts her knowledge and modifies her skills for a disputing culture that places renewed emphasis on settlement and consensus-building.

What is the evidence for change?

It has always been true that more cases settled before trial than proceeded to full adjudication. In the 1960s, around 80 per cent of cases (depending on the jurisdiction) settled before trial. Possibly more important than the rate of settlement is the timing of settlement. An examination of the data reveals that cases consistently settle right before trial — on the courtroom steps. In the last 30 years, judicial policy-makers have focused on encouraging earlier settlement, motivated by widespread public dissatisfaction with the costs and delays of the justice system. To retain the interest of the public in using the legal system and lawyers to resolve their everyday problems and conflicts, it is critical to provide access to justice using practical conflict resolution that does not require an investment of many years of time, and enormous sums of money on legal fees.

The consequence — in Australia as well as in the US, Canada, the UK and many other legal systems — has been the introduction of court-based settlement programs, often mandatory, which bring the parties and their advisers together in mediation, to a judicial conference, or to offer early assessment and evaluation to explore and expedite the potential for settlement. Mandatory mediation is increasingly familiar to Australian litigants and their lawyers, as well as judge-led initiatives that encourage early information exchange and negotiation between lawyers. There have been innovations in the private sector as well, most notably the development of collaborative family law, which seem to reflect a distaste among some sectors of the Bar for litigious processes and a desire for settlement-oriented processes that can better serve the needs of their clients.

Those clients are changing too. Clients now expect to be able to access legal information via the Internet. Our courts are witnessing a phenomenal rise in the number of self-represented litigants, and not only in family matters. Part of the explanation for this is the rising costs of legal services, but another element is the belief that lawyers have become 'unnecessary', or even antithetical to achieving the goals

of practical problem-solving in a timely manner.

The increasing use of negotiation, mediation and collaboration in resolving lawsuits belies the traditional conception of the lawyer as a 'rights warrior' focused on expensive legal argument and arcane procedures, and is evolving a new professional identity which centres on value for money and practical problem-solving for clients. This role moves away from the provision of narrow technical advice and strategies that centre on litigation and fighting, towards a more holistic, practical and efficient approach to conflict resolution. The new lawyer is an evolved, contemporary version of the warrior lawyer (and perhaps closer to the traditional model of country legal practice familiar to the most senior practitioners in our small towns). In order to be effective in the pursuit of effective, timely and just resolutions lawyers need to know when to set aside assumptions of adversarial behaviour, understand when to strategise about accommodation and trade-offs, and when to focus on problem-solving. This means developing new skills of communication and persuasion and solution-creation that do not focus solely on entitlement and positionality, and avoiding the conflation of strength with inflexibility and unyielding argument.

New skills for the New Lawyer

My new book draws from more than 700 interviews I have conducted over the past 12 years with lawyers and their clients using new dispute resolution processes. It tells us a great deal, I think, about the types of 'strengths' that the 'new lawyer' needs, both from the perspective of counsel themselves and from the perspective of their clients. Lawyers have told me consistently that in order to be effective in this changed environment they need to be intentional and strategic about working towards settlement, and not simply wait for a last-minute exchange of offers between counsel. Instead they need to think about how to bring the sides together in negotiation as soon as they feel they have sufficient information, and to seek ways to speed up that exchange of information.

Their clients increasingly expect value-for-money in their contacts with legal professionals and are far less deferential to the lawyer's opinion — especially an opinion that proposes spending a lot of money without much in the way of results. A decline in professional deference is a challenge for professional relationships in many areas of expertise, and not just law. Twenty-first century clients expect their lawyers to involve them in strategic planning and decision-making in ways that previous generations did not. They are interested in practical problem-solving and they both need and expect more than technical legal advice from their lawyer in order to get them this result. Otherwise clients are increasingly likely to 'vote with their feet' — for example to represent themselves, or to seek limited advice to get them started or assist them at a particular point in the case ('unbundling legal services') or — in the case of corporate or institutional clients — to turn the matter over to in-house counsel (now more than 10 per cent of the profession) who commit to a budget and a timeline.

The new lawyer needs new skills in order to work with this new type of client in new dispute resolution processes. Working to build consensus requires a different approach to the use of information and facts and presages a different type of advocacy — where the goals are more nuanced and more inclusive of the client than the traditional model of zealous advocacy. In my book I describe this as 'conflict resolution advocacy'. This is still strong and committed advocacy, but it takes a different form. It means broadening the scope of client goals to include but also go beyond legal remedies, prioritising these goals with the client, and placing this type of information on the table in order that the other side can they know what is at stake here for one side, while simultaneously seeking out the same type of information from them. In consensus-building counsel needs to be asking not 'what information about our legal theory and bottom line must I hide from the other side in order to be powerful?' but rather 'what information about my client and our case does the other side need in order to be persuaded to settle on our best possible terms?' This means that an evaluation of the legal issues in the case are still critically important in order to assess BATNA ('Best Alternative to a Negotiated Agreement') but counsel needs other tools and techniques — including building trust and rapport with the other side, providing opportunities for both sides to listen to the other. Lawyers have told me over and over again that this new approach to advocacy requires them to put themselves 'in the shoes' of the other side in order to strategise about what would encourage this party to settle on their clients' best possible terms. This is a significant adjustment from the traditional approach where '(Y)ou don't worry about the other side as much at a trial because … well, they're the other side. When you're working towards a consensus — then it matters.'

The New Lawyer and third parties

The new lawyer understands that not every conflict is about rights and entitlements and that these are conventional disguises for anger, hurt feelings and struggles over scarce resources. If the new lawyer is to act as an effective ally on behalf of her client, she must look at the whole problem and not simply the legal issues. She may need to bring in other specialist resources, and many of these specialists will not be lawyers — but that is precisely what they can contribute to the solving of the clients' unique problem. Conflicts often require the input of third parties who can assist in the resolution of the conflict or with the provision of critical additional tools and information to this end. This means that new lawyers need to be able to work with mediators and other advisors who can assist in the building of settlement. These third parties will offer a range of skills and qualifications, and new lawyers will be expected to assess what would be appropriate in any one given case. Not all these third parties are, of course, lawyers, but they can work with lawyers to complement their skills and knowledge. We see this taking place in court-based family programs that

include the expertise of child welfare specialists as assessors, in collaborative law where financial advisors and coaches are used to move the negotiation along, and in both court-based and private commercial dispute resolution where conventional commercial arbitration is increasingly overshadowed by a plethora of alternatives including case management, early evaluation, mini-trials and hybrid med/arb processes. Again, the clients of the 21st century increasingly expect this approach to practical problem-solving.

This emergent professional identity moves counsel beyond the narrow articulation of partisan interests towards the realisation of a new, practical, conflict specialist role. It does not reject but rather builds on the traditional role of the lawyer as technical advisor. The bottom line is that this convergence between the old and the new is taking place before our eyes. Since my book was first published nine months ago, I have heard from many lawyers all over the world who tell me that its description of 21st century legal practice resonates with their own sense of change. Most exciting is the potential for renewal of the profession as it adapts itself to the new conditions of the times. ●

Julie Macfarlane is Professor of Law at the University of Windsor. Her new book The New Lawyer: How Settlement is Transforming the Practice of Law *is available at* <*www.ubcpress.ca*>.

ADR Diary

- The **IAMA Conference 2009,** Resolution and Resilience: ADR in the Global Recession will be held on 29–31 May at the Hotel Sofitel in Melbourne, or further information go to <www.iama.org.au>.
- **LEADR** is holding 5-day **Mediation Workshops** around the country that meet the standards for the National Mediator Accreditation Scheme. Mediation Workshops offered in 2009 include Melbourne on 20–24 April; Darwin and Brisbane on 5–9 May and many more dates for the remainder of the year. LEADR will also be holding 4-day **Cinergy Conflict Coaching Workshops** in Melbourne on 21–24 April; and Adelaide on 5–8 May. For registration forms, early bird registration dates and more information on courses, visit <www.leadr.com.au/training.html>.
- The **Fifth Asia Pacific Mediation Forum Conference** will be held in India on 21–27 November 2010. For further information go to <www.ausdispute.unisa.edu.au/apmf/>.
- The **Bond University Dispute Resolution Centre** is offering numerous courses over the year including **Conflict in Schools** on 14 May; an **Assessment Course** on 12–13 June; and a **Basic Mediation** Course on 30 July–2 August. Bond will also be offering, in conjunction with University de Catholique, a course in **Global Negotiation** in Lyon, France from 27 April–2 May 2009. For more information email <drc@bond.edu.au> or visit <www.bond.edu.au/law/centres>.
- The Australian Commercial Disputes Centre (ACDC) next **5-Day Mediation Training** course will next run 25–29 May 2009 in Sydney. Participants wishing to become ACDC Accredited mediators and apply for recognition under the Australian National Mediator Accreditation System should undertake the additional Accreditation Day (optional) held on Thursday 4 June 2009. Visit <www.acdcltd.com.au> for further information.
- **Resolve** is holding a one-and-a-half-day **Confronting Conversations Workshop** in Sydney on 26–27 May. For further information go to <www.bond.edu.au/study-areas/law/drc/drc_courses.html>.

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