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Book Review

THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW, by Julie Macfarlane[1]

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I. INTRODUCTION

PROFESSOR JULIE MACFARLANE is onto something here. As she does in the Preface to *The New Lawyer*, I too would recommend this book not only to those lawyers who may be disillusioned with what she calls the "warrior mentality" of legal practice but also to lawyers who may be skeptical of the alternative legal image that Macfarlane sees emerging. The "new lawyer" may seem foreign to some legal interests, but there is nothing to fear; the book is by no means a mere indictment of the old paradigm. For Macfarlane, the new lawyer is the result of a natural evolution that is and should be occurring in a vital and vibrant profession like law. The new lawyer represents not so much a rejection of traditions, but rather, a convergence of litigation and consensus-building cultures, resulting in what she calls the new skills, knowledge, and sensitivities of "conflict resolution advocacy."

In this review, I first set out how Macfarlane carefully develops and supports her thesis of the emerging new lawyer. Second, I summarize who this new lawyer is and what he or she looks like. Finally, I refer to a recent case that illustrates this new lawyer.

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1. (Vancouver: UBC Press, 2008) 304 pages [*The New Lawyer*].
2. Professor, Faculty of Law, University of Victoria and founding Director, UVic Institute for Dispute Resolution.

II. THE EMERGENCE OF THE NEW LAWYER

As I was reading *The New Lawyer*, I could not help but think that I had seen this lawyer before. Thirty years ago, as a young associate at Osler, Hoskin & Harcourt LLP, I was struck by lawyers like Bertha Wilson and John J. Robinette, who exemplified the deliberative wisdom and other qualities that Macfarlane now ascribes to the new lawyer. Even today, I see lawyers who are respected by their peers because they model at least some of the qualities of Macfarlane's new lawyer. They are practical problem solvers, creative thinkers, excellent communicators, and persuasive negotiators. They understand that settlement is the norm for good lawyering and that going to court is just one option.

I also see the "pit bulls," both young and old who, as Macfarlane points out, often self-identify:

> I mean, we're trained as pit bulls ... and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and stronger and better than you are ... (or as one female lawyer put it, 'a bulldog with lipstick').[3]

Macfarlane's thesis is not that the new lawyer is totally novel. Her message is that it is now time for legal professionals to reflect upon themselves, and recognize that the profession *needs* the new lawyer on a much larger scale. For Macfarlane, the image of the lawyer still grounded in old beliefs and values that "have been barely revised or challenged since the formal establishment of the profession almost two centuries ago"[4] is no longer sustainable. Warren Burger, former Chief Justice of the United States Supreme Court, decried the dominant image of the lawyer as a "knight in shining armour whose courtroom lance strikes down all obstacles."[5] Macfarlane, like Burger, queries: "Isn't there a better way?"[6]

Macfarlane points to changes in the legal profession over the last thirty years that propelled the new lawyer forward. These include the corporatization of legal practice, the emergence of the large or "mega" firm, the corresponding decline of the sole practitioner, and the rapidly rising numbers of lawyers. These conditions

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3. *The New Lawyer*, *supra* note 1 at 12.
4. *Ibid.* at 48.
5. Chief Justice Warren Burger, "Isn't There A Better Way?" (1982) 68 A.B.A. J. 274 at 275.
6. *Ibid.*

combine to increase the competitive and adversarial approaches to advocacy, which in turn fuel discontent with this model of lawyering.

For Macfarlane, the chief catalyst of change must be the emphasis on settlement within dispute resolution processes. She highlights how the enormous pressures for civil justice reform have resulted in fundamental shifts in civil litigation practices, such as requirements for court-annexed mandatory mediation, settlement conferencing, case management programs, judicial mediation, and the vanishing trial. She references similar trends in the criminal justice system in which some disillusionment with retributive or punitive models have encouraged restorative justice processes, such as community panels, victim offender mediation, and sentencing circles.

The New Lawyer also notes many changes outside the formal justice system around settlement practices. These include therapeutic practice, new and interest-based approaches to negotiation, and cooperative lawyering groups. Based on her Collaborative Law Research Project, Macfarlane chronicles the intriguing move to collaborative lawyering, in which the lawyer and client contract with each other not to litigate the matter. The lawyer is retained to represent and advise the client on a non-litigious, consensual, and negotiated resolution. If settlement discussions do not result in an agreement, the clients must retain new lawyers to do the dirty work—litigation.

Although these changes nurture the new lawyer, Macfarlane also wisely acknowledges a strong resistance to change. She points the finger at three core professional beliefs and values of the "old lawyer" that shaped the identity of the legal profession and that are resistant to change: (1) a belief in the primacy and superiority of rights-based conflict resolution; (2) a belief in the authority of the formal legal process, or justice as process; and (3) a belief in the lawyer-in-charge model. Macfarlane elaborates on each of the three core beliefs.

III. THE DEFAULT TO RIGHTS

As discussed in *The New Lawyer*, Western justice systems recognize and uphold individual rights. Individuals are also protected against the unfair assertions of the rights of others, including the state. In this system, the lawyer's primary responsibility is to advocate strongly for his or her client's legal rights.[7] Rights

7. *The New Lawyer*, *supra* note 1 at 49.

advocacy, which is highly logical and functional and integral to a lawyer's education, leads inevitably to positional arguments—my rights are better than your rights. If these arguments are not resolved, the courts are available to make binding decisions.

Macfarlane asserts that many of the disputes brought to lawyers do not require and are not suited for rights-based arguments or solutions. She acknowledges that legal rights are extremely important for less powerful and marginalized persons in society, and that these rights need to be protected. However, MacFarlane correctly recognizes that in many cases the emphasis on rights arguments leads to excessive posturing, deeply entrenched positions, the unnecessary escalation of disputes, and significant difficulties in reaching early and inexpensive resolutions.

IV. JUSTICE AS PROCESS

Macfarlane is concerned that lawyers often emphasize achieving justice through a formalized process but do not give enough attention to substantive outcomes. She suggests that lawyers hold a pervasive, unchallenged, and reified belief that consistently applied procedural rules result in equality and fairness for all. They assume that justice equates with a formal judicial process.

I am not sure that the majority of lawyers, particularly litigators, would ascribe to this view, but there is no doubt that legal process occupies a large space in both civil and criminal matters. As a result, there is often uncertainty around, discomfort with, and resistance to, process reforms and innovations. Macfarlane also points out the well-documented potential for procedural abuse when lawyers use—in fact are taught to use—procedures in tactical or mean-spirited ways.

V. LAWYERS-IN-CHARGE

Macfarlane asserts that "the established norms of the decision-making process, while occasionally negotiable, still generally assume that the lawyer manages the file and steers in whatever direction he or she considers appropriate."[8] This is the traditional lawyer-client model, in which the client is relatively passive and the lawyer is mostly autonomous. The client follows the lawyer's instructions.

8. *Ibid.* at 59.

This model is contrasted with the participatory model, in which the client plays a more active role and asserts his or her wishes regarding both the eventual outcome and important process decisions.

According to Macfarlane, the lawyer-centred role, combined with a preoccupation with legal rights, can lead to problems. For example, through the statement of claim, defence, or other missive, the lawyer-in-charge can transform the original problem into something not readily recognizable by the client. Carrie Menkel-Meadow describes this transformation, in the following way:

> The grievant tells a story of felt or perceived wrong to a third party (the lawyer) and the lawyer transforms the dispute by imposing categories on events and relationships which redefine the subject matter of the dispute in ways that make it amenable to conventional management procedures. This process of narrowing disputes occurs at various stages in lawyer-client interactions.[9]

For example, the affair that sparked a divorce can become buried in a "best interests of the child" custody claim. The lack of respect by the insurer for the seriously injured plaintiff can become a prolonged battle about heads of damages. The repairing of neighbourly relations is replaced by lawyer-led allegations and counter allegations of nuisance, harassment, and trespass.

VI. THE NEW LAWYER

Despite these embedded beliefs, or perhaps because of them, Macfarlane sees the new lawyer emerging. She flatly rejects the idea that this is a paradigm change, although many might understand it as such. Instead, her analysis is based on a non-threatening compromise. Macfarlane sees the convergence of the norms and traditions of two different cultures of dispute resolution. Over time, the "genetic combination"[10] of both litigation and consensus-building cultures will result in each taking on some of the ideas, values, and practices of the other.

The new lawyer's genetics are most interesting. Many qualities remain the same. Macfarlane devotes a whole chapter to the continued importance of law and legal advice, and notes that considered legal advice is an integral part of professional responsibility.

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9. Carrie Menkel-Meadow, "The Transformation of Disputes by Lawyers" (1985) J. Disp. Resol. 25 at 31.

10. *The New Lawyer, supra* note 1 at 21.

Yet, the differences in the new lawyer are profound and include changed ethical obligations and a new relationship with clients. Macfarlane broadens the understanding of ethics to encompass "any value-based choice between alternative courses of action."[11] More attention will have to be given to this idea. She calls for an affective working partnership with clients and emphasizes a more holistic vision of understanding client issues through inter-professional collaboration.

However, Macfarlane says, "advocacy is at the heart of how lawyers understand their role and it is at the heart of what is different for the new lawyer."[12] Accordingly, the major attribute of the newly converged lawyer is an adherence to the new advocacy. Macfarlane challenges the old, assumed duty of the advocate "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case."[13] She asks what the purpose of advocacy is and provides her own answer: "conflict resolution advocacy."[14] She states:

> The new lawyer will conceive of her advocacy role more deeply and broadly than simply fighting on her client's behalf. This role comprehends both a different relationship with the client, closer to a working partnership ... and a different orientation toward conflict ... Conflict resolution advocacy means working with clients to anticipate, raise, strategize, and negotiate over conflict and, if possible, to implement jointly agreed outcomes.[15]

The conflict resolution advocate both builds upon and challenges the three core legal beliefs. The new lawyer uses rights-based strategies, but not exclusively or unthinkingly. The conflict resolution advocate considers fair processes, particularly in cases of private ordering outside the formal justice system, and learns in part from formal procedures. In conflict resolution advocacy, the client's role in planning and decision making is more significant and meaningful than it is in the lawyer-in-charge model.

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11. *Ibid.* at 197.
12. *Ibid.* at 96.
13. "The Lawyer As Advocate" in *CBA Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006) 57 at 57, online: CBA <http://www.cba.org/CBA/activities/pdf/codeofconduct06.pdf>.
14. *The New Lawyer, supra* note 1 at 109
15. *Ibid.*

Negotiation is central to conflict resolution advocacy. Macfarlane's stimulating chapter on negotiation demonstrates how this key legal activity has become ritualized, predictable, and often inefficient and uncreative at the expense of clients. Both the new and old lawyer can learn from her description of negotiation in collaborative and cooperative legal practices.

Macfarlane's compromise convergence produces a happy hybrid that many lawyers can relate to and already see within themselves—a lawyer who is both a fighter and a settler and who helps the client both engage with conflict and make a "game plan for victory."[16] The identity crisis, Macfarlane notes, is in reconciling the tension between the two:

> Here is the heart of all of the tensions that arise in a model of conflict resolution advocacy. The new lawyer must learn how to wear the two hats of fighter and settler and understand when to take one off and put the other on ... or even when both hats need to be worn at the same time (for example a last ditch settlement meeting before initiating litigation or proceeding to trial).[17]

VII. A CONCLUDING CASE

The recent important case of *Tsilhqot'in Nation v British Columbia*[18] speaks to Macfarlane's convergence thesis.

The *Tsilhqot'in* litigation lasted five years and consumed 339 trial days from November 2002 to April 2007. Justice Vickers likely hoped that the legion of lawyers involved would have settled the case early. They did not, and he had to render a decision.

Remarkably, his decision is almost entirely *obiter*. The plaintiff had asked in the statement of claim for a declaration of Aboriginal title covering all of the lands in the Claim Area, but did not make a reduced, alternative claim for a portion of the lands. After the trial, Justice Vickers would have decided Aboriginal title covered only part of the Claim Area and a portion outside. In a procedurally-bound and rights-based adjudicative process in which the lawyers were in charge, it would have been prejudicial to the defendants to grant the plaintiff's claim without giving the defendants a chance to be heard.

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16. *Ibid.*

17. *Ibid.* at 119.

18. (2007), [2008] 1 C.N.L.R. 112 [*Tsilhqot'in*].

Rather than risk a *Delgamuukw*[19] ending, where there could be appeals for years to the Supreme Court of Canada and a new trial ordered, Justice Vickers told the disputants and their lawyers that he was not able to make a Declaration of Aboriginal Title; rather, he gave them his opinion, non-binding and *obiter*, in 485 carefully reasoned pages. He also gave them a gift at the end of the decision, in a "Reconciliation" section. In hopes that his judgment would "shine new light on the path of reconciliation that lies ahead,"[20] he said in part:

> In an ideal world, the process of reconciliation would take place outside the adversarial milieu of the courtroom. This case demonstrates how the court confined by the issues raised in the pleadings and the jurisprudence on Aboriginal rights and title is ill equipped to effect a reconciliation of competing interests. That must be reserved to a treaty negotiation process ... In an adversarial system claims are dealt with to produce a win/lose result. Interest negotiations, designed to take opposing interests into account, have the potential to achieve a win/win result. Such an approach, in the context of consensual treaty negotiation, would provide the forum for a fair and just reconciliation.[21]

Tsilhqot'in illustrates the convergence of litigation and consensus-building cultures. It could reveal an additional attribute for Macfarlane's new lawyer—a deeply held personal and professional commitment to a just settlement with a true understanding of the principles behind this commitment. Perhaps the story is about the heart of the new lawyer. Imagine a new lawyer's enormous satisfaction, not to mention relief, if the parties in *Tsilhqot'in* were to accept Justice Vickers' guidance on the pathway to their own just and honourable reconciliation.

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19. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

20. *Tsilhqot'in*, *supra* note 18 at para. 7.

21. *Ibid.* at paras. 1357-60.