BOOK REVIEW

THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW by Julie Macfarlane (UBC Press, 2008) 280 pp.

The aim of Professor Macfarlane's book is to promote debate concerning the impact of modern reforms to the civil justice system on the practice of law. Her contribution to the debate is to advance a carefully crafted, in depth analysis of how the institutional emphasis on settlement as the primary form of dispute resolution is fundamentally changing the practice of law. At the core of her analysis is the proposition that modern lawyers must be skilful settlement advocates. She concisely summarises the professional skills and role of the new lawyer in the following passage which boldly predicts:[1]

> The most successful lawyers of the next century will be practical problem solvers, creative and strategic thinkers, excellent communicators, who are persuasive and skilful negotiators, thoroughly prepared advocates for good settlements, who are able and willing to work in a new type of professional partnership with their clients, and aware of the need to constantly update their knowledge of conflict management processes and techniques as well as substantive law. This is the lawyer as conflict resolution advocate, and whom this book calls the new lawyer.

The extensive repertoire of professional skills which define the new lawyer might at first glance seem a little daunting. Law schools have a vital role in exposing students to the skills and processes which are central to the modern practice of law. She laments the failure of traditional legal education, which focuses almost exclusively on rights based approaches to the resolution of disputes, rather than effective negotiation skills, and information about the relative merits of various consensual dispute resolution processes. More broadly she poses the question "how do we understand the relationship between legal practice and legal education".[2] In this context she has some interesting insights into the perennial question concerning the nature of the relationship between intellectual development and vocational training of lawyers. Her response to this often debated issue is likely to provoke a hostile response from members of the academy who assert that legal education should be unconcerned with the actual practice of law. Members of the profession[3] and academics[4] may also challenge the primacy of settlement which is currently in vogue with policy makers. After all, it is difficult to quarrel with the notion that court based adjudication fulfils an important social function, vindication of rights, the reasoned articulation of public values[5] and is essential for the development of precedent.

Professor Macfarlane acknowledges that legal knowledge and expertise remain a critical dimension of the new lawyers' settlement advocacy skills, but she appears to overlook the importance of their co-operative problem solving skills in the efficient resolution of the small percentage

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1 Julie Macfarlane *The New Lawyer: How Settlement is Transforming the Practice of Law* (UBC Press, Vancouver, 2008) at 244.

2 Ibid, at 225.

3 Lawrence West "Have the Woolf Reforms Worked?" *The Times* (United Kingdom, 9 April, 2009).

4 See Dame Hazel Genn *Judging Civil Justice* (Cambridge University Press, 2009); Owen M Fiss "Against Settlement" (1983) 93(6) Yale Law Journal at 1085.

5 Ibid, Genn.

of cases which are decided by the court. It should not be overlooked that an important objective of the civil justice reforms is to promote access to court based adjudication within a reasonable time at a reasonable cost.[6]

The genesis of the author's conceptualisation of the settlement advocacy role of the new lawyer are the reforms to the civil justice system in Canada. She assesses the impact of these reforms on the culture of disputing by drawing on considerable empirical research, no doubt fortified by her experience as a practicing mediator. While civil justice reforms in Canada are not discussed in detail it seems clear that the reforms in Canada follow a similarly broad structure to reforms to civil justice in England and Wales, Australia and New Zealand.[7] Certainly a broad overview of the reforms in these jurisdictions offers clear support for her central proposition that settlement is now regarded by policy makers as the primary process for the resolution of disputes. There is some evidence that the reforms in England and Wales have mitigated adversarial litigation culture and have "forced" lawyers to disclose information about their case and engage in co-operative negotiations prior to the issue of proceedings.[8] To this extent the reforms appear to have compelled lawyers to engage with aspects of conflict resolution advocacy. A brief overview of the main features of reforms in the jurisdictions mentioned is a useful context to a discussion of the challenges, potential and scope of conflict resolution advocacy, the defining attribute of the new lawyer.

Pre-action protocols are the most obvious illustration of the settlement orientation of modern reforms to the civil justice system.[9] The purpose of pre-action protocols, in keeping with the overarching objective of the reforms, is the early cost effective and fair resolution of disputes.[10] Conceptually pre-action protocols, which require lawyers to disclose information critical to their case and engage co-operatively in settlement negotiations, represent a sea change to the traditional withholding of information and adversarial positional bargaining which typically characterise pre-issue negotiations in unreformed civil justice systems.

Professor Macfarlane's view that settlement advocacy places negotiation at the centre of legal practice clearly fits with the purpose of pre-action protocols, the prompt, cost effective and fair resolution of disputes. In fact, it is arguable that not only is the emergence of the new lawyer, in large part, attributable to the importance of settlement but that the success of pre-action protocols is largely dependent on the conflict resolution skills which she attributes to the new lawyer. Placing negotiation at the centre of legal practice raises questions about the skills necessary to negotiate effectively and the relationship between legal expertise and consensus building.

The new lawyer, as with the traditional lawyer, understands that information exchange is critical to the negotiated resolution of disputes. As noted above, an important purpose of pre-action protocols is to encourage the informal cost effective disclosure of information. An important dis-

6 Adrian Zuckerman "Court Adjudication of Civil Disputes: A Public Service to be Delivered With Proportionate Resources, Within a Reasonable Time and at Reasonable Cost" (2006) <www.aija.org.au>.

7 Civil Procedure Rules 1998 (UK) no 3132 (L17) Ministry of Justice (UK); Civil Procedures Act 2010 (Vic).

8 John Peysner and Mary Seneviratne "The Management of Civil Cases: the Courts and the Post–Woolf Landscape" (DCA Research Series, 2005) at 8 and 35.

9 Civil Procedure Rules 1998 (UK) r 1.1(1); Civil Procedures Act 2010 (Vic), s 7; in New Zealand the process is managed through the exchange of information capsules in the Court as required by the District Court Rules 2.14-2.17.

10 Civil Procedures Act 2010 (Vic), s 7 "[t]he overarching purpose of this Act and the rules of court … is to facilitate the just, efficient, timely and cost effective resolution of the real issues in dispute." Civil Dispute Resolution Act 2011 (Cth), s 3 "The object of this Act is to ensure that, ... people take genuine steps to resolve disputes before certain civil proceedings are instituted; Civil Procedure Rules 1998 (United Kingdom), r 1.1(1) "... overriding objective of enabling the court to deal to cases justly".

tinction which influences the bargaining strategy of the new lawyer is that the objective of information disclosure is to achieve a robust, durable and fair settlement rather than to achieve victory in a trial. Settlement, rather than preparing for a trial which is statistically unlikely to occur,[11] is the focus of the new lawyer and building a relationship with the other party becomes much more useful than adversarial posturing. A critical factor in relationship building is the ability to conceptualise and understand the dispute from the perspective of the other side.[12] In some disputes however it is likely the client will be uninterested in the other side's perspective, particularly where there is no ongoing relationship between the parties or where party is weak. It is likely that the law will provide the most important benchmark against which possible settlement should be judged. For this reason Macfarlane explicitly acknowledges that "… the use of the law to predict alternatives to negotiation remains a critical dimension of skilful negotiation."[13] In these circumstances skilful negotiation involves a clear exposition of the law to the particular circumstances backed up by credible evidence grounded in a genuine attempt to resolve the dispute. Positional bargaining based on exaggerated claims unsupported by credible evidence with little legal merit is strongly discouraged by pre-action protocols and is eschewed by the new lawyer.

Careful analysis of substantive legal rights is critical to the achievement of fair settlement.[14] The integration of legal expertise with interest based bargaining, which acknowledge clients non-legal objectives, such as an ongoing commercial or personal relationship is recognised as the most challenging dimension of conflict resolution advocacy. A crucial factor in analysing the often complementary nature of the relationship between rights and interests is for the new lawyer to fully understand the client's motivations and considered objectives. Given the potential importance of non-legal interests in achieving an optimum settlement the traditional "lawyer in charge" model of the lawyer client relationship, based on legal expertise, is replaced by a partnership model. Aside from greater sharing of goals and motivations the partnership model encourages informed participation by the client in the appropriate dispute resolution process, negotiation, mediation, judicial settlement conference or adjudication. Further if a consensual process is selected the client is normally expected to engage in the process and not be relegated to the role of passive observer. Clearly the client's informed consent to the appropriate process requires the new lawyer to have substantive knowledge of the relative merits of consensual and adjudicative processes.

Professor Macfarlane considers that many of the ethical challenges confronting the new lawyer arise from the new lawyer's role as a conflict resolution advocate. She makes the point that the duty of lawyers to clients within a traditional adversarial litigation framework is reasonably well articulated by rules of professional conduct. In short, rules of professional conduct typically provide that the lawyer's obligation is to pursue the client's interests subject zealously to an overarching duty to the court.[15] In this context client interests are synonymous with legal rights and the procedural steps necessary to vindicate substantive rights are being increasingly managed by

11 John Peysner and Mary Seneviratne above n 8.

12 This insight has been popularised in the book by Roger Fisher, William Ury, and Bruce Patton *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed, Penguin Books, New York, 1999).

13 Macfarlane, above n 1, at 166.

14 Fair, in this context, refers to settlements based on reasonable assessment of predicted adjudicated outcome; the new lawyer also understands that the law is just one way of achieving a principled basis for resolution.

15 See Lawyers and Conveyancers Act 2006 (NZ), s 4(d) which states: "the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients".

the judiciary. So if disputes arise concerning the litigation strategies adopted by overly aggressive counsel, an impartial expert on the application of the rules is available to provide a binding decision. The ethical landscape takes a different shape when the settlement process is characterised by consensus building rather than adversarial posturing. If consensus building to produce an optimum agreement is the objective, the question is not how much deception is permitted by the rules, but rather, that the disclosure information concerning facts, motivations and interests is more likely to produce a robust agreement than the withholding of information. The author acknowledges that the new lawyers focus on consensus building and settlement is problematic to the extent that settlement might be viewed as the goal rather than satisfying the client's interests. This danger is memorably expressed by Dame Hazel Genn when she stated "the goal of ADR is just to produce settlement rather than a just settlement".[16]

In her pivotal Chapter 8 the author discusses the ethical issues raised by conflict resolution advocacy. As with the traditional concept of advocacy the objective of the new lawyer is to advance the clients' interests. Loyalty in pursuing the clients' interests zealously is complicated by the recognition that consensus building also requires the new lawyer to take into account to some extent the interests of the other party. Ultimately, however, the new lawyer has a professional responsibility to ensure that the client is not pressured into a settlement which does not as far as possible match the clients' interests. In this regard joint decision making and rigorous reality testing is critical. The new lawyer must be careful not to allow clients to be pressured into an unjust settlement by opposing counsel, mediators, judges or the settlement philosophy of the client's new lawyer. Conflict resolution advocacy is not just about settlement, although as discussed above, the notion of justice is not restricted to adjudication based on legal rights, negotiated justice can also take into account non-legal rights. As settlement philosophy becomes pervasive the new lawyer must ensure that the dispute resolution process is appropriate to the needs of the particular client and not merely reflect the personal preference of the lawyer.

Professor Macfarlane also confronts the broader issue of the relationship between ethics and professional identity in the context of the conduct of lawyers in informal dispute resolution processes. She argues that conduct of lawyers and clients in informal processes is largely unregulated by codes of professional conduct.[17] Such rules and laws seem to fall short of approaching informal processes in good faith. Although good faith is a nebulous term, it is obviously not acting in good faith to use mediation for instrumental purposes such as fishing expeditions, not being properly prepared, or not preparing the client to engage in the process (assuming mediation is the appropriate process). It is also arguable that good faith negotiation does not include withholding information which includes critical facts about the case, clear exposition of the law relied on, and if relevant, non-legal interests.

While historically the author is correct in her assertion that rules of professional conduct and civil procedure do not usually reach into disputes which are not before the court, this position is changing as policy makers seek to reduce the time and cost which inhibit access to justice. Pre-action protocols are a good example of a reform which is intended to assist the early resolution of disputes. Sanctions apply for breach of protocols which require parties to act cooperatively in the exchange of information and to engage in genuine negotiation.[18] The effectiveness of pre-action

16 Genn, above n 4, at 117.

17 In New Zealand, rules for negotiation and private mediations are regulated by law: the Fair Trading Act 1986 and mirrored by rules of conduct which forbid deceptive practices.

18 See Civil Procedure Act 2010 (Vic), ss 29-31, ss 37-41; Civil Procedure Rules 1998 (UK), r 3.1.

protocols in enhancing timely, fair and cost effective dispute resolution is controversial.[19] Clearly the aim of protocols is to mitigate adversarial culture and to encourage parties to engage in conflict resolution advocacy rather than adversarial positional bargaining which often unnecessarily consume party and court resources before settlement is reached on the steps of the court.[20] Arguably the effectiveness of pre-trial protocols largely turns on lawyers discarding adversarial strategies and adopting the professional identity and skill set which Professor Macfarlane attributes to the new lawyer.

Given the inherent uncertainty of litigation, the changes to the rules of civil procedure which encourage early settlement are likely to contribute to the phenomena of "vanishing trials".[21] It is understandable that the new lawyer is primarily concerned with conflict resolution advocacy rather than adversarial trial lawyering. Importantly, conflict resolution, or settlement advocacy, recognises that substantive legal rights often provide a benchmark for the fair resolution of a dispute and are particularly important to protect the position of vulnerable parties. So while it is crucial for the new lawyer to provide clients with competent legal advice, an essential element of conflict resolution advocacy is the insight that rights based strategies will not always result in a robust and durable settlement that meets the client's interests. As might be expected in a book which focuses on the art of achieving a fair, timely and reasonable settlement which satisfies the client's interests, Professor Macfarlane argues that the traditional adversarial approach to legal negotiation should be rejected in favour of a problem solving approach which encourages the informal disclosure of information and consensus building. Her view is that lawyers must be effective negotiators; indeed she contends that negotiation should be at the centre of legal practice. This is supported by pre-action protocols which require lawyers to disclose comprehensive information and engage in "cooperative" negotiation, in a genuine attempt to resolve the dispute before proceedings are issued.

The evolution of the new lawyer grounded in the role of a conflict resolution advocate not restricted by rights based strategies has significant implications for the client lawyer relationship. This is because the traditional "lawyer in charge" model of the professional relationship between lawyer and client is often based on the lawyer's superior knowledge of procedure and substantive law. The basis of the relationship becomes more of a partnership to the extent the client's non-legal issues including relationship issues are factored into the resolution process. Professor Macfarlane does not shirk from engaging with the ethical dilemmas raised by the new lawyers' commitment to resolve disputes having regard to the legal and non-legal issues.

The author indentifies traditional legal education as an impediment to the evolution of the new lawyer. Her starting point for this argument is based on her assumption that legal education is "…critical to both the creation and reinforcement of the dominant norms and values of the legal profession".[22] Accordingly a legal education that largely remains in thrall to traditional models of lawyering[23] by focusing on dispute resolution via adjudication, is therefore failing to respond to

19 Dame Hazel Genn above n 4; Michael Zander *The State of Justice* (Sweet & Maxwell, London, 2000) at 41.

20 See, Civil Procedure Act 2010 (Vic), part 3.1 Pre-litigation requirements; Civil Dispute Resolution Act 2011 (Cth), s 4(1); Civil Procedure Rules 1998 (United Kingdom), r 1.4.

21 Julie Macfarlane "The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law" (2008) 1 Journal of Dispute Resolution at 61, citing Mark Galanter "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts" (2004) 1 Journal of Empirical Legal Studies at 459.

22 Macfarlane, above n 1, at 224.

23 Ibid.

the phenomenon of the vanishing trial and range of settlement processes encouraged by reforms to the civil justice system. In this context she poses a big question "how do we understand the relationship between legal practice and legal education?"[24] The question is of course rhetorical as she forcefully argues that in order to remain relevant legal education must reflect the contemporary practice of law.

To achieve this end students should be exposed to learning experiences which promote client centred creative problem solving approach to the resolution of disputes. Substantive knowledge of the law, which is critical, must be supplemented by communication skills and exposure to the theory and practice of effective negotiation strategies and a broad range of dispute resolution processes. She emphasises that vocational skills based training must be integrated with a theoretical appreciation of the relative merits of, in particular, consensual dispute resolution processes. Legal education which does not consider the emerging professional identity of the new lawyer as a conflict resolution advocate is considered to be remote from the current practice of law. Although this view will be controversial in the academy, as many legal academics view the practice of law as distinct from teaching the law to be beyond the role of teachers. Perhaps the real question is how should conflict resolution skills be incorporated into the curriculum? Stand alone or integrated into core subjects? She does not appear to draw a firm conclusion on this point although she is absolutely clear that "legal education must teach and promote reflective practice and the related capacity for problem solving".[25] She is surely correct to conclude that "information transmission via lectures that deal extensively with legal rules but ignore dispute resolution, client service, and professional attitudes provides neither reflective practice nor problem solving".[26]

As a student and teacher of Dispute Resolution and Legal Ethics I particularly appreciated the way in which the author constructed the professional identity and role of the new lawyer around the idea of conflict resolution advocacy. There is, and always has been, much more to advocacy than the adversarial, partisan presentation of legal rights captured by the hired gun model of lawyering. The reconceptualisation of the role of lawyers as dispute resolvers rather than adversarial gladiators does raise problems in relation to client autonomy and ethical boundaries relating to settlement and processes of settlement, such as the exchange of information, which are simplified by the traditional adversarial model of lawyering.

It is critical to note that these challenges are inherent in the reforms to the civil justice system which typically promote settlement as the primary form of dispute resolution. Conflict resolution advocacy provides a valuable framework to critically consider the scope and application of modern reforms. Perhaps understandably given the settlement orientation of the book, little mention is made that an important feature of the reforms is also to enhance access to court based adjudication. An interesting question might be how would the new lawyer respond to the requirement to act 'cooperatively'? Given the importance which Professor Macfarlane attributes to knowledge of substantive legal rights, exchange of information and importance of protecting weak and vulnerable clients, it is not difficult to imagine that the skills of the new lawyer adapt to the intention of policy makers to mitigate adversarial litigation culture.

Many law students, practitioners and judges are likely to find this important book inspirational and helpful in the development of practice which conforms with institutional rules attempting to

24 Macfarlane, above n 1, at 225.

25 Ibid, at 230.

26 Ibid.

modify the role of lawyers, and judges, in resolving disputes. Some legal academics will be disturbed and perhaps surprised by the idea that legal education should be concerned with the changing realities of legal practice. After all the aims of law school are typically broader than preparing students for legal practice and the experience of many academics increasingly does not include the exigencies of practicing law. This is perhaps the context for Kronman's view that "... [i]ts schools now encourage a style of scholarly work that is increasingly remote from - even hostile to - the concerns of practicing lawyers".[27]

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27 Anthony Kronman *The Lost Lawyer: Failing Ideals of the Legal Profession* (Harvard University Press, Massachusetts, 1993) at 353.

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