

JULIE MACFARLANE

THE NEW LAWYER

**How Clients Are Transforming
the Practice of Law**

Second Edition



UBCPress · Vancouver · Toronto

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Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies.

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Praise for the First Edition

“This book is brilliant! Professor Macfarlane analyzes the changes in the legal profession as fewer and fewer cases go to trial and legal information (and misinformation) abounds on the internet. *The New Lawyer* is a fascinating analysis of the shifting public perception and expectations of lawyers as well as ways that the practice of law has changed in recent years ... This is an extraordinary research-based analysis of the past, present, and future of the role of lawyers in our society. Thought-provoking for anyone interested in the future of the legal profession.”

– Susan Hansen, Hansen & Hildebrand, Milwaukee;
past president, International Academy of Collaborative Professionals

“This is a remarkable book. I recommend it to all as a profound explanation of the somewhat glacial revolution in legal services that began in the 1970s. It is a landmark book that speaks to the entire legal profession about itself. Professor Macfarlane’s empirical research and laser-like observations show how the distinctive threads of legal and facilitative approaches to conflict interrelate and form the fabric that is emerging from their confluence. A real-life vision of a changing landscape.”

– Chip Rose, lawyer and mediator; director, The Mediation Center, Santa Cruz

“Building on her cutting edge research on lawyering, with *The New Lawyer* Professor Macfarlane has established her place as a leading thinker in the areas of legal access,

negotiation, and dispute resolution. With an easy-to-read style breaking down complex and nuanced issues and the use of interviews with practising lawyers, Macfarlane eloquently educates the reader on the problems facing legal services and proposes workable solutions for the future. This book should be required reading for law students, practising lawyers, and policy makers in legal education and the organized bar.”

– Forrest (Woody) Mosten, collaborative lawyer and mediator; adjunct professor at UCLA School of Law; author, *Collaborative Divorce Handbook* (2009), *Mediation Career Guide* (2001), and *Unbundling Legal Services* (2000)

“For anyone who is considering going to law school, who is presently in law school, or who is already in legal practice, *The New Lawyer* is a must-read. Dr. Macfarlane paints a compelling picture of the future of lawyering and the significant role of legal education in helping create that picture. If the experience of my students reading the book at the University of Victoria is any indicator, Macfarlane’s description of the new lawyer will resonate with all persons interested in a progressive and honourable legal profession. The book might even signal an end to lawyer jokes!”

– Andrew Pirie, professor, University of Victoria Law School

“The legal profession needs a wake-up call, and *The New Lawyer* resoundingly provides it. Macfarlane persuasively critiques the outmoded habits of the profession and lays the foundation for the new settlement-oriented, problem-solving approach to lawyering.”

– David Hoffman, founding member of Boston Law Collaborative, LLC;
John H. Watson, Jr. Lecturer on Law, Harvard Law School; and Boston’s “Lawyer of the Year”
2016 in the field of mediation

“A provocative and hopeful vision of the ‘new lawyer’ who has chosen to embrace a more inclusive calling ... With Macfarlane’s guidance, it may be possible to reclaim the pragmatic nobility of the legal profession.”

– Nancy A. Welsh, Professor of Law, Dickinson School of Law, Pennsylvania State University;
chair of the Section of Dispute Resolution of the American Bar Association, 2016–17

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1

Changes in the Legal Profession and the Emergence of the New Lawyer

“You’re giving a speech about lawyers and *conflict resolution*? Huh?
I don’t usually connect lawyers with conflict resolution.”

– Waiter in Vancouver hotel

“The two lawyers were just saber rattling, seeing who
could piss the other off the most.”

– Former client, now a self-represented litigant¹

The disassociation between lawyers and conflict resolution expressed in these two statements reflects a public culture that increasingly regards lawyers as irrelevant to the practical solving of problems, and an individual experience that is unfortunately all too common. Both publicly and privately in our culture, lawyers are more often associated with conflict than with conflict resolution.

There is a growing divide between private citizens and the delivery of legal services. Over the past thirty years, legal services have increasingly focused on corporate and institutional clients, diminishing their relevance for ordinary people with domestic disputes (and without the resources to pay for expert aggression or defence). At the same time, legal aid and public assistance have dramatically declined and now assist only the very poorest in family and civil cases.² The disassociation between lawyers and conflict resolution does not work for commercial clients either – those who need to solve their business

conflicts without unnecessary expense, delays, obfuscation, and posturing. Spending vast sums of money and scads of time on “fighting” is no longer acceptable to major corporations and institutions. In any case, this strategy was never pragmatic enough in terms of results to be fully compatible with a business culture.³ The huge costs of protracted litigation and the delays in accessing judicial hearings increase a sense of profound disconnect between what the legal profession offers and attainable, expeditious conflict resolution.

If lawyers do not represent affordable and effective conflict resolution in our culture, then what is their function? What unique services and skills can they offer clients to justify their hourly rate? What value and advantage do legal representation bring? And what is it that twenty-first-century clients want lawyers to do for them? In order to answer these questions, the legal profession needs to adapt to changes in the professional environment – where the frequency of settlement in civil and family cases means a growing emphasis on processes such as mediation and settlement conferencing – and new social and economic conditions in the public sphere.

Prospective clients now have access to the World Wide Web: as one self-represented litigant put it, “Google is my lawyer.”⁴ Google may not be a very skilled or effective lawyer, but it is a lot less expensive than a “real” lawyer. Numerous studies now show that the cost of legal services is out of reach for many, and an unappealing big-ticket investment even for those with a reasonable income.⁵ Domestic clients – accustomed to shopping in the limitless environment of the web – now evaluate legal services against the standard of an expeditious, practical solution at a reasonable cost, and are far less likely than the previous generation to defer to their lawyer’s directions. This demand for “value for money” is coming from all client groups, and the phenomenal explosion of access to legal information facilitated by the web sets a new benchmark.

The consequences can be seen most dramatically in the exponential rise in the number of people going to court without a lawyer at their side. Self-represented litigants now account for at least half the docket in many family courts, and 30–45 percent in the civil courts.⁶ Many of these litigants cannot afford to even contemplate paying upwards of \$350 an hour for legal assistance. Many others reach a point at which they can no longer go on paying for a lawyer, long before their matter is concluded.⁷ Spending decisions differ in an era when Internet information is ubiquitous and proprietary information less walled off – there is a new sense of consumer empowerment. Some who may have taken their business to a lawyer – perhaps by using up their savings or forgoing other expenses such as a vacation or a new car – ten or even five years ago now regard legal services as out of their reach.

The New Lawyer of the twenty-first century must find creative, practical, and affordable ways to meet his or her clients' expectations and aspirations. This means a shorter time frame for achieving effective, appropriate, and sustainable outcomes. It means greater transparency about likely outcomes – and more frank talk about what can and cannot be achieved in the current justice system. It means offering the client tangible progress at a suitable price.⁸

Some of the consequences of a movement away from using lawyers include the development of web-based self-help legal services;⁹ a larger role for paralegals in areas delegated to them by the legal profession;¹⁰ new interest in “unbundling legal services,” so clients can purchase a particular service from a lawyer rather than retain the lawyer for full representation;¹¹ and a developing market for all types of vaunted “cost-effective” dispute resolution processes, including collaborative law and mediation.

Governments and policymakers have begun to take action. Placing a priority on cost savings and efficiency, jurisdictions across North America have introduced a variety of new systems (e.g., case management) and processes (e.g., mandatory mediation, settlement conferences) into civil and criminal justice systems, many focused on reaching an agreed-upon resolution. Some of these new approaches have been forced on lawyers by policymakers who recognize the inefficiency of a conflict resolution model in which almost everything resolves before trial but only after years of expending money on legal fees and accumulating paperwork, much of which is never used in the construction of a settlement. Increasing numbers of “access to justice” initiatives – such as court-based legal information services and online resources – are being introduced to assist the vast numbers of self-represented litigants.¹²

This book describes and analyzes the changes both inside and outside the legal profession that are driving a transformation in the role of lawyers, the nature of client service, and the fundamental principles of legal practice.

Economic and Demographic Changes inside the Profession

The first site of change for the legal profession is internal. The structure of the profession – particularly its economic footprint, and hence its practice emphasis – changed dramatically over the final twenty-five years of the twentieth century.

An obvious place to begin this analysis is the size of the bar. The number of lawyers has almost doubled in both Canada and the United States since the 1970s.¹³ The Canadian bar has grown tenfold since 1951, and it is estimated that the profession grows by another fifteen thousand lawyers every five years.¹⁴

The Canadian Bar Association recently reported that the number of practising lawyers in Canada is growing at a faster rate than the general population.¹⁵

The employment market for lawyers is not growing at the same rate, however. The last five years have seen law firm mergers – creating “mega-firms,” discussed below – and even firm closures.¹⁶ For the first time in thirty years, new law schools are opening in Canada,¹⁷ but in the United States there is a significant decrease in law school applications due to tuition costs and employment prospects.¹⁸ The likelihood that supply has outstripped demand – at least for traditional “full-representation” legal services priced using a billable-hours model – looms over much of this book’s analysis and discussion.

The Rise of the “Mega-Firm”

The practice of law has become increasingly directed to the service of corporate and institutional clients, which reflects the expanding influence of increasingly large corporations, who in turn impel the search for more efficient economic models, such as the increasing “outsourcing” (also known as legal process outsourcing, or LPO¹⁹) of document review, drafting, and physical appearances at hearings. While sole practitioners are still entering the marketplace, the proportion of practice conducted in larger organizations has risen at a much sharper rate, often at the expense of sole practitioners or small firms that do not enjoy the economies of scale available to larger units. Sole practitioners and small firms now face growing competition in their “core” areas – divorce, landlord and tenant issues, simple wills, and consumer bankruptcies – from a barely regulated market for paralegals, contract lawyers working for low salaries in larger firms, and even from advertised “legal help” services on craigslist.²⁰

While much of the data used as evidence of these changes originate in the United States, it is broadly applicable to other common law jurisdictions with similarly developed market models, legal professions, and legal systems. The profession in both Canada and the United Kingdom, for example, has experienced very similar patterns of economic restructuring over this period. Two studies that examined work patterns among lawyers in the Chicago bar have been especially influential in highlighting these changes. The first Chicago study, published in 1975, suggested that two “hemispheres” of legal work were emerging, one related to delivering services to personal clients and the other dedicated to serving commercial clients.²¹ A second study, sponsored by the American Bar Foundation and published in 1995, found a similar separation between personal and commercial work, although there was some overlap – for example, a tax lawyer might have both personal and corporate clients – and

generally a much higher level of specialization among practitioners.²² These conclusions were broadly accepted by Canadian researchers John Hagan and Fiona Kay, who recognized that the two hemispheres were typically represented by different models of law firm, with larger firms representing commercial clients and smaller firms or sole practitioners representing personal clients.²³ Most significant is the fact that in the last quarter of the twentieth century the corporate legal sector grew at a far greater rate than the personal sector. In the second study, 61 percent of Chicago lawyers' time was spent on work for corporate clients, compared with 53 percent in the first Chicago study, while the figures for personal client work dropped from 40 percent to 29 percent by 1995.

To meet the expanding demand from commercial and institutional clients, the so-called mega-firm has emerged. These firms can more effectively respond to corporate client needs by offering specialized departments and teams of lawyers dedicated to serving particular clients. The second Chicago study found that the average number of lawyers in a firm had rocketed from 27 in 1975 to 141 in 1995. Ron Daniels and Hagan and Kay have found a similar trend towards larger units and the absorption of sole practitioners in Ontario in the early 1990s.²⁴ Firms that serve mostly commercial clients can now offer them a range of highly specialized legal services in new or emergent areas that were unheard of thirty years ago, including international trade law, e-law, and a range of intellectual property disciplines. Professional regulators increasingly offer specialist qualifications and designations that recognize areas of special expertise. Law school curricula also offer a larger range of subjects representing many new specializations, especially in business law.

With the decline in their market share and workload, the earnings of sole practitioners have declined significantly over the last thirty years, and the earnings of lawyers (and especially partners) in large firms have risen exponentially. The profitability of larger firms is maintained by the concept of the billable hour; as a result, targets are set for lawyers at all levels, and younger associates in particular are required to work extremely long hours. Competition for the best young lawyers also means that in some cases earnings rise at a faster rate than profits,²⁵ which simply increases the pressure to bill more hours to make up the shortfall.²⁶

The billable-hours model has significant consequences for the culture of the mega-firm. By separating fee generation from salary calculation, the firm establishes and maintains a hierarchy within that is tightly controlled by the partners. Some firms now encourage consolidation of the power of the partners by establishing two levels of partnership – one of which enjoys only limited rights – in order to delay the achievement of full partnership status for

associates.²⁷ Mobility within the firm is difficult other than by embracing the given criteria (not only the volume of billable hours but also the various social requirements, such as client contact and networking).

The dominance of the mega-firm market model within the professional culture has had a profound impact on professional identity. Law students quickly learn to regard articles on Bay Street or a job on Wall Street as the ultimate mark of status and success at law school. However, once they begin working within a large firm, their self-image is often challenged by the realization that the economic conditions of their labour constrain the types of professional autonomy and responsibility for decision making that they assumed would come with the dream job for which they had competed so fiercely. In order to be economically successful within this model, lawyers must also accept significant limitations on their personal autonomy and decision making.²⁸

The Rise of Corporate Counsel

Paradoxically, another consequence of the increasing emphasis on corporate legal services in the second half of the twentieth century has been the establishment of corporate legal departments and the emergence of a new professional role: in-house corporate counsel. Almost unheard of prior to the 1950s, the number of in-house positions has grown rapidly and demonstrates the significance large corporations attach to keeping a firm handle on their legal strategies and costs. Where litigation is still contracted outside the corporation, in-house counsel acts as a highly informed client asserting the company's interests. Business analysts agree that the power and prestige of general counsel within any given corporation is greater now than ever before, and reflects a desire to take control over outside legal fees and strategy.²⁹

The numbers of corporate counsel appear to be growing at a faster rate than in any other sector of the profession.³⁰ According to Mary Daly, there was a 40 percent rise in the numbers of in-house counsel between 1970 and 1980, and a further 33 percent rise from 1980 to 1991.³¹ Robert Nelson found that the proportion of lawyers in corporate positions had risen from 4.4 percent in 1948 to 9.8 percent in 1988.³² According to a survey conducted by the Association of Corporate Counsel (ACC) in 2004, there were 71,702 corporate counsel working in 23,540 corporations in the United States. This number represents approximately 10 percent of the total number of practising lawyers in the United States.³³ In Canada, the Canadian Corporate Counsel Association was established as a conference of the Canadian Bar Association in 1998 and now has almost 9,000 members.³⁴

A More Diverse Legal Profession

Besides structural and economic changes, the profession has experienced dramatic change in demographic composition during this period, at least at the entry level. Women and minorities are entering law school and the profession in unprecedented numbers, and law school classrooms and associate levels in law firms have taken on a different gender and ethnic composition as a result. For example, in the 1950s just 4 percent of law school entrants were female. By the 1990s, the numbers of men and women in law school classrooms had become virtually equal.³⁵ Lesser but still significant increases have also been recorded in the numbers of minority students attending law school, which rose from 4.3 percent of enrollment in law schools approved by the American Bar Association in 1969 to 13.1 percent in 1990.³⁶

It seems, however, that previously excluded groups have not yet acquired sufficient power to affect the organizational culture of the law firm. Research shows that these newer members of the profession also leave at higher rates than established white males. When they stay, they rarely acquire the power and status their white male counterparts continue to enjoy. Fiona Kay and John Hagan's work has highlighted the marginalization of women in practice, even when they reach partner level.³⁷ The systemic barriers, including the lack of role models and mentors and inflexible and anti-social working hours, were chronicled in the 1995 report *Touchstones for Change: Equality, Diversity and Accountability*, which concluded that the consequence is a "glass ceiling" in the legal profession for women and minorities.³⁸ Women are also leaving the profession in greater numbers than men.³⁹

This means that despite some efforts at diversification, especially at the level of law school recruitment, the legal profession in Canada continues to be overwhelmingly white and underrepresents minorities. A 2004 survey sponsored by the Law Society of Upper Canada reported that less than 1 percent of the sample described themselves as African-Canadian, South Asian-Canadian, or Aboriginal.⁴⁰ It is well known that minority law graduates face greater obstacles to securing articles than Caucasians. Lawyers of colour face many structural barriers similar to those of women lawyers, including a lack of mentoring opportunities and difficulty achieving partnership status. Like their female colleagues, minority lawyers are often marginalized in particular roles within the profession, with an assumption that they will prefer and adopt certain positions.⁴¹ The consequence is that minority lawyers are well represented in legal clinics and government positions, but underrepresented in the mega-firms that are the economic engine of the profession.⁴²

The structural changes of the last thirty years have profoundly reshaped the business model of the profession. The dominant market model of lawyering is moving towards larger and larger firms, providing increasingly specialized services to primarily corporate and institutional clients, and a growing corporate counsel sector. These changes have transformed the organizational and economic structure of the profession, and helped to shape its practice norms. The limited impact to date of a generation of women and minority lawyers should alert us to an apparent contrast between the relative ease with which the profession accommodates changes to its structure and organization and its resistance to deeper challenges to dominant norms and values.

Changes in Dispute Resolution Processes

A second site of change is the transformation of many civil and family – and, to a lesser extent, criminal – dispute resolution processes that has been changing practice for many, if not most, lawyers since the late 1980s and early 1990s. Pressure for justice reform has come and continues to come from government, from the largely dissatisfied and often disenfranchised public, and from influential members of the bench and bar. Some of the calls are for simplification of procedures; some are for expedited processes and the reduction of delays in reaching resolution. Many are for greater emphasis on early intervention and assistance with resolution, enabling cases that will settle anyway before trial to settle earlier, at lower cost and with less damage to the parties. In 1994, the Ontario Civil Justice Review estimated the cost to each party for bringing a case to trial (assuming three days) in the Superior Court to be \$38,000. The average family income in the same year was \$44,000.⁴³

The widespread introduction of court-connected and private mediation programs, case management, and judicial mediation into courts throughout North America – programs that encourage and facilitate early negotiation and assessment of resolution possibilities – is testament to concerns about costs and delays in justice. Civil and family justice innovations throughout North America, especially over the past twenty years, have focused on changing the procedural context within which settlement might occur, including case management programs (setting timelines, encouraging the early exchange of documents) and court-annexed mediation programs (assigning a neutral third party to facilitate settlement discussions and/or to evaluate potential legal outcomes). As a result, all courts now function differently from twenty-five years ago, with at least some shift towards the judicial management of cases and their settlement.

While settlement before trial has long been the norm, the rate of resolution before trial has risen to 98.2 percent.⁴⁴ Even before the initiation of major procedural reforms designed to divert civil cases into early settlement negotiations, the number of full trials had been steadily declining for several decades. Data collected by Marc Galanter show that, in spite of the growth of all aspects of the legal system (more law, more lawyers, more judges, more court personnel, and bigger budgets), the absolute number of trials has declined significantly since 1962.⁴⁵ The phenomenon of the “vanishing trial” is not limited to the United States. The proportion of civil cases that proceed to full trial in Ontario has also been falling over the past twenty years. One study using a sample of approximately six hundred cases a year shows that recourse to full or partial trials fell from 4.9 percent in 1973–74 to 3.2 percent in 1993–94.⁴⁶ The decline in the number of full trials appears to have had little overall impact on the accumulation of cases on trial lists, however, since, when trials do take place, they are often longer and more complex (using more expert witnesses and taking up more courtroom time).⁴⁷

Outside the courts, some of the most significant innovations in developing early dispute resolution processes for clients have grown out of the dissatisfaction felt by some members of the profession with the frequent inability of traditional litigation to bring peace and closure to their clients. Some sectors of the bar are experimenting with practice models that focus on practical problem solving and have reduced their reliance on complex, expensive, and time-consuming procedures. A few initiatives – such as collaborative law, where counsel is retained only to negotiate and is disqualified from litigating the case, in an effort to incentivize negotiation – have developed out of the frustration of lawyers who want to offer their clients a faster, less expensive, and more pragmatic and realistic approach to conflict resolution.

How This Changes the Lawyer's Role

The shift away from full trials – and the growing importance and credibility of processes designed to facilitate the settlement of issues that are unlikely ever to be argued in a courtroom – has many layers of significance for the legal profession. Recent scholarship examining the phenomenon of the “vanishing trial” has pulled back the curtain on the small amount of time litigators now spend on trial work and opened a debate over academic and professional training.⁴⁸ Lawyers and judges are increasingly involved in legal tasks that are not related to trials. Lawyers are offering different kinds of services to their clients and performing different tasks. Some of these tasks, such as negotiating with the

other side or providing the written forms of advocacy required for pleadings and other litigation documents, are familiar but acquire new significance in a legal culture that is increasingly conscious of the need to offer practical problem solving and resolution. Lawyers are also spending more time on newer and less familiar forms of advocacy, such as judge-led settlement conferences and pre-trials as well as representation in mediation.

There are more opportunities for lawyers offering services within a different financial structure. Best known among alternative billing practices is “unbundled legal services,” where lawyers offer expertise and assistance on an hourly as-needed basis to individuals who will undertake some tasks themselves in order to save money.⁴⁹ The closer a matter gets to trial, the more difficult it becomes for self-represented litigants to handle their case alone, yet they often lack the financial resources to pay counsel for full representation.⁵⁰ The stress and difficulty of conducting a trial as a person without a legal background is immense, as attested to by data collected from individual self-represented litigants.⁵¹ In some jurisdictions, rules on the appearance of paralegals have been relaxed to enable a less costly alternative to trial representation, whereas in others restrictions remain.⁵²

The combination of the decline of the full trial with the development of new processes to facilitate dialogue about settlement (some of them mandatory) has changed the environment within which much contentious legal practice occurs. While the impact of these changes is greatest on civil litigators, it also affects lawyers who specialize in administrative law matters; most administrative tribunals now require or recommend an early settlement meeting, pre-trial, or mediation. In corporate legal services, there is growing emphasis on dispute resolution clauses that enable parties to retain control over future disputing processes, as well as other strategies that anticipate and reduce the costs of future conflict.

Criminal Justice

Reform is also taking place within the criminal justice system. Interactions between the public and the criminal justice system demonstrate similar patterns of dissatisfaction and diminishing trust, and a disconnect between the work of lawyers and the courts and real-life problem solving. There is manifest evidence for the failure of the retributive model to reduce crime or increase public safety in light of recidivism rates.⁵³ Overcrowding in prisons and inadequate resources for rehabilitation programs mean that incarceration often

compounds tendencies towards crime and antisocial behaviours. Disillusionment with the retributive model has led to legislative and other initiatives to encourage restorative justice processes and outcomes that rest on the offender's acceptance of responsibility and agreement to cooperate with a sanctions regime.

As or more important, the criminal justice system is losing credibility as an unbiased and fair means of social control. For example, First Nations people make up 2 percent of the population of Canada but 10.6 percent of its prison population.⁵⁴ In the United States, African Americans make up 12 percent of the population and 44 percent of the prison population.⁵⁵

These startling statistics, along with the rise of victims' movements asking for greater involvement in the punishment process, have generated momentum to look beyond traditional models of crime and punishment to community panels, victim/offender mediation, and sentencing circles. In Canada, legislation now places responsibility on criminal court judges to consider the possibilities of a restorative justice process for "all offenders, with particular attention to the circumstances of aboriginal offenders."⁵⁶ The 2002 *Youth Criminal Justice Act* introduced a new regime described as "extra-judicial measures," which promotes the use of earlier, preventive alternatives to incarceration for juvenile offenders, where the offender pleads guilty and the victim is willing to participate in a dialogue.⁵⁷ Both of these innovations reflect the same trends seen in the civil courts, with an effort to reduce judicial time spent on hearing arguments and a corresponding emphasis on broadening the responsibility of the parties, with the assistance of counsel, to negotiate an appropriate outcome. All of these processes are based on principles of dialogue, information exchange, and agreed outcomes, as are civil justice processes such as mediation and settlement conferencing. The universality of these norms is a reminder of just how closely related some types of criminal behaviour are to civil torts, especially where personal relationships are affected.⁵⁸ Just as civil litigators are having their legal practice changed by civil mediation and other settlement processes, so too are criminal lawyers seeing their responsibilities, their relationships with client offenders or victims, and the strategies they may pursue altered by the introduction of restorative justice processes.

How Have These Changes Affected Legal Practice?

How much impact have changes in dispute resolution processes and norms had on the legal profession? Just as we saw in examining economic restructuring within the profession, there is plentiful evidence of significant external

changes – in this case, in the ways in which contentious matters are managed by lawyers and the courts. The sheer volume and extent of civil justice reforms suggest that a settlement orientation is here to stay. As well, some evaluation data indicate deeper systemic changes measured by the acceptance of these new processes by both lawyers and their clients.⁵⁹ While there is less clarity about the effectiveness of restorative justice programming (e.g., in bringing about lower levels of recidivism), early experiments have produced good results.⁶⁰ Some civil and criminal programs have been in existence now for almost two decades, and we are beginning to see the mid-term impacts of an emphasis on facilitating early settlement wherever possible. A deeper level of acceptance and change may be a matter of time.

One conclusion drawn from studies of more established dispute resolution programs is that continued exposure to mediation and other settlement processes, even where these are initially resisted by the bar (especially where they are mandatory), generally builds recognition of the usefulness of the process and commitment to its continued use. Several studies now demonstrate that the attitudes of counsel become more positive with time as a result of repeated experiences with mediation. Some lawyers have even described themselves as “converts” or “believers.”⁶¹ In less melodramatic terms:

My experience has now belied my original idea that counsel can always do this themselves ... I recognize that in some cases what happens would never have happened that way without a mediator ... Without a mediator we often stop [negotiating] on hearing first offers.⁶²

Another lawyer summed up what these studies are showing:

I think it's fair to say that my experience with mediation has improved every time, and I suspect it will continue to improve.⁶³

Similar changes over time are illustrated in data on changes in lawyer/client relationships in settlement processes. What is initially an unfamiliar and often uncomfortable shift in practice – for example, working with clients at the table rather than holding them at arm's length from mediation – becomes more comfortable over time, enabling lawyers to explore its potential benefits. Many find that their commercial clients welcome the opportunity to take a more hands-on and active role in managing the file. Others point out that mediation can provide a welcome reality check for less experienced clients:

Mediation can ... put things into a different perspective, including seeing the shades of gray that were always apparent to the solicitors.⁶⁴

The frequency with which lawyers now encounter various court and private dispute resolution processes is also reflected in cultural norms around a “mainstream” style of practice. Lawyers who are vocal about opposing settlement and gunning for trial are more likely to describe themselves as “dinosaurs,” whereas they would once have regarded themselves as part of the mainstream. Related to this, there is some evidence of a growing acceptance of the importance of taking an earlier look at settlement, in contrast to a system where settlement most often took place right before trial, and lawyers who eschew this newer approach feel the need to justify their position.⁶⁵

While these findings suggest that familiarity and experience with dispute resolution is having an impact on professional norms and values, other data suggest that change is still often superficial. In criminal law, attitudes towards restorative justice and the actual use of alternative measures in the sentencing of juveniles and other offenders varies widely between prosecutors and courts. Civil justice reform that does not resonate with the local bar association is often reassimilated into more familiar process models and outcomes (or, in Ontario, “downgraded” to a far less interventionist model that allows lawyers complete control over the timing of mediation⁶⁶). We know that lawyers are critical in influencing their clients’ attitude towards mediation or any other mandated settlement process, and in determining the amount of effort and goodwill that is invested in the process.⁶⁷ Given the reality that settlement efforts require good faith, and of the influence of lawyers over their clients, it is easy for the claim that these processes are a waste of time to become a self-fulfilling prophecy.

Other strategies for resistance include belittling mediators and other “softies” (colleagues) who are supportive of mediation, using mediation and settlement conferencing to obtain a strategic advantage (such as informal discovery) rather than entering into them with an intention to settle, and “going through the motions” by showing up but being unprepared to negotiate. The creative capacity of lawyers to find ways to frustrate the purpose of mandatory settlement procedures if they are convinced that mediation is unhelpful or useless is apparently boundless. In Ontario, the pioneering early mandatory mediation program (requiring mediation within ninety days of the filing of the statement of defence) has been altered to allow mediation to take place any time before trial, arguably in part as a result of pressure from the bar as well as an under-resourced case management system.⁶⁸ Also in Toronto, lawyers boasted openly

about defeating the random assignment case management system that existed in the mid-1990s by closing a file that was selected for case management and refileing it in the hope of escaping assignment. It is important to remember that formal procedural reforms are typically driven by legislators and policymakers and only rarely by lawyers themselves. Unsurprisingly, imposed change, such as the introduction of case management or mandatory mediation, has not been welcomed by many bars, which regard such initiatives as encroachment on their professional autonomy.

Other lawyers accept the formal imposition of a mediation consideration but do not see this as having an impact on their practice.⁶⁹ There is still a belief among some that they do not need to be concerned about any new knowledge or skills training that might equip them to function more effectively in dispute resolution processes, and law school curricula address these issues only through electives. There is still a widespread assumption that, of course, a lawyer knows how to negotiate or advocate effectively in a mediation or settlement conference, without an acknowledgment that this requires a different skill set from appearing in an adversarial hearing. These lawyers do not believe that any special training or the acquisition of new skills and knowledge is necessary to function effectively in a range of dispute resolution processes as well as in traditional adversarial proceedings; indeed, they may not see these as different in any important way.

Some lawyers continue to express discomfort with processes that require a different approach to advocacy and negotiation, that diverge from the traditional advocacy skills that they are comfortable with and that have become central to their self-image. As one put it:

I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained 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 strong and better than you are.⁷⁰

Change? What Change?

This chapter invites the conclusion that the legal profession embraces some types of change and resists others. While the profession has historically been adept in responding to changing marketplace conditions, its core norms and values are much more resistant to change. Earlier, I suggested that the continuing difficulty faced by women and minorities in reaching the same levels of status and influence as their white male peers is a good example of the profession's ability to

make structural adjustments without challenging or changing internal norms and values. The profession cannot resist the integration of women and minorities, but it can maintain its traditional systems of status, hierarchy, and evaluation in order to keep them “in their place.”

Another example of the limits of structural change in altering deeper professional values is the entrenchment of traditional attitudes towards practice, as shown, for example, in the image of the pit bull in the quote at the end of the previous section (or, as one female lawyer put it, “a bulldog with lipstick”).⁷¹ The types of strategies and attitudes implied by the pit bull and bulldog analogies are still widely regarded as appropriate and even normative lawyering behaviour – this despite the fact that justice reforms mean that lawyers are increasingly asked to explore an early negotiated settlement through the intervention of a mediator or a judicial officer, and that commercial clients in particular are more likely to press for expeditious settlement in place of protracted litigation.

It is certainly true that problem-solving styles of negotiation are more widely understood and used now than they were thirty years ago. This is in part the result of a growing market for continuing legal education programs and publications that teach models of problem solving and principled negotiation. There is also evidence, however, that the traditional values of advocacy and adversarialism have, if anything, become more entrenched as a result of the increasingly competitive environment of the 1980s and 1990s. Extreme versions of these traditional values are common in larger firms in big cities, which promote competition and believe that they need to cultivate a macho image, particularly for their commercial clients.⁷² The consequence is a notable decline in civility and a rise in adversarialism in civil litigation, exemplified by the increasing use of the unfortunately named “discovery” process to delay, obfuscate, obstruct, and badger.⁷³

Possibly the most conclusive evidence for the assertion that despite sweeping structural changes, the profession’s underlying norms and values remain relatively unchanged is to be found in our law school classrooms. Despite important curriculum innovations – primarily the addition of specialized substantive courses, mostly in the business area but also in human rights, international law, and critical legal theory – the philosophy and substance of legal education, particularly its implicit ideal of what makes a “good” or “successful” lawyer, has been easily sustained without major challenge for the thirty years that I have taught in law schools. There have been some calls for a renewed commitment to professionalism⁷⁴ and some work on enhancing the practical nature of aspects of the law school curriculum.⁷⁵ However, legal education continues to be focused on the teaching of substantive knowledge, in

an adversarial normative framework, and within the dominance of adjudicative decision making. Considerations that are irrelevant to the making and proving of a legal case are ignored, and students are not taught how to assess or deal with such issues – the “client” is a purely hypothetical construct to most law students. The lawyer’s “philosophical map” continues to include certain skills, knowledge, and values and to exclude others, and what are included and excluded have remained largely unchanged.⁷⁶ Over the past decade, important reports – such as the American Bar Association’s MacCrate Report⁷⁷ and the Canadian Bar Association’s *Futures* reports⁷⁸ – have called for change, but despite the repeated calls for a more responsive legal education curriculum, laws schools continue to focus on the “old” skills: appellate advocacy via mooting, and traditional doctrinal pedagogies and assessments. The practice values promoted by legal education in North America continue to emphasize technical skills, client control models, and the discounting of non-legal and emotional considerations in disputing. These remain the profession’s dominant values.

In summary, although significant change has taken place in the structural, economic, and procedural character of legal practice, these changes have had far less impact than one might expect on the core practice norms and values or on the ways law students are prepared to enter practice. One can see the impact of a growing focus on corporate clients and the power of the mega-firms in the business orientation of many law school curricula, but this emphasis does not extend to a re-examination of the lawyer’s role, and even further entrenches a traditional model of client advocacy founded on argument and assertion. There is a growing disconnect between traditional adversarial advocacy and the pressure to participate in early settlement processes – a tension experienced by many litigators and met with anything from outright resistance to demands for an entirely different approach to legal training.

Despite the speed and scope of change, both internal and external to the profession, there seems to be only patchy interest in a serious mainstream debate over what these mean for the skills and services lawyers sell to clients. Procedural, demographic, and business changes within the profession appear to have had little, if any, impact on the types of practice knowledge valued by the larger firms who serve an increasingly corporate-dominated client base; technical specialist knowledge is still widely regarded as vastly more important than process experience or resolution expertise. At least at the point of hiring, there seems to be little interest in other skills and qualities, such as empathy, wise counsel, creativity, and conflict resolution. In this largely unaltered world, legal education continues to be functionally efficient: the image of lawyering

promoted by the law schools fits with the qualities emphasized by many law firms at the entry level.

At the other end of the legal services market, as the gap between those who are eligible for public legal assistance and those who can afford lawyers widens,⁷⁹ it may be that lawyers are losing the battle for public regard. Public skepticism about the cost of legal services is now widespread. Historically, negative public attitudes towards the legal profession as a whole – exemplified in lawyer jokes – has been balanced by the fact that most clients report that they are satisfied with their own lawyers.⁸⁰ Some have reasonably concluded that there is no apparent threat to the assumptive status of lawyers as the authoritative agents of conflict resolution in our communities,⁸¹ but this may no longer be the case.

A consistent critique is emerging among those who are now self-representing of how they were served by the lawyers whom they had previously retained, identifying in particular poor listening skills and insufficient consultation and transparency over fees and costs.⁸² Both developments suggest a widening gap between what the public wants and can afford and what lawyers continue to offer.⁸³ When they retain a lawyer, clients and potential consumers of legal services have limited information about alternative models of lawyering, such as work based on a limited-scope retainer, legal “coaching,” or fixed-fee services. They just know that they want a speedy and affordable solution. A very large number of middle-income litigants are self-representing because they feel that legal representation is too expensive, represents poor value for money, and does not give them enough personal agency.

There are of course exceptions to the largely passive response of the bar to these potentially critical challenges to its legitimacy. At senior levels of the bench and bar, there are individuals who increasingly recognize the need for adjustment and for acquisition of new skills for negotiation, consensus building, and settlement. However, these voices have not yet been able to challenge the traditional benchmarks for what makes a “good” lawyer that law schools and the recruiters continue to use – namely, high grades for memorization in technical courses and success in competitive mootings, rather than strong interpersonal and communication skills or successful clinical experience. At the critical point of entry into the profession, there is a continued failure to recognize the skills and qualities that are needed by a new generation of lawyers in a new environment of dispute resolution, facing a new set of client expectations (including, increasingly, affordability and value for money). The disconnect that occurs once these students become lawyers operating in the real world is plain to see.

The absence of real change in underlying values and norms should not really surprise us. Lawyers are an extraordinarily powerful professional group, whose clients hire them for their superior expertise and rarely question their judgment. Jokes denigrating the profession at large abound on the Internet, but how many clients – even sophisticated ones – can constructively and knowledgeably critique their lawyer’s strategy and demand a specific alternative course? As in any professional field sustained by its high social status, much of what lawyers do as a matter of course – diagnosis, strategy, argument, and, eventually in most cases, settlement – has gone unquestioned and unchallenged for decades, despite the possibility of alternative approaches, potential efficiencies, and new ideas.

The Evolution of the New Lawyer

I first argued in the 2008 edition of this book that what we were seeing was the evolution of a new form of lawyering, one that would be more effective and realistic in an evolving disputing landscape in which trials are a rarity. Eight years on, this continues to be my view. However, another, critical aspect of the evolution of the lawyer’s role has become increasingly important since the first edition of *The New Lawyer*: how the profession responds to an increasingly empowered client, both corporate and personal.

These clients can access knowledge through the Internet, can carry out some tasks associated with their matter themselves, and are looking to their professional advisers for more than technical assistance or courtroom advocacy. The empowered twenty-first-century legal consumer directly challenges the ingrained paternalism of the profession. Many clients no longer want to be told that lawyers know better what is good for them; they want to be talked to as peers. Many are no longer content with “trust me, I’ll take care of it”; they want to know exactly what they are paying for, and why. This decline in deference is a phenomenon not limited to lawyers – it is taking place across all aspects of professional services – but it may be an especially bitter pill for the legal profession to swallow. Status – as an expert, as a person of social stature in their community, and as an earner – is a core element in the identity of many entering the legal profession. The historical assumption that lawyers must “take care of” their clients needs to be replaced with an open, working partnership in which there is full transparency and shared decision making.

What would it take for a new professional identity to evolve and emerge from these multiple layers of change – in the profession’s internal structure, in the practice of litigation, and in external conditions (e.g., the Internet-savvy

empowered consumer)? What would happen if, in addition to reorganizing the way it does business and manages client files, the profession also examined its core values and skills in light of the changes of the last thirty years?

Rethinking Practice Habits

A prerequisite in any change process is a willingness to take a long, hard look at cherished habits and modes of operation. Many elements of the practice habits of lawyers, like those of any other professional, are fairly routine and go largely unquestioned. Every lawyer can identify some routinized habits in his or her particular practice. Some of these habits relate to negotiation, which is used as a detailed case study in Chapter 3.⁸⁴ There are also parallel sets of habits and routines for litigation drafting, courtroom advocacy, corporate deal-making, and so on. Some of these habits are useful, important, and often successful. Others need re-evaluating in light of contemporary conditions. All need to be responsive to the needs of the individual client.

Practice habits arise from, and are sustained by, norms and values that form the ideological backbone of the lawyer's professional identity. These norms and values are in turn sustained by beliefs, many adopted unconsciously long ago. The evolution and modification of beliefs is an incremental process that should continue over the course of an individual's professional life and over the centuries-long development of the legal profession. In order to challenge beliefs, it is necessary first to recognize and understand them. The hallmark of a vibrant and responsible profession is the ability to re-evaluate itself without fear and in anticipation of offering enhanced service.

Re-examining old habits does not mean starting from scratch. Effective representation of clients in settlement-oriented processes require some new "habits" of action and thought, but many of these will build on existing skills and values, including client loyalty, information assimilation, and analysis. The discourse over just what needs to change has sometimes been misleading and even polarizing. A popular expression is "paradigm shift." A call to lawyers to embrace paradigm shift assumes that real change requires the elimination of the old paradigm (characterized by the old lawyer) and its replacement with a new one (the new lawyer).⁸⁵ However, many of the traditional tools that lawyers use to protect client interests remain important, for example, the evaluation of possible outcomes, the development of strategy, and the firm assertion of bottom lines (supported by legal advice). The core value of protecting and advancing client interests is not changed by dispute resolution processes that help focus the parties on the potential for settlement.

The introduction of consensus-building processes into legal disputing structures does not mean an elimination of the old system of litigation. Rather, litigation continues to travel alongside efforts to settle legal disputes using settlement processes. Although trial work makes up a much smaller part of legal practice than in the past, many trial advocacy skills are similar to, or congruent with, the skills and techniques that the New Lawyer needs in order to practise conflict resolution advocacy. For example, good litigators are extremely capable of assimilating large amounts of new information, analyzing and synthesizing data, and moving between strategies and options in order to maximize their clients' gains (often by providing expert legal advice). The New Lawyer needs these same skills. But fewer and fewer lawyers are now regular litigators, especially at a trial level. In working towards a just and expeditious settlement, the New Lawyer will be making different choices about what information to prioritize, how to use data (exactly how that information is used), and what strategies are most effective in bringing about a good outcome for the client.

The profession needs to be willing to challenge its present assumptive habits of practice and belief if it is to evolve a new professional identity – the New Lawyer – that accepts and responds to all these new challenges. This includes a willingness to take some risks, to cautiously experiment with new dispute resolution processes, and to consider offering services to clients who may do some of the work themselves and who are, in the spirit of the contemporary consumer, looking for “coaching” rather than directing. These new experiences will in turn lead to a demand for training that meets the challenges of this new environment by addressing the skills and knowledge gap.

Filling the Skills and Knowledge Gap

The way that legal services are now offered as well as demands for further change require new skills and knowledge that those who entered the profession one or more decades ago did not encounter in their own legal education and training. While most law schools now offer some training in dispute resolution – basic negotiation and mediation skills – as electives in the curriculum, many law students still graduate without knowing the difference between a mediation and an arbitration; what it takes to be an effective advocate in a settlement process; the numbers of potential personal clients who are now self-representing in family and civil court; or the range of (fully indemnified) possible retainers that can enable clients to pick the legal services they can afford to pay for.

Some lawyers are especially effective in settlement processes but others come ill prepared and, as a result, are sometimes wrong-footed. The most effective ones can identify special new skills and knowledge – albeit often built on more familiar practices – that are valuable and relevant to them and their clients. Much of this they have developed on a need-to-know basis, having been thrown into mediation or similar processes and discovering that these processes offer a genuine opportunity for advancing client interests:

My role has significantly changed and now I don't think a litigator can be a litigator without also being a ... person who has advocacy skills relevant to conducting the process of mediation ... How do you do an opening statement? How do you identify issues? How do you know to prepare yourself for what issues you want to give up? What issues do you want to hold on to? How do you best present your client's case? *All of those things are done quite differently at the mediation.*⁸⁶

As yet, relatively little writing or training has focused on the skills of counsel in settlement processes.⁸⁷ There are complex and sophisticated skills and qualities involved (e.g., persuasive oral advocacy, effective interpersonal communication, patience and attention to detail, the ability to rapidly assimilate large amounts of new information), as well as new knowledge required (e.g., basic negotiation theory, how to choose the right mediator for your case). Our current understanding of these skills and new areas of knowledge for lawyers is as yet underdeveloped. As the use of settlement processes continues to grow, the expectation and the market value of skillful performance will rise. Similarly, as commercial and institutional clients increasingly look to counsel for advice on process design in large and complex cases, the skills and knowledge associated with dispute systems design will become a commodity of consequence. If obtaining these new skills and the knowledge that underpins them ensures continued professional income and status, then the profession will buy in.⁸⁸

The same can be hoped for new skills and knowledge that anticipate and respond to the expectations and needs of twenty-first-century clients. In order to work with clients as peers and to respect them as decision makers and problem-solving partners, lawyers need to learn to talk less and listen better. Respecting the terms of the new professional “contract” between legal expert and a savvy, sophisticated client will be necessary in order to market legal services. Lawyers may find that they need to take seriously client desires – for empathy, for shared decision making, and for affordable financial arrangements with realistic cost caps – that they may have previously considered an optional add-on.

Changing the Norms of Legitimacy

The ultimate step in any process of change is altering the norms of legitimacy. Here, this means changing our understanding of what “good lawyers” do. In the old model, a good lawyer is a zealous advocate, asserting the best-case outcome for as long as possible, neglecting negotiation and continuing to assert rights claims until a final “compromise” is reached on the courthouse steps. The good lawyer of law school mythology spends every day in appeals court arguing obscure points of law.

Or are good lawyers those who see themselves as conflict resolvers, providing efficient, realistic, principled, and empathetic dispute resolution with constructive and practicable results? Real change follows when these norms change. For example:

Good lawyers, in this town, understand what mediation’s about ... I think that’s what is accepted in the system, so lawyers have made the change.⁸⁹

The challenge is to create credibility and legitimacy within the profession itself for both new dispute resolution processes and a modernized lawyer/client relationship. Lawyers who choose to practise in a settlement advocacy model need a supportive community within which to work. One indicator of change would be a situation where lawyers in a community find themselves regularly facing opponents who have a similar level of skill and commitment to engaging in serious settlement processes. Many lawyers presently describe the frustration they experience when a negotiation or mediation meeting reverts to the lowest common denominator – when the lawyer on the other side is poorly prepared, or unskilled, and/or unwilling to take the negotiation process seriously. They cannot gain traction. Exasperation with the predominance of settlement-averse lawyers in their community has led collaborative family lawyers to form their own networks that over time have provided critical mass for their alternative process.

Outside the voluntary networks of like-minded lawyers, a critical mass of support for settlement processes can be achieved only by changing the types of practice associated with good lawyering. This shift may be accomplished faster in smaller communities, where the legal culture is often more cohesive, with stronger prevailing norms and a relatively homogeneous client base.⁹⁰ In larger communities, the role of the most influential players in the wider legal community – and their leadership role in encouraging innovation and change – is

critical. Local professional leaders include not only members of the judiciary but also seasoned litigators.⁹¹

A similar level of normative change is required to confront the challenges of a new generation of legal consumers, both corporate and institutional as well as personal. Public confidence in legal services and the legal system is at an all-time low.⁹² Corporate and institutional clients want to control decision making; experienced commercial litigators have seen this trend coming for many years.⁹³ So do personal clients, who expect their lawyers to treat them as peers and partners (and not as an ATM) – there is growing public pressure for lawyers to offer affordable legal services. This requires changing the norms of not only how legal services are offered but also who offer them (e.g., paralegals, other specialists).⁹⁴

The New Lawyer

It is more urgent than ever that the legal profession not be passive in the face of these changes. Lawyers and their professional organizations should take a proactive approach to managing the new disputing environment and continuously assessing the need for new skills and knowledge. This includes developing new financial structures that offer affordable services to more Canadians. The profession needs to respond to client expectations for faster, less costly, and more effective legal services, negotiated between lawyer and client and fully transparent in relation to costs.

If the legal profession is to rise to these challenges, it must be willing to reappraise some of its sacred tenets, including the traditional notion of zealous advocacy and the primacy of rights-based dispute resolution processes. Lawyers need to start thinking about the public as “users” who are increasingly participating in legal processes without a lawyer’s assistance. They need to view the contemporary consumer as a prospective client and partner.

Which brings us to the need for a “New Lawyer.” The New Lawyer will have evolved and responsive professional values and beliefs, and new habits of practice. The rest of this book focuses on three core dimensions of the New Lawyer’s practice that distinguish her from the old lawyer.

The first is the elevation of negotiation skills. Lawyers have always negotiated on behalf of their clients, but they have used a model of arm’s-length communication between agents using a bargaining dynamic framed exclusively by legal positions. Despite the regularity with which negotiation closes a dispute, negotiation has not been regarded as a primary area of expertise for lawyers.

But negotiation skills are critical to the effectiveness of the New Lawyer, and she will place a far greater emphasis than her predecessors on becoming a good (intentional, educated) negotiator. The old tools of positional bargaining, often ritual bluff and bluster represented by a terse exchange of offers, are ineffective in building a consensus. They are being replaced by problem-solving strategies and more effort to directly include the client in face-to-face negotiation.

Second, communication skills such as listening, explaining, questioning, and establishing rapport and trust have always been important for lawyers who work directly with clients or as oral advocates. In the litigation model, however, effective interpersonal communication takes second place to making substantive and procedural arguments. Courtroom eloquence – the convincing presentation of arguments – has been regarded as the pinnacle of communication. For the New Lawyer, a different type of communicative eloquence is necessary. Interpersonal communication is the primary vehicle for the resolution of conflict, whether through negotiation, mediation, or another settlement process. In this model, interpersonal communication skills have the potential to set one lawyer apart as particularly skillful and ultimately successful. This model also elevates the importance of so-called emotional intelligence, as well as legal knowledge, including attributes such as empathy, self-awareness, optimism, and impulse control – all important qualities in an effective negotiator.⁹⁵

Demonstrating the importance of persuasive interpersonal communication in reaching a good agreement requires paying more attention to what the other side in a dispute needs and wants. One experienced litigator describes this as follows:

I call it the new lawyering role. You do have to be in tune to the other side's interests. For instance, I've seen counsel do it for a plaintiff in a personal injury action, a lot of it is they just want to be able to look at my insurance client and vent, and money is not always what they want; they just want the other side to feel their pain and to understand what they've gone through. You start thinking about what their interests are, and what they really need out of this mediation and a lot of times it's just that, in order for them to understand or for them or your client just to see the other side and hear their side of story and see what's driving them and their personality. You have to be more attuned to the interests of the parties and what's going on between them.⁹⁶

Third, the New Lawyer considers her client a partner in problem solving, to the extent that this is both feasible and desirable (for the client) in any one case. Ideally, there is a new mutuality of both purpose and action between lawyer