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Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change

Julie Macfarlane

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Will Changing the Process Change the Outcome? The Relationship between Procedural and Systemic Change

*Julie Macfarlane**

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I. INTRODUCTION

The development of litigation alternatives in family law—most notably, family mediation and the more recent emergence of collaborative family law—is often heralded as the answer to the miserable emotional, financial, and practical consequences of many divorces. The costs of litigation, especially for children,¹ are clearly demonstrated by research and recognized by many disillusioned lawyers. Some family lawyers speak with a distaste bordering on ferocity about the negative consequences of litigation. Consider the

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* Professor of Law University of Windsor Ontario. I am grateful to Bernie Mayer and Roselle Wissler for their extremely helpful comments on an earlier draft of this essay

1. See generally Robert E. Emery, Ph.D., *Marriage, Divorce, and Children’s Adjustment* (2d ed., Sage Publications 1999); Peter McCarthy et al., *Longitudinal Study of the Impact of Different Dispute Resolution Processes on Post-Divorce Relationships between Parents and Children*, Report to the Fund for Research on Dispute Resolution (1992); J.B. Kelly, *Children’s Adjustment in Conflicted Marriage and Divorce: A Decade Review of Research*, 10 *J. Child & Adolescent Psychiatry* 237 (2003).

following comment from a family lawyer reflecting on twenty-five years of practice experience: "In litigation, even if you got a good legal result for the client . . . at the end of it there is just depression and ashes. It leaves more than a sour taste—it leaves a sickness in the stomach of the client, and in mine too."²

The rights-based position-taking required by a litigation strategy entrenches feelings of grievance and entitlement. Position-taking, however justifiable, inevitably acts to polarize the parties and escalates conflict. The resultant tensions can be deeply unsettling for lawyers and clients alike. Such experiences led one experienced litigator, himself in the process of divorce, to describe litigation as the unleashing of "demons" who represent the dark side of human nature: "[Litigation] feeds the demons raw meat and works them into a frenzy . . . [it] provides a battalion of troops for vindication."³

Position-taking in litigation also tends to reduce creativity and the capacity for accommodation. In this environment, winning takes on a particular appearance and may overshadow a practical, acceptable family transition. Even if winning is ultimately achieved, it may not be all that was hoped for. Inevitably, emotional closure and recovery are pushed further away in the process, often eroding any remaining commitment to co-parenting.⁴ In civil trials, the process of resolution may be prolonged yet further by the need for enforcement steps after securing a favorable judgment. This may partly explain why, in this author's 1995 study matching a control group of Ontario litigants who went to trial with a group who mediated their dispute, only 8.5% of trial group litigants described themselves as completely satisfied with the outcome.⁵

This dismal record of the failures of the traditional litigation model, especially in the family context where future parenting relationships are often critical, suggests a strong case for rethinking processes and procedures in order to reduce the negative consequences of litigation while maintaining the protection of vulnerable clients. But is redesigning how we approach litigation, for example, by the introduction of new consensus-building processes such as mediation and collaborative law, sufficient to change the quality of the experience for litigants and its outcomes?

2. Julie Macfarlane, *Experiences of Collaborative Law: Preliminary Results from the Collaborative Lawyering Research Project*, 2004 J. Disp. Resol. 179, 191 (2004).

3. Julie Macfarlane, *The Emerging Phenomenon of Collaborative Family Law (CFL): A Qualitative Study of CFL Cases 22* (Dep't of Just. of Canada 2005).

4. This tendency is illustrated by the gradual withdrawal from the child's life of the non-custodial parent. See generally Emery, *supra* note 1.

5. Julie Macfarlane, *Court-Based Mediation in Civil Cases: An Evaluation of the Toronto General Division ADR Centre 22* (1995) (on file with author).

II. THE IMPETUS FOR PROCEDURAL REFORMS

The reliance on lawyer-to-lawyer negotiation to resolve the vast majority of suits before trial appears at first glance to support the assertion, made by many lawyers, that they are extremely effective at settling cases. That is, until we look closely at just when and how settlement usually takes place. Most settlement takes place either shortly before trial or “on the courtroom steps.” Of particular concern are the delay in commencing serious negotiations until significant resources have been expended⁶ and the restrictive, depersonalized, and often inadequate character of negotiated solutions.⁷ A further concern should be the apparently minimal amount of time lawyers actually spend on negotiation, especially when compared with their efforts to pursue litigation.⁸

Lawyers generally conduct litigation as if they are going to trial but they almost never do.⁹ Research on the negotiating behaviors of family lawyers,¹⁰ personal injury specialists,¹¹ and commercial litigators¹² demonstrates that lawyers practicing in these areas assume they will ultimately settle almost all of their cases. However, research also shows that the ritual opening “dance” (at least) of lawyer-to-lawyer bargaining is dominated by hard-line positions reflecting zero-sum assumptions which drive a culture of competition and widespread expectations of zealous advocacy among both

6. Characteristically, following the discovery phase. See John L Barkai & Gene Kassebaum, *Using Court-Annexed Arbitration to Reduce Litigant Costs and to Increase the Pace of Litigation*, 16 Pepp. L. Rev. 43, 47 (1989); Julie Macfarlane, *Culture Change? A Tale of Two Cities and Mandatory Court-Connected Mediation*, 2002. J. Disp. Resol. 241, 291 (2002).

7. Settlements generally reflect anticipated likely outcomes, constitute merely monetary solutions, and do little or nothing to repair commercial or domestic relationships. See Carrie Menkel-Meadow, *Lawyer Negotiations: Theories and Realities—What We Learn from Mediation*, 56 Mod. L. Rev. 361, 369–71 (1993); Carrie Menkel-Meadow, *The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us*, 1985 Mo. J. on Disp. Resol. 25, 33–34 (1985).

8. Herbet M. Kritzer, *Let’s Make A Deal: Understanding the Negotiation Process in Ordinary Litigation* 30–41 (Univ. of Wis. Press 1991).

9. The most recent study from 2002 shows that just 1.8% of all filings in United States federal court proceed to trial, down from 11.5% in 1962. See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Stud. 459 (2004).

10. See generally Lynn M. Mather, et al., *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford Univ. Press 2001).

11. See generally Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Clarendon Press 1988).

12. See generally Macfarlane, *Culture Change*, *supra* note 6.

lawyers and clients.¹³ The “double-think” involved in knowing that a case will almost certainly settle but acting as if it will not is variously explained by the need to present a strong or even aggressive opening in order to obtain a good deal,¹⁴ the need to bolster one’s reputation as a strong negotiator,¹⁵ and the need to frame every possible strategy within the “shadow of the law”¹⁶ that may be the final arbiter of the conflict. These justifications sustain and reinforce habits of negotiation that prefer to define a problem according to legal issues,¹⁷ which are inevitably normative and understood as either right or wrong positions.¹⁸

This importance of maintaining an appearance at least of resistance to settlement extends (at the client’s cost) into widespread reluctance among practicing lawyers to even contemplate negotiation until “everything” is known about the case,¹⁹ where information is rarely offered up voluntarily and is sometimes withheld. The consequent lack of knowledge about the other side’s motivation, goals, needs, or sincerity replays over and over again the defensive-reactive dynamic of the Prisoner’s Dilemma.²⁰ These philosophic and behavioral habits are further overlaid by a widespread yet generally unstated conviction that any other approach to settlement negotiation would defeat the current market economics of legal practice. As one lawyer admitted: “[Mediation] kick[s] me squarely in the pocket book, or not me because I have clients that want to fight those big numbers, but . . . if you’re being entirely selfish, just looking at the lawyer’s interest, then why do I want this?”²¹

13. See generally Stevens H. Clarke et al., *Court-Ordered Civil Case Mediation in North Carolina: Court Efficiency and Litigant Satisfaction* (Inst. of Gov’t, Univ. of N.C. 1996); Milton Heumann & Jonathan M. Hyman, *Negotiation Methods and Litigation Settlement Methods in New Jersey: “You Can’t Always Get What You Want”*, 12 Ohio St. J. on Disp. Resol. 253, 261–65 (1997).

14. See generally Genn, *supra* note 11.

15. *Id.*

16. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 954–55 (1979).

17. See generally Heumann & Hyman, *supra* note 13.

18. See generally Julie Macfarlane, *What Does the Changing Culture of Legal Practice Mean for Legal Education?*, 20 Windsor Y.B. Access Just. 191 (2001).

19. Macfarlane, *Culture Change*, *supra* note 6, at 283.

20. The Prisoner’s Dilemma occurs when one party takes a defensive-reactive approach to negotiation (for example, concealing information, goals, and needs) because, without information to the contrary, it must assume that the other party will do likewise. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 Colum. L. Rev. 509, 514–15 (1994).

21. Macfarlane, *Culture Change*, *supra* note 6, at 283. The same lawyer, who suggested that possibly ninety-seven percent of what lawyers did was “wasted,” followed up this comment by musing about the hundred boxes of litigation material

These assumptions about what it means to be an effective litigator and negotiator result in a litigation culture in which settlement is frequently understood as the manifestation of a “watered-down legal system”²² rather than a skillful negotiation process which achieves the clients’ best interests. For a disconcerting number of litigators, settlement is for “wimps:” “I would say to the client, if you’re interested in settlement, you go and talk to the other side about it, I’m very bad at it. My job is to manage a war, not to manage a peace.”²³

Not all lawyers approach settlement negotiations this way, but enough do to produce a perception that, despite the small number of cases that proceed to a full trial, a culture of adversarialism is on the rise. This author’s own research on commercial litigators found many examples of lawyers who understood their role as highly adversarial or, and this may be more important, believed that this was the cultural expectation of them: “I’m known as a son of bitch. I’m not afraid to go to trial. I won’t cave in and go and settle. I have clients who know that and don’t mind losing. They want to fight, so they expect me to be a son of a bitch.”²⁴

Professor Andrea Schneider’s recreation of Gerald Williams’s pioneering research on how lawyers negotiate found, like Williams did twenty-five years earlier, that lawyers self-describe a range of negotiation styles,²⁵ including both “problem-solving” (“co-operative” in Williams’s original survey) and “adversarial” (“competitive” in Williams’s survey).²⁶ Schneider also found that the number and the “nastiness” of “adversarial” lawyers in the sample had increased.²⁷ She attributes this at least in part to the culture of competition in law school and legal practice: “[G]iven the choice between being too soft and too hard, most lawyers would opt for too hard.”²⁸

The complex and diverse culture of legal practice, impacted by numerous factors such as area of practice, size of firm, and size of the

currently crowding his office. Thinking aloud, perhaps, he then asked the rhetorical question: “But how am I am going to pay for the hundred boxes?” *Id.*

22. A comment repeated by a number of lawyers in the *Culture Change* project. Unpublished data from Macfarlane, *Culture Change*, *supra* note 6.

23. Unpublished data from the *Culture Change* project, *supra* note 6 (on file with author).

24. Macfarlane, *Culture Change*, *supra* note 6, at 302.

25. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 Harv. Negot. L. Rev. 143 (2002) (referencing Gerald R. Williams, *Legal Negotiation and Settlement* (West Publishing 1983)).

26. *Id.* at 151–54, 163.

27. *Id.* at 189.

28. *Id.* at 146.

local bar, and so on,²⁹ inevitably makes generalizations about the rise or fall of adversarialism contestable. What is less contentious is that the sensitivity of the consuming public (especially institutional and corporate clients) to exponentially rising legal costs has led to demands for less costly and more efficient methods of dispute resolution, demands that policy-makers have begun to respond to via procedural reforms. An increasing appetite for early reporting, strategic settlement planning, and early dispute resolution has been noted in relationships between commercial lawyers and their institutional clients (for example, financial institutions and insurance companies).³⁰ Sophisticated commercial clients, especially repeat players, may generally be less prepared to be passive and more inclined to assert their wishes. Sometimes, this is attributed to the increasing influence of in-house counsel, who are obliged to account for and justify all litigation expenditures to their managers.³¹ Litigators themselves are noticing the change in approach among many of their commercial clients. As one expressed it, “[T]he old ‘just fight-at-all-costs and don’t look at it [the legal bill], don’t even think about an approach [opening negotiations],’ [that attitude] just doesn’t seem to exist anymore.”³²

Whatever the current state of adversarialism in the legal profession, policy-makers have become extremely concerned about the economic efficiency of a model that settles almost every case but not until after a significant expenditure of time and resources, both public and private. Settlement “on the courthouse steps” means backlogs and delays in court systems and dissatisfied litigants. Civil justice reform to compensate or counteract this bargaining culture has concentrated on encouraging earlier settlement via a range of institutionalized processes. Attention to the structure of the conflict resolution process—timelines, opportunities for negotiation, encouragement to exchange party information in private, off-the-record meetings—has dominated this agenda in North America for at least two decades. We now have court-connected mediation and arbitration programs, case management systems, increased use of settlement conferencing and pre-trial procedures, and a myriad of

29. Described generally as “communities of practice” in Mather, *supra* note 10, at ch. 3. In earlier work, this notion has been described as “local legal culture.” Thomas W. Church, Jr., *Examining Local Legal Culture*, Am. B. Found. Res. J. 449 (1985).

30. Macfarlane *Culture Change*, *supra* note 6, at 293–95.

31. See generally Craig A. McEwen, *Managing Corporate Disputing*, 14 Ohio J. Disp. Resol. 1 (1998).

32. Unpublished data from Macfarlane, *Culture Change*, *supra* note 6 (on file with author).

private counseling, support, and advocacy services that operate outside the formal court system.

Reflecting the disillusionment of some practitioners with the deficiencies of the litigation system, professional practice initiatives have also emerged outside the court system, including collaborative and co-operative lawyering networks and movements such as therapeutic jurisprudence and holistic law.³³ While the institutional initiatives generally have efficiency objectives (i.e., to reduce or clear the backlog), the voluntary innovations tend to reflect the goals of practitioners to develop more personally satisfying ways of serving clients.³⁴

In summary, there is plentiful evidence of a widespread perception (at least outside the legal profession) of the need for faster, less costly, and more humane methods of conflict resolution that can produce efficacious results. The larger question this essay will explore is how far can procedural initiatives and innovations contribute to real change in conflict resolution processes and outcomes?

III. THE CONSEQUENCES OF PROCEDURAL REFORM

After twenty years of experimentation, there is by now a significant body of data examining the results of procedural justice reforms. In many cases, court-based procedural reform has been shown to increase the rate of earlier settlements.³⁵ Satisfaction among clients with mediation and other settlement-oriented initiatives is generally high.³⁶ Similarly, studies of private mediation and now collaborative law settings also show consistently high levels of client satisfaction.³⁷ Interestingly, the evidence for enhanced party relationships, more durable outcomes, and other qualitative measures

33. See generally Nancy J. Cameron, *Collaborative Practice: Deepening the Dialogue* (Continuing Legal Educ. Soc'y of B.C. 2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 Harv. Negot. L. Rev. 1 (2002); Pauline H. Tesler, *Collaborative Law: A New Paradigm For Divorce Lawyers*, 5 Psychol. Pub. Pol'y & L. 967 (1999); David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. Cooley L. Rev. 125 (2000).

34. Macfarlane, *Experiences of Collaborative Law*, *supra* note 2, at 194–216.

35. See generally Robert Hann & Carl Barr, *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report—The First 23 Months* (Ont. Ministry of the Attorney-General Queens Printer 2001); Roselle L. Wissler, *The Effectiveness of Court-Connected Dispute Resolution in Civil Cases*, 22 Conflict Resolution Quarterly 55 (2004).

36. See generally Wissler, *Effectiveness*, *supra* note 35.

37. See generally Macfarlane, *Experiences of Collaborative Law*, *supra* note 2.

is more mixed,³⁸ as is the causal connection between program design (for instance, how mediators are selected and voluntary or mandatory referrals into programs).³⁹ One way to summarize what we do know so far about the impact of procedural innovations and changes is that they appear to be largely if not uniformly successful along several baseline indicators: higher and earlier rates of settlement and general client satisfaction with both the process and the third party mediator. It is less clear, however, that the introduction of new procedures and practice models is creating systemic and fundamental changes in lawyers' attitudes towards negotiation and negotiated outcomes, the consideration of non-legal factors in developing settlements, and the genuine inclusion of clients in formulating outcomes.⁴⁰

It is changes like these, however, that are critical to the reorientation of litigation to the expeditious pursuit of just and appropriate settlement. Changing the processes without changing lawyers' attitudes and supporting the development of appropriate new legal skills will only get us partway to the goals described earlier: faster, cheaper, more humane conflict resolution with constructive and practicable results. Similarly, changing procedures without persuading lawyers of the need to adapt their traditional skills to a new environment of settlement advocacy creates tension and resistance, not real change. Systemic change has implications for the fundamental character of legal expertise and skills—what it means for a lawyer to be an effective conflict advocate and conflict resolver. It means challenging the profession's dominant ideology of conflict, the idea that victory is to be achieved at all costs and that disputes are always morally justified arguments. It means reevaluating the nature of the lawyer/client relationship and the types of outcomes that are legitimately sought and valued.

If this depth of change is what we want, we cannot assume that redesigning our existing conflict resolution processes is going to get us there in a single leap. The impact of procedures aimed at encouraging settlement cannot be understood in isolation from the cultural and attitudinal environment that surrounds the "business" of litigation. Law is a business and for the last twenty years it has come

38. Wissler, *Effectiveness*, *supra* note 35; Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research* 17 Ohio J. Disp. Resol. 641 (2002).

39. Wissler, *Court-Connected Mediation*, *supra* note 38, at 674–81.

40. Evidence indicates that lawyers still dominate mediation and generally minimize their client's contribution. Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do With It?*, 79 Wash. U. L.Q. 787, 788 (2001); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 Harv. Negot. L. Rev. 1 (2001). *But see*, e.g., Macfarlane, *Culture Change*, *supra* note 6.

increasingly to be built on the foundation of the billable hour. Lawyers need to feel comfortable that they can continue to make a living if they adapt their practice to embrace new settlement processes. This is a radical departure from the conventional “business” of settlement negotiation, which comes later in the life of most files, is limited to interaction between the lawyers themselves, and is thus far less likely to involve clients, judges, or other third parties.

The superficiality of procedural reforms that do not take root in lawyers’ attitudes and skills and are not demonstrably viable in business terms is illustrated by the impact that lawyers have on litigants’ experiences of new processes. While there is some evidence that lawyers can be highly effective and constructive in mediation when they are fully supportive of such an approach,⁴¹ there is also abundant evidence that they can frustrate and undermine the process.⁴² Research data confirms what has long been suspected, that lawyers still control the settlement process, including the degree of preparation, how serious they are about negotiation, how far if at all they involve their clients in the settlement process, and how the bargaining dynamic actually plays out. In a recent study by this author of the impact of a decade-long mandatory mediation program in Saskatchewan,⁴³ the impact of lawyer attitudes on client expectations and experiences of mediation was strikingly clear. Where counsel was positive about using the mediation process, their clients had a good and constructive experience.⁴⁴ Where counsel were negative and ill-prepared, their clients went into mediation unaware of the purpose of the session and unready to settle.⁴⁵ A number of clients complained that the primary factor thwarting settlement was the adversarial approach of their own or both lawyers.⁴⁶ Other lawyers described how they resist client involvement in mediation by coaching their clients in advance to remain silent (“I teach them to shut-up.”).⁴⁷ These reports were

41. See generally Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 Minn. L. Rev. 1317 (1995).

42. Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin’s Grid*, 3 Harv. Negot. L. Rev. 71, 96 (1998); Welsh, *Making Deals*, *supra* note 40, at 795–804; see also Macfarlane, *Culture Change*, *supra* note 6.

43. Julie Macfarlane & Michaela Keet, *Civil Justice Reform and Mandatory Civil Mediation in Saskatchewan: Lessons from a Maturing Program*, 42 Alberta L. Rev. 677, 691–93 (2005).

44. *Id.* at 691–92.

45. *Id.*

46. *Id.* at 691–93.

47. Macfarlane, *Culture Change*, *supra* note 6, at 275.

confirmed by many clients.⁴⁸ Settlement efforts require good faith and, given lawyer influence over their clients, it is easy to turn the claim that these processes are a waste of time into a self-fulfilling prophecy. Given that procedural reform challenges a lawyer's autonomy and is generally not the lawyer's idea in the first place, the persistence of this resistance should not be surprising.

Litigation is essentially disputing carried out by agents.⁴⁹ As the agents, lawyers remain the dominant players in the adversary system.⁵⁰ These agents and their professional cultures exert a powerful control over the norms and expectations⁵¹ of civil disputing. When procedural reform does not capture the hearts and minds of the legal profession, it is frequently re-assimilated into old familiar process models and outcomes. This is not limited to the lawyer's influence over his client. Other documented strategies include belittling mediators and other "softies" (colleagues who support mediation), using mediation and settlement conferencing to obtain a strategic advantage (such as informal discovery) rather than intending to settle, and "going through the motions" by showing up yet being totally unprepared to negotiate. Toronto lawyers talk about the "twenty minute mediation" where they attend mandatory mediation without any preparation or intention of serious negotiation.⁵² Also in Toronto, lawyers boasted openly about defeating the random assignment case management system that existed in the mid-1990s by closing a file selected for case management, then re-filing in the hope of escaping assignment.⁵³ The creative capacity of lawyers to develop ways to frustrate the purpose of mandatory settlement procedures when they are convinced the procedures will not be helpful to their own analysis of a case is apparently boundless.

Despite these inherent limitations, procedural reforms have achieved some important results. The most important of these is the exposure of the legal profession and its clients to alternative processes for resolving cases that are by now demonstrably effective in settling contentious matters earlier than traditional negotiation interventions, and often with fewer negative consequences (to both relationships and pocketbooks) for commercial and domestic clients alike. Moreover, procedural reforms are here to stay. Despite continued debates over mandatory requirements, the role of judges

48. Macfarlane & Keet, *supra* note 43, at 691-93.

49. See generally Gilson & Mnookin, *supra* note 20.

50. Jacqueline M. Nolan-Haley, *Lawyers, Clients and Mediation*, 73 *Notre Dame L. Rev.* 1369, 1372 (1998).

51. See generally Richard Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *Law & Soc'y Rev.* 525 (1980-81).

52. Macfarlane, *Culture Change*, *supra* note 6, at 263, 268.

53. *Id.* at 263.

versus third party mediators, and resistance by some parts of the legal profession, policy-makers now have sufficient evidence to convince them that institutionalizing settlement-oriented processes is a strategy capable of producing the desired results of shorter dispute timelines and higher settlement rates.⁵⁴

Procedural reforms are a necessary but insufficient element of long term and systemic change to dispute resolution processes. Real change requires changes in attitudes about the nature of effective advocacy and conflict resolution and the parallel development of new skills. Procedural change can support and reinforce systemic change, however, and from the experiences of the last twenty years, we can uncover important lessons in how system redesigns might eventually translate into systemic change in lawyers' skills and attitudes.

IV. BUILDING ON PROCEDURAL REFORM TO CREATE SYSTEMIC CHANGE

What then can we learn from procedural reform about creating systemic change in dispute resolution processes and outcomes?

A. The Relationship Between Changing Behaviors and Changing Attitudes

First, while changing the process does not in itself change attitudes, there may be a longer-term relationship between process and attitude change. In the same way as mediation can secure behavioral undertakings but not necessarily change minds and hearts, the value of changing process, or behavioral, expectations is that this may begin to change the normative values associated with the process or behavior. For example, if management and labor representatives agree to a process for consultation and the raising of issues, over time, labor-management communication will likely increase and be enhanced. In the family context, if co-parents agree not to speak poorly of one another in front of the children and each keeps their word, over time the idea of doing anything other than this begins to appear inappropriate. Thus, engaging in a particular, well-defined mode of behavior has the capacity to both normalize that mode and enable those affected to experience a different and hopefully constructive alternative to the old behaviors.

54. However, the debate over whether adjudication is simply being diverted to earlier stages through the increased use of motions and other pre-trial applications is only just beginning. See generally Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. Empirical Legal Stud. 705 (2004).

Similarly, research evidence suggests that lawyers' attitudes towards mediation become more positive with time and as a result of repeated experiences with it.⁵⁵ John Lande's work suggests that what he describes as lawyers' "faith"⁵⁶ in mediation increases with exposure to the process.⁵⁷ A study of Indiana lawyers reached the conclusion that favorable attitudes towards mediation correlate significantly with mediation experience as a representative.⁵⁸ This author's "Culture Change" study has found evidence to suggest that attitudes towards mediation become more positive with greater experience and familiarity with the process.⁵⁹ A recent evaluation of the Saskatchewan program also uncovered numerous testimonials from lawyers who described themselves as being resistant to the legislature's introduction of mandatory mediation in 1994, only to have changed their views over time.⁶⁰ A number of lawyers gave personal accounts of what was sometimes described as their "conversion"⁶¹ to the usefulness of mediation in civil dispute settlement. Even some senior practitioners explained a shift in their strategy and attitudes towards settlement as the result of pragmatism and experience. As one experienced lawyer stoically put it, "[W]hen you practice long enough, you'll understand there are some brilliant legal arguments that are not worth making."⁶²

Similar changes over time are also illustrated in data on changes in lawyer/client relationships in settlement processes. The requirement that clients attend mediation and settlement conferences despite the fact that many lawyers are able to effectively sideline their clients' genuine participation⁶³ nonetheless threatens counsel accustomed to conducting discussions with other lawyers and sometimes with a judge, but without their client present. Working with the client present rather than holding him or her at arm's length

55. See generally McEwen et al., *Bring in the Lawyers*, *supra* note 41; Roselle L. Wissler, *When Does Familiarity Breed Content? A Study of the Role of Different Forms of ADR Education and Experience in Attorneys' ADR Recommendations*, 2 Pepp. Disp. Resol. L.J. 199 (2002).

56. John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 Harv. Negot. L. Rev. 137, 199 (2000).

57. *Id.* at 171-176; see also McEwen, *Managing Corporate Disputing*, *supra* note 31.

58. Morris L. Medley & James A. Schellenberg, *Attitudes of Attorneys Toward Mediation*, 12 Mediation Q. 185, 195-96 (1994).

59. Macfarlane, *Culture Change*, *supra* note 6.

60. Macfarlane & Keet, *supra* note 43.

61. *Id.* at 688-89.

62. Julie Macfarlane & Michaela Keet, *Learning from Experience: An Evaluation of the Saskatchewan Queens Bench Mediation Program*, 2003 Sask. Just. Disp. Resol. 19, 28 (2003).

63. See Welsh, *Making Deals*, *supra* note 40, at 838-46.

from negotiation is unfamiliar to most lawyers and requires significant adjustment. This appears to occur over time, with many lawyers who are experienced in mediation attesting to the benefits of involving clients in the negotiations. One lawyer, who now described himself as now very comfortable involving clients in the mediation process, frankly described his early experiences as follows:

It completely caught me off guard at first. The first few mediations, I hadn't had any mediation training. My only training was the general attitude in the profession that this is a lot of horse crap and I had settlements hit me between the eyes and I couldn't believe my clients sold out on me the way they did. I was concerned that I had a serious client control problem.⁶⁴

Social psychologists have long posited a dynamic relationship between changing behaviors and changing attitudes.⁶⁵ Of course, neither operates in a vacuum. Even relatively positive attitudes can be further undermined by other economic and cultural factors which may act as barriers to change, for example, the dominance of a positional approach to bargaining, and other entrenched habits of action and mind.⁶⁶ At minimum, these other factors probably operate to reduce the amount of real change in habits of action and mind and increase the degree to which change is assimilated into old behaviors with only slight adjustments (for example, when lawyers attend mediation but simply, "go through the motions").⁶⁷ It seems to be a reasonable assertion, however, based on data on how lawyers respond to exposure to mediation, that changing behavioral practices, even coercively, allows for a new and different experience, which, if positive, may change lawyers' attitudes. This remains the strongest argument for at least a limited period and/or scope of mandatory mediation processes.⁶⁸

64. Macfarlane, *Culture Change*, *supra* note 6, at 30.

65. That is, behavior is not determinative of attitudes, nor vice versa. See, e.g., Michael J. Saks & Edward Krupat, *Social Psychology and Its Applications*, 197-198 (Harper & Row 1988). However, dissonance theory also suggests that we try to reduce the dissonance between our behavior and our attitudes in order to avoid the discomfort this produces. L. Festinger, *A Theory of Cognitive Dissonance* (Stanford Univ. Press 1957).

66. See generally Heumann & Hyman, *supra* note 13.

67. Julie Macfarlane, *When Cultures Collide*, in *Intercultural Dispute Resolution in Aboriginal Contexts: Canadian and International Perspectives* (Catherine Bell & David Kahane, eds., Univ. of B.C. Press, 2004) (suggesting that the meeting of two different dispute resolution cultures (litigation and consensus-seeking) could result in assimilation, divergence, or convergence).

68. For a policy proposal on the appropriate use of mandatory processes to encourage consensus-building and settlement, see *Transforming Relationships*

B. *Changing the Norms of Legitimacy*

Part of the problem with simply requiring counsel (along with their clients) to engage in different procedural steps is that there is often no supporting culture of legitimacy within the profession for engaging seriously with these processes. Decisions on procedural reform are usually made by policy-makers (court administrators) or legislatures. Occasionally, the legal profession participates in such decisions through bar association working groups or consultative bodies.⁶⁹ Quite often, though, the legal profession finds itself facing major procedural change with little or no consultation or opportunity for input. Many lawyers feel their sense of personal autonomy keenly and resent being dictated to by courts or legislatures. This feeling may persist even where counsel feels positively about, or is at least resigned to, new procedural requirements such as case management and mandatory mediation. Articulating the sentiments of many, one lawyer put it: "I feel like there's somebody out there, the thought's almost paranoid, who is calling the shots."⁷⁰

While legislators and policy-makers may reflect the legitimate aspirations of legal consumers for faster and less costly legal services, the reforms they propose impact a quite separate area of professional expertise. What legislators and policy-makers do not take into account is that the status of the legal profession, including each professional relationship between lawyer and client, is founded on the lawyer's claim to superior knowledge. This means that if counsel tells his or her client that mediation is a waste of time, that collaborative law is for softies, or not to worry about attending the settlement conference, their expertise is assumed and accepted. Where this expertise appears to run counter to government requirements, it is easy for counsel to debase the requirements as government interference rather than sound public policy.

The challenge is to create credibility and legitimacy for new conflict processes within the legal profession itself. The norms that will be changed as a result encompass both community and personal values. The following statement by an Ottawa lawyer makes this point perfectly: "Good lawyers, in this town, understand what

Through Participatory Justice 161 (Law Comm'n of Canada 2004). See *infra* discussion Part 4(c).

69. For example, the Ontario Civil Rules Committee, consisting of representatives of government, the bar association, the judiciary, and the public, developed and approved a new rule of procedure for mandatory mediation in that city. Available at http://ontariocourts.on.ca/superior_court_justice/casemanagement/newsletter/2001/april2001.htm.

70. Macfarlane, *Culture Change*, *supra* note 6, at 280.

mediation's about . . . I think that's what is accepted in the system, so lawyers have made the change."⁷¹

Lawyers who choose to practice in a settlement advocacy model (for example, the collaborative lawyers and those who promote "co-operative negotiation protocols"⁷²), along with those who would describe themselves as "mediation believers,"⁷³ have already made the shift in their personal norms and values, but they still need to find a supportive community to work within. A personal reputation for collaboration becomes a valuable resource where a critical mass within the community has embraced collaborative settlement processes as mainstream and reflective of good lawyering. Similarly, once the skills associated with effective settlement advocacy become recognized as a commodity having positive economic and reputational consequences, members of the legal profession will buy into what they regard as a significant means of ensuring their continued professional status.⁷⁴

The question of critical mass has an important practical dimension. At what point do 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 describe the frustrations of negotiation sessions reverting to the lowest common denominator, that is, if the lawyer on the other side is poorly prepared, unskilled, and unwilling to take the negotiation process seriously, they cannot gain traction.⁷⁵ Frustration with the predominance of settlement-adverse lawyers in their community has led collaborative family lawyers to form their own networks, which overnight provide critical mass for their alternative processes.⁷⁶

Outside voluntary networks of like-minded lawyers, it is intriguing to ask how a "critical mass" of support for settlement processes can be achieved. One route is to force exposure using one hundred percent mandatory processes, hoping that the experience will produce some converts, but this also has some negative consequences, which shall be discussed below. Another approach is to identify the most influential players in the wider legal community

71. *Id.* at 316.

72. John Lande, *Evading Evasion: How Protocols Can Improve Civil Case Results*, 21 *Alternatives to High Cost Litig.* 149 (2003) (discussing co-operative protocols).

73. Macfarlane, *Culture Change*, *supra* note 6, at 256.

74. *See generally* Richard L. Abel, *American Lawyers* (Oxford Univ. Press, reprint ed. 1991).

75. Macfarlane & Keet, *supra* note 43, at 689–90.

76. *See generally* Macfarlane, *Experiences of Collaborative Law*, *supra* note 2; Macfarlane, *Emerging Phenomenon*, *supra* note 3.

and look to them to play a leadership role. This includes members of the judiciary⁷⁷ but also seasoned litigators. The experiences of Ottawa and Toronto with mandatory mediation provide for an interesting comparison. In Toronto, there are some professional leaders committed to mediation, but they are fewer and less powerful than their compatriots in Ottawa.⁷⁸ This is reflected in peer group norms in Toronto, where it is still not fashionable for top-flight litigators to vocally support mediation, and certainly not a mandatory mediation program.⁷⁹ In contrast, the widespread acceptance of mandatory mediation in Ottawa is such that lawyers wish to be seen as supportive of such a positively regarded development.⁸⁰ The Saskatchewan legal community, described by one respondent as originally “dragged into this kicking and screaming,”⁸¹ also appears to have shifted in its core attitudes towards the use of mediation. As one lawyer put it, “mediation is no longer a dirty word.”⁸² Thus, getting the leadership of the bar and bench behind procedural change appears to have a significant impact on the efficacy of such reforms. It may also be that “critical mass” can be reached faster in smaller communities where the legal culture or “community of practice”⁸³ is more cohesive, with stronger prevailing norms, and a relatively homogeneous client base.

C. *Voluntarism Versus Mandated Processes*

Whereas repeated experiences of mediation and other similar settlement-oriented processes can and apparently do make a difference, also significant is the extent to which lawyers choose new processes rather than having them imposed upon them.⁸⁴ Again, a

77. Roselle L. Wissler, *Barriers to Attorneys' Discussion and Use of ADR*, 19 Ohio St. J. on Disp. Resol. 459, 488–89 (2004).

78. Macfarlane, *Culture Change*, *supra* note 6, at 313–18.

79. *Id.*

80. *Id.*

81. Macfarlane & Keet, *supra* note 43, at 688.

82. *Id.*

83. This point may also apply to the development of voluntary networks. For example, in Medicine Hat, Alberta (population 51,000), the two most prominent members of the local family law bar (consisting of eighteen lawyers) attended training for collaborative law in the late 1990s. They returned inspired and began a collaborative lawyering group for family lawyers. Within a year, all but one of the members of the local family law bar had joined up. Not practicing collaboratively is now considered counter-culture in Medicine Hat. Mather, *supra* note 10, at ch. 3.

84. The fact that we often adjust our attitudes to fit our behavior (often explained by dissonance theory, *see supra* text accompanying note 65) can also be explained by self-perception theory. According to this theory, in forming our attitudes, we draw inferences from our behavior and the circumstances under which

comparison between the phenomenon of collaborative family lawyering and court-connected mandatory mediation is helpful here. Rather than being imposed on them by policy-makers, collaborative family lawyering has been created by lawyers themselves and comes out of their experiences and disappointments with the litigation model. Collaborative family law, in which negotiation replaces litigation and the expertise of other professionals is integrated into problem-solving and resolution, is therefore offered by lawyers who have already significantly reframed their conceptions of effective process and good outcomes in family conflict. Rather than being pressured by their clients into finding less costly and time-consuming alternatives to litigation, the desire of collaborative lawyers for systemic change in the way divorce is handled may outpace the appetites of their clients.⁸⁵

It seems obvious that where lawyers choose to practice in a different way, for example, by committing to collaboration, they will anticipate and promote systemic change faster and more dramatically than where the justice system imposes a requirement on the legal community. The motivation is different and the goals are more personal and far-reaching. Many collaborative lawyers describe embracing collaborative law as enabling a synthesis between their personal and professional values, which is important to them and which they had not experienced with traditional litigation practice.⁸⁶ In a sense, this is a process of uncovering and embracing a new professional identity. This is not simply a choice about better client service, such as lowering fees, increasing hours of availability, or offering additional services, but for most collaborative lawyers, it is a decision to radically reshape the way they approach practice.⁸⁷

While one can safely assume that voluntary adoption of process innovation reflects a personal choice already made for change,

it occurs. If we are compelled to do something, we are not likely to infer that we did it because we had favorable attitudes toward it. See, e.g., D.J. Bem, *Self-Perception Theory*, in *Advances in Experimental Social Psychology*, Vol. 6 (Leonard Berkowitz ed., 1972).

85. The phenomenal recent growth of collaborative family lawyering groups throughout North America has not yet been matched by client demand. Macfarlane, *Emerging Phenomenon*, *supra* note 3, at 17–21.

86. *Id.* at 23–37.

87. However, skepticism about collaborative law has been expressed by some who suspect it to be a way for mediocre family lawyers to recreate themselves as a new form of “specialist,” thus garnering an enhanced public profile and new clients. However, this author’s 2000–2003 study of collaborative lawyering in Canada and the United States found a widespread authentic commitment at the basis of individual decisions to practice collaboratively. See Macfarlane, *Emerging Phenomenon*, *supra* note 3, at 17–21 (value realignment), 29–34 (bargaining dynamics), 41–48 (advocacy and client control).

mandatory processes seem to be able to produce some of the same types of change, at least over the mid to long term. A number of studies of mandatory processes show similar reframing and reorientation among many lawyers, although these inevitably are more gradual and less widespread than among a self-selected group.⁸⁸ Research also shows relatively little difference in settlement rates between voluntarily referred cases and those mandated into mediation.⁸⁹ Other mandatory programs fare less well in winning the hearts and minds of participating counsel.⁹⁰

There are lessons to be gleaned from the varied experiences of mandatory programs and also from voluntary collaboration arrangements. A significant factor in enhancing commitment to mediation and other settlement processes seems to be offering counsel some flexibility and choices within the framework of a mandatory program. For example, allowing counsel some discretion to decide when cases come to mediation (by making procedures to apply for adjournment easily accessible and user-friendly), offering counsel a choice of mediator, and even exempting certain types of cases from mandatory requirements would reduce some of the resistance and enable counsel to take some responsibility for making good judgments about these questions.

There are also lessons about ensuring the necessary threshold conditions within which a constructive negotiation is able to take place. One of these is that the parties are each in receipt of adequate, if not complete, information from which to seriously conduct bargaining. In mandatory settlement processes which do not stipulate requirements for prior exchange of documents and other relevant information (and most mandatory mediation programs have minimal requirements in this respect), there is often an unevenness of openness between the two sides that makes meaningful negotiation

88. See generally Macfarlane, *Culture Change*, *supra* note 6 (commercial litigators in Ottawa); Macfarlane & Keet, *supra* note 43 (civil litigators in Saskatchewan); McEwen et al., *Lawyers, Mediation and the Management of Divorce Practice*, 28 *Law & Soc'y Rev.* 149 (1994) (divorce lawyers in Maine).

89. Wissler, *Effectiveness*, *supra* note 35, at 69. Some studies, however, have found small differences in settlement rates between voluntary and mandatory referrals. See Craig A. McEwen, *An Evaluation of the ADR Pilot Project*, 7 *ME. B.J.* 310 (1992).

90. For example, the Toronto data in the *Culture Change* project reflected a far more negative and instrumentalist view of mandatory mediation. See *supra* note 6, at 313-19. Roselle L. Wissler's study of Ohio's court-mandated mediation programs found that lawyers who request mediation, rather than having it imposed upon them, form somewhat more favorable assessments of the process. However their clients' views are unaffected by whether their cases are referred voluntarily or mandated into mediation. See Wissler, *Court-Connected Mediation in Civil Cases*, *supra* note 38.

and collaboration much more difficult, or provides a ready excuse for not taking the process seriously. One way that institutionalized processes can learn from voluntary innovations such as collaborative law, where the collaborative retainer agreement stipulates a shared commitment to disclose all relevant information during the negotiations, is that the predetermination of responsibilities for information exchange is probably critical to a useful and constructive bargaining session. Some lawyers participating in mandatory programs are developing their own conventions on this, for example, in Toronto and Ottawa, it is not required but is becoming increasingly expected that each side will provide an affidavit of documents prior to mediation.⁹¹ Following our 2004 evaluation of the Saskatchewan mandatory mediation program, we recommended the transformation of this informal practice (which was evident in smaller communities such as Prince Alberta) into a formal requirement for the whole program.⁹²

D. The "Skills Gap"

Despite an explosion of mediation and ADR training for lawyers, judges, and third party participants, there is still a dominant assumption among members of the legal profession that participating in the new settlement processes does not require them to acquire any new skills. These types of courses, both in law schools and offered commercially in continuing legal education programs, emphasize the role of the lawyer as mediator and rarely focus in any depth on the role of the lawyer as a representative in mediation and other settlement processes. Several books have been published over the last ten years on "mediation advocacy,"⁹³ but the dearth of writing and training in this area speaks for itself. There are complex and sophisticated skills involved in acting as a lawyer-advocate in a settlement-oriented process, and our current state of knowledge about these skills and how to enhance them is as yet quite underdeveloped.⁹⁴ There is sometimes an equally unhelpful assumption that what is fashionably described as a "paradigm shift" (the move towards interests-based dispute resolution in negotiation settings) requires lawyers to diminish or even abandon their advocacy

91. Macfarlane & Keet, *supra* note 43 at 689–90

92. Macfarlane & Keet, *Learning from Experience*, *supra* note 62, at 52–53; Macfarlane & Keet, *Civil Justice Reform*, *supra* note 43, at 697.

93. See generally John W. Cooley, *Mediation Advocacy* (Nat'l Inst. for Trial Advoc., 2d ed. 2002); Cinnie Noble et al., *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Emond Montgomery Publications 1998).

94. Macfarlane, *Changing Culture*, *supra* note 18.

skills and engage in a complete re-education.⁹⁵ While the skillful and effective representation of clients in settlement-oriented processes requires significant and challenging new habits of action and thought,⁹⁶ these can be built on the traditional advocacy skills of lawyers in developing a new, more client-inclusive, interests-oriented, collaborative, and pragmatic model of client service.

The strength of the argument for “retooling” lawyers in this way is, of course, directly related to the perceived legitimacy of settlement processes. Where mandatory mediation and other institutional processes are regarded as an irrelevant nuisance, lawyers will be unconcerned about acquiring any new skills and knowledge; they will not even recognize that any new skills and knowledge are needed. Even lawyers who are relatively positive about participating in new settlement processes often fail to recognize that they require any new strategies, tools, or skills. Others acknowledge only superficial and often highly instrumental new skills, for example, assuming the persona of “Miss Helpful,” who shows a (fake) friendly and helpful front in mediation.⁹⁷ As these processes become more mainstream and accepted, the expectation of skillful performance, and its market value, goes up. Law firms and individual lawyers begin to market themselves as mediation or ADR “specialists” as this becomes a valuable commodity.⁹⁸

There are also increasing numbers of lawyers who, while originally exposed to mediation and settlement conferences as a result of mandatory requirements, have come to reframe their required skills as a result of their experiences in those processes. What is most interesting about these types of comments is that they describe learning and retooling which flows directly from a “need to know.”⁹⁹ Having been “thrown into” mediation or similar processes, and discovering that these processes often offered a genuine opportunity for advancing client interests, these lawyers found they needed to develop different types of approaches in order to do an effective job for their clients. For example, one noted that:

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 . . . [H]ow do you do an opening statement? How do you identify issues? How do you know to prepare yourself

95. See P.H. Tesler, *Collaborative Law: A New Paradigm for Divorce Lawyers*, 6 *Psychol., Pub. Pol'y, and Law*, 951–66 (March 2000).

96. See generally Heumann & Hyman, *supra* note 13.

97. Macfarlane, *Culture Change*, *supra* note 6, at 299.

98. See generally Abel, *supra* note 74.

99. Macfarlane, *Emerging Phenomenon*, *supra* note 3, at 34–36.

into 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* (this author's italics) because the adversarial process to a large extent has been dropped . . . [N]ow instead of coming in as an aggressive advocate saying I'm going to take you to court, you've got to come somewhat conciliatory because you are there to settle.¹⁰⁰

The "skills gap" will be an issue for the next generation of lawyers, whether or not they come to settlement processes voluntarily or via mandatory requirements. The "gap" is, of course, not effectively closed simply by the voluntary adoption of settlement processes. Even where lawyers voluntarily choose to embrace new processes and pay for and attend skills training, their competence is, of course, not guaranteed. Sometimes the zeal of collaborative lawyers for their chosen process outstrips their competence, as where their clients complain of the limits of their lawyers' abilities to contain and manage high-conflict four-way meetings,¹⁰¹ or where a case which appears unsuitable for collaboration, perhaps because of a history of domestic abuse or violence or years of mistrust and deception, is introduced to the process by lawyers eager for a new collaborative case.

V. CONCLUSIONS

In order to achieve systemic change, it is not enough to change the structure of conflict resolution processes, whether by mandatory justice procedures such as settlement conferences or mediation, or even where lawyers themselves develop and promote new settlement-oriented processes. Neither is it feasible to wait for the legal profession to transform itself. There is a need for civil justice reform to at least begin the process of underlying change in norms and values and start to nurture alternative models of skillful practice. The

100. Macfarlane, *Culture Change*, *supra* note 6, at 306.

101. Macfarlane, *Emerging Phenomenon*, *supra* note 3. A number of clients in that study commented that their lawyers seemed to underestimate the level of emotionality that would inevitably color the negotiation process between themselves and their spouse. Sometimes, clients experienced this condition as the lawyer's denial of their feelings in an attempt to impose a false "harmony" on the situation. One client recalled:

Emotionally, it is very difficult. The real danger is that they [lawyers] deal with people in an emotionally dangerous time. . . . The lawyers are encouraging the expression of emotions. So we both do. But they are not psychologists! They encourage the expression of emotion but they don't know how to deal with it.

Id.

procedural innovations of the last twenty years have demonstrated that these changes can make a difference, but that there are many environmental and cultural limitations. The question is, how do we now maximize and extend the difference that procedural changes can make?

We should take with us into our continuing efforts at civil justice reform a healthy realism about the efficacy of these efforts for change and look for ways to support them, both institutionally and culturally. These include cultivating effective professional leadership by key figures in the bench and bar, and looking for their support to ensure the exposure of as many lawyers as possible to settlement processes in order to broaden their experience and expertise. When designing institutional programs, we should consider the introduction of looser controls over some aspects of mandatory processes in order to give responsibility back to counsel and encourage lawyers to “buy in” and take responsibility. Some critical “threshold” aspects of settlement preparation (for example, documentary exchange), should be more strictly regulated. We should also focus on the design features of processes that maximize the potential for change (for example, the explicit inclusion of clients). In legal education programs, we should approach the clarification of counsel’s role as an advocate in settlement processes with a new and serious vigor. These programs should also take every opportunity to showcase the transformation stories of counsel participating in both institutional and private settings who have found settlement advocacy to be an essential, and self-fulfilling, dimension of legal practice. The theme that runs through these lessons for building on procedural reform to create systemic change is a simple one: the legitimation of legal practice as conflict resolution.