Is the Law Still a Profession?

I have seen it happen during my own lifetime: litigation has changed from being a profession, to being a business, to being an industry.

A profession is a career dedicated to helping others. It involves self-sacrifice because the interests of the client must always come ahead of the professional's own interests.

A business is a means of generating wealth for the business owner. The business must of course provide something that is of use to others but this is only as a means towards generating wealth for the owner. It is different from a profession because, while businesses must stay within dictated legal and ethical boundaries, they are otherwise free to put their own interests first.

An industry is a group of businesses which feed each other, support each other, and facilitate each other's processes, and which feel good about it. The legal industry today includes lawyers, paralegals, professional brief writers, court reporters, document management companies, experts, arbitration and mediation service providers, publishers, messengers, printers, libraries, secretaries, conference producers, CLE providers, bar groups and professional associations, legislators and lobbyists, court staffs – and I probably have forgotten a few. To be a litigation lawyer today is to be a participant in this industry.

A profession is similar to a vocation or "calling" because it involves a similar kind of dedication to a higher purpose. But it has always been more secular than a calling, and has not traditionally involved the same kind of total abandonment of one's ego (as my readers may know). It is different also because a profession has always required special education and a highly developed and diligently maintained skill set – while a calling does not require these things. As for businesses, they benefit from skill sets but still do not generally require certification of them.

There has always been a tension between the profession and the business because the lawyer has to support himself. The client would prefer to have the lawyer work for free but the lawyer has to charge fees and this means that at least in this one regard he has to set his own interests ahead of his client's. In recognition of this tension, our law has always exempted fee negotiations from the strictures of the lawyer's fiduciary duties. Although the Rules of Professional Conduct do require the fee not to be "unconscionable" [Rule 4-200] and although fee schedules have been promulgated for certain kinds of legal work (family law, probate work), the lawyer is still free to set his own fee and may decline to represent the client unless his fee is paid. [Rule 3-700(C)(1)(f), permitting withdrawal for nonpayment of fees or expenses].

Tensions between the business and the industry have intensified over the years as the number of lawyers practicing in larger firms has increased relative to the number in solo or small-firm practice. The solo practitioner may have to think about supporting himself, but the law firm has to think about supporting all its members.

The law firm involves systematic delegation of duties – and it is not clear that professional duties can or ever should be delegated. The law firm – particularly the large law firm – involves a hierarchy: from senior partners down to summer interns. This hierarchy interacts with the systematic delegation of duties to the point that there is a temptation to push the time-consuming work down to the grunts at the bottom of the hierarchy in order to support the higher-ups. The law firm that wants to compete successfully on the industrial playing-field must adopt standards of "productivity" to justify the hierarchical structure: The partners who bring in the clients, for instance, are more valuable to the firm than the members who do the work. And in these ways, the law firm functions as a business does, measuring the contributions of its members to the firm rather than measuring their contributions to the clients. Those lower in the hierarchy focus their efforts on advancing within the firm: They curry favor with their employers and senior partners first, and seek the approval of their clients only to the extent that such approval enhances their upward mobility in the firm – or their lateral mobility if they can leave the firm and carry their clients with them.

A deeper tension exists between the profession and the industry. The professional's client is someone who is vulnerable, and who seeks professional help to address his vulnerability. He has been sued; he has suffered an injury, or a calamity, so he goes to a lawyer. He is sick or wounded, so he seeks the aid of a doctor. This vulnerability is ultimately the source of the fiduciary duty and the professional must always be sensitive towards it. But once the profession becomes part of an industry, the sense of the client's vulnerability gets lost. The client becomes instead a customer and the object of a marketing effort in which he is encouraged to become a client.

It is not my purpose here to make value judgments about law as an industry; I plan to do that elsewhere. Instead, I will simply ask you to decide for yourselves: If law has become an industry, can it also still really be a profession?

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