Hamilton: Are the profession and professionalism dead?

By Neil Hamilton
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George Washington University Law School Professor Thomas Morgan’s new book, “The Vanishing American Lawyer,” makes the argument that the legal profession and professionalism are dead. In light of the future market realities facing lawyers, Morgan views the death of both law as a profession and professionalism as a good thing.

Morgan is the co-author of the widely-adopted professional responsibility textbook that I use in my courses, and a friend. While his book makes some good points and forces thought, friends sometimes get things only partially right.

Morgan thinks, and I strongly disagree, that lawyers can better respond to new market realities and thus serve the public good by saying that the profession and professionalism are dead.

I make what we might call a Churchillian defense of the profession and professionalism. I agree that the concepts are flawed in actual practice, and we could do a great deal better in realizing them, but I argue that the alternative that Morgan proposes is more flawed in terms of ultimate benefit for the public good. Business schools following Morgan’s model have largely failed to acculturate our most gifted and educated students into moralities necessary for sustainable responsible capitalism.

New market realities

The strength of the book is Morgan’s analysis of the market realities that have been transforming the practice of law (and will continue to do so) since the 1970s, as well as his outline of proposals on how lawyers should address the new market realities. The list of changing market realities includes:

• the dramatic growth in the number of lawyers;

• the impact of globalization on lawyers and law practice;

• the impact of improving information technology on lawyers’ work;

• the growth of the law firm as the premier practice organization including changes in firm billing practices and leverage;

• the increasing proportion of lawyers representing business in comparison with the proportion providing individual-oriented work;
• the increasing relative power of inside counsel; and

• the diminished significance of licensing to protect lawyers from increasing competition by paralegals, banks, insurance companies, investment advisers, and other organizations.

The book predicts “that the intersection of law with increasingly complex economic and social issues will make distinctively legal questions less common. … Rather than needing professionals whose understanding of law dwarfs their understanding of the substantive issue faced by clients, the world will require legally trained persons to be more fully integrated into the substantive challenges today’s clients face.”

The lawyers who will prosper “will be those who can make themselves into the best available go-to person in a combined law-and-substantive field and who market themselves accordingly.” Morgan believes that most of tomorrow’s lawyers will resemble what we today call business consultants.

Morgan provides suggestions on how American lawyers and their firms should address these new market realities. These include specific proposals for:

• the future course of an individual lawyer’s career;

• the importance of law firms to diversify risk, achieve economies of scope, and develop brand names;

• the challenge of meeting diverse client needs anywhere in the world;

• the challenges of maintaining law firm strength in a world of individual stars; and

• the development of new ways for clients to pay for legal services.

The book argues that lawyers “are economic actors, specially trained, but driven by all the vices and virtues of a capitalist economic system.” Morgan believes that the concepts of a “profession” and “professionalism” flowing from a social contract theory for the peer-review professions inhibit and weaken inevitably necessary responses of lawyers as economic actors to the new market realities.

Morgan writes, “[U]se of the idea of a ‘profession’ to understand the world of lawyers obstructs clear thinking about what lawyers actually do and how they have to respond to the world they face. … [W]e should not let the label ‘profession’ weaken the response to the realities that the future likely holds for legally trained persons.”
The social contract

In a market economy, the strong presumption is that an optimal outcome maximizing the public good is a competitive market with management of each enterprise controlling work to provide the goods and services consumers want at the lowest cost.

The peer-review professions, including law, have essentially argued that they are exceptions to this strong presumption because the public good benefits from some degree of greater autonomy in the work as compared to the usual employer/employee and service provider/customer for maximum profit paradigm of other occupations.

The peer-review professions have argued specifically that some degree of occupational control over the work of individual professionals through peer review will provide greater public good than the usual market paradigm.

Paragraphs 10-13 of the preamble to the American Bar Association’s Model Rules of Professional Conduct outline the social contract for the legal profession. The black-letter rules provide for a floor of minimum standards below which the peers will discipline each other. Paragraphs 1-9 of the preamble outline the aspirational core principles and ideals to serve justice, which individual lawyers and the peer group foster.

While the profession has always been about making what paragraph 9 of the preamble calls “a satisfactory living,” inherent in the social contract is that members of the profession will restrain self-interest to some degree greater than a pure market paradigm to justify the profession’s autonomy in the work.

The burden is on each peer-review profession to justify on an ongoing basis why members of the profession deserve some greater degree of autonomy in the work different from the usual employer/employee and service provider/customer to maximize profit paradigm. Failure to justify the greater autonomy as serving the public good leads to a renegotiation of the social contract and less professional autonomy.

Morgan argues that lawyers are economic actors just like all other occupations in a capitalistic economic system; indeed he predicts a substantial proportion of lawyers will become a type of business consultant. He thinks the sole justification offered for the legal profession’s social contract is that “law and legal issues are largely impenetrable by non-lawyers” so “responsibility for both has been delegated to the legal profession.” This justification, he argues, is no longer true so the “profession” and “professionalism” provide no basis for some degree of occupational control of the work.
Each lawyer and the organized bar should ask whether there are other societal benefits that justify the profession’s social contract protecting some degree of autonomy in professional work.

For example, the preamble’s first sentence calls on each lawyer to be a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice. Focusing on the role of a representative of clients, Model Rule 2.1 states that “a lawyer shall exercise independent judgment and render candid advice.” Paragraph 6 of the preamble calls all lawyers to devote professional time and resources to ensure equal access to our system of justice for the disadvantaged.

To what degree are lawyers actually living out these and other commitments for the public good of justice?

The ultimate question is not whether the concepts of a “profession” and “professionalism” in actual practice are flawed, but whether the alternative of the same employer/employee and service provider/customer to maximize profit paradigm of other occupations with no special protection for professional autonomy is more flawed in serving the public good.

Ironically, some business ethics MBA professors argue that in light of both the recent catastrophic failures of management in the financial and other sectors and a pattern of scandals recurring more frequently, the short-term profit maximization model underlying graduate business education must be changed.

In his book “From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession,” Harvard Business School Professor Rakesh Khurana observes, “The loss of this historical meta-narrative of management as a profession — a narrative that had placed managers at the center of the corporation and made them the primary link between the narrower concerns of business and the broader ones of society — is, I believe, the root cause of the inchoateness and drift that, more than 125 years after the establishment of the Wharton School and nearly 100 years after the founding of Harvard Business School, characterizes much contemporary business education. The effects of this loss, in turn, are visible all around those of us who teach in business schools today.”

For a member of a peer-review profession, Khurana emphasizes, work is more than a market exchange; it is, rather, a source of meaning and identity within a community of like-minded practitioners. In sum, discipline and self restraint to some degree to preserve the good name of the professional community and advance the public good are hallmarks of a “profession.” Society could greatly benefit from this type of acculturation of business management.
The heart of Morgan’s argument is that the concepts of a “profession” and “professionalism” are major barriers inhibiting necessary responses to changing market realities.

As an advocate for professionalism for more than two decades, I only wish that the concepts had the influence that Morgan ascribes to them. My experience is similar to Morgan’s observation that lawyers “have not responded in large numbers to calls for action made in the name of restoring professionalism.”

I do not believe in any previous golden age of professionalism, but I agree that the number of lawyers actively working on professionalism in any state currently is small and not powerful.

The Carnegie Foundation’s multiyear study of legal education, “Educating Lawyers,” found that law schools do quite poorly at acculturating students into professionalism (or a synonym, ethical professional identity). The reality is that legal education and the profession have largely not successfully fostered the internalization of professionalism concepts for law students and new entrants into the profession.

Morgan also argues that “far from representing a social contract, the professionalism label has largely been applied by lawyers to themselves in an effort to achieve political influence and economic advancement.”

In the 22 years I have worked with lawyers on professionalism, I can’t think of one lawyer motivated principally by political influence and economic advancement, but if Morgan believes this is true, then certainly these self-interested lawyers masquerading under professionalism would pose no barrier for Morgan’s proposed responses to changing market realities.

Morgan argues, and I agree, that everyone benefits from having lawyers — and others acting alongside and in competition with lawyers — act with high character and a sense of pride and dignity in the excellence of the work. He also advocates, and I agree, that lawyers should internalize high degrees of “integrity, loyalty, competence, and confidentiality.”

My definition of professionalism drawn from the ABA professionalism reports includes also public service, respect for the legal system, independent professional judgment, peer review and self-restraint in seeking sustainable profits. Morgan notes, and I agree, that all legal service providers exercise implicit moral judgments when they decide how to act on matters that they handle, and society benefits if these are good moral judgments.

Morgan thinks, and here I strongly disagree, that we can achieve these goals better by saying the “profession” and “professionalism” are dead. On the contrary, I think legal education and the
profession have just begun to learn how effectively to foster professionalism — a strong ethical professional identity — in new entrants and veteran practitioners.

Some law schools and schools in the health professions are making progress on pedagogies that foster an ethical professional identity. The empirical data strongly support the hypothesis that adult moral formation continues to occur throughout education, including graduate education. We must give this effort a chance to help new entrants internalize the strong ethical identity toward concepts of responsibility and duty to the public good that both Morgan and I (and many business ethics professors in the MBA programs) agree are important. These concepts of responsibility and duty flow from “profession” and “professionalism.”

Finally, I strongly disagree with Morgan that if law students and new entrants into the profession internalize a strong ethical professional identity (professionalism), this will inhibit effective responses to changing market realities.

The empirical data available point in exactly the opposite direction.

What are friends for if not a good debate?

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