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TRUST AND THE GLOBAL LAW FIRM

ROBERT K. VISCHER^{*}

My project explores the concept of trust as it relates to the lawyer's role and explains how recent trends in the structure, operation, and regulation of law firms may make the traditionally "thick," relational type of attorney-client trust more elusive. At the same time, trust may become even more important to some clients given the efficiency-driven changes and corresponding uncertainty that mark the globalized economy. As such, I believe that attorneys have an opportunity to reassert their value against increasing competition from service providers from other jurisdictions and disciplines. In doing so, they can redouble their commitment to the client's best interests, their own sense of vocation, and the public good. Or, as some have suggested, they can move past purportedly archaic notions of professionalism and face the brave new world as just another market provider of services. Deciding between these two paths comes down, in significant part, to a fundamental question: what is the nature and role of trust in the attorney-client relationship?

In other words, I'm asking whether market pressures will tend to marginalize the attorney's role as trusted advisor and normalize a conception of the attorney as technician. I don't mean "technician" as a pejorative, for an attorney who is not technically competent cannot even aspire to be a trusted adviser; my concern is that technical competence will expand from being one dimension of the lawyer's role to being the entirety of the lawyer's role. Will this expansion be facilitated by trust's marginalization? To the extent that relational trust becomes less central to corporate legal practice, lawyers themselves may increasingly struggle to find meaning in their work, and clients may discover that technicians work efficiently until a problem calls for counsel that is not strictly technical. More broadly, though, the story of trust's marginalization should be of interest to a society that has long empowered attorneys to function as quasi-

^{*} Professor of Law and Associate Dean for Academic Affairs, University of St. Thomas School of Law (Minnesota). This presentation was delivered at the American Association of Law Schools annual conference in January 2011. The article on which the presentation is based will appear in *The Georgetown Journal of Legal Ethics*. See Robert K. Vischer, *Big Law and the Marginalization of Trust*, GEO. J. LEG. ETHICS (forthcoming 2011).

public actors, for the weakening of trust directly compromises the attorney's capacity and inclination to introduce public values into the representation. If the attorney-client relationship becomes less personal, more distant, and more fungible, particularly within the corporate legal services market, will relational trust be a notable casualty, and should the public be worried about that?

First, though, a word about the sort of trust I'm talking about. Trust is a state of mind that enables a person to make herself vulnerable to another. There is cognitive trust, and there is affective trust, and lawyers tend to be more comfortable talking about cognitive trust. But portraying trust as strictly cognitive—based on rational assessments of self-interest and background regulatory protections—misses something essential. Trust can also be affective or grounded in the emotions. When we speak of an attitude of goodwill toward the “truster,” a feeling of safety in the face of vulnerability, we speak of affective trust.² In the absence of perfect knowledge, the trusting client cannot just rely on cost-benefit calculations; she must look to other factors arising out of her relationship with the trusted, including assumptions about the motivations of the trusted.

Let me draw the distinction in the context of friendship. If I trust my friend based only on my calculation that my friendship is too valuable for him to risk alienating me, or because I know that his reputation as a friend will suffer if he betrays me, we would hardly call that a friendship. I trust my friend because I believe that mutual trust is a central attribute of friendship—it comes with the territory.

Trust in the fullest sense requires more than an awareness that legal remedies are available in the event that the trust is breached. Trust, as a willingness to make oneself vulnerable to another, is relational. An arms-length transaction between two interest-maximizing individuals may often require a certain degree of trust, but that is not the quality of trust that has made possible the attorney's roles as counselor, advocate, and public citizen. Trust as rational calculation may work fine in my relationship with “a” car dealer, but how will it work in my relationship with “my” attorney?

Is relational trust—by which I mean a client's trust in the relationship itself, as opposed to the client's trust in the market or regulatory safeguards in which the relationship is embedded—still relevant to a lawyer's work? Especially for modern corporate lawyers practicing in a global law firm, is relational trust even a viable aspiration?

I'll mention a few of the changes that may have an impact on trust.³

2. See, e.g., Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1464 (2005) (citing Karen Jones, *Trust as an Affective Attitude*, 107 ETHICS 4, 5-6, 12 (1996)).

3. For a helpful and provocative overview of how some of these changes are impacting the distinctiveness of lawyers, see generally THOMAS D. MORGAN, *THE*

1. Globalization

Today's corporate lawyers face intense competition not only from the law firm across town. Due to our globalized economy, they now face competition from firms across the ocean, and firms in some foreign jurisdictions have competitive advantages due to recent regulatory reforms. Even more problematic is the fact that the global provision of legal services involves fewer personal connections between provider and client. The lack of face-to-face interaction is not conducive to trust. Researchers have found that visual contact significantly increases cooperation rates in social dilemmas even though the ability to see the other participants does not change the payoffs. I'm not sure if internet video conferencing tools such as Skype can fill the void. Beyond the importance of visual contact, though, the global provision of legal services often occurs without the shared background of cultural norms and values in which trust is rooted. Trust relationships develop from a sense that we are responsible for each other.

We know that trust and distrust are contagious. Even while stretching and "thinning" the attorney-client relationships, globalization ratchets up the level of interconnectedness dramatically. If pro-competition reforms in other countries make trust less of a hallmark of the attorney-client relationship by making the relationship just like any other provider-consumer relationship in the marketplace, the effects will not easily be kept off American shores.

By outpacing personal familiarity and the reach of law, the global economy tests the boundaries of both affective and cognitive trust between lawyers and clients. A lack of trust may contribute to the tendency to use lawyers for their technical competence on discrete tasks, rather than relying on them for a wider ranging advisory role.

2. The Disaggregation of Legal Services

Much of the concern with outsourcing focuses on the fact that an overseas third party is being brought into the attorney-client relationship, but there is another element to the outsourcing phenomenon that is just as important from the standpoint of relational trust: outsourcing is based on the disaggregation of legal services.⁴ If legal services, like manufacturing, can be stripped down to their component parts and tasked to the lowest cost provider, is relational trust still part of the equation? Are attorneys selling a product, or are they selling, in a very real sense, a relationship? Put

VANISHING AMERICAN LAWYER (2010).

4. See, e.g., Milton C. Regan, Jr. & Palmer T. Heeton, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORD. L. REV. 2137 (2010).

simply, can relationships be disaggregated?

3. The rise of in-house counsel

We probably all know about this dynamic; as an attorney's knowledge of, and experience with, the client narrows, she lacks the foundation to be anything more than a technician working on isolated projects, rather than a partner engaged in the stewardship of the client's well-being. Is the trust relationship now located between management and in-house counsel? If so, is that a problem?

4. The decline of self-regulation

What if lawyers no longer hold their regulatory future in their own hands? And what if corporate lawyers end up subject to the same set of obligations that every other business provider is?

5. Multi-disciplinary practice

In terms of MDP, from the perspective of trust, the relevant question is whether blurring the organizational lines between law firms and other providers blurs the distinctiveness of the attorney-client relationship as well.

My concern about MDP is not premised on a belief that individual attorneys are more virtuous than other professionals. Like anyone else, attorneys are flawed, prone to self-dealing and ethical shortcuts. But has the legal profession's traditional narrative about the attorney's role—including relational trust as a constitutive element of that role—served as at least a partial check on the attorney's pursuit of their own interests? As competitive pressures and the by-products of regulatory initiatives combine to make lawyers less distinct from other market providers, there may be a decreasing amount of definitional content built into the lawyer's role.

6. Law firm culture

Fostering trust in social settings is not all about creating external incentives in the form of rules and regulations—there is a significant affective component that is contingent on the interpersonal signals that are sent on a day-to-day basis. Levels of trust within a firm are contingent, in significant part, on the culture, by which I mean the priorities and values embodied in, and reflected by, the day-to-day interactions of the firm's constituents. As firms have grown exponentially both in terms of numerical size and geographical scope, building a culture that incorporates values beyond the lowest-common denominator of market performance becomes increasingly difficult.

If law firm culture has become an atomized pursuit of the bottom line,

we have a trust problem. The weakening of trust within the firm cannot help but impact an attorney's stance toward clients. Perhaps the "eat what you kill" law firm model has bred a lawyer culture that values self-reliance over cooperation, competition over collegiality, short-term profit over the client's long-term good, and the avoidance of vulnerability over the espousal of trust. Trust is contagious in a sense that should be troubling to clients, even large corporate clients. Studies have shown that "the extent to which one says one trusts others may, in fact, be a reflection of that person's trustworthiness"—for the results suggest that "the best way to determine whether or not a person is trustworthy is to ask him whether or not he trusts others." A lawyer whose workplace is devoid of relational trust will not be well equipped or inclined to develop client relationships based on relational trust.

Given these trends, it may be more accurate to say that the legal profession is moving from a paradigm of "trusting in" to "trusting that," a distinction productively mined by Claire Hill and Erin O'Hara in other contexts.⁵ For our purposes, what I'm trying to capture with these labels is the notion that lawyers' distinctive service was providing business with a "thickness" of relationship that allowed clients to trust "in" the lawyer. And now as lawyers' services have grown less distinctive and their firms have marginalized non-economic values, perhaps, clients are asked only to trust "that" a lawyer will not act contrary to the client's interests in a specific scenario. If the legal profession is now resigned to using ethics rules, contracts, or other market incentives to ensure that corporate clients can accurately predict how their lawyers will behave in a given situation, rather than cultivating a more general trust that the lawyer, because she is a lawyer, is worthy of the client's trust, what have we lost?

Why Trust (still) Matters

The diminishment of relational trust should be of concern to clients and to lawyers, but given the focus of the panel, let me say a word or two about another less obvious cost to trust's marginalization: the attorney's role as public citizen. To the extent that the attorney is a technician hired to handle a single transaction, the attorney is not realistically in a position to vindicate any interests other than those articulated by the client in that particular transaction. If the client lacks trust in the attorney sufficient to bring her into the business's ongoing conversation in any sustained way, the attorney will not be in a position to counsel the client about the business's overall direction and how that direction implicates the interests of other constituents, including the interests of the surrounding community.

5. Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1725-26 (2006).

Further, the dynamic could become a self-perpetuating cycle, for as the diminishment of trust diminishes the attorney's ability and inclination to introduce public values into the representation, the trust-enhancing regulatory framework may erode as well. Attorneys enjoy a range of legal privileges based, at least in part, on the belief that these privileges promote the public good. If the privileges are perceived to do nothing other than enhance the market profitability of lawyers, their long-term political sustainability is open to question.

The Importance of Trust in a Globalized Profession

As noted, globalization puts pressure on trust by stretching attorney-client relationships over greater distances, across less frequent and less personal contacts, and beyond the reach of regulatory frameworks. At the same time, however, the opportunity for attorneys to meet client needs by building relationships of trust is unmistakable. International business practice is complicated by uncertainty about legal jurisdiction and conflict resolution, and many businesses overestimate these complications. Because, in the cross-border context, there is insufficient confidence in the legal system, trust in the lawyer is essential.

Even beyond confidence in the legal system, there is a more general lack of "system trust" in the international arena because actors are often operating outside their normal social systems, and thus background cultural norms and practices may provide limited guidance for their interactions. If "system trust" is lacking due to the lack of a coherent "system," interpersonal trust relationships may be even more essential to facilitating cooperation.

The Importance of Trust in a Time of Change

Interpersonal trust grows in importance to the extent that trust in the social and legal systems is more elusive in a globalized economy. Trust becomes doubly elusive because of lawyers' changing roles. As role negotiability increases in a system, trust must correspondingly increase. Lawyers are not cashiers. Their behavior has never been circumscribed entirely by their role; rather, discretion has always been part of a lawyer's work. And thus, a lawyer's trustworthiness, both individually and as a categorical professional attribute, has always been a significant component of their value to clients. But as the role-defined boundaries become more malleable, the need for trust increases.

What Can be Done?

The primary purpose of this paper is to raise concern about trust's future prospects, rather than prescribing surefire ways to change course.

Obviously, the legal profession is not entirely in control of its own destiny. Globalization and the accompanying focus on increased efficiency in the provision of legal services are not up for a vote by the ABA's House of Delegates. And I must caution that legal reform is not the magic elixir for ensuring trust's centrality. The legal framework can facilitate trust, but an overreliance on law can actually marginalize trust. Cries for stepped-up enforcement of tax laws, for example, can actually decrease compliance by signaling to taxpayers that their fellow citizens are flouting the law.⁶

Despite these limitations, the regulatory framework still matters. A background level of confidence can be a necessary precursor to willingly embracing vulnerability, and the law can help establish that confidence. We should allow trust to help shape our understanding of the nature, scope, and prudence of the objectives underlying the law governing lawyers. Some regulatory changes might look different when viewed in relationship to trust as a professional attribute. The "appearance of impropriety" standard has fallen into disfavor as a relevant regulatory concern, but has its disappearance made it easier for the profession to lose sight of the fact that public perception is an element of public trust? Given the ABA's recent revision of Rule 1.10 to permit the screening of conflicted lawyers, a lawyer could conceivably switch to the opposing firm in the middle of litigation without the affected client's consent.⁷ What does this revision tell clients about the wisdom of "trusting in" their lawyer, even if they "trust that" their former lawyer will be screened from participation in the case?

If we care about maintaining trust as a central feature of the attorney-client relationship, we have to care about the legal profession being more than the sum of its market-driven parts. It is important that attributes of trustworthiness flow, at least in part, from a lawyer's status as a lawyer, and not simply from her willingness to market herself as trustworthy or to enter into contracts that limit her ability to take advantage of the client's trust. These attributes can be facilitated, though of course not guaranteed, by the expectations that are embedded in professional identity. Those expectations, including those held by the public and lawyers themselves, are shaped by the messages communicated by the profession.

If we truly believe that lawyers have obligations as public citizens that go beyond what we are willing to ascribe to every other market provider, then the profession's rhetoric and self-conception matter. Are we technicians or trusted advisors? If lawyers only bring technical competence to the table, much of what lawyers do can be stripped down to

6. See Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and the Law*, 102 MICH. L. REV. 71, 83 (2002).

7. See MODEL RULES OF PROF'L CONDUCT R. 1.10 (2010).

separate tasks and distributed to other providers. But what if the bundle of tasks is more than the sum of its parts? If a “more than the sum” approach is to prove viable in the marketplace, it will be trust that makes the lawyer’s role coherent and distinctive.