

January 5, 1999

To: Bar leaders
From: Randy Roth
Re: 1999 retreat

If polls are to be believed, a substantial number of people think something is terribly wrong with the legal profession here and elsewhere. Consider, for example, the following list of alleged perceptions of the public:

- That lawyers care more about lining their own pockets and protecting their own turf than addressing the public's needs.
- That lawyers take on assignments for which they lack competence.
- That lawyers do not do a good job of regulating themselves.
- That lawyers sometimes file or threaten to file frivolous lawsuits.
- That politics sometimes plays an inappropriate role in judicial selection and retention.
- That judges and justices are not accountable to anyone.

We will begin our retreat with a discussion of how we think the public in Hawaii perceives us and why it perceives us in those ways. The basic idea behind this opening segment is that perceptions can be important, whether or not they are accurate.

Most of our time, however, will be spent discussing a series of specific proposals for substantive change of one kind or another. Some of these proposals, if widely supported, conceivably could be adopted and implemented relatively quickly. Others would necessarily involve other organizations and require considerable time and effort.

Peter Adler will be on hand to moderate the entire retreat. The first segment will begin promptly at 8 with brief presentations by two non-lawyers (editorial page editor Jerry Burris and political commentator Dan Boylan) who will tell us how they think lawyers are perceived by the public in Hawaii, and suggest ways in which those perceptions might be altered. They'll stick around just long enough to respond to our questions or comments. After we've then had an opportunity to share our own thoughts about public perceptions, designated lawyers will take turns describing what they perceive to be problems and/or opportunities facing lawyers in Hawaii, and each will offer and defend a specific proposal for substantive change. In some cases, a consensus for action might be reached. In others, we'll at least end up better understanding the competing positions.

While these discussions hopefully will result in bar association projects, at a minimum they will be referred to during the coming year as we deal with specific issues already raised by others (eg, specialization and mandatory CLE). One of my goals for 1999 is develop a 3- to

5-year HSBA agenda that can help provide continuity to long-term endeavors.

As “homework” for the opening segment, I’m asking that everyone read the following excerpts from a talk given in 1998 by Stanford Law School professor Deborah Rhode:

“Lawyers belong to a profession permanently in decline. Or so it appears from the chronic laments by critics within and outside the bar Discontent with legal practice is increasingly pervasive and is driven by structural factors that are widening the distance between professional ideals and professional practice. Yet what is most disheartening about the profession’s current plight is the gap between the bar’s and the public’s perception of the problem, and the failure of both groups to confront its underlying causes and the need for structural solutions.

“Three-fifths of Americans think that lawyers are greedy, and only one-fifth think either ‘honest and ethical,’ or ‘caring and compassionate’ describe most lawyers Two-thirds of surveyed Americans believe that attorneys are no longer ‘seekers of justice,’ and a quarter believe that they inappropriately ‘manipulate the legal system without regard to right and wrong.’

“When asked to identify the most important problems facing the profession, lawyers consistently have put public image and credibility at the top of the list. Yet when confronted with specific complaints, attorneys’ responses typically have alternated between irritation and resignation. From their vantage, popular perceptions seem unfair and uninformed, largely a result of bad press. But the bar’s own commissioned research suggests a more complicated picture. Most Americans have had direct contact with attorneys. Three quarters of the public have retained lawyers and half have had some dealings with them on a more than occasional basis. Moreover, the individuals most likely to have negative impressions of attorneys are those with the most knowledge and personal experience. Corporate clients are among lawyers’ harshest critics. By contrast, those who know relatively little about the legal profession and the legal system, and who get their information primarily from television, have the most favorable impressions. While lawyers are probably right that newspaper coverage is skewed in the opposite direction, much of the adverse press coverage is consistent with people’s personal experience. The problem, in short, is more with the reality of lawyering than its image. Yet finding solutions is more difficult than the public typically acknowledges.

“A large part of popular dislike of lawyers stems from aspects of the legal system that are not readily changed. Indeed some discontent is inherent in any system of dispute resolution. The contexts in which people encounter the profession are often unpleasant: divorce, bankruptcies, personal injuries, or contractual disputes. This unpleasantness inevitably affects perceptions of lawyers who are profiting from others’ miseries. Attorneys are also the messengers of unwelcome messages about the law, so they readily become scapegoats when the justice system fails to deliver justice as participants perceive.

Litigation is rarely a win-win enterprise and losers are apt to put some of the blame on lawyers. The targets of resentment are not, however, only — or even primarily — parties’ own attorneys. Between two-thirds and three-quarters of surveyed individuals are satisfied with

their lawyers. The public's major grievances involve perceived abuses by other peoples' lawyers and a system that fails to prevent them Much of what people dislike about opposing counsel is what they value in their own. One of the most positive traits that the public associates with lawyers is that their first priority is loyalty to their clients. Yet one of the most negative traits is lawyers' willingness to manipulate the system on behalf of clients without regard to right or wrong. People hate a hired gun until they need one themselves.

"The public is similarly conflicted about the tension between money and justice. Americans dislike the fact that lawyers are for sale and that law is accessible only to those who can afford it. But Americans also dislike efforts to remedy that imbalance As one Denver legal aid attorney observes, 'the only thing less popular than a poor person these days is a poor person with a lawyer.'

"Many criticisms of professional conduct and regulatory processes have a strong basis in fact. On matters such as excessive fees, unresponsive disciplinary structures, and overly broad protections of the professional monopoly, the public does not appear ambivalent, and its concerns do not seem unwarranted.

"In short, on some important issues of professional regulation, the problem is not so much that the public is uninformed or undecided, but rather that it is unorganized and uninvolved. For the vast majority of Americans, such issues are not a priority. Although egregious abuses occasionally galvanize the public into action, nonlawyers seldom have sufficient incentives to organize around questions involving regulation of lawyers. By contrast, the legal profession has every incentive to pursue regulatory concerns and to block initiatives that advance public interests at the expense of its own.

"The conditions for building a reform constituency within the profession have seldom been better. Discontent among attorneys is pervasive and increasing. A majority of lawyers report that they would choose another career if they had the decision to make over, and three-quarters would not want their children to become lawyers. The symptoms of professional malaise are also reflected in health-related difficulties. An estimated one-third of American attorneys suffer from depression or from alcohol or drug addiction — a rate three to four times that of other Americans.

"At the most general level, many lawyers express concern about the 'decline of professionalism,' which captures a range of more specific complaints. About three-quarters of surveyed lawyers believe that practitioners are more 'money conscious,' half think they are less civil, and a third report that they are more likely to lie than in earlier eras Increases in the number of lawyers have increased the level of professional competition and diminished the force of informal community sanctions. Price consciousness among corporate clients, together with the relaxation of bar restrictions on competition within and across professions, also have intensified economic pressures in private practice, and have led to increased instability in lawyer-client relationships. As a consequence, attorneys face intense pressure to serve clients' short term interests at the expense of other values.

"Part of the dishonesty, incivility, and acrimony that lawyers find troubling in current

practice seems driven by these profit dynamics. As Richard Posner points out, competitive markets are 'no fun for most sellers.' Law is not an exception and fun is not the only casualty. Legal practice has become more competitive within as well as among law firms. Partnership means less and is harder to obtain. As the likelihood of promotion diminishes, the competition among young lawyers intensifies. Incoming associates are wined and dined, then worked to death All work and no play is fast becoming the norm rather than the exception. What loses out is not just leisure. It is also the opportunities for pro bono service, civic involvement, and breadth of experience that build professional judgement and sustains a professional culture. So too, almost half of American attorneys feel that they don't have enough time for their families.

"The problem in some of these settings is not only the quantity of work but also the quality — as Steve Gillers puts it, too much of practice is 'nasty, narrow ... relentlessly repetitive, and strangely unconnected to a dimly recollected purpose in choosing law.' This lack of larger purpose accounts for the greatest gap between expectations and experience among American lawyers. In the ABA's mid-1990s survey of career satisfaction, less than a fifth of surveyed attorneys felt that legal practice had 'very well' lived up to their expectations in contributing to the social good.

"The driving force of much of what lawyers dislike, but also very much like about legal practice, is money. This is an awkward fact the bar is reluctant to face. There are suggestions that lawyers should simply rise above their baser instincts. This approach — 'just say no to greed' — appears to have fallen somewhat short. Although lawyers often acknowledge that money is part of the problem, they generally manage to place responsibility anywhere and everywhere else. In no context is this more apparent than law firms. Partners blame mercenary and unrealistic associates, while associates blame mercenary and unfeeling partners.

"A related problem involves the tension between moral independence and more worldly rewards. Professional rhetoric tends to paper over this conflict by making a virtue out of expedience. Under prevailing norms of professional responsibility, lawyers need not exercise moral independence within their professional roles. Rather, their preeminent obligation is loyalty to client interests. Over the last century, the bar's codes of conduct have progressively narrowed the ethical discretion that lawyers are expected to exercise once they have accepted representation. The assumption underpinning bar codes of conduct is that the most effective way to discover truth and preserve rights is through an adversarial process in which lawyers have 'undivided fidelity to each clients's interests as the client perceives them.' This assumption remains plausible only if all interests have comparable access to information and legal representation. Such conditions seldom prevail in the world that most lawyers encounter. The result is a dispiriting disjuncture between current norms and traditional aspirations.

"A final problem, similarly unacknowledged in professionalism debates, involves the tension between professional autonomy and public respect. While many practitioners resent the level of popular animosity toward the profession, they generally resist efforts to address its sources, or to acknowledge any tension between public accountability and professional autonomy. Rather, the assumption frequently repeated in ethical codes and professionalism discussion is that the bar's power of self-regulation serves the public interest, by helping to 'maintain the legal professions's independence from government domination.' Almost never do

bar leaders acknowledge the possibility that self-interest has skewed lawyers' sense of the public interest and the structure of self-regulation. Yet studies of these regulatory processes uniformly find serious flaws in their responsiveness to non-client interests and to ordinary consumer grievances.

"The conclusion of this lecture and starting point for my intended book is that if lawyers are seriously committed to fostering professionalism, they first must develop a clearer sense of what it means and the tradeoffs it requires. The bar needs a vision beyond the wistful nostalgia and wishful exhortation that dominate current debates."