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## Presented by the Japan Federation of Bar Associations

Shigeru Kobori

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# Presented by the Japan Federation of Bar Associations

## Shigeru Kobori\*

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\* President, Japan Federation of Bar Associations.

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*NOTE: For ease of drafting, this opinion has adopted only male gender references in connection with the lawyer or other professional. Such references are, however, intended to encompass both the male and female genders.*

#### A. Uniqueness and responsibilities of the legal profession

Due to the internationalization and multinationalization of commercial activities, or the so-called globalization, the movement of services across national borders has become active along with the international movement of people, goods and capital. In light of this, the need for foreign lawyers to perform legal services in countries other than the country in which their qualification was given has also increased. Accordingly, the type of qualification to be recognized and activities permitted to be undertaken by foreign lawyers within each country's borders have become important issues for the legal professions of the world. In considering these issues, we believe that sufficient consideration must be given to the fact that the legal profession, which comprises one arm of a country's judicial system, has the special characteristic of serving the public interest, as well as to the fact that the legal system of each country is founded on the history, culture and economy of that country.

The details of these issues will be discussed below, but based on such fundamental stance, we believe that although crossborder legal practice should be promoted reflecting the so-called globalization, the independence and ethical standards of the legal profession should be strictly adhered to. From a similar perspective, we believe that the legal profession should be separately and independently considered from other professional services in the preparation of multilateral regulations and mutual recognition standards under WTO/GATS.

In addition, the so-called "big six" worldwide accounting firms are currently pushing to offer their clients a "one-stop shop" by which they are able, either by employing lawyers or working in conjunction with lawyers, to provide various services under the roof of one integrated firm. In fact, we are already seeing the emergence in Europe and Australia of big law firms operating either jointly or in association with public accounting firms.

The establishment of such comprehensive integrated firms may be convenient for a portion of clients who in the past have had to consider the consistency of advice received separately from both a legal firm and an accounting firm consulted independently in relation to the same matter. An integrated firm with a worldwide network opens up the possibility of receiving specialized country to country service.

Although the convenience for some clients of such comprehensive integrated firm establishment cannot be denied, there are fundamental differences between the specialist professions such as lawyers and certified public accountants (CPA) with regard to their systems of social responsibility, independence, professional ethics and consumer protection that not only result in lack of protection and loss of benefit for clients, but may even result in grave harm to the judicial and lawyers systems themselves which institutionally guarantee the function of the legal profession to serve the public interest. Accordingly, sufficient thought must be given to such issues.

The pivotal issues of social responsibility and independence of the legal profession will firstly be discussed below, and based on such discussion, problems of ethics, consumer protection and multi-disciplinary partnerships will be examined in turn.

## 1. The Social Responsibility and Independence of the Legal Profession

### *a. Social Responsibility*

A lawyer's principal social responsibility is to play a part in the exercise of judicial power which forms an important element of the national sovereignty, and to strive for the protection of basic human rights and realization of social justice.

As social life develops and becomes more complicated, legal systems also become variously complex and it is not always an easy task for society's citizens to comprehend by themselves what rights they have, what measures are available to achieve such rights and how to enforce them.

The system of lawyers has been established to enable those who have acquired legal expertise and skills to assist the public in the use of the legal system so as to safeguard their basic human rights and thereby create a society governed by justice and the rule of law.

Accordingly, a lawyer is not merely a mouthpiece of his client in pursuit of profit but must rather assume a guardianship role. He must protect the proper interests of his client based on judgement supported by his legal expertise and also, when occasion demands, persuade his client as to a course of action, whether it is in respect of court procedure or practical affairs outside the courtroom. This is also true of a lawyer involved in business law, since he too must ultimately act in the proper legal interest of his instructing party as sanctioned by the law.

Having regard to the high public interest content of a lawyer's professional responsibilities such as his part in the exercise of judicial power forming an essential element of national sovereignty, the protection of basic human rights and realization of social justice, a lawyer can be clearly distinguished from other professions bearing different professional responsibilities. A CPA, for example, in performing his principal duties of audit, is involved in corporate financial affairs and has a responsibility to protect the financial interests of shareholders, creditors and general investors, by disclosing a corporation's exact financial condition. In the conduct of a consultancy business (which is a substantially important part of an accountant's practice), a CPA contributes to his client's business not only by way of advice on corporate accounts and financial matters but also by the examination of corporate conditions relating to sales and distribution management, personnel and organizational management and information systems. In this regard, a CPA's professional responsibilities are vastly different to those of a lawyer.

Moreover, CPAs must apply accounting principles which are becoming in essence internationally standardized and universal. In contrast, a lawyer must apply the "law" which is affected by history, national character and cultural influences and varies markedly from one country to the next. The lawyer system depends greatly on and varies according to each country's history, national character and culture and a lawyer's knowledge and experience also depend largely on the specific national laws by which he gained his qualifications.

*b. Independence*

It is a lawyer's professional responsibility, based on his legal knowledge and skill, to act in the proper legal interests of his client and thereby foster a society ruled by justice and law. Accordingly, a lawyer is not restrained by external factors but must rather fulfil his professional responsibilities in obedience to the law and his own legal conscience. Moreover, the institutional guaranty of the society which enables such performance of services must be established. In other words, a society governed by justice and the rule of law can only be realized when lawyers are, under a social regime, guaranteed free unhindered practice of their profession.

There are three aspects to this independence of lawyers:

- 1) Independence from third parties such as government powers and interest groups;
- 2) Independence from the client; and
- 3) Independence from other lawyers.

Firstly, in order that a lawyer can carry out his duty to protect his client's rights and achieve social justice he must be independent of all improper influences from third parties including powers of the government. In Japan, autonomy of lawyers is recognized in order that the independence of lawyers can be systematically guaranteed. Due to the existence of this self-government, it is possible for lawyers to boldly oppose government powers.

In contrast to recognized autonomy of lawyers in Japan and the supervision and discipline of lawyers by bar associations, which in turn guarantee lawyers a strong independence from government powers, CPAs are under supervision and discipline of the Ministry of Finance and their firm independence from government authority is not recognized.

Secondly, with respect to a lawyer's independence from his client, a lawyer does not act merely as a mouthpiece of his client but is charged with the professional responsibility of using his legal expertise and skill to act in his client's proper legal interests. Accordingly, a lawyer is also bound by a duty to work to some degree independently of his client in order to solve a matter pursuant to the law and his legal conscience. (The lawyer's position of guardianship.)

Finally, a lawyer's independence must be guaranteed with respect to his relationship with other colleagues within the law firm. Problems arising from a conflict of professional ethics do not easily occur in regard to a partnership of lawyers within a firm due to their mutual observance of the same ethical code which precludes one lawyer from damaging the independence of another.

Such recognized strong independence of lawyers, designed to accomplish a lawyer's professional responsibilities, is not generally found in other professional disciplines. As one example of this, a CPA conducting one of his major duties, a financial audit, in principle carries out a systematic inspection which, in order for the results of the audit to be declared, must be subjected to scrutiny by another CPA not engaged in the conduct of the audit itself.

There is thus no genuine independence of one CPA from other colleagues in his firm. Moreover, a CPA working in connection with a consultancy business should not be independent of other colleagues in his firm.

*c. Ethics Rules*

A lawyer has a professional responsibility to contribute to the realization of a society governed by justice and the rule of law by applying his skill and expertise to assist society's citizens in the use of the legal system.

The lawyer must therefore act in accordance with high ethical standards. In light of the fact that it is a lawyer's professional responsibility to play a part in the exercise of judicial power by which national sovereignty is comprised and to guard fundamental human rights and the realization of social justice, there resides in the ethical standards of a lawyer an element of public interest which operates as a systematic guarantee necessary to ensure the appropriate and smooth exercise of judicial power.

For example, a client discloses to his lawyer his private affairs and confidential information. There is a danger that the lawyer may disclose such information or that it will be disseminated or used for the lawyer's own benefit or the benefit of others in derogation of the client's interests. High ethical standards are required to counter such abuses. Among such ethical criteria are the concepts of confidentiality, conflict of interest and good faith obligation. These exemplify legal ethical standards of universal application and importance.

Confidentiality is an ethical standard required because a lawyer must have a sufficient grasp of all relevant information relating to the client to enable him to act on the client's behalf. If there is a possibility that all or a portion of the information disclosed to the lawyer is revealed to a third party or otherwise used improperly then sufficient information cannot be obtained and the lawyer cannot completely fulfil his professional responsibilities.

Without a strong lawyer-client trust relationship, a lawyer cannot in good faith act in the client's best interest due to the client's inability to disclose all relevant information. The ethical standard pursuant to which a lawyer may not take on a case which gives rise to a conflict of interest precludes a lawyer from creating circumstances in which he cannot pursue in good faith the proper



interests of his client or from putting himself in circumstances which generate in his client feelings of mistrust.

A lawyer's good faith obligation requires him to act on his client's behalf in the matter in which he has been instructed and therefore to defend in good faith the legal rights and best interests of his client.

Although these high ethical standards are demanded of lawyers, the laws which they apply naturally differ from country to country and since the lawyer system in each country is greatly influenced by that country's legal system, history, national character and culture, a detailed lawyer's code of ethics would give rise to differences depending on the country in question. (For example, some countries permit advertising whereas others do not; regulation of lawyers' remuneration exists in some places but not in others). Consequently, without the unification of the ethical codes of lawyers from each country, the provision of legal services by a partnership of lawyers from different countries or by a lawyer of one country on behalf of a client from another country would give rise to various problems.

Additionally, since other professions are bound by professional responsibilities which are different from those of a lawyer, their ethical codes are of course also vastly different. In the case of CPAs, for example, since their professional responsibility in respect of a financial audit is to protect the financial interests of shareholders, creditors, and general investors by disclosing an accurate financial profile of the relevant corporate enterprise, they observe a code of ethics which is different from that of a lawyer.

Firstly, with respect to confidentiality, the principal duty of the CPA is to accurately disclose the financial condition of the client corporation so the accountant-client relationship is completely different from the lawyer-client relationship. It is possible to envisage, for example, the audit by a CPA of both opposing parties to a lawsuit. Due to such differences in a CPA's professional responsibilities and ethical standards, the concept of privilege is not recognized and the content of confidentiality is significantly different.

Regarding conflict of interest, a lawyer must guard his client's legal rights in relation to the opposing party, who in most cases will have opposing interests. By contrast, in the case of a CPA (whether in the conduct of an audit or provision of consulting services) there is not necessarily a clear opposing party directly in

conflict with the interests of the client. Conflict of interest is thus regulated by a different approach from that of lawyers.

In respect of good faith obligation, a lawyer's duties are carried out on behalf of a client by whom he has been instructed, but a CPA, although he may be instructed by a corporate enterprise, can undertake an audit not necessarily for the benefit of such enterprise but to discharge a duty to the public including shareholders, creditors and general investors.

Accordingly, it can be said with respect to a CPA, at least in relation to his essential main duty of auditing, that a good faith obligation to protect the interests of his client is either not recognized or has undergone wide-sweeping change.

It should be noted that the above ethical standards which lawyers are obligated to observe are eminently territorial in nature. That is, the requirement that lawyers in their own country as well as permitted lawyers from other countries adhere to the ethical standards applicable in the country in which the legal services are provided is an important standard that forms the core of the judicial system of that country, and it also enables protection to be extended to the consumers of the legal services of that country. Accordingly, the foreign lawyer authorized to perform legal services in the host country must adhere not only to the ethical standards of the country in which he is licensed but also to the ethical standards of the host country.

## 2. Consumer Protection regarding Transnational Practice

### *a. Consumer Protection in Legal Practice (see Note)*

Since a lawyer has a professional responsibility to realize social justice by safeguarding the legal rights of his client, he must bear high ethical standards included among which are ethics aimed at protection of his client.

Considering the issue of confidentiality referred to above, a client cannot receive appropriate advice from his lawyer unless he discloses to his counsel all relevant information. However, as long as there is a possibility that such information might be leaked to a third party or improperly used, a client cannot disclose all relevant details. For this reason, lawyers are subject to strong obligations of confidentiality, and testimonial immunity based on attorney-client privilege, etc. is recognized for the purpose of providing institutional guarantees of such obligations.

With respect to the issue of conflict of interest as described above, if a client is to entrust to his lawyer the realization of his own legal rights, there must exist between the client and his lawyer a solid trust relationship. In this context, a lawyer must not therefore take on a case which gives rise to a conflict of interest; he must not allow the creation of circumstances in which he cannot act in his client's best interests or in which his client is imbued with feelings of mistrust.

As mentioned earlier with respect to good faith obligation, a lawyer must act for his client in the matter in which he is instructed and therefore defend in good faith the rights and best interests of his client.

*b. Issues Presented by Transnational Legal Practice*

From the viewpoint of client protection issues referred to above, very special caution is required when considering the mutual recognition of legal qualifications, the partnership between host country lawyers and foreign lawyers, or the employment of host country lawyers by foreign lawyers.

Namely, the main responsibility of one country's lawyer lies in the application of mainly that country's law, and the law itself as applied varies enormously from one country to the next, depending on the nation's history, culture and national character. For this reason, the recognition of de facto practice of a host country's law by a foreign lawyer who is not well acquainted with the content and methods of application of such law gives rise to a strong possibility that the client's interests will be compromised. Accordingly, this matter must be given due consideration with respect to the mutual recognition of legal qualifications, the partnership between lawyers of a host country and foreign lawyers and the employment by foreign lawyers of host country lawyers.

Since the code of ethics of lawyers varies from country to country, there is a possibility of unanticipated circumstances for a client who acts in the belief that a foreign lawyer observes the same ethical code as lawyers from his own country. Additionally, lawyers from different countries working in the same firm must face the problem of which code of ethics should be followed. This problem is compounded in the case of legal services rendered by lawyers from the same firm working in partnership who have different ethical codes.

*c. Issues Presented by Partnership Between Lawyers and Other Professionals*

Lawyers and other professionals have different ethical standards arising from their different professional responsibilities, predominantly with respect to the three important ethical criteria of confidentiality, conflict of interest and good faith obligation which are so essential to the protection of the client. That a CPA, for example, obeys a different code of ethics in respect of these three criteria has already been demonstrated in section 1 (3) above (Ethical Issues).

Accordingly, in terms of the convenience and benefit to the client, there may be cases in which the provision of various services by one integrated firm will be convenient for the client. However, as discussed in section 3. below, this matter must be seriously considered from the viewpoints of the protection of the client's interests and the public interest for appropriate and smooth exercise of judicial power.

NOTE: The reference herein to "consumer" is intended to mean present and potential future clients.

3. Particular Problems Presented by Multidisciplinary Practice

A lawyer has a professional responsibility to guard the legal pursuit of his clients' best interests and thereby to play a part in the exercise of judicial power which forms an important element of national sovereignty, and to create a society governed by justice and the rule of law. Other professions do not share this responsibility and since their professional responsibilities are different, neither do they share in general the high ethical standards nor the strongly independent position accorded to lawyers to enable the fulfillment of their professional legal responsibilities.

Additionally, lawyers are professionally bound to apply the law which itself can vary greatly from country to country, according to that country's strong influences of history, national character and culture. An unthinking approval of a partnership between a legal profession having the special characteristics described above with specialists from other disciplines raises the possibility of damage to the interests of the client. Consequently, with respect to multidisciplinary practice, due care and consideration must be had to the differences in professional

responsibility and to the variance in levels of independence and professional ethics arising from such differences.

The differences in professional responsibility, independence and ethical standards between a lawyer and a CPA have already been discussed above in section 1. If a partnership between lawyers and CPAs is condoned without regard to these differences, then the following problems may result.

On the issue of confidentiality, a lawyer can claim attorney-client privilege with respect to confidential client information obtained for the purpose of the lawyer's provision of advice in cooperation with the CPA, but the CPA himself has no claim to such privilege. Accordingly, the confidentiality of the client's information cannot be sufficiently protected. Since a client seeks a lawyer's assistance and discloses all relevant information precisely because of the assured protection of its confidentiality, a client stands to be disadvantaged by the loss of protection of his confidential information which flows from a multidisciplinary practice. This may prevent a client from relaying all relevant information to his lawyer which would in turn prevent the lawyer from duly acting to safeguard his client's best interests and thereby fulfilling his rightful social responsibilities.

On the question of conflict of interest, there is a real possibility, owing to the fact that a CPA has a lower standard than a lawyer for judging when a conflict of interest arises, that in respect of the joint provision of services by a lawyer and a CPA, the services would be performed in accordance with the lower CPA standard. However, in the event that a lawyer undertakes services pursuant to such lower standard, he must act in a matter which his own ethical code would otherwise preclude him from accepting. As a result, the lawyer is not only acting in violation of his own ethical standards but the interests of the client are also being jeopardized.

In addition, the fact that CPA firms have established worldwide networks and a large client base, coupled with the lower standard for judgement of a conflict of interest, increases the odds of a conflict of interest arising and extends the range of negative factors influencing a lawyer's performance of his duties.

In a multidisciplinary partnership which renders various services, such as legal, accounting, auditing, and other advice or services related to many countries, it would be impossible to expect that the professionals in the partnership would be able to maintain and operate under their respective ethical standards. Therefore, we believe that such kind of partnership should, in

principle, be prohibited. In the event that such multidisciplinary practice were to be recognized, however, it would be necessary to construct a system whereby a lawyer's ethical standards can be observed and his professional responsibilities fulfilled without harm to the interests of either the client or the public.

Regarding the specific form of such a system, the following rules proposed by the IBA Standing Committee of Multi-disciplinary Partnerships are worth noting:

Namely:

- 1) With respect to the establishment of rules in relation to a multidisciplinary practice, the importance and the essential features of the legal profession (a lawyer's social responsibilities, independence, ethics and protection of clients) must be addressed, and proper safeguards should be provided. These rules could range from outlawing multidisciplinary partnerships altogether or establishing a regulatory regime which eliminates risk of undermining the aforesaid essential features;
- 2) In the event that multidisciplinary partnerships are accepted, the following are examples of regulatory rules which should be established in order that a lawyer's independence and ethical criteria such as confidentiality, conflict of interest and attorney-client privilege are not compromised.
  - a requirement to clearly disclose, to regulatory and disciplinary authorities and to the public, the manner in which integrated cooperation with non-lawyers is effected, and the interests represented in the organization concerned;
  - submission of the entire organization in question, including its non-lawyers, to the regulatory and disciplinary authority of the legal profession;
  - a requirement of clear notice to clients as to forms of integrated cooperation, and the risks attaching thereto;
  - precise rules on the avoidance of conflicting interests: e.g. excluding the possibility of combining auditing services with legal representation; and clear rules on the restriction of access to confidential information;
  - rules setting out the minimum degree of ownership and/or voting control which lawyers must hold in multidisciplinary practices.

B. Measures that might be taken for the reduction of impediments to the ability of lawyers to practice in jurisdictions other than that of their original licensure

1. Ownership Restrictions

As stated in section 3 of Chapter A, a lawyer as a legal professional has special ethical and social responsibilities and, for this purpose, is expected to maintain independence from any other person. In order to systematically support such independence, the person who performs the legal services should be the person who owns and enjoys profits from such law firm. Separation of ownership and management of a law firm will jeopardize independence of lawyers in such firm. In recent years, huge international public accounting firms have begun to offer directly or indirectly legal services in various Western nations at dramatically increasing levels. The objective of these firms is to create global professional service organizations which offer legal services in combination with other types of professional services ranging from accounting, auditing, valuation and business consulting. There is a prevailing view amongst lawyers around the world that such multiple disciplinary practice ("MDP") firms have the potential to seriously undermine the independence of lawyers because the multi-disciplinary nature of such firm's practice makes it difficult for lawyers in such firms to comply with the strict legal duties imposed by each country's legal ethics, particularly with regard to conflicts of interest and the preservation of confidential client information and secrets. Thus, there is a real risk that such MDP firms may be structurally incapable of acting for the best interest of their clients which receive legal services from such firms and may result in damage to the public interest. Because of this risk, many lawyers believe that MDP firms should be prohibited or severely restricted from practicing law. We in principle agree to this view.

We believe that the risk expressed above regarding MDP firms also exist in international law firms if their lawyers practice law in multiple nations. Each nation has its own unique legal system imposing its own particular ethical and social responsibilities on its lawyers, and these stem from its own history and culture. These responsibilities may not necessarily be identical to those of another nation's legal system. In this light, it is, in principle, reasonable not to permit a lawyer qualified to

practice law in one country (“Home Jurisdiction”) to exert control over lawyers in another country (“Host Jurisdiction”) by owning or investing in their law firms.

In Japan, the Attorneys Law prohibits anyone who is not a lawyer from handling legal services and also prohibits lawyers from associating with non-lawyers so that Japanese lawyers cannot work as partners or associates at a law firm owned or invested in by foreign lawyers. In addition, provision of legal services in the form of a corporation is not allowed in Japan at present. Even if such corporation were to be allowed in the future, for the reason stated above, foreign lawyers should not, in principle, be permitted to own or invest in such a corporation conducting legal service with respect to Japanese laws. A partnership between a foreign lawyer who qualified to perform a certain legal practice in a Host Jurisdiction and a local lawyer in the Host Jurisdiction has a similar nature as a legal service corporation discussed above. We will discuss issues arising out of such partnership in the next section.

## 2. Restrictions on Partnerships Between Foreign and Locally Qualified Lawyers

“Partnership” as used in this section shall mean a “joint enterprise established by a foreign lawyer and a Host Jurisdiction lawyer for the purpose of conducting legal service under a partnership agreement or similar agreement, under which partners of both sides share expenses and profits internally and jointly take responsibility for the obligations and duties arising in connection with the provision of such external service.”

As stated above, lawyers as a legal professional have special ethical and social responsibilities and, for this purpose, they are expected to maintain independence from any other person. In order to systematically support such independence, a law firm should be owned and managed by the same person providing legal services under the name of such law firm. In other words, a division between the provision of legal service by a law firm from the ownership of such firm should not be permitted. This principle is also applicable to foreign lawyers. However, even under this principle, if a foreign lawyer (a) is qualified to provide certain legal service concerning a foreign law in a Host Jurisdiction and, (b) is subject to substantially the same supervision by bar associations as lawyers in such Host Jurisdiction are, we believe that it would be permissible, at the



Host Jurisdiction's discretion; for such a foreign lawyer to form a partnership with the Host Jurisdiction's lawyers subject to reasonable conditions, because such foreign lawyers would be obliged to maintain almost the same ethical and social responsibilities as local lawyers.

Based on the above-mentioned belief, in Japan, foreign lawyers are permitted to conduct a "joint enterprise" with Japanese lawyers on the condition that they are subject to substantially the same supervision by Japanese bar associations as Japanese lawyers. The "joint enterprise" is one type of the partnership, however, this does not mean that the scope of legal service which can be provided by such foreign lawyers is expanded on an individual basis. It is also emphasized that such foreign lawyers must not exercise undue influence on the practice of Japanese law by a Japanese partner lawyer in such joint enterprise.

### 3. Restrictions on Scope of Practice

Each country has a unique legal system based on its own history and culture, which must be respected. On the other hand, the world economy is becoming increasingly borderless and cross-cultural activities are more prevalent in today's society. Therefore, it is desirable that Home Jurisdiction lawyers are able to perform legal services in Host Jurisdictions subject to reasonable conditions, while paying respect to each country's legal system, in order to satisfy the request for legal services arising out of borderless economies and cross-cultural activities.

#### *a. Legal Practice Concerning Home Country Law*

As a lawyer who is qualified in a Home Jurisdiction is an expert in that country's law, we believe that they must be permitted while in a Host Jurisdiction, to provide legal services in respect of the law of their Home Jurisdiction ("Home Country Law") subject to reasonable conditions which take into consideration lawyers' ethics, the protection of clients and so on. Based on this belief, Japan permits foreign lawyers to provide legal services in respect of their Home Country Law subject to reasonable conditions which take into consideration lawyers' ethics, the protection of clients and so on. Currently, such conditions include, obtaining a certain level of experience, residency, membership of Japanese bar associations, and so on. These are stated separately below.

- 1) A registered foreign lawyer in Japan shall not provide the following legal services even though such practice relates to their Home Country Law.
  - a) legal representation in relation to judicial procedures in the Japanese courts and other Japanese government agencies including the preparation of legal documents for such procedures.
  - b) the provision of legal opinions in relation to laws other than their Home Country Law;
  - c) legal representation for the entrustment of the preparation of notarial deeds; and
  - d) activities in respect of transactions where the primary objective is the acquisition or loss or change of rights concerning real property in Japan or of industrial property rights, mining rights or other rights arising upon registration thereof with government agencies in Japan.
  
- 2) A registered foreign lawyer in Japan shall cooperate with a Japanese lawyer or to ask for their advice in a matter which relates to family relations or inheritances governed by the Home Country Law, in which a Japanese national is a party, or in a matter where the objective is the acquisition, disposal, or change of rights arising upon registration thereof with government agencies in Japan, provided that the above objective is not the primary objective of the matter.

*b. Legal Practice Concerning Other Countries Law*

As foreign lawyers have no special status in respect of laws other than their Home Country Laws (“Other Countries’ Laws”), when in a Host Jurisdiction they are not in a position to be given any special privileges with respect to the practice of Other Countries’ Laws. However, the following matters may be taken into account:

1) Legal Practice Concerning Designated Law

A foreign lawyer who is not qualified to practice law in a country other than their Home Country may have substantial expertise on the laws of that other country. In such case, we believe that a Host Jurisdiction may permit such a lawyer to provide legal services in respect of the laws of that other country. However, this is an exception to paragraph (1) above and,

therefore, should be treated with care. Whether or not to adopt such system should be left to the Host Jurisdiction's discretion.

On the basis of this belief, Japan has adopted a system pursuant to which, after the completion of certain designated formalities, a foreign lawyer who is qualified in their Home Jurisdiction, who is authorized to provide legal services in Japan in respect of their Home Country Law (a "Registered Foreign Lawyer in Japan") and who has substantial expertise on laws of some other country (other than such Home Jurisdiction) is permitted to provide legal services in respect of such other country's law in Japan.

## 2) Legal Practice Concerning Other Third Countries Law

In light of the fact that foreign lawyers have received training for providing certain legal services, we believe that some Host Jurisdictions may adopt a system under which foreign lawyers may be permitted to provide legal services in respect of Other Countries' Laws subject to reasonable conditions which take into consideration lawyers' ethics, the protection of clients and so on. However, this is an exception to paragraph (1) above and, therefore, should be treated with care. Whether or not to adopt such system should be left to the Host Jurisdiction's discretion.

In Japan, despite the fact that there is demand for legal services in respect of a wide variety of foreign laws, the types of Home Country Laws offered by the registered foreign lawyers that currently provide legal services in Japan is very limited. Considering the present situation, and in light of the belief stated above, as from August 13, 1998, Japan will adopt the system described above with respect to Registered Foreign Lawyers in Japan. However, in order to ensure the protection of clients and so on, the system will impose a condition that such legal services may, in principle, only be performed when the Registered Foreign Lawyer concerned has obtained written advice from a lawyer who is qualified in such Third Country.

## 3) Representation in International Commercial Arbitration

International commercial arbitrations relate to disputes in international transactions and are expected to render an award through expeditious procedures without the direct participation of the Host Jurisdiction's courts. In light of their peculiar nature, we believe that foreign lawyers should be permitted to represent clients in such procedures in a Host Jurisdiction, irrespective of

the particular governing law. Based on this belief, Japan permits foreign lawyers to represent clients in international commercial arbitration proceedings irrespective of the particular governing law.

#### 4. Educational Requirements

As already stated in section 3 above, based on the policies that the difference of each country's legal system should be respected and that economic and cultural exchange among countries should be facilitated, the matter of educational requirements is viewed as follows:

- (1) In situations where a foreign lawyer provides legal services in respect of their Home Country Law in a Host Jurisdiction, are they required to satisfy special educational requirements?

Each country has its own unique legal system which prescribes the educational requirements that must be completed in order for lawyers to practice law in that country. These should be respected as a difference between the legal systems of different countries. Accordingly, in situations where a foreign lawyer provides legal services in respect of his Home Country Law in a Host Jurisdiction, we believe that such foreign lawyer should not be required to satisfy any additional special educational requirements other than the educational requirements as prescribed by the law of his Home Jurisdiction.

In Japan, on the basis of this belief, foreign lawyers who provide legal services in relation to their Home Country Law are not required to satisfy any other educational requirements in addition to those of their Home Jurisdictions.

- (2) Should a person who has satisfied particular educational requirements in another country be treated in a special manner in respect of his qualification as a lawyer to provide legal services in respect of laws of a Host Jurisdiction while in such jurisdiction?

As stated above, each country prescribes its own unique educational requirements and such requirements should be respected. Accordingly, we believe that the question of how to treat a person who satisfies certain educational requirements in another country in respect of his qualification as a lawyer in a

Host Jurisdiction while in such jurisdiction should be left to the Host Jurisdiction's discretion.

The qualification examination for lawyers in Japan is designed to determine whether or not an examinee has the academic and practical ability necessary to become a judge, public prosecutor or lawyer in Japan. In fact, examinees are not required to have actually graduated from a Japanese university or other school as a condition of being permitted to take the qualification examination.

## 5. Local Presence and Nationality Requirements

### (1) Local Presence Requirements

One of the reasons why foreign lawyers are permitted to provide certain legal services in a Host Jurisdiction is to satisfy the needs of clients in that Host Jurisdiction. Therefore, in order to provide steady and appropriate legal services to clients in such Host Jurisdiction, it is preferable that foreign lawyers reside in the Host Jurisdiction. Moreover, if a foreign lawyer manages a law firm in a Host Jurisdiction without also residing in the Host Jurisdiction for a substantial amount of time, it may result in that firm's non-lawyer employees attempting to provide legal services. It is also essential that, while residing in a Host Jurisdiction, foreign lawyers become subject to the jurisdiction of courts of such Host Jurisdiction. Further, foreign lawyers should be subject to the supervision of a bar association or other local authorities, and effective supervision cannot be expected if the foreign lawyers is not resident in that country. Therefore, at present stage, we believe that it is reasonable to require that foreign lawyers reside in the Host Jurisdiction in order to be permitted to provide certain legal services in such Host Jurisdiction.

On the basis of this belief, Japan requires foreign lawyers to reside in Japan for at least 180 days a year as one of the conditions of being permitted to provide certain legal services in Japan.

### (2) Nationality Requirements

We see no reason to believe that lawyers should have to be required to have a certain nationality in order to provide legal services to clients. Accordingly, foreign lawyers should not be required to have a specific nationality in order to be permitted to provide legal services in a Host Jurisdiction.

On the basis of this belief, Japan does not require foreign lawyers to have a specific nationality as a conditions of being permitted to provide legal services in Japan.

## 6. Mutual Recognition Agreements

If, because of the sameness or similarity of laws and societies, cultures or languages, among countries of the Commonwealth of Nations, the common law countries or the EC countries, a country decides to grant reciprocally to lawyers of other countries the same license as that of lawyers of their own country, there is no reason not to do so. However, it is not appropriate globally to do so, ignoring the difference of each country in its laws, legal system, training system of legal professionals, history, economy or culture, and to seek mutual recognition of the lawyer's license as an international principle.

## C. Forms of Licensure

### 1. Membership of Host Bar

If the bar associations of a Host Country is a voluntary organization, i.e., if the participation in the bar association is not a prerequisite to practice law in the Host Country, the Host Country shall be entitled to determine at its sole discretion whether foreign lawyers are to be compelled to participate in, and whether they are admissible for, the bar associations of the Host Country. However, as discussed in section 1 (3) of Chapter A, foreign lawyers must adhere to the ethical standards of the Host Country. Therefore, even in cases where membership in the bar association is not made mandatory, foreign lawyers should be subject to the supervision of the courts or other regulatory institution of the Host Country.

In the contrary, however, if the participation in a bar association or similar organization is compulsory in the Host Country, thereby having the Host Country lawyers be supervised by the bar associations or the similar organization, then the foreign lawyers shall be equally compelled to participate in the local bar associations or the similar organization as well, thereby having them be regulated and supervised by the local bar association, the court or the similar organization of the Host Country.

In Japan, the registered foreign lawyers who obtained an approval of the Ministry of Justice are to be registered with the

Japan Federation of Bar Associations and a local bar association as a foreign special member, and are subject to the same ethics rules, regulation and supervision of the Japan Federation of Bar Associations and the local bar association that equally apply to the lawyers of Japan.

## 2. Title of Registered Foreign Lawyer

We are of opinion that, in view of consumer protection, the appropriate approach is to require Japanese lawyers and foreign lawyers to indicate their respective qualifications representing their respective practice categories. As mentioned below, requiring that the license or qualification as a lawyer be mutually recognized or that lawyers from other jurisdictions be able to obtain a qualification equal to that of the local lawyers only upon an admission test that is less burdensome than the test for other candidates and forming it as the general rules among countries will not be the proper approach. Even if the mutual recognition is adopted, in light of the consumer protection it would be appropriate that the indication of the qualification of the foreign lawyers should be made in a manner distinctive from that of the local lawyers.

If mutual recognition is not adopted, the indication of the qualification shall be in accord with the powers and authorities of the foreign lawyers who are not authorized to handle the legal issues concerning the laws of the Host Country. The indication of the qualification shall not be made in such manner that the consumers may be confused to misbelieve that the person bearing the said title is a lawyer of the Host Country. Also, in the event that a system is adopted entitling foreign lawyers to obtain the qualification of the Host Country by passing less-burdensome test, in view of the consumer protection, the foreign lawyers shall not be allowed to indicate the qualification identical to that of the local lawyers. The proper approach is to require a distinctive indication such as "Registered Foreign Lawyer". Those foreign lawyers who wish to use the same indication of qualification with the local lawyers should take the same bar examination with the candidates for the local lawyers.

## 3. Other Forms of Licensure

- (1) Whether a license granted to foreign lawyers should be the same as that granted to a country's own lawyers should be entrusted to each country's discretionary decision, but in any

event should not be forced on a country. Such a decision should be made keeping the protection of consumers in mind.

The judicial system of each country is deeply rooted in its history, politics, economy, society and culture. The system regulating lawyers plays an important role in the judicial system and is thus one of the products of each country's culture and society.

The basis of the judicial system is the "rule of law," under which an organization called a court resolves disputes between a nation and a private person and disputes among private persons in accordance with laws. Lawyers are given a role as "an expert practicing law for clients." Whether lawyers place more weight on public service or pursuit of economic interests, i.e., professionalism or commercialism, depends on each country.

In Japan, in connection with the monopoly in practicing law granted to lawyers as described below, lawyers are entrusted with a mission to protect fundamental human rights and to realize social justice (Article 1 of the Attorneys Law). With such a mission, lawyers are expected to play a role in the judicial system and to carry out public duties inside and outside their services. Lawyers are prohibited from establishing corporations for their services, and required to obtain permission from the bar association to engage in commercial activities or to become directors of corporations, and strict restrictions are imposed on their advertising. By contrast, in some states in the U. S. having big cities (although it depends on each state), lawyers place more weight on the economic aspect of their services, engage in marketing activities not different from those of other enterprises, and are free to engage in other business simultaneously. If the license of lawyers is unified between such countries whose understanding of the nature of their services are different, it will naturally affect the society. However, to resolve issues relating to society or culture which have inestimable value for the life of the people, we should take such a position that, in principle, each society or culture is equal and should be respected by each other.

Furthermore, this issue cannot be discussed without recognizing the fact that the legal systems are different depending on each country and, especially, the common law and civil law legal systems are totally different. Likewise, Asian laws are totally different from each of European, American and African laws. In this connection, we must say that lawyers are fundamentally different from other professionals such as natural scientists, who



pursue objective truth beyond the national character, doctors, whose subject is human health, or accountants, who render services based on international accounting standards whose unification is in progress.

For instance, if each country decides to grant reciprocally to lawyers of other countries the same license as that of lawyers of their own countries, among countries of the Commonwealth of Nations, the common law countries or the EC countries because of the sameness or similarity of laws and societies, cultures or languages, there is no reason not to do so. However, it is not appropriate globally to do so, ignoring the difference of each country in its laws, legal system, training system of legal professionals, history, economy or culture, and to seek mutual recognition of the lawyer's license as an international principle.

Likewise, it is not appropriate to seek as an international principle a method by which each country grants the same license to other countries' lawyers as to local lawyers based on passing an easier examination designed especially for them. Such mutual recognition or granting of the same license to passers of easier examinations raises problems in light of the protection of consumers. This issue also pertains to the issue of representation of license.

- (2) In light of such protection of consumers, Japan has not taken the so-called Full Licensing Approach (Unitary) system, but has taken the so-called Limited Licensing Approach (Dual) system. In Japan, as a rule, only "lawyers" are allowed to practice law. As an exception to this rule, "registered foreign lawyers in Japan" are allowed to practice law of foreign countries.

- (i) *Lawyers*

Pursuant to the law, lawyers are given a monopoly in practicing law (non-lawyers are prohibited from practicing law as a business in connection with legal cases for the purpose of obtaining remuneration).

Except for a few cases, persons qualified as a lawyer are persons who completed the course for a legal apprentice in the Legal Training and Research Institute of the Supreme Court (regardless of their nationality). To be a legal apprentice, persons must pass the bar examination, which is

a national examination. The bar examination consists of a first examination and a second examination. Persons who complete, among other things, the general education curriculum of Japanese universities are exempted from the first examination. The second examination consists of a multiple choice examination, an essay examination, and an oral examination. The second examination is carried out in Japanese language on six legal subjects such as Constitutional Law, the Civil Code, the Commercial Code, the Penal Code, the Code of Civil Procedure and the Code of Criminal Procedure. Because the training system of legal professionals are financed by the national budget, the number of passers is limited to about 700 every year (to be increased to about 1,000 from 1999) and thus the bar examination is not a qualification examination, but a competitive examination.

The current system of training legal professionals in Japan was created after World War II. Before the war, the training of judges and public prosecutors was separate from the training of lawyers and led to bureaucratization of judges and public prosecutors and the judicial branch's subordination to the administrative branch. To remedy such abuses, a unified system of training legal professionals, which consists of an unified examination and unified legal training, was created.

The unified examination and the unified training of the three legal professionals became a basis for the three legal professionals to maintain a close relationship and to operate the judiciary, among other things, in the court rooms, with respect to the law. It has so far contributed greatly to the realization of fair trials and the smooth operation of the judiciary. Three legal professionals, i.e., judges, public prosecutors and lawyers, positively support this system from each point of view.

During the two-year legal training, except for the joint training in the Legal Training and Research Institute for the first four months and the last four months, the legal apprentice is currently dispatched to the district courts, bar associations and public prosecutors' offices designated for practical training for 16 months and experiences four-month practice in each of civil trials, criminal trials, lawyering and prosecution. In the practical training of lawyering, the legal apprentice experiences practice in individual law offices and

is trained based on the curriculum set up by each bar association in consideration of the public and social mission to be performed by lawyers (from 1999, the training period will be reduced to one and a half years, i.e., the first three and the last three months will be joint training and with three-month practice of each of civil trials, criminal trials, lawyering and prosecution).

*(ii) Registered Foreign Lawyers in Japan*

To qualify as a registered foreign lawyer in Japan, an applicant who engages in the practice of law as a business in a foreign country and is qualified as a “foreign lawyer” equivalent to a lawyer must receive approval from the Minister of Justice. If the person applying to be a registered foreign lawyer in Japan is qualified as a foreign lawyer and has engaged in the practice of law for three years or more (until 1997 five years, but reduced) following the qualification in the foreign country where he was qualified, the Minister of Justice, as a rule, approves the application (If an applicant who is qualified as a foreign lawyer has engaged in the practice of law of the Home Country in a foreign country other than the Home Country based on his qualification as a foreign lawyer following qualification in the foreign country, this period is included in the required work experience years. If an applicant is employed by a lawyer or a registered foreign lawyer in Japan and he renders service to the lawyer or the registered foreign lawyer in Japan based on his knowledge regarding the laws of the foreign country where he is qualified as a foreign lawyer, up to one year in total may be deemed as work experience of the foreign lawyer in the foreign country where he is qualified.).

Respecting the qualification in the Home Country, no examination regarding laws, Japanese language, or other matters are carried out.

The scope of legal services allowed to the registered foreign lawyer in Japan is not completely the same as that allowed to lawyers, as described in a separate part. This difference is based on a rational distinction to protect Japanese society or culture which has an important relationship with the life of the people. To unify the license of registered foreign lawyers in Japan and the license of

lawyers in the near future is unthinkable because there is no basis for such unification.

#### 4. Use of Home and Host Title

##### *(1) Qualification in the Host Country*

The Host Country is entitled to specify the title of the qualification to be used by the foreign lawyers. The title shall be the one that is accorded to the duties and position of the foreign lawyers who are authorized to handle only those legal issues concerning the laws of their respective Home Country.

In Japan, the use of the specific title, Gaikokuhou Jimu Bengoshi (“Registered Foreign Lawyer”), is required as the duty of all qualified foreign lawyers. Also, the name of the Home Country must be added to the title.

##### *(2) Qualification in the Home Country*

The advantage and merit enjoyed by the registered foreign lawyers in Japan in their use of the respective title and firm name in the Home Country cannot be ignored. Thus, the use of these title and firm name shall be allowed.

Any misunderstanding or confusion regarding the duties and position of the registered foreign lawyers in Japan must be avoided, however. Accordingly, the title and the firm name in the Home Country shall be used only in such manner that these are ancillary and dependent to the title of the qualification in the Host Country. Also, the title and the firm name in the Home Country shall accompany the indication of the name of the Home Country. In addition, the title and the firm name in the Home Country shall not be indicated in the language of the Host Country upon the translation.

