INTRODUCTION

1. IMPORTANCE OF CODE OF CONDUCT

It is very timely that the 12th POLA conference is discussing code of conduct for the legal profession.

The importance of code of conduct for lawyers and its enhancement and enforcement should be more stressed, considering recent trends such as (1) increase in number of lawyers and legal profession, (2) internationalization of legal issues and business of lawyers, (3) enhancement of the scope of lawyers' business and activities and (4) cooperation of other professions.

The Japanese government established the Justice System Reform Council under the Cabinet in July 1999, for the purpose of examining and deliberating the role to be played by the justice system in the Japanese society of the 21st century. In June 2001, the Council finalized and submitted its “Recommendations” to the Cabinet, including some important recommendations for practicing lawyers or Bengoshi in Japan.

2. THREE ASPECTS OF CODE OF CONDUCT

Code of conduct for lawyers should have the following three aspects, which are all essential for lawyers.

Namely, (A) ethics of lawyers, (B) public interest activities and (C) independence of lawyers and bar association.

A. CODE OF ETHICS AND ITS ENFORCEMENT

1. JFBA’S CODES OF ETHICS

The Code of Ethics for Practicing Attorneys adopted in 1990 by the Japan Federation of Bar Associations (“JFBA”), as well as the Practicing Attorney Law (prescribing basic principles) establishes professional ethics for Japanese lawyers (“bengoshi”). The 1990 Code of Ethics, replacing the former code adopted in 1955, is an ethical code of conduct which each individual lawyer is expected to follow in the course of delivering legal services. In addition, every lawyer must undergo a program of ethical training.
The following is an introduction to the essence of professional ethics in Japan.

2. SOME PROVISION OF CODE OF ETHICS
   (1) PROHIBITION AGAINST UNLAWFUL CONDUCT
       A bengoshi shall not promote fraudulent business transactions, violence, or any other similar violation of laws or unlawful conduct, nor shall he or she perform such conduct. (Code of Ethics, Article 14)

   (2) CONFIDENTIALITY
       The obligation of confidentiality is the essence of confidence between bengoshi and clients.
       A bengoshi shall not disclose or use, without good cause, confidential information of a client obtained in the course of his or her practice. (Criminal Code, Article 134; Practicing Attorney Law, Article 23; Code of Ethics, Article 20)

   CRIMINAL CONDUCT AND CONFIDENTIALITY
       Difficult issues can arise when determining what circumstances would justify the waiver of confidentiality. The biggest issue relates to the criminal conduct of clients.
       It is generally agreed that when the client’s intention is obviously criminally motivated and the criminal conduct would cause imminent danger with serious results, then a lawyer may disclose client confidences.
       There also seem to be few objections in situations where the criminal conduct would result in bodily harm such as homicide or grave bodily injury. However, there are different opinions as to whether disclosure is permitted when the criminal conduct would result in damage to property. This is an issue that must be carefully decided after considering the type and severity of the resulting damage as well as the type of criminal behavior involved.
       Recently, a lawyer's obligation of confidentiality in money laundering situations has been widely debated. The ABA Ethics 2000 commission proposed revising the ABA Model Rules of Professional Conduct in order to permit disclosure of client confidences in situations when the client’s conduct would result in material property damage to others (Section 1.6), but the ABA House of Delegates rejected the proposal this year.

   (3) CONFLICT OF INTERESTS
       Bengoshi are unable to fulfill their responsibilities unless their fiduciary relationship with clients is maintained. Therefore, it is clear that bengoshi shall not handle matters adverse to their client's interests. (Practicing Attorney Law, Article 25; Code of Ethics, Article 26)
       The Practicing Attorney Law was revised in June 2001 (enforced from April 1, 2002) to permit legal corporations. Therefore, the above revisions to the Code of Ethics are now being considered. Specifically, a main issue being discussed is whether the condition stated in (o) is too lax or not. One side argues that it might be better to prohibit a legal
corporation to handle cases which even one of the partners or associates is prohibited to handle, allowing exceptions when there are circumstances where both corporation and attorneys are able to maintain fairness in pursuing their duties.

(4) ADVERTISEMENT, SOLICITATION OF PROSPECTIVE CLIENTS
   During the year 2000, JFBA revised its Code of Advertisement. Previously, it generally prohibited advertising by bengoshi, but this ban was changed to permit bengoshi to freely advertise, except for certain types of situations.

   Local bar associations are working to provide the public with more information. JFBA and many bar associations have set up their homepages on the Internet, and some have even listed profiles of their member bengoshi. Other public relations activities include lectures, guides to bar associations, and assistance with observing court hearings.

   The revised Code of Advertisement of 2000 prohibits the following practice:
   • Comparative advertisements with specific attorneys.
   • Advertisements which may damage the dignity or credibility of bengoshi.
   • Advertisement through visitation or telephone to the person with whom a bengoshi has no acquaintance.
   • Advertisement through direct contact the parties of a specific case with whom a bengoshi has no acquaintance

(5) PROHIBITION OF COOPERATION WITH PERSONS WHO ARE NOT BENGOSHI
   A bengoshi shall not obtain a referral of a matter from a person who conducts legal practice in violation of the Practicing Attorney Law or who is doing business to make such referral, nor shall he or she employ the service of, or allow his or her name to be utilized by such person. (Practicing Attorney Law, Article 27; Code of Ethics, Article 12)

3. ENFORCEMENT
   Two pillars to realize and enforce the code of ethics are (1) continuing training and education for lawyers, and (2) disciplinary procedure.

   Local bar associations in Japan are asking their members to participate their educational seminar on legal ethics, for first-year lawyers and the 4th-year, the 10th-year, the 20th-year and the 30th-year members.

   For the improvement of disciplinary procedure, fundamental discussion has been began in JFBA.
B. PUBLIC INTEREST ACTIVITIES

Article 1 of the Practicing Attorney Law states that “a lawyer is entrusted with the mission to protect fundamental human rights and to realize social justice.” It is the obligation of each bengoshi to perform his or her public duties and protect the rights of citizens. Pursuit of profit shall not be a primary purpose.

The following are concrete examples of the public characteristics of a bengoshi.

- Acting as a court-appointed defense counselor (Constitution, Article 37 (3)).
- Required to provide legal aid to indigent individuals (Practicing Attorney Law, Article 33(2))
- Foundations in bar associations have been established for the maintenance and development of an “on-call” lawyer system that dispatches bengoshi to give one-time free interviews with an accused who is arrested or detained; and
- The JFBA “Himawari” foundation was established for the purpose of offering legal services to residents in areas where there are not enough attorneys. This foundation has established and expanded legal consultation centers, and provided financial assistance to law offices in these areas.

JFBA has established a few JFBA-supported law offices in some rural and less-populated areas, to offer legal services to such areas.

By-laws of some local bar associations provide that their members shall perform some public interest activities.

C. INDEPENDENCE OF BENGOSHI

To carry out the aforementioned mission, namely to protect fundamental human rights and to realize social justice, lawyers are sometimes obliged to perform their duties, being opposed to governmental authorities and/or social authorities. To guarantee to perform such missions, bengoshi are granted freedom and independence in their duties, and guaranteed a high degree of autonomy (Code of Ethics, Preamble and Article 2).

The Practicing Attorney Law stipulates that qualification, disqualification, and the discipline of bengoshi should be performed by bar associations, and bar associations should be administered independently without outside interference.

Before World War II, bengoshi were under the supervision of the government. Their freedom and independence was not guaranteed. As a result, it was difficult for bengoshi to protect the rights of citizens from infringement by a public authority. For some time, bengoshi struggled to achieve independence from the national authority, but it was only after the defeat in World War II that bengoshi finally realized their independence from the state power. At present, bengoshi are not subject to the supervision of the Court of Justice, Office of the Prosecutor, or other public authority. Only the bar association to which each lawyer belongs has the power to guide, supervise, or discipline the bengoshi. Every bengoshi is required to register his or her name with the JFBA through the bar association that he or she intends to join (Practicing Attorney Law, Articles 8 and 36). Accordingly, if
a bengoshi is disbarred for serious wrongdoing, the bengoshi can no longer practice law. Moreover, bengoshi must be guaranteed their independence from their clients and other lawyers as well as the national authority, and have the freedom to accomplish their obligations without being subordinate to anyone. (Code of Ethics, Articles 18 and 43). (Please see endnotes and another report concerning some very important issues of independence of lawyers with foreign lawyers (Gaikokuho-Jimu-Begoshi) and Quasi-Legal Profession.

CONCLUSION

As briefly stated above, today in this wave of internationalization and deregulation, there is pressure for bengoshi to change dramatically the way in which they practice law. Large law firms and the Big Five accounting firms from the U.S. and Europe continuously increase this pressure. And for reform of legal and judicial system, Japanese government has began to draft some bills. Resisting to be washed away by these formidable influences, lawyers as a group must protect the tradition of our profession by firmly protecting our core ethical values while changing flexibly what we should change. We sincerely hope that lawyers in Asian countries who share so many values will establish these important common core values for the future of our profession.

It is necessary to observe legal ethics and to continue to improve effective complaint and disciplinary procedures. And, public interest activities are to be encouraged. Such effort to meet expectations of clients and citizens is the best way to ensure the confidence in legal profession and to secure the independence of legal profession and bar associations.

Attachments:
  Practicing Attorney Law
  Code of Ethics for Practicing Attorneys

In response to these movements, it proposed various important reforms for the legal system such as:

- a substantial increase in the number of legal professionals;
- requiring bengoshi to perform activities for the public interest;
- liberalizing restrictions on bengoshi in assuming official public positions and the system requiring bengoshi to obtain permission to conduct business;
- establishing improved bengoshi professional ethics;
- establishing transparent and reasonable bengoshi fees;
- the public disclosure of information related to bengoshi, as well as, permitting advertising of a bengoshi’s field of expertise, past performance and the like;
- the internationalization of bengoshi, strengthening of expertise, and promoting cooperation with other types of businesses, including the establishment of comprehensive firms;
promoting cooperation and coordination between bengoshi and gaiben, as well as, relaxing requirements for Specific Joint Enterprises (tokutei-kyodo-jigyo); and

cooperation between bengoshi and quasi-legal professionals, such as judicial scriveners (shiho shoshi), patent attorneys (benrishi), and tax attorneys (zeirishi) in order to achieve one-stop services (comprehensive legal and economic firms).

The world in which lawyers practice is changing rapidly with the reorganization of social structures and intensifying globalization. Japan is not outside of this influence. Until now, many of the lawyers in Japan qualified to handle matters concerning Japanese law (known as “bengoshi”) were either solo or small office practitioners mostly engaged in litigation practice. Recently, however, due to a perceived lack of access to bengoshi, the public wishes to increase the number of bengoshi. The business community has remarked that bengoshi are not responding to the demands of enterprises with worldwide business and fail to offer adequate legal services regarding various economic transactions. They demand for law offices to establish legal entities and to specialize, like in the U.S. and Europe, as well as closer cooperation between bengoshi and Registered Foreign Lawyers (known as “gaikokuho-jimu-bengoshi” or “gaiben”) or other professions.

The U.S. and EU also submitted their request that Japan should deregulate and permit partnerships between gaiben and bengoshi, as well as, employment of bengoshi. At the WTO, the working group on domestic regulations is planning to draft a rule related to the acceptance of foreign lawyers in the domestic legal environment.

In this context, it is necessary for us, as lawyers, to reconfirm the fundamental values of our profession. Different from other service professions, the legal profession is a part of the judicial system of each particular country, and is deeply rooted in the law, history, culture, etc. of each country. In this regard, lawyers must reconsider and firmly protect the core values of the legal profession – such as the independence of lawyers, confidentiality, and avoidance of conflict of interests – in order to maintain public and client confidence in the judicial system and lawyers. In this sense, the establishment of professional ethics is extremely important.

New ethical matters are also arising from the internationalization and organization of lawyers. Among them are confidentiality in the Internet age, conflict of interests involving multiple law firms, professional ethics related to cooperation with quasi-legal professionals or other types of businesses, the maintenance of lawyer independence while affiliating or cooperating with large foreign firms, and an increase in the employment of lawyers by various organizations including companies. To cope with this new situation, this year the JFBA established a committee to review the current Code of Ethics.

[Conflict of Interests: general rule]

Conflicts of interest permitted with client consent
(Practicing Attorney Law, Article 25(3); Code of Ethics, Article 26(3)(4))

(a) When a bengoshi represents Party 1 against Party 2, and Party 2 requests for the bengoshi to represent Party 2 in an unrelated matter.

(b) When a bengoshi represents Party 1 in a matter, and a third party requests for the bengoshi to represent the third party against Party 1 in an unrelated matter.

Conflicts of Interest prohibited even with client consent

(c) If a bengoshi has consulted with and assisted Party 1 (or agreed to accept Party 1 as a client) against Party 2, and Party 2 requests for the bengoshi to represent Party 2 in the same matter. (Practicing Attorney Law, Article 25(1))

(d) If a bengoshi has consulted with Party 1 to such a degree that it could be considered an attorney-client relationship has developed in a matter against Party 2, and Party 2 requests for the...
bengoshi to represent Party 2 in the same matter. (Practicing Attorney Law, Article 25(2))

(e) If a bengoshi handled matters while the bengoshi was (i) a public servant, (ii) engaged in public affairs, or (iii) as an arbitrator, the bengoshi may not later represent a party. (Practicing Attorney Law, Article 25(4)(5); Code of Ethics, Article 26(5))

(f) If a bengoshi represents Party 1 against Party 2, and Party 2 requests for the bengoshi to represent Party 2, but the interests of Party 1 and Party 2 generally conflict. (Practicing Attorney Law, Article 25(3); Code of Ethics, Article 26(2))

[Conflict of Interests in Relation to Another Lawyer (Code of Ethics, Article 27 ) ]

If bengoshi and/or gaiben work in the same office, a bengoshi may not represent Party 1 (i) if the interests of Party 1 generally conflict with the interests of the other bengoshi and/or gaiben in the office or their clients to a significant degree, and (ii) the bengoshi would not be able to maintain a level of fairness.

[ Conflict of Interests Relating to a Legal Corporation ]
(1) Conflict of interests of a bengoshi in a legal corporation
(Practicing Attorney Law, Article 25)
Conflict of Interests permitted with client consent

(g) If a legal corporation represents Party 1 against Party 2, and Party 2 requests for a partner or associate of the legal corporation to represent Party 2 in an unrelated matter.

Conflicts of Interest prohibited even with client consent

(h) If a legal corporation has consulted with and assisted Party 1 (or agreed to accept Party 1 as a client) against Party 2 and a partner or associate of the legal corporation is involved with the matter, then if the partner or associate leaves the legal corporation the partner/associate or the new legal corporation for which the partner/associate works may not assist Party 2 in the same matter.

(i) If a legal corporation has consulted with Party 1 to such a degree that it could be considered an attorney-client relationship has developed in a matter against Party 2 and a partner or associate of the legal corporation is involved with the matter, then if the partner or associate leaves the legal corporation the partner/associate or the new legal corporation for which the partner/associate works may not assist Party 2 in the same matter.

(j) If a partner/associate of a legal corporation represents Party 1 against Party 2 in a matter, then another partner/associate in the same legal corporation may not represent Party 2.

(2) Conflict of interests of a legal corporation (Article 30-17 of Practicing Attorney Law)
Conflict of Interests allowable with client consent

(k) When a legal corporation represents Party 1 against Party 2, and Party 2 requests for the legal corporation to represent Party 2 in an unrelated matter.

Conflict of Interests prohibited even with client consent

(l) If a legal corporation has consulted with and assisted Party 1 (or agreed to accept Party 1 as a client) against Party 2, and Party 2 requests for the legal corporation to represent Party 2 in the same matter.

(m) If a legal corporation has consulted with Party 1 to such a degree that it could be considered an attorney-client relationship has developed in a matter against Party 2, and Party 2 requests for the legal corporation to represent Party 2 in the same matter.

(n) If a partner or associate represents Party 1 against Party 2, and Party 2 requests for the legal corporation to represent Party 2 in the same matter.

(o) Cases in which half or more than half of partners or associates of a legal corporation are prohibited from handling on the grounds of (b)–(e)(h)(i)
THE UNAUTHORIZED PRACTICE OF LAW BY NON-LAWYERS

A person other than a practicing attorney shall not, for payment or as an occupation, engage in the practice of law by giving legal advice, providing legal representation, arbitrating, settling disputes amicably or performing any like acts in respect of lawsuits, non-contentious matters, etc., or act as an intermediary in such matters as are specified in this Article as constituting the practice of law. (Practicing Attorney Law, Article 72)

This provision gives bengoshi a monopoly in the practice of law and prohibits non-lawyers from practicing law for payment, in order to ensure that client’s interests may not be harmed. Recently, there is a growing movement to liberalize this law with respect to gaiben or other quasi-legal professionals.

[ Registered Foreign Lawyers (“gaikokuho-jimu-bengoshi” or “gaiben”)]

Although the requirements for qualifying as a Registered Foreign Lawyer in Japan are more lax than in other countries, the U.S. and EU continue to pressure Japan to permit partnerships between bengoshi and gaiben, as well as, employment of bengoshi by gaiben.

It seems, however, that once partnerships or employment is permitted, then gaiben, who are not qualified to practice Japanese law, will be able to handle Japanese legal matters through bengoshi. Moreover, it appears clear that bengoshi would not be able to maintain their independence in such situations, since the U.S. and European law firms are far larger than those in Japan. On such basis, JFBA is opposed to further relaxation of the law. As the qualification system for bengoshi and the monopoly of practice for bengoshi are closely related to the judicial culture of each country, we are unable to agree with this movement which may harm the qualification system of bengoshi.

The current Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers permits arrangements between bengoshi and gaiben known as Specific Joint Enterprises, in which bengoshi and gaiben are allowed to share fees in internationally related cases. This goal of this structure is to harmonize the requirements for internationalization with bengoshi independence. This structure is widely used, such as the recently reported Clifford-Chance Specific Joint Enterprise with a Japanese law office.

[ Quasi-Legal Professionals ]

As mentioned in the Introduction, in Japan, currently a opinion is gaining speed among the business community which proposes the ability to establish partnerships between bengoshi and the quasi-legal professionals, such as judicial scriveners (shiho shoshi), tax attorneys (zeirishi), and patent attorneys (benrishi). Multi-Disciplinary Practices (“MDPs”) with the so-called Big Five accounting firms has not been concretely discussed yet.

As to partnerships with Japanese quasi-legal professionals, JFBA is evaluating whether to promote this structure, but there remain many issues to be examined. There is the difficult issue that the quasi-legal professions are subject to administrative supervision and their professional ethics differ from those of bengoshi. The autonomy of bengoshi is a firmly placed system that bengoshi have acquired after a long struggle. It would not be an exaggeration to say that the reason bengoshi have gained the faith of citizens after World War II and have been recognized as an important profession in society lies in the guarantee of their independence.

In order to realize the so-called comprehensive legal and economic firms, these issues must be resolved.

[ Multidisciplinary Practices ]

There are many ethical issues related to MDPs.

Due to the different ethical obligations of lawyers and accountants (while lawyers have strong confidentiality obligations, accountants owe obligations to inform the public of a client’s wrongdoing),
the U.S. SEC clearly objected to partnerships between accountants and lawyers. In addition to confidentiality issues, there are many other problems

- Regarding conflict of interests, is it possible for accountants to abide by the same strict rules as lawyers? In fact, is it feasible for the Big Five accounting firms to check for conflicts throughout the world?
- Would there be problems with dividing fees between lawyers and accountants?
- Given the huge capital wealth of accountants, is it possible for lawyers to maintain their independence?
- Would accountants, who are not qualified to practice law, in reality be practicing law through lawyers?

Considering these issues, the ABA, at its year 2000 annual meeting, rejected the proposal of its committee to permit MDPs. Within JFBA, the majority of influential opinions argue that only a structure of affiliation with accountants, while maintaining separate independent offices, should be permitted.

[Law Office Names]

Only Article 20 of the Practicing Attorney Law refers to the name of a law office, stating “the office of a practicing attorney shall be called a law office.” There are no other rules regulating law office names. Previously, most law offices chose names of bengoshi or places where the offices were located, but recently offices began using other types of names.

If there is no rule restricting the type of name, may law offices use any name? Recently, one case caused heated discussion. A Japanese law office involved in a Specific Joint Enterprise with a Registered Foreign Lawyers office changed its name to that of the foreign lawyer’s office. .

One influential opinion argues that such office names should not be allowed because they mislead public to believe that bengoshi and gaiben have established a partnership, as well as, hindering the independence of bengoshi. In fact, the ABA Model Rules of Professional Conduct (Rule 7.5) prohibits the use of a firm name which would be false or misleading (a violation of Rule 7.1).