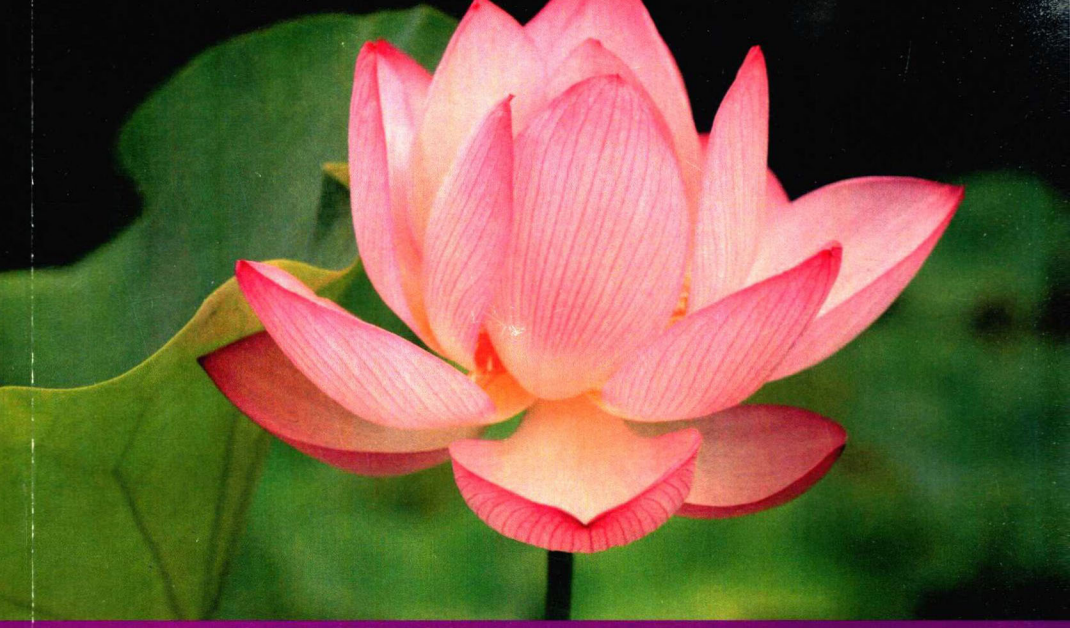

Kyoko Ishida

Ethics and Regulations of Legal Service Providers in Japan

De-regulation or Re-regulation? Remaining Problems after the Justice System Reform

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June 2006, Seattle, USA

TABLE OF CONTENTS

INTRODUCTION

The Japanese Justice System Reform (*shihōseido kaikaku*), that began in 1999, is called the third fundamental reform of the judiciary in modern Japanese history. The first was when Japan adopted the Meiji Constitution in 1889 and the second was when Japan adopted the Constitution of Japan after World War II in 1946. The Justice System Reform took place in the midst of administrative deregulation policies and was constituted as "the final linchpin" in a series of reforms.[1] Under this policy, those people who provide legal services both in and out of courts were subject to various reforms. For example, in 2004, the graduate-level law school system was introduced for those planning to take the national bar examination; the number of successful candidates for the national bar examination was significantly increased from 994 in 1999 to a target of 3,000 in 2010; and the regulation of unauthorized practice of law was loosened by authorizing license holders other than attorneys to conduct a wider scope of practice. One result of these policy shifts will be that the legal services market in Japan this century will become more complex with a greater number and variety of players.

This work focuses on those people who provide legal services ("legal service providers") in the Japanese market and examines their ethical standards and regulations. The ethical standards of legal service providers (LSPs) define their professional duties and aspirations. The regulatory scheme of LSPs defines how and by whom those standards are enforced. The Justice System Reform increased the number of LSPs in the Japanese market with the aim of allowing people to form social connections "as self-determinative beings" with the support of LSPs.[2] However, a mere increase in the number of LSPs does not necessarily achieve this purpose. Some studies show that access to legal services can cause individuals to be caught inside regulations and excluded from the interpretive community about their own issues.[3] These studies suggest possible negative effects of increasing

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[1] The Justice System Reform Council, Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (hereinafter "Recommendation"), June 2001, ch1, online at http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html (last visited March 10, 2010).

[2] *Id.*, ch1, part 2.2.

[3] See, for example, Austin Sarat, "*The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 Yale J L & Humanities 343 (1990). Sarat discusses how legal services can isolate the welfare poor from their own life based on his interviews with welfare recipients who had legal counseling. He argues that welfare recipients are not invited to interpret what the law is, but just caught inside the rules.

LSPs – individuals can be isolated from their own private issues by having access to LSPs. Further, individuals can be injured if they retain unethical LSPs. People who access legal services tend to be those who already have serious private problems. If their confidential information is revealed or utilized for other purposes by the LSP, for example, the LSP simply makes the situation worse. Consequently, we cannot discuss what effect the increase in the number of LSPs would have on individuals without first examining how these LSPs provide legal services and whether adequate quality control is in place in the market.

My research on ethical standards and regulations of LSPs shows that Japanese LSPs continue to be deeply entangled in governmental bureaucracy even after the Justice System Reform. In addition to attorneys (*bengoshi*), there are various other license holders who are authorized to practice law in particular fields in Japan. Their conduct is regulated by various statutes, and few of these LSPs have their own concrete ethics codes for their members. All LSPs except attorneys are disciplined by state agencies. Although Japanese attorneys enjoy self-regulation in disciplining their peers, they too are subject to various government regulations – the number of successful candidates of the national bar examination is decided by the Ministry of Justice and the law governing attorneys forms the basis for regulating attorney conduct. This is in substantial contrast to the United States, where attorneys are the major licensed players in the legal services market and they are generally regulated by bar associations and State supreme courts. In Japan, the executive branch, not the judiciary, plays a major role in regulating LSPs. Furthermore, the Justice System Reform expanded the scope of the legal services to be provided by those players who are regulated by government agencies. These LSPs are given standards of conduct that do not clearly govern how they are to deal with clients, and their disciplinary proceedings are conducted by government authority without a public monitoring system. This presents a significant paradox between what the Justice System Reform advocates – expansion of the rule of law throughout Japan – and the reality after the reform – expansion of possible bureaucratic control over legal services through LSPs, with no increase in transparency.

The word "legal service provider (*hōritsu sābisu teikyōsha*)" is not a general term currently used to describe people providing legal services in Japan. Conventionally, they are distinguished into two groups and are respectively called: "the legal profession (*hōsō*)" and "quasi-legal professionals (*rinsetsu hōritsu senmonshokushu*)." The term "the legal profession" refers to judges (*saibankan*),

prosecutors (*kensatsukan*) and attorneys (*bengoshi*). The term "quasi-legal professionals" refers to other license holders in particular fields of law.[4] This distinction is expressed in the fact that a unitary education and examination system exists for judges, prosecutors, and attorneys, whereas other license holders are licensed through their respective independent examinations.[5] This distinction has a great cultural impact on people's image of legal professionals: Many people, including foreign researchers, believe that members of the *hōsō* are the only ones allowed to practice law, although there are several license holders other than *hōsō* who are authorized to practice law to some extent.[6] The report of the Justice System Reform strictly maintains this distinction and emphasizes the important role of *hōsō*, referring to them as "doctors for the people's social lives."[7] The report discusses quasi-legal professionals in a subsection of the chapter titled "How the Legal Profession Supporting the Justice System Should Be"; it recommends utilization of license holders other than attorneys in order to "immediately remedy the present situation whereby the rights of the public are not sufficiently protected."[8] This "immediate remedy" opened doors to quasi-legal professionals to compete with attorneys in the field of legal counseling, and representation in summary courts.[9] However, the report does not explain what the responsibilities will be for those players who are to become more important in the market. At least at the political and social level, the distinction between *hōsō* and other license holders remains deep, despite the enhanced complexity of the legal services market after the Justice System Reform.

In this work, I employ the term "legal service provider (LSP)" as a term encompassing all kinds of license holders who provide legal services in the market. There are three reasons that I do not use the conventional classification. First, the purpose of my work is to examine ethical standards and regulation of persons who provide legal services. The conventional classification inevitably conveys political and cultural connotations that the legal profession has a higher status than the others. However, even if this is true, it does not mean that the group called the legal profession has higher ethical standards than the group called quasi-legal professionals. Also, social status does not

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[4] In fact, the direct translation of Japanese term of quasi-legal professionals (*rinsetsu hōritsu shokushu*) means "occupations adjoining attorneys."
[5] See, supra Chapter One.
[6] *Id.*
[7] Recommendation, ch1, part 2 (cited in note 1).
[8] *Id.*, ch3, part 3.7.
[9] See, supra Chapter One, I.

necessarily parallel the market share of services that each group provides. Indeed, all groups will compete more actively in the legal services market this century. Therefore, I use a more neutral and objective term to describe all groups of people providing legal services. The term "legal service provider" sufficiently fits my purpose because it simply means a person who provides legal services, whatever the scope of these services.

Second, in contrast to the United States, where prosecutors and attorneys are generally regulated by State bar associations and supreme courts, and are thereby united under the court, together with judges, as the "legal profession," Japanese prosecutors and attorneys are regulated differently in Japan's unitary legal system.[10] As discussed in Chapters Two and Three, attorneys and prosecutors have different ethical standards and disciplinary schemes. Judges are also regulated independently from attorneys and prosecutors.[11] Also, quasi-legal professionals form different associations based on their respective regulatory schemes. Therefore, dividing legal service providers into two conventional groups is not a meaningful way to discuss ethics and the regulation of those providing legal services. Rather, it is more suitable for my research objective to refer to them comprehensively as LSPs and examine their conduct and regulation based on their respective licensing systems.

Third, the Justice System Reform is promoting competition between different license holders, and this may challenge the conventional definition of the Japanese legal profession. In Japan, the practice of law in the courtroom was dominated by judges, prosecutors and attorneys for a long time. Accordingly, people's image of the legal profession is the legal professional who is authorized to appear in court. However, recent policies under the Justice System Reform have expanded the scope of practice for license holders other than attorneys, so that today, their practice areas and those of attorneys overlap.[12] It is no longer only attorneys who are authorized to give legal advice or to represent clients both in and out of courts. This fact may disturb the conventional classification of players practicing law. Adopting the conventional classification, however, may direct attention away

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[10] Even in the US, however, judges are regulated independently from attorneys and prosecutors under the Code of Judicial Conduct whereas attorneys and prosecutors are regulated by the same standards of conduct.

[11] However, as stated later, judges are not within the scope of my research.

[12] For a long time attorneys, prosecutors, and judges were the people practicing law in the court. However, some other license holders were authorized to appear in court on limited occasions. See, infra, Chapter One, I, C. Also, attorneys are expected to practice law outside courts more actively in this century. This may promote complexity of the legal services market.

from the real state of the complex legal services market in Japan. Therefore, I refer to all kinds of players neutrally as LSPs and examine their individual ethical standards and regulatory schemes.

ABBOTT'S SYSTEM THEORY

For the purpose of analyzing groups of LSPs in Japan, I primarily employ the theory of Andrew Abbott in *The System of Professions*. In this book, Abbott claims that the professions make up an interdependent system.[13] Among the literature discussing the theory of professions,[14] his argument is distinctive in that he recognizes that there exist in society various competing professions or para-professions, and suggests a theory for why one particular profession becomes successful whereas others fail. He defines "profession" very loosely – professions are "exclusive occupational groups applying somewhat abstract knowledge to particular cases." He focuses on the work of professions, calling the link between a profession and its work "jurisdiction." He examines how the jurisdiction of a profession is settled and what factors can break it. He argues that professions are interdependent and that the essence of the system of professions is jurisdictional competition between professions.

Abbott argues that a profession occupies a jurisdiction only when finding it vacant or by fighting for it. One profession's jurisdictional shift inevitably affects other professions because jurisdiction is exclusive in principle. The system of professions can be disturbed by external or internal sources. Abbott cites changes in technologies or culture, competitors' attacks, and state policy as examples of external sources that disturb the system. Client differentiation, internal divisions of labor, and career patterns are examples of internal sources. When state policy forcibly changes a jurisdiction of one profession, it inevitably affects the profession that is deprived of its jurisdiction and other professions that can participate in the competition to occupy that jurisdiction. Also, when internal divisions of labor are promoted in a profession, a dominant group becomes real

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[13] Andrew Abbott, *The System of Professions* (Chicago 1988).

[14] Early sociologists focused on the functions of professions and recognized professions as honored servants of public need. See, for example, Talcott Parsons, *The Professions and Social Structure*, in *Essays in Sociological Theory* 35 (Free Press 1964). Later sociologists looked at professions more critically. For example, Larson examined the relationship between the profession and the market; Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis* (California 1977). Eliot Friderson focused on the political influence of professions in his work of 1970. Eliot Freidson, *Profession of Medicine: A Study in the Sociology of Applied Knowledge* (Dodd Mead 1970).

professionals whereas the subordinate group allows outsiders to invade the jurisdiction. Accordingly, Abbott argues that the system of professions is dynamic and no profession can survive forever.

Abbott's theory is insightful in that he defines "profession" so loosely and pays little attention to the privileged status of conventionally defined professions – such as doctors or attorneys. Some sociologists criticize his analysis as "idiosyncratic" despite the strong influence of his work on the theory of professions.[15] However, Abbott's theory is useful for analyzing the current state of legal professionals in Japan. As stated, there are various kinds of license holders who provide legal services in Japan. We cannot understand the condition of the legal services market in Japan accurately without examining these groups. Which group provides what kind of legal service with how many members? How do the LSP groups relate to each other? How did the Justice System Reform change their jurisdictions? How does the current condition of each group affect their ethical standards? Who has the most influence or power in regulating each group? Finding answers for all these questions is necessary and important if we are to discuss ethics and regulations of LSPs in Japan.

Definition and Scope of the Research

I define "legal service" in my work as services that cause or affect another person's legal rights or status. Examples of legal services include giving legal advice, representing clients in and out of courts, and drafting a contract or court document. This is a loose definition. In fact, the Japanese government historically granted attorneys an enormous monopoly over such conduct. A huge jurisdiction with a small number of attorneys resulted in various disturbances to their jurisdiction, as discussed in Chapter One. One example of such a disturbance is the existence of corporate employees conducting corporate legal affairs. They are not licensed attorneys but engage in a variety of legal business on behalf of the corporation. Their conduct is not regarded as unauthorized practice of law because they practice law for their corporate employer, not for others.[16] Another example is

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[15] Eliot Freidson, *Professionalism The Third Logic* 6 (Chicago 2001). However, Freidson also acknowledges Abbott's theory as one of the most influential analysis.

[16] Nippon Keidanren (Japan Organization of Economic Organizations) suggested expanding the scope of practice for corporate employees. It argued that corporate employees engaging in legal affairs should be able to handle the legal business of the group corporations. Nippon Keidanren, *Shihōseido kaikaku ni tsuite no iken* (opinion on the justice system reform), May 19, 1998, online at http://www.keidanren.or.jp/japanese/policy/pol173.html (last visited on February 28, 2006). However, the

the gradual invasion of the jurisdiction of attorneys by other license holders. Although other LSPs were prohibited from giving legal advice, they sometimes breached this restriction in the postwar period and finally expanded their authorized scope of practice under the Justice System Reform. By using a loose definition of legal services, I hope to be able to explore how legal affairs are disposed of both in and outside of courts in Japan.

The openness of my definition of "legal service" results in the openness of the definition of "legal service providers." Here I have to clarify the scope of my research. I primarily focus on the following eight groups of licensed LSPs that were scrutinized during the formulation of the Justice System Reform: attorneys, prosecutors, judicial scriveners (*shihōshoshi*), administrative scriveners (*gyōsei shoshi*), patent attorneys (*benrishi*), tax attorneys (*zeirishi*), social insurance and labor consultants (*shakai hoken rōmushi*), and foreign business attorneys (*gaikokuhō jimu bengoshi*). One reason for this limitation is the accessibility of their ethical standards and regulation. They are licensed by the government according to laws governing each group of license holders. Therefore, their regulatory rules and professional duties are public information. Each group has an association, whose ethics code is also disclosed to the public.

On the other hand, corporate employees engaging in legal affairs are regulated by general labor law and private contracts with employers and it is difficult to identify any unified ethical standards and regulations governing all of these people at present. According to the investigation conducted by Shōji Hōmu Kenkyūkai in 2000, more than fifty percent of corporations have a department specializing in legal affairs.[17] On average, about seven people work for the legal department and engage in drafting contracts, legal counseling, and many other legal affairs for the corporation or corporate employees.[18] However, only small number of corporations employs a

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report of the Justice System Reform only mentions that the contents of regulation under unauthorized practice of law should be made clear "including the relationship to the business operations of quasi-legal professionals and persons engaged in corporate legal affairs from the standpoint of changes to meet diversification of business forms." Recommendation, ch3, part 3–7 (cited in note 1). See also, infra Chapter One, I and II.

[17] The investigation is conducted by providing a questionnaire to 5077 corporations including 2452 companies whose stock is listed on the stock exchange. 1183 corporations replied. 616 corporations answered that they have a department specialized in legal affairs. Shōji hōmu kenkyūkai, *Kaisha hōmubu: dai hachiji jittaichōsa no bunsekihōkoku* (Legal affairs department in coporations: analysis report of the 8th investigation of actual condition), 44 (Shōji hōmu kenkyūkai 2001).

[18] Id, 51–63.

licensed attorney in their legal department.[19] Nonetheless, 65.9 percent of employees working for the legal departments graduated from a faculty of law.[20] These data show that a significant proportion of work involving corporate business law is processed by non-licensed specialists. Despite the weight of legal business conducted by these people, there is no unified ethics code or regulatory scheme for them. Furthermore, these employees are thought of simply as the agents of corporations conducting legal business for the corporations not for others, as discussed in Chapter One. Therefore, I exclude these people from the scope of LSPs I discuss in my work.

There are other license holders such as real estate and building appraisers (*tochi kaoku chōsashi*) who partially deal with legal affairs in the course of their professional services. However, the license holders that I wish to consider are the major groups whose practice was directly influenced by the Justice System Reform. Examination of their ethical standards and regulation gives one of the most effective illustrations of the current regulatory scheme of LSPs in Japan. I do not include judges in the scope of my research whereas I examine prosecutors' conduct and regulation. This may seem to lack symmetry because both judges and prosecutors are public servants in Japan. However, whereas judges adjudicate claims in the court, prosecutors provide legal services to the public.[21] Also, prosecutors confront defense attorneys in criminal proceedings. Examination of prosecutors' standards of conduct is important to ascertain how players in criminal courts perform their duties in Japan.[22] Therefore, the LSPs I examine are the eight primary license holders who are authorized to practice law in or out of courts.

The term "ethics" in my work denotes norms that LSPs follow in the course of their professional services. Although the word "ethics" is sometimes used as a synonym for an ethics code of a group of LSPs in Japan, ethics codes of Japanese LSPs often provide only a small part of their professional norms.[23] In fact, the government's role in shaping LSPs' professional norms shows the distinctive character of Japanese LSPs. Very little literature has discussed the ethics of LSPs in Japan

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[19] Id, 57.
[20] *Id.*
[21] For this reason, in the U.S. the ABA Model Rules of Professional Conduct treat prosecutors as simply one species of attorneys whereas judges are governed by other independent ethics code – the Code of Judicial Conduct.
[22] Johnson's work gives great insight on how Japanese criminal justice is unique comparing it with US practice. David T. Johnson, *The Japanese Way of Justice* (Oxford 2002).
[23] See, infra, Chapter Two.

until recently.[24] In particular, only a few articles discuss the ethics of LSPs other than attorneys, regardless of the fact that many LSPs face ethical dilemmas regularly, as reflected in my interviews. There is also no literature comparing ethical standards of various LSPs standard by standard. However, such research is necessary in order to know more accurately how legal services are provided in Japan.

I intentionally refer to "*bengoshi*" as "attorneys," not "lawyers" even though the word "lawyer" may be a more familiar term for a person practicing law. The reason for this choice is that legal services provided by lawyers in the United States are provided in Japan not only by *bengoshi* but also by other license holders. Calling only the *bengoshi* "lawyers" may give the inaccurate perception that *bengoshi* are the only persons providing legal services. Therefore, I choose "attorney" as the appropriate translation for the Japanese word "*bengoshi.*"

SIGNIFICANCE OF THE STUDY

My study presents a more accurate portrayal of the legal profession in Japan than is available in the current literature. Although it is generally stated that the number of attorneys in Japan is extremely small compared to that of the United States, few studies discuss the roles of other groups of LSPs. However, in order to know how legal services are provided in Japan, it is not sufficient to merely investigate the number and distribution of attorneys. Such an investigation only discloses a very limited part of the legal services in the market and tends to ignore the rest of the picture. In order to obtain a larger and more accurate picture, we need to examine not only attorneys but also other license holders. While Professor Ramseyer already addressed in his article in 1980 that there are several lawyer substitutes in Japan,[25] this work examines and compares such LSPs across the dimension of ethical regulation. Although it is an incomplete comparison of all the professional groups, it is the first study in English on Japanese LSPs, comparing each license group across a

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[24] The introduction of graduate-level law schools has promoted discussion of legal ethics recently. There are several textbooks on ethics of the legal profession (*hōsō rinri*). Examples are: Takanaka, Masahiko, *Hōsōrinri kōgi* (Lecture on ethics of the legal profession) (Minjihōkenkyūkai 2005); Morigiwa, Yasutomo ed, *Hōsō no rinri* (Ethics of the legal profession) (Nagoya shuppankai 2005); Kojima Takeshi, et al ed, *Hōsō rinri* (Ethics of the legal profession) (Yūhikaku 2004); Tsukahara Eiji et al ed, *Hōsō no rinri to sekinin : Puroburemubukku* (Case Book: Ethics and responsibility of the legal profession) (Gendai Jinbunsha 2004).

[25] Ramseyer, J. Mark, Lawyers, *Foreign Lawyers, and Lawyer-Substitutes: the Market For Regulation in Japan*, 27 Harvard International Law Journal 499 (1986).

common dimension – ethics and regulations. As such, it significantly expands our understanding of LSPs in Japan and lays the groundwork for future comparative empirical studies.

The Justice System Reform incorporated several US-style elements. For example, it introduced the graduate-level law school system for the education of judges, prosecutors, and attorneys. It decided to more than double the number of attorneys by 2018 – from about 22,000 attorneys in 2006 to 50,000 attorneys by 2018. The Final Recommendation of the Justice System Reform states that the Japanese justice system in the 21st century should resolve various disputes based on fair and clear legal rules so that individuals can realize their own rights after removing many preemptive regulations by the government.[26] The reform decided both to increase the number of attorneys and to expand the scope of practice conducted by other license holders, on the assumption that they would support such a justice system together. These changes seem to be premised on the idea that Japan will become a society more like the United States – one where individuals actively achieve their own rights through courts and other methods, with the support of LSPs.

However, the schemes regulating LSPs in the United States and Japan are completely different, even after the Justice System Reform. In Japan, all LSPs are governed by specific statutes that generate separate licensing and regulatory systems. Apart from attorneys, all LSPs are supervised and disciplined by administrative agencies. Each group of LSPs is deeply embedded in administrative bureaucracy and there seems to be no single identity for "a person providing legal services for clients." An increase of legal services by those LSPs may take a different path than that of provision of services by US attorneys. Accordingly, the assumption of cause and effect in the report of the Justice System Reform – increased legal services will enable individuals to lead more self-determinative lives based on the rule of law – may be wrong.

Professor Haley has argued in his well-known article that it is a myth that the Japanese are exceptionally non-litigious people.[27] He argued that the low rates of litigation are a result of institutional arrangements. In my work I present another aspect of the institutional design of the justice system in Japan: different roles are assumed by different groups of LSPs and this division of labor among LSPs enables the state to effectively regulate society by supervising LSPs. Despite the

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[26] Recommendation, ch1, part 2.1 (cited in note 1).
[27] John O. Haley, *The Myth of the Reluctant Litigant*, 4 J Japanese Studies 359 (1978).