

# FROM SOCIALIST ETHICS TO LEGAL ETHICS: LEGAL ETHICS, PROFESSIONAL CONDUCT, AND THE CHINESE LEGAL PROFESSION

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## ABSTRACT

*When the first lawyers of the modern Chinese legal regime began work in 1980, the role they played in society was radically different from the role played by lawyers in China today, as were the professional requirements placed upon them. This paper examines the development of the legal profession and the conception of what it means to be a “lawyer” in China. Consideration is also extended to the increasing independence granted to the legal profession by the Chinese government as well as the controls and supervision still in place. The system of professional responsibility is presented through an analysis of the Lawyer’s Law, which serves as the legislative basis of the Chinese legal profession, and the ethical and professional problems that present themselves in the day-to-day practice of Chinese lawyers. Finally, some modest suggestions for how to improve the situation are offered.*

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## I. Introduction

China is a popular topic for law review articles and other forms of legal scholarship due to the vastness of the country and the increasingly prominent role China has played in the world economy over the last fifty years. Moreover, China has a propensity to serve as the basis for debates on legal topics ranging from intellectual protection to human rights. However, despite the wealth of English language literature on various legal facets of the nation, there is little discussion of China's lawyers or of the ethical and professional framework within which Chinese lawyers, so integral to the intellectual protection and the furthering of human rights, operate day-to-day. This paper provides an overview of the development of the legal profession in China, the system of professional responsibility currently in place, and the major issues that arise when this system is transposed from the documents that comprise the controlling law and regulations into the day-to-day practice of Chinese lawyers. In doing so, this paper discusses the beginning of the modern Chinese legal system in the late 1970s; the increasing independence granted to the legal profession by the Chinese government as well as the controls and supervision that are still very clearly in place; the laws regulating both the pursuit of the legal profession and the conduct of lawyers; the prominent issues that confront Chinese lawyers in attempting to practice law; and makes suggestions for how to improve the situation.

## II. Notes on the Chinese Legal System

The Chinese legal system is often characterized by the strong influence of the Communist Party and informality in both the law and legal process.<sup>1</sup> The Constitution, whose emanations permeate the legal system and which all lawyers are bound to uphold, lays heavy emphasis on the obligations of individual citizens to the state and the Party.<sup>2</sup> As noted by Pitman B. Potter, the Chinese government addresses law in a matter that is fundamentally “instrumentalist,” with laws and regulations employed as instruments of policy enforcement and enacted to achieve immediate policy objectives. The state and the Communist party established the legal system and the institutions that comprise it as mechanisms through which state power may be exercised.<sup>3</sup> Unlike American law, with its roots in the English common law, China ascribes to a civil law structure where precedent has no force and judges cannot create law. This structure has the effect of ensuring that the state’s goals are not pushed aside by dissident actors within the system.<sup>4</sup> Moreover, laws are often vaguely drafted to allow local authorities to interpret and implement the law in a manner tailored to their policy objectives.<sup>5</sup>

China’s famed steps towards opening its economy and privatization have affected many aspects of the Chinese landscape, but the authoritarian tradition in state-led social control efforts are still apparent. The laws promulgated by the government are often evaded by government officials themselves.<sup>6</sup> Party members, although not above the law, are part of the body that determines both what the law consists of and when it will be brought to bear.<sup>7</sup>

Unsurprisingly, the structure of the Chinese legal system strongly reflects the emphasis on state control that underscored its creation. The Chinese judiciary is under direct control by the Ministry of Justice, which is a part of the executive branch. Judges and prosecutors commonly appear more as government

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1. See JOHN W. HEAD, CHINA’S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT 99 (2009).

2. *Id.* at 100. Duties required of Chinese citizens by the Constitution include “safeguarding the security, honor, and interests of the motherland; preserving the nation’s unity; observing the law and social ethics; performing military service; and paying taxes as required by law.” DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE’S REPUBLIC OF CHINA IN A NUTSHELL 109 (2003).

3. PITMAN B. POTTER, THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE 10 (2001).

4. Niels J. Philipsen, *Regulation of Liberal Professions and Competition Policy: Developments in the EU and China*, 6 J. COMPETITION L. & ECON. 203, 226 (2009).

5. POTTER, *supra* note 3, at 12.

6. HEAD, *supra* note 1, at 100.

7. POTTER, *supra* note, 3 at 11.

workers and extensions of Party interests and less as independent actors. Prosecutors, known as procurators, operate under the same government unit as the courts in which they work. As such, Chinese criminal proceedings are characterized by the affiliation of judges and prosecutors against defense lawyers, as opposed to the American model of two adversarial lawyers with an impartial arbitrator.<sup>8</sup> Moreover, Chinese courts employ an inquisitorial legal procedure, with commensurately greater emphasis on the judge.<sup>9</sup>

Lawyers do not hold a monopoly on the provision of legal services within China. For example, “basic level legal workers” who are licensed at the provincial level and work primarily in less populous areas also offer some legal services.<sup>10</sup> These workers are only required to undergo six months of training and possess a middle or high school degree. They may represent clients in civil litigation, as well as occasionally in criminal cases despite being technically prohibited from doing so.<sup>11</sup> Basic level legal workers make up a sizeable portion of the legal service providers in China. In 2003, they provided more advice and drafted more documents for their clients than formal lawyers.<sup>12</sup> Furthermore, so-called “barefoot lawyers” also provide legal services. Barefoot lawyers do not have formal legal training or qualifications but nevertheless assist the impoverished in rural areas.<sup>13</sup> Since Chinese law allows parties to choose their legal representatives, barefoot lawyers not only offer non-litigation services but also appear in court. They often pursue controversial cases avoided by lawyers due to the negative feedback such cases draw from the authorities.<sup>14</sup>

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8. Judith A. McMorrow, *Professional Responsibility in an Uncertain Profession: Legal Ethics in China*, 43 AKRON L. REV. 1081, 1089 (2010).

9. Philipsen, *supra* note 4, at 225 (2009).

10. McMorrow, *supra* note 8, at 1089 (quoting Samuel J. Levine & Russell G. Pearce, *Rethinking the Legal Reform Agenda: Will Raising the Standards for Bar Admission Promote or Undermine Democracy, Human Rights, and the Rule of Law?*, 77 FORDHAM L. REV. 1635, 1643 (2009)); In China lawyers perform 1.8 times more litigation work than non-litigation work, in stark contrast to more developed countries, where 80% of the work performed by lawyers is non-litigation focused. Randall Peerenboom, *Economic Development and the Development of the Legal Profession in China*, 7 (February 13, 2009), available at [http://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID1342287\\_code328862.pdf?abstractid=1342287&mirid=1](http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1342287_code328862.pdf?abstractid=1342287&mirid=1) (last visited Jan. 11, 2012).

11. Peerenboom, *supra* note 10, at 11.

12. *Id.*

13. McMorrow, *supra* note 8, at 1089; Peerenboom, *supra* note 10, at 11.

14. Peerenboom, *supra* note 10, at 11.

### III. A Brief Overview of the Modern Chinese Lawyer

The Cultural Revolution brought about the persecution of lawyers throughout China and the suppression of the nascent socialist legal profession. Therefore, the modern Chinese legal system began with the rise of Deng Xiaoping to power and the development of a legal system to support his economic reforms.<sup>15</sup> With the enactment of the 1978 Constitution, the government stressed the importance of a “socialist legal system” for “socialist modernization,” and reinstated the litigation system as well as the right to defense in criminal proceedings.<sup>16</sup> In 1979 the Ministry of Justice was reconstituted, legal education and research in China resumed, and law advisory offices servicing the public were reinstated.<sup>17</sup> In 1980 the *Provisional Regulations on the Lawyers of the People’s Republic of China*<sup>18</sup> were promulgated, becoming effective January 1, 1982, and the modern Chinese lawyer was born under the watchful eye of the Ministry of Justice.<sup>19</sup>

Under the Provisional Regulations, private practices did not exist as lawyers were defined as “legal workers of the state.” Lawyers worked in the state-funded legal advisory offices that began to appear in 1979. These offices were public institutions under the leadership and supervision of the Ministry of Justice and were not hierarchically organized with regard to each other.<sup>20</sup> The lawyers working in these offices were charged with upholding socialism and protecting the state, and tasked with “giv[ing] legal assistance to state organs, enterprises and institutions, public organizations, people’s communes, and citizens in order to ensure the correct implementation of the law and protect the interests of the state and collectives as well as the lawful rights and interests of citizens.”<sup>21</sup> All revenues earned from the low fees charged were given to the state, the lawyers themselves drawing small government salaries.<sup>22</sup> During this period, becoming a lawyer did not require formal training or higher education; rather, the requisite qualifications were approval by the local justice bureau, love of the state, support of the socialist system, and being able to vote and be elected to public office.

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15. Gerald J. Clark, *An Introduction to the Legal Profession in China in the Year 2008*, 41 SUFFOLK U. L. REV. 833, 838 (2008).

16. Charles Chao Liu, *China’s Lawyer System: Dawning Upon the World Through a Tortuous Process*, 23 WHITTIER L. REV. 1037, 1054 (2002).

17. Carlos Wing-Ho Lo & Ed Snape, *Lawyers in the People’s Republic of China: A Study of Commitment and Professionalization*, 53 AM. J. COMP. L. 433, 442 (2005).

18. Translated by some scholars as the *Interim Regulations on Lawyers*.

19. Liu, *supra* note 16, at 1054.

20. *Id.* at 1058.

21. Philipsen, *supra* note 4, at 219.

22. CHOW, *supra* note 2, at 229.

The legal landscape of China quickly changed as markets opened under Deng Xiaoping and private enterprises proliferated, leading to a commensurate expansion of the Chinese legal framework and increasing numbers of legal disputes. The government's initial reaction was to introduce more state legal workers, but soon changes in the organization and licensing of the legal profession were implemented.<sup>23</sup> In 1986 the first form of bar examination was implemented,<sup>24</sup> and the All-China Lawyers' Association, which serves as the national bar association of which all Chinese lawyers are members, was established.<sup>25</sup> Cooperative law firms were also allowed and considered to be a "socialist organization with the status of [an] institutional legal person." These firms, which represented the first non-state run and financially independent firms of the Communist era, were first organized in Beijing and Shenzhen and then spread throughout the nation.<sup>26</sup> In 1994, the State Council approved a reform plan to move the nascent legal profession towards financial independence from the state and self-regulation, at least in part, through bar associations rather than by the Ministry of Justice.<sup>27</sup>

The situation drastically changed with the *Lawyers Law of the People's Republic of China*,<sup>28</sup> introduced in 1996 and effective in 1997. The definition of what constituted a lawyer changed from that of a state employee to a "legal practitioner who holds a certificate to practice law and who provides legal services to society." In addition, the new law further encouraged the creation of independent law firms, incrementally moving the legal profession further in the direction of professionalism and independence from the state.<sup>29</sup> Yet, the Ministry of Justice still maintained, and continues to maintain, regulatory control over lawyers and law firms. It holds the power to certify lawyers, allow for the establishment of law firms, regulate fees, as well as mete out discipline. The Ministry of Justice may even intrude into a lawyer's handling of a politically sensitive or controversial issue. Nevertheless, while administrative and regulatory authority over law-

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23. Philipsen, *supra* note 4, at 219.

24. CHOW, *supra* note 2, at 228.

25. Zhonghua Renmin Gongheguo Lushi Fa (中华人民共和国律师法) [People's Republic of China Lawyer's Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective June 1, 2008), translated in CHINA L. & PRAC., January 2008.

26. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 163 (2008).

27. *Id.*

28. Alternatively translated by some scholars as the "Lawyer's Law," the "Lawyers' Law," or the "Law on Lawyers."

29. Clark, *supra* note 15, at 837. 1996 also saw the adoption of a Code of Ethics by the All-China Lawyers' Association, another milestone in the professionalization of Chinese lawyers. Lo & Snape, *supra* note 17, at 442.

yers is still rooted in the Ministry of Justice, it has begun to share this power with the national and local bar associations.<sup>30</sup>

These drastic reforms have also been matched by the drastic growth of the legal profession itself. Since the promulgation of the Provisional Regulations in 1980 and the birth of the modern Chinese lawyer, the bar and lawyer system has grown exponentially. The number of firms has grown quickly, and the form of organization they take has similarly shifted away from state control. In 1998 there were 8,946 Chinese firms, of which fifty nine percent were state owned. Only four years later, the number of firms grew to over a thousand, and only twenty three percent were state-owned.<sup>31</sup> The number of lawyers has also increased from several thousand less than thirty years ago to over 130,000 today. In addition, 200,000 to 260,000 people take the national judicial exam each year, drawn by the possibility of high wages in the legal sector.<sup>32</sup>

#### IV. Legal Education in China

Legal education in China is now focused on creating lawyers who “know law, know economics, and know foreign languages.”<sup>33</sup> Legal education is jointly governed by the Ministry of Education and the Ministry of Justice, within which the specialized Department of Law and Education addresses legal education and research. While the Ministry of Education issues the guiding opinions on how to prepare higher education teaching materials, the Ministry of Justice prepares its own textbooks, apparently considered the most authoritative in China.<sup>34</sup> The Ministry of Justice’s control over the legal profession thus extends to the legal education which students receive. This is not surprising, as China is still a Communist country and ascribes to state-centric socialist ideology. The mission of legal education as articulated by the government was once “to train students through higher legal education to become people who possess basic knowledge of the Marxist-Leninist theory of law; are familiar

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30. Clark, *supra* note 15, at 839.

31. *Id.*

32. Peerenboom, *supra* note 10, at 10. In 2005, the average salary for a Chinese lawyer was 80,000 renminbi, which equaled \$11,400 USD at the then-current exchange rate. *Id.* at 14. Partners at successful firms can earn in the millions of renminbi. *Id.* at 15. These salaries are impressive, given that in 2006 the average income across the nation was only \$2,025 USD. *China - China Quick Facts*, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CHINAEXTN/0,,contentMDK:20680895~pagePK:1497618~piPK:217854~theSitePK:318950,00.html> (last visited Jan. 11, 2012).

33. ZOU KEYUAN, CHINA’S LEGAL REFORM: TOWARDS THE RULE OF LAW 205 (2006).

34. *Id.* at 211.

with the Party's political and legal work, policies and guiding principles; are endowed with socialist political consciousness; have mastered the professional knowledge of law; and are capable of undertaking research, teaching, and practical legal work."<sup>35</sup> Since the 1980s, with the move away from a planned economy, the focus of legal education has become increasingly pragmatic, as exemplified by the current mission statement of the Peking University Law School, which spurns socialist buzzwords in favor of a mission statement focused on training students to have knowledge of the law and the ability to apply such knowledge.<sup>36</sup>

The ideological shift towards instilling students with useful legal skills does not seem to have fully filtered down to the classrooms. Chinese legal education is strongly focused on the academic aspects of the law instead of producing capable legal professionals, and contains only limited clinical or skills education.<sup>37</sup> As noted by Judith A. McMorrow, a professional education focuses on producing graduates who are ready to take on their professional roles within a living society, and thus considerations of the practice context must be incorporated into the curriculum. As McMorrow posits, the Chinese approach to education overlooks legal ethics because issues that may arise in actual practice are never addressed.<sup>38</sup> Chinese legal education often consists of lectures delivered by professors with sparse legal experience, guided in content and form by the Ministry of Justice.<sup>39</sup> There is little in class discussion, and much of the education is focused on memorization of legal doctrine.<sup>40</sup> The emphasis is on Formalism and comprehension of the black-letter law, rather than the law as an organic system enmeshed in society and subject to its pressures.<sup>41</sup> As noted by Eli Wald, the focus on black-letter law is a possible result of the civil law system of China, which places the role of propounding the law with the legislature rather than the courts.<sup>42</sup>

The number of law schools grew from a mere eight at the time the Provisional Regulations became effective in 1982 to 559 in 2005. By 2006, 620 places of higher learning offered a law ma-

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35. *Id.* at 212.

36. *Id.*

37. McMorrow, *supra* note 8, at 1088.

38. *Id.*

39. *Id.* at 1086.

40. Deborah Meiners & Jian Chen, *Professionalization in the Chinese Legal System: Current Education and Certification of Chinese Lawyers*, THE BAR EXAMINER, May 2007, at 32.

41. McMorrow, *supra* note 8, at 1086.

42. Eli Wald, *Notes from Tsinghua: Law and Legal Ethics in Contemporary China*, 23 CONN. J. INT'L L. 369, 371 (2008).

jur. By 2005 there were 450,000 people studying law, and over 150,000 students of the subject graduating each year. Sadly, there is not sufficient demand to meet the supply of young Chinese law students, and many graduate to find him or herself faced with unemployment. In 2002, twenty three percent of Chinese law graduates were unable to find work, and a further twenty one percent went into positions that did not involve practicing. More starkly, in terms of finding jobs, law ranks only 187 out of 214 majors.<sup>43</sup> Unfortunately for Chinese graduates, although there is extensive need for legal services among the poor, there does not appear to be a way for lawyers to service the poor while receiving an adequate income.<sup>44</sup>

However, as detailed below, a legal education is not required to take the national judicial exam and passing the national judicial exam is not required to be a lawyer. Although new lawyers are required to have a college degree, as of 2009 only two-thirds of lawyers had a college degree.<sup>45</sup>

## V. An Introduction to The Lawyers Law of the People's Republic of China

The Lawyers Law was a major step in the development of the Chinese lawyer system. It was amended October 28, 2007, was effective June 1, 2008, and consists of seven parts and 60 articles.<sup>46</sup> It codifies both the regulation of and basic legal ethics required of Chinese lawyers. However, it is important to note that when the Lawyers Law or Code of Ethics promulgated by the All-China Lawyers Association in accord with the Lawyers Law is at odds with other Chinese laws, the provisions of the Lawyers Law are usually subordinate.<sup>47</sup>

### 1. *What Makes a Lawyer?*

In line with previous reforms increasing the independence of lawyers from the state, Article 2 of the Lawyers Law currently defines a lawyer as “a practitioner who has obtained a lawyer’s practice certificate in accordance with the law and who, by way of accepting an appointment or through designation, provides legal services to a concerned party.” Legal service providers who do not meet this criteria are not “lawyers”, nor are they entitled

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43. Peerenboom, *supra* note 10, at 7.

44. McMorrow, *supra* note 8, at 1084.

45. Peerenboom, *supra* note 10, at 11.

46. There are multiple translations of the current Lawyers Law. For the purposes of this essay, as noted above, I have relied on the translation printed in the January 2008 issue of *China Law and Practice*.

47. McMorrow, *supra* note 8, at 1101.

to use that appellation when providing such services. Moreover, the Lawyers Law contains sections designed to protect the sanctity of the lawyerly profession as thus defined. Article 13 fortifies the legal profession's hold on the provision of legal services when one presents oneself as a "lawyer". It states that those who do not have practice certificates cannot act in the capacity of a "lawyer," and unless otherwise provided, cannot act as an agent *ad litem* or in a defense capacity.<sup>48</sup> This is complemented by Article 55, which states that those who provide legal services in the capacity of a "lawyer" without a practice certificate will be ordered to stop their practice by the local judicial administration department, their income from practicing will be disgorged to the same, and they will be assessed up to five times the amount disgorged in fines.

The above definition of a lawyer as a certified practitioner primarily concerned with the interests of his or her client rather than those of the state, however, is tempered by many of the other provisions within the Lawyers Law. By the terms of Article 1 of the law, the legislation is designed to ensure that lawyers "fulfill their role in the building of the socialist legal system." The continuing supervision of the judicial administration bureaus of the State Counsel is explicitly enshrined in Article 4 of the law. Article 3 contains an admonition that lawyers must abide by the Constitution, which codifies the leadership of the Communist Party and the duty of citizens to uphold and protect the interests of the state. Article 3 further states that lawyers shall subject themselves to the monitoring of the state and the public, as well as their clients.<sup>49</sup> To further underline the point, the Ministry of Justice released a notice after the original Lawyers Law 1996 was effective stating that lawyers need to "develop correct political thinking and put the interests of society first."<sup>50</sup> Moreover, law

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48. Compared to the 1996 Lawyers Law, Article 13 of the 2008 Lawyers Law actually opens the door wider for the provision of legal services by those not presenting themselves as formal lawyers. The prior law forbade those without a practice certificate to litigate for profit. The clause concerning profit has now been dropped. As the Chinese Civil Procedure Law allows for "citizen representation," an individual without a practice certificate engaging in such litigation, so long as not doing so in the capacity of a formal lawyer, may now charge for doing so. E-mail from Sida Liu, Assistant Prof., Soc. and L., Univ. of Wis., to author (Nov. 17, 2010, 14:57 PST) (on file with author).

49. Notably, Article 3 also requires lawyers to "adhere to the ethics of the legal profession and practice discipline."

50. This position is underlined by the words of Vice-Minister Zhao Daocheng, as written in 2006: "[s]ome comrades unilaterally believe that the legal service of lawyers is a mere legal professional activity, they neglect its intrinsic political attributes; . . . Some comrades incorrectly indicate that lawyers are a liberal profession, and neglect the essential attribute of the socialist legal worker." HUMAN RIGHTS WATCH, "WALKING ON THIN ICE" CONTROL, INTIMIDATION AND HARASSMENT OF

firms with three or more Party members commonly form Party cells, and those with less than three members form cells in association with other firms.<sup>51</sup> On the other hand, the law also makes some overt steps to separate the Party and the legal profession. For example, Article 11 holds that public servants and members of standing committees of the People's Congress cannot practice law while being in office.

## 2. *Becoming a Lawyer*

The Lawyers Law also deals with more mundane concerns regarding the regulation of the legal profession. Article 5 establishes how one may receive permission to practice as a lawyer and receive a practice certificate. It requires one to uphold the Constitution, pass the state judicial examination, receive a year's training in a law firm, and maintain good conduct. It also allows for the continuing validity of certificates received before implementation of the state judicial examination. Article 6 further stipulates that upon applying for a practice certificate, one will furnish proof that a law firm has agreed to employ the applicant. Article 7 establishes the conditions under which a lawyer will not be granted a practice certificate, holding in most relevant part that if one has had their practice certificate revoked they will not be issued another.

Article 8 provides an alternative to passing the judicial examination. It provides that a person who holds an undergraduate degree, has worked for 15 years in a field with a shortage of legal services, holds a senior title or equivalent professional title, and has the relevant legal knowledge may be granted a practice certificate with the approval of the judicial administration bureau (i.e., the Ministry of Justice). Note that a law degree is not required, posited by Daniel C.K. Chow as a reasonable exception given the limited access to institutions of legal education and the high demand for lawyers.<sup>52</sup> Only a certain number of people are granted a practice certificate, with the amount determined in response to the demand for lawyers by the Ministry of Justice in conjunction with the Supreme People's Court and the People's Prosecuting Authority.<sup>53</sup>

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LAWYERS IN CHINA 26 (2008) (quoting ZHAO DAOCHENG, *Several Issues Relating to the Administration of Lawyers*, JUSTICE OF CHINA, Nov. 2006, at 9-14).

51. CHOW, *supra* note 2, at 246. Note, however, that this requirement is not required by law, but rather is common practice. E-mail from Oliver Xiaoke Zhang, Senior Assoc., Sunshine Law Firm, to author (Nov. 27, 2010, 08:27 PST) (on file with author).

52. CHOW, *supra* note 2, at 230.

53. Philipsen, *supra* note 4, at 221.

### 3. *Law Firms*

The current Lawyers Law allows for partnership law firms, the establishment of branch offices, and noticeably for the first time, individually owned law firms.<sup>54</sup> Among other provisions new to the current law are Articles 23, 24, and 27. Article 23 requires law firms to establish a system of effective practice management, conflict checking, billing, complaint handling, annual assessment, and file management. It further requires law firms to “monitor compliance by its lawyers with professional ethics and practice discipline.” Per Article 24, the law firm’s annual assessment must be submitted to the judicial administration bureau, as well as results of the assessment of the practices of the lawyers in the firm. Article 27 restricts law firms from engaging in business activities outside of the field of law. Article 26, not a new provision but noteworthy nonetheless, continues to restrict law firms from soliciting business through attacking other lawyers and law firms or engaging middlemen.

### 4. *The Business of Lawyers*

Part Four of the Lawyers Law, consisting of Articles 28 through 42, establishes the “business, rights, and obligations of lawyers.” Article 28 establishes the various forms of business that lawyers can enter into. Lawyers may: serve as counsel; represent parties in civil or administrative cases; defend in criminal cases; file petitions in various types of lawsuits; act as a mediator or arbitrator; provide non-litigation legal services; answer legal inquiries; and prepare legal documents. Articles 29, 30, and 31 specify that lawyers shall “safeguard the lawful rights and interests” of their clients when retained in the above capacities. Article 32 reserves clients the right to end their retainer of a given lawyer. Conversely, lawyers are restricted from ending their representation without a “legitimate reason,” such as if the client uses their services to further illegal activities or the client conceals facts important to the case.

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54. The provisions specific to law firms are in Part Three of the law, which contains Articles 14 through 27. One-person law firms are recent additions to the range of organizational structures for Chinese firms. They are not necessarily single-practitioner firms as the appellation may imply, but rather are firms founded by a single lawyer (who must have at least five years of experience) and who may hire associates if he sees fit. E-mail from Sida Liu, Assistant Prof., Soc. and L., Univ. of Wis., to author (Nov. 17, 2010, 14:57 PST) (on file with author). Regulations specific to law firms have been promulgated by the Ministry of Justice, in the *Measures for the Administration of Law Firms*.

### 5. *Provisions for Defense Counsel*

Articles 33, 34, 35, and portions of Article 37 are new additions to the Lawyers Law. They comprise a definite step towards international human rights norms and a softening of the previously very one-sided nature of criminal proceedings in China. Article 33 affords a lawyer the right to meet a criminal defendant and be informed of matters pertaining to the case “from the first time the subject is questioned by the investigative authority or the date on which enforcement measures are taken.” Moreover, meetings between the defendant and their attorney will not be monitored. Article 34 allows the lawyer to have the right to review and take copies of litigation documents, while Article 35 allows the lawyer to “apply to the people’s procuratorate or people’s court for the collection and turnover of evidence, or apply to the people’s court for telling the witnesses to appear in court and give testimony.”<sup>55</sup> Further, it allows the lawyer to conduct an independent investigation of the matter. Article 36 provides that the right of a defense attorney to provide a defense will be protected. Similarly, Article 37 provides that a lawyer will not be subjected to criminal proceedings themselves for offering a defense. However, this right is suspended for “statements that jeopardize state security, maliciously slander others or seriously disturb court order.”<sup>56</sup> As such, there is quite a bit of discretion left to the court regarding what language is protected and what would leave a defense attorney liable. Article 37 further addresses the result of being arrested in connection with litigation activities, providing that the arresting authority will notify the lawyer’s family, law firm, and bar association within twenty four hours of the arrest. Unfortunately, as shown by Judith A. McMorro, lawyers in China are reporting that in controversial cases these exceptions swallow the rule.<sup>57</sup>

### 6. *Confidentiality*

Article 38 contains the Chinese approach to confidentiality, holding that “[a] lawyer shall keep the state secrets and trade secrets he/she learns in the course of his/her practice activities confidential and may not divulge the private matters of concerned parties.”<sup>58</sup> New to the current version of the law is additional language to the effect that lawyers will keep information that the “client or others do not wish to be divulged and that he/she [the lawyer] learns in the course of his/her practice activities”

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55. People’s Republic of China Lawyer’s Law, *supra* note 25, at art. 38.

56. *Id.* at art. 35.

57. McMorro, *supra* note 8, at 1101.

58. People’s Republic of China Lawyer’s Law, *supra* note 25, at art. 38.

confidential.<sup>59</sup> On the face, this duty is quite broad. However, the duty of confidentiality is not absolute; information “pertaining to a criminal offence that jeopardizes state security, public safety or seriously jeopardizes the safety of others or others’ property that the client or another is preparing to commit shall be excepted.”<sup>60</sup> As noted again by McMorrow, what constitutes “state security” is defined solely by the Party, which creates an amorphous exception to the duty of confidentiality.<sup>61</sup>

### 7. *Improper Conduct*

Articles 39 and 40 address improper conduct for lawyers to engage in, while Articles 47 to 49 address the penalties that lawyers as individuals face for engaging in such behavior.<sup>62</sup> The judicial administration bureau assesses the penalties.<sup>63</sup> They range from fines of between 5,000 to 50,000 renminbi;<sup>64</sup> the disgorgement of illicit profits; suspension from practice for up to one year; revocation of the lawyer’s practice certificate; and possible criminal liability. Lawyers are not allowed to: practice simultaneously with two or more firms; solicit business through improper means; represent both parties in a case or represent a client in a matter in which the lawyer or a close relative has a conflict of interest;<sup>65</sup> act as an agent *ad litem* or defense counsel two years after acting as a judge or procuratorate; refuse to perform the

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59. *Id.*

60. *Id.*

61. McMorrow, *supra* note 8, at 1101. It should be noted that the existence of this exception is in line with instrumentalist perceptions of law as a tool to be used in supporting the state that underpins the Chinese legal system.

62. Article 50 addresses the penalties brought to bear on law firms as a whole, rather than lawyers individually, engaging in the enumerated prohibited activity. Subsequent Articles up to Article 56 continue fleshing out the penal framework for lawyers who engage in unprofessional or unethical conduct. Notably, placed in the middle of this section of the law is Article 52, which states “[t]he judicial administrative department. . . at the county level shall conduct day-to-day oversight of the practice activities of a lawyer or law firm and shall order rectification for any issues discovered in the monitoring.”

63. Note that these penalties are not assessed by the lawyers’ associations, but by the government.

64. Approximately \$750 to \$7,500 USD at the prevailing exchange rate in December 2010.

65. It is worth taking a moment to reflect on the Chinese approach to conflicts of interest, which are generally approached from a purely legal perspective, rather than taking into consideration personal conflicts of interest stemming from social relationships, the language to the above notwithstanding. It is also worth noting that informed client consent cannot cure a conflict of interest. Wald, *supra* note 42, at 396. China’s rules of legal ethics define a conflict of interest as a situation where representing a new client might cause a conflict with the representation of an existing client. Jing “Brad” Luo, *Chinese Law on Lawyers Amended: Progress Made and to Be Made*, CHINA L. & PRAC., Feb. 2008 (citing RULES OF PROFESSIONAL ETHICS AND CONDUCT (PROVISIONAL) (2004), available in Chinese at:

legal aid obligations required by Article 42; accept an appointment from a client or accept payment from a client without the participation of the lawyer's firm; refuse to represent a client without a legitimate reason or fail to appear before an adjudicator on time; exploit their position over their client to misappropriate their rights and interests; divulge trade secrets or people's private matters; meet with an adjudicator or procurator in violation of provisions or attempt to improperly influence them; offer or induce a bribe to an adjudicator or procurator; commit fraud; introduce or cause to be introduced false evidence or hinder the lawful obtaining of evidence; accept benefits from or collude with the other party to his client or a third party to infringe upon the rights and interests of his client; disrupt the order of the court; incite another to disrupt public order or threaten public safety to resolve a dispute; make a statement that "jeopardize[s] state security, maliciously slanders others or seriously disrupts the court order;" or divulge state secrets.<sup>66</sup>

Although it is hard to tell how common it is for lawyers or firms that engage in the above behaviors are sanctioned, or how closely linked sanctions are to the offending behavior, at least some form of enforcement is being brought to bear. In 2004, 719 lawyers and 213 law firms were sanctioned by the Ministry of Justice for violations including improper billing, negligent work, unfair competition, deceptive advertising, and improper interactions with judges. Randall Peerenboom describes the violations of legal ethics that led to these sanctions as being a result of the still-developing nature of the legal profession in China, the high levels of corruption found in middle-income countries, and the economic pressures on some lawyers.<sup>67</sup> Daniel C.K. Chow similarly states that "[s]harp practices and improper conduct among PRC lawyers constitute the most serious problem in the PRC legal profession today," and cites the drive to secure income from limited clients as the motivation for these violations.<sup>68</sup>

#### 8. *Lawyers' Associations*

Articles 43 to 46 address lawyers' associations, which comprise China's bar associations. Article 43 proclaims that the lawyers' associations hold legal personality and are the self-regulatory organizations for lawyers. Further, it establishes the All China Lawyers Association and local lawyers' associations.

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[www.law-lib.com/law/law\\_view.asp?id="82747"](http://www.law-lib.com/law/law_view.asp?id=), (last visited Jan. 2, 2008), Article 76).

66. People's Republic of China Lawyer's Law, *supra* note 25, at art. 37.

67. Peerenboom, *supra* note 10, at 26.

68. CHOW, *supra* note 2, at 252.

Article 45 states that lawyers will join their local lawyers' associations and that in doing so they automatically join the All China Lawyers Association. The All China Lawyers Association receives funding from the pool of mandatory fees placed on law firms by the Ministry of Justice.<sup>69</sup> Article 46 establishes the duties of the lawyers' associations, which include ensuring that lawyers practice lawfully, set standards and punishment rules, organize legal training and education on professional ethics, reward and punish lawyers and their firms, deal with complaints against lawyers, and mediate disputes that arise due to lawyers' practices.

### 9. *Other Revisions to the Lawyers Law*

As outlined above, several positive amendments were made to the Lawyers Law in 2008. It is useful to further distinguish between the current Lawyers Law and the original. The 1996 Lawyers Law, as noted above, first allowed for an independent legal profession that focused on clients rather than the state.<sup>70</sup> The definition of lawyer, found in Article 2 of the law, changed from a "state legal worker," as lawyers were defined under the Provisional Regulations, to "a practitioner who has acquired a lawyer's practice certificate pursuant to law and provides legal services to the public."<sup>71</sup> Despite the wording that the provision of legal services were to the public, it was apparent from Articles 26, 27, and 28 of the 1996 Lawyers Law that lawyers were required to protect the legitimate rights and interests of their clients regardless of the context, and that the object of their legal services was the client rather than the public as a whole, or by extension, the state. As noted above, this language has been changed such that the focus on the client is codified in the language "provides legal services to a concerned party."<sup>72</sup>

Article 6 of the original law granted qualification as a lawyer to "a person who has acquired three years legal education in an institution of higher learning. . . or attained an equivalent professional level, or has acquired an undergraduate education in another major in an institution of higher learning. . . and has passed the examination for the qualification as a lawyer." In the current law, references to an educational requirement to become a lawyer have been removed, but the actual standard has been raised such that degrees from junior colleges are no longer acceptable;

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69. Philipsen, *supra* note 4, at 221.

70. Liu, *supra* note 16, at 1074.

71. Zhonghua Renmin Gongheguo Lushi Fa (中华人民共和国律师法) [People's Republic of China Lawyer's Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective January 1, 1997), available at <http://en.chinacourt.org/public/detail.php?id=100> (last visited Jan. 11, 2012).

72. People's Republic of China Lawyer's Law, *supra* note 25, at art. 2.

rather, an undergraduate degree is now the bare minimum.<sup>73</sup> However, the undergraduate degree can be in any major.<sup>74</sup> The educational requirement may be met by studying at a technical college, through self-study, night courses, correspondence courses, or adult education programs, as long as an undergraduate degree results.<sup>75</sup>

#### 10. *Lawyers Associations*

The Ministry of Justice is no longer in sole, direct control of the regulation of lawyers. This development is indicative of the transformation of lawyers from state workers to legal practitioners and the growing independence of the profession. The middleman of the lawyers' associations, which is under the control of the Ministry of Justice, has been introduced.<sup>76</sup> This shift has carried some weight. The annual inspections of law firms are now conducted by the local lawyers' associations, rather than by the Ministry of Justice. Moreover, the same local associations take most disciplinary actions, although the power to disbar is reserved to the Ministry of Justice. As a result, the lawyers' associations have become the forum in which members of the Chinese public can pursue claims of malpractice, a mechanism often employed to get lawyers to lower their fees.<sup>77</sup> Disciplining the legal community through the lawyers' associations is particularly effective because all lawyers must join a lawyers' association to practice. However, the efficacy of the lawyers' associations in some fields and their ability to discipline members should not be taken to mean that the legal profession has become wholly self-governing. Chinese lawyers are not permitted to form their own lawyers' associations but must join those created by the state, and the national and local associations must follow the directives of the Ministry of Justice in general and its department on lawyers, the "Lawyers and Notaries Bureau," in particular. The influence of the judiciary extends directly to those in charge of the lawyers' associations, as the local judicial authorities usually select the head and secretary of local lawyers' associations. As noted by Human Rights Watch, this creates a system in which the Ministry of Justice and its judicial bureaus administer the profession on the "macro" level of guidance, admission, administration,

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73. E-mail from Sida Liu, Assistant Prof., Soc. and L., Univ. of Wis., to author (Nov. 17, 2010, 14:57 PST) (on file with author).

74. E-mail from Oliver Xiaoke Zhang, Senior. Assoc., Sunshine Law Firm, to author (Nov. 27, 2010, 08:27 PST) (on file with author).

75. CHOW, *supra* note 2, at 230.

76. Liu, *supra* note 16, at 1075.

77. Arjun Subrahmanyam, *Growth and Change: The Diverse Challenges Facing Chinese Law Firms*, CHINA L. & PRAC., June 2004.

and coordination, while the lawyers associations address the “micro” level of body structure, professional duties, daily affairs, training, and education.<sup>78</sup>

The lawyers’ associations are responsible for promulgating codes of ethics. A prime example of how this duty is carried out may be found in the 2002 Standards for Lawyers’ Professional Ethics and Practice Disciplines (Standards) released by the All China Lawyers Association.<sup>79</sup> It consists of seven Chapters and 49 Articles. The Articles are written very vaguely, and often contain broad goals. For example, Article 7 states: “[l]awyers shall cherish and maintain [l]awyers’ professional reputation, observe social morality, and pay attention to edify their moral characters as well as accomplishments of professional ethics.”<sup>80</sup> Some Articles seem quite mundane, such as Article 19 which reads in part “[l]awyers shall dress as required when appearing [in] court.” Frequently, the Articles of the Standards map to the language of the Lawyers’ Law itself.<sup>81</sup> For example, Article 28 of the Standards reads in part, “[a] lawyer shall not act as agent for both parties concerned in the same case.” Article 34 of the 1996 Lawyers Law, which was then in effect, read “[a] lawyer shall not represent both parties involved in the same case.”

However, the Standards do add some ethical requirements that are not embodied in the Lawyers Law. Articles 24 and 25 address the measure of competence required by Chinese lawyers by calling for lawyers to apply their professional knowledge and skills adequately to protect their clients and to not accept assignments beyond their ability. Article 31 requires lawyers to keep the client informed of developments relating to his or her representation in a timely manner. Article 32 requires lawyers to respect the scope of their agency, and not abuse their position of power relative to clients. This duty is further elaborated on by Article 35, which prohibits embezzling the property of clients. Article 39 extends the obligation of confidentiality past the end of the attorney-client relationship. Article 20 notably further ad-

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78. HUMAN RIGHTS WATCH, *supra* note 50, at 13.

79. ALL CHINA LAWYERS’ ASSOCIATION, STANDARDS FOR LAWYERS’ PROFESSIONAL ETHICS AND PRACTICE DISCIPLINES, *available at* [http://hk.isinolaw.com/gate/big5/www.isinolaw.com/isinolaw/english/outline\\_t1.jsp?channelid=76951&searchword=catalog=0-ifbase4-base28-JTIwYW5kJTlwaXNlbmdsaXNoPj0x](http://hk.isinolaw.com/gate/big5/www.isinolaw.com/isinolaw/english/outline_t1.jsp?channelid=76951&searchword=catalog=0-ifbase4-base28-JTIwYW5kJTlwaXNlbmdsaXNoPj0x) (last visited Jan. 11, 2012).

80. Some articles are written in a manner that seems ironic in English translation, such as Article 12, “Lawyers shall participate in social welfare activities voluntarily.”

81. On September 9, 2008, the Ministry of Justice released the *Measures for the Administration of the Practice of Lawyers*, effective July 18, 2008. However, with regards to the ethical and professional requirements expected of lawyers, this document strongly tracks the Lawyers Law.

dresses improper use of contacts by requiring lawyers to not advertise their relationships with law enforcement or others in positions of power.

If rigorously implemented, the combination of the provisions of the Lawyers Law and the various ethical codes put out by the lawyers' associations on both the national and local levels would strongly support a high level of ethical practice in Chinese law. Unfortunately, as noted by Judith A. McMorrow, "[w]e see again a system fine in theory, but weak in practice. It is difficult to tell from the English language literature how much influence, if any, the codes of ethics released by lawyers' associations have on the actual practice of lawyers,"<sup>82</sup> or even whether infractions of the code are used as the basis for disciplinary actions.

Many Chinese lawyers do feel that the lawyers' associations have helped to raise the standard of ethics in practice, if only in the larger coastal cities. This is no doubt aided by the lawyers' associations' practice of publishing the disciplinary cases they have brought and reviews of compliance with regulatory issues on a monthly basis. The lawyers' associations also actively participate in continuing legal education, although some Chinese lawyers have emphasized the need for more. However, at least in 2004, older rather than younger lawyers dominated active participation in the lawyers' associations and their events. Moreover, the lawyers' associations are not perceived as being effective lobbying groups. As such, the lawyers' associations are more effective in their disciplinary role than as vehicles for furthering the interests of their constituent members.<sup>83</sup>

Carlos Wing-Ho Lo and Ed Snape highlight that the lawyers' associations have, in many regards, been used as tools of the state to control lawyers, and are considered to be among the root causes for the slow development of both professional ethics and a focus on the client.<sup>84</sup> The restrictions imposed on the lawyers' associations in pursuing self-governance or structural changes in the legal profession are clearly illustrated by recent events. In 2008 thirty-five members of the Beijing lawyers' association moved to allow their representatives within the association to be directly elected. The response by the authorities was to pressure their law firms to dismiss them, removing the ability of these lawyers to practice, and to denounce these lawyers as

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82. McMorrow, *supra* note 8, at 1101.

83. Subrahmanyam, *supra* note 77.

84. Lo & Snape, *supra* note 17, at 433.

pushing for the “total repudiation of China’s current lawyers’ administrative system, justice system, and even political system.”<sup>85</sup>

## VI. Confidentiality

The Provisional Regulations of 1980 only extended a lawyer’s duty of confidentiality to state secrets and nebulously defined “private matters.”<sup>86</sup> In 1993, the Ministry of Justice released a Code of Conduct for lawyers, which prohibited lawyers from revealing clients’ private information or “secrets or other facts and materials that the client does not wish to divulge to the public.”<sup>87</sup> The 1996 Lawyers Law codified this advance and expanded confidentiality to cover clients’ “trade secrets” and “private information” learned in the course of the representation, adding a marginal degree of specificity.<sup>88</sup> As noted above, the current Lawyers Law further expands the duty of confidentiality such that it is now quite broad and includes state secrets, trade secrets, and information learned in the course of representation from the client or others which the client does not wish to reveal. No protection is extended, however, to information regarding an ongoing or planned criminal offense that jeopardizes safety or property. Article 56 of the Code of Conduct for Lawyers promulgated by the All-China Lawyers Association in 2004, extends the duty of confidentiality beyond individual lawyers to their law firms and support personnel.<sup>89</sup>

The language of the Lawyers’ Law does not address whether the lawyer has to protect confidential information after the attorney-client relationship has ended, but such confidentiality is required by the Standards for Lawyers’ Professional Ethics and Practice Disciplines promulgated in 2004 and reaffirmed in the 2004 Code of Conduct by the All-China Lawyers Association. Moreover, it is unclear from the language of the Lawyers’ Law whether the duty to reveal information relating to offenses is mandatory or permissive, thus protecting a lawyer from liability for disclosing such information. However, the construction lends itself more easily to the latter interpretation. This construction does not appear to retroactively extend confidentiality to infor-

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85. McMorrow, *supra* note 8, at 1102 (quoting China Forum, *CCP Afraid of China’s Lawyers*, <http://www.topix.com/forum/world/china/TF3QBM3LPMLSDI8CD> (last visited Jan. 11, 2012)).

86. Xu Xi, *A Comparative Study of Lawyers’ Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality*, 1 *TSINGHUA CHINA L. REV.* 46, 49-50 (2009).

87. *Id.* at 51.

88. *Id.* at 50.

89. E-mail from Li Xueyao, Assoc. Professor, KoGuan Law Sch., Shanghai Jiao Tong U., to author (Nov. 24, 2010, 12:21 PST) (on file with author).

mation regarding completed offenses, and it is similarly unclear whether an attorney would have an affirmative duty to inform authorities of such offenses.<sup>90</sup>

Despite the laws discussed above, there are several elements in the Chinese legal system which impair the protection of confidential information in practice. Under the *Criminal Procedure Law of the People's Republic of China*, the *Civil Procedure Law of the People's Republic of China*, and the *Administrative Procedure Law of the People's Republic of China*, citizens of China are legally obligated to cooperate with the courts, procuratorates and public security bureaus in providing testimony. Chinese lawyers are citizens of China and thus may be compelled to testify about their clients whether or not there has been a request for confidentiality. It is conceivable that the 2008 Lawyer's Law could be construed as trumping these older laws, since China ascribes to a later-in-time rule when settling conflicts between legislation.<sup>91</sup> However, it would appear that defense lawyers who hold information regarding their clients are still being compelled to testify despite the provisions in the new Lawyers Law.<sup>92</sup> Moreover, the National People's Congress has stated that defense lawyers are required to testify on their clients' criminal activities even if doing so would involve disclosing confidential information.<sup>93</sup> In addition, it is unlikely that lawyers would refuse to give information requested by the court, as the Criminal Law authorizes arresting lawyers for being "obstructive," which the courts have a tendency to broadly utilize.<sup>94</sup> Non-disclosure in the face of such consequences is particularly unlikely because confidentiality is "not the norm for Chinese lawyers, in part because protecting a client's confidential information from the state is not taken for granted, and in part because the idea that client confidentiality is a desirable concept. . . is not well accepted."<sup>95</sup> The practical result is that although the legal doctrine provides for broad confidentiality protections, there are likely limits to how candid a client will be when discussing information in a criminal or other-

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90. Xu, *supra* note 86, at 54. As also noted by Xu Xi, the confidentiality protection does not extend to in-house counsel with regard to information received from clients, as there is no attorney-client privilege. E-mail from Li Xueyao, Assoc. Professor, KoGuan L. Sch., Shanghai Jiao Tong U., to author (Nov. 24, 2010, 12:21 PST) (on file with author).

91. Xu, *supra* note 86, at 56.

92. E-mail from Oliver Xiaoke Zhang, Senior Assoc., Sunshine Law Firm, to author (Nov. 27, 2010, 08:27 PST) (on file with author).

93. E-mail from Li Xueyao, Assoc. Professor, KoGuan L. Sch., Shanghai Jiao Tong U., to author (Nov. 24, 2010, 12:21 PST) (on file with author).

94. Xu, *supra* note 86, at 57.

95. Wald, *supra* note 42, at 389.

wise sensitive case, since the attorney may well be forced to reveal this information in court.

## VII. *Guanxi*, or the Use of Social Networks

One of the most apparent issues in Chinese legal ethics is the effect of *guanxi*, or personal relationships, which in Chinese culture carry great weight in influencing the actions of individuals. *Guanxi* is so powerful that connections to the right people and an ability to get the desired results from them rather than possessing legal competence are stressed as the essential ingredient to a successful practice.<sup>96</sup> These endemic concerns are addressed in both the Articles in the Lawyers Law forbidding improper contact with judges, as well as the Articles in the Standards forbidding lawyers from advertising the connections their firms have to powerful individuals. However, *guanxi* is still a core part of legal practice and is considered by firms to be an important part of what they offer to their clients. As a result, improper conduct such as abusing *guanxi* to influence the resolution of legal matters remained a serious problem in 2003, well after the promulgation of the original Lawyers Law containing the vast majority of the above prohibitions regarding improper actions.

Unfortunately, while Chinese disciplinary laws for unprofessional conduct by lawyers are similar to those found internationally, there is not the same level of compliance or enforcement found elsewhere. For example, although bribes and improper contact with judges are prohibited, they are nonetheless widespread. For many lawyers, in light of rising competition between firms, the object is to secure what the client wants regardless of what means are needed to affect that goal. The potential for abuse of bribes or *guanxi* is magnified when the legal matter depends on the action of a government official.<sup>97</sup> Lawyers thus network with judges, local officials, and the officials who regulate lawyers in order to facilitate the verdicts and government approvals needed for their clients.<sup>98</sup>

A 2005 survey of Chinese lawyers performed by Lo and Snape found many practitioners perceived *guanxi* as a necessary means of increasing competitiveness and marketability.<sup>99</sup> Lo and Snape suggest that low entry requirements for the field in the past had created low professional standards, and that *guanxi* allowed one to be an effective lawyer despite lacking technical

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96. Citow, *supra* note 2, at 251.

97. *Id.* at 254.

98. McMorrow, *supra* note 8, at 1095.

99. Lo & Snape, *supra* note 17, at 449.

skill.<sup>100</sup> Moreover, for human rights and criminal lawyers in particular, cultivating *guanxi* is a way to avoid hostility from the state and achieve cooperation from judges and procurators, although the utility of these relationships becomes limited for politically sensitive matters.<sup>101</sup> Lawyers in other fields that require the issuance of special licenses from government officials to practice<sup>102</sup> may be driven to cultivate ties with the officials who control their professional futures, even if they are not concerned with the competitive advantages that *guanxi* may bring.<sup>103</sup>

However, all of this is not to suggest that *guanxi* is the paramount concern of Chinese clients. As the legal field has exponentially grown and increasingly professionalized, the government has taken actions to limit the influence that social connections have on decision-making. The importance of *guanxi* has correspondingly dropped, while the emphasis on legal ability has increased.<sup>104</sup> Some lawyers wish to further marginalize the importance of *guanxi* to their field. Many lawyers are unsettled by the amount of connections that their competitors have and the continuing influence of "fixers" and connected middlemen in the field, even while continuing to hire such individuals themselves.<sup>105</sup>

#### VIII. Independence of the Legal Profession, and Government Control

The increasing independence of the legal profession from the state, balanced by the ongoing oversight of the government, is a consistent theme in the evolution of the Chinese lawyer. Although lawyers are no longer state workers but are now private practitioners of the law focused on serving their clients, they are still subject to the regulations and discipline of the Ministry of Justice and its organs, both directly and indirectly through their lawyers' association. The situation is one in which the Communist Party and its ideology are often paid lip service by citizens of all walks of life while privately regarded with both cynicism and a sense of resignation, as well as an awareness of endemic corruption within the political system.<sup>106</sup> Yet, while law in China is by no means a free profession, lawyers are definitely increasingly independent. In particular, criminal lawyers have been able to defend their clients more effectively as the criminal court system

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100. *Id.* at 451.

101. HUMAN RIGHTS WATCH, *supra* note 50, at 63.

102. For example, securities law, patent registration, or bankruptcy.

103. Peerenboom, *supra* note 10, at 25.

104. Subrahmanyam, *supra* note 77.

105. Peerenboom, *supra* note 10, at 24.

106. CHOW, *supra* note 2, at 249.

has liberalized over time. By the same token, lawyers have been suing the government and its organs through the Administrative Litigation Law. Through the lawyers' associations, lawyers have been given the opportunity to self-regulate, albeit with pervasive government influence.<sup>107</sup>

The amount of independence that a given lawyer will be able to exercise from the state depends strongly on practice area. Lawyers who are involved in litigation against state organs or criminal defense work are exposed to far more pressure from the government and the Party. Similarly, lawyers who work in state-funded law firms are obligated to the state for their funding, and have commensurately less independence than firms that do not rely on such funding. Those in partnership law firms or one-person firms, on the other hand, are beholden not to state, but to the realities of the legal market.<sup>108</sup>

It is important to remember that the law in China is not meant to be independent of the state. Instead, law is a tool of the state that the government has no intention of relinquishing control of. As stated by Luo Gan, the country's most senior judicial official, "[e]nemy forces are seeking to use China's legal system to Westernize and divide the country, and the Communist Party must fend them off by maintaining its dominance over lawyers, judges and prosecutors."<sup>109</sup> This approach is regularly reflected in Chinese media reports of lawyers who are deemed a threat to social order being subjected to government intimidation, arrest, or suspension from practice. As previously discussed, the local judicial administration bureau, which controls practice certificates, often exerts pressure on lawyers. Only last year, new reports emerged about lawyers who had their certificates suspended or renewed without comment for representing clients considered to be threatening to state interests.<sup>110</sup>

A more insidious approach to removing lawyers who are pursuing ends that are disfavored by the state is through application of Article 306 of the Criminal Law, which levies three to seven years of incarceration for any legal representative who tampers with evidence or induces a witness to change testimony. Charges that the lawyer induced defendants to give false evidence are brought if the defendant's testimony changes after meeting with the lawyer. However, since forceful means are frequently employed to extract confessions, defendants often withdraw false confessions when given the opportunity. Such

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107. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 166 (2008).

108. CHOW, *supra* note 2, at 249.

109. Clark, *supra* note 15, at 834.

110. McMorro, *supra* note 8, at 1099.

withdrawals create an opening for the government to charge the lawyer. Although most were acquitted, by the beginning of this decade at least 150 lawyers had been arrested on such charges.<sup>111</sup>

More directly, lawyers bringing cases against government organs or the Communist Party involving ten or more plaintiffs must place themselves in the "guidance and supervision" of the All China Lawyers Association and the local judicial administration bureau, which are both under the control of the Ministry of Justice. Moreover, they need to have the consent of three partners in their law firm before even accepting the case (clearly a measure designed to limit the ability of lawyers to take such cases) and in pursuing the case must avoid media coverage.<sup>112</sup> This is one example among many of the restrictions imposed by the state that Chinese lawyers complain of in their ability to represent their clients.<sup>113</sup> In this environment, any discussion of grand legal ethics is subsumed within the more immediately relevant concern of what ethics the state would like lawyers to pursue.<sup>114</sup> In light of all the above, it is little wonder that Chinese lawyers point to the lack of continuing independence as the largest issue for the advancement of their profession.<sup>115</sup>

### IX. Recommendations

A variety of issues face the relatively young Chinese legal profession. The push to advance the profession is supported by government statements that have laid heavy emphasis on the need to develop the legal profession as one facet of the government's promotion of the rule of law.<sup>116</sup> However, in espousing changes that might improve the legal profession, it is important to be mindful that the official enthusiasm for reforming the field only goes so far. As illustrated by the reaction to the suggestion that members of the Beijing lawyers' association directly elect their representatives, movements in directions that are not in line with government policy are quite ill-fated. Any successful changes will be dependent upon a positive government response. Chinese lawyers identify the lack of true independence from the state as their greatest problem, yet this is the issue over which the government is least likely to bend. Keeping in mind that some of the suggestions below are untenable given the current political climate and context in which Chinese lawyers operate, they are

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111. Clark, *supra* note 15, at 843.

112. *Id.* at 844.

113. HUMAN RIGHTS WATCH, *supra* note 50, at 62.

114. McMorrow, *supra* note 8, at 1094.

115. HUMAN RIGHTS WATCH, *supra* note 50, at 4.

116. *Id.* at 5.

designed to strengthen and improve the profession, if only in an ideal world.

### 1. *Strengthening Lawyers' Associations*

Many of the issues facing the Chinese legal profession may be addressed through increasing the amount of self-regulation that Chinese lawyers are able to exert over themselves through their lawyers' associations, and through achieving the practical independence of the same. The associations could be immeasurably useful tools in the pursuit of other positive changes if there was an increased emphasis on the role that these groups play as not just disciplinary and educational bodies, but as mouthpieces for their constituent members. Such a transformation would require far greater independence for the associations, which may be difficult to achieve in the current political climate; yet, the above example of negative government response to partially democratizing lawyers' association elections aside, the lawyers' associations have the potential to become powerful tools to promote lawyers' interests to the state. The removal of government officials from the leadership of the associations, and the placement of practicing lawyers into these positions, is a positive move that hopefully reflects openness to at least some increased autonomy for the associations.<sup>117</sup>

Younger lawyers are underrepresented among active participants in the lawyers' associations, and the associations themselves are not seen as effective lobbying groups.<sup>118</sup> Both of these issues need to be addressed, and are related. Young lawyers would likely be more active in the lawyers' associations if the associations were perceived as being relevant to their practice and as effective tools to improve their practice conditions. On the other hand, lobbying efforts would be more effective if young lawyers would lend their manpower and efforts.

In addition, the organizations have proven themselves helpful in enforcing the Chinese canon of professional responsibility and cracking down on illicit conduct. They would be yet more effective with greater participation on behalf of the lawyerly populace. This would not only enhance the associations' information gathering capabilities with regard to the manner in which lawyers are conducting their practices, but perhaps the increased profile of associations would help increase the profile of the ethical- and conduct-based messages they promote. Such an effect may passively reduce the frequency of transgressions by causing lawyers

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117. Meiners & Chen, *supra* note 40, at 30.

118. Subrahmanyam, *supra* note 77.

to have second thoughts on a given course of illicit conduct through greater awareness of their professional responsibilities.

## 2. *Improving Legal Education*

Just as gains may be made by increasing the participation of young lawyers in the lawyers' associations, reforming the manner in which law is taught could yield dividends for the legal profession. Chinese legal education is still often characterized by a focus on legal theory in an academic setting, rather than consideration of the manner in which those theories operate in the day-to-day practice of a lawyer. Shifting this emphasis will allow for greater cognizance among students of the ethical issues they will face in practice and for the role of law in society. Moreover, an emphasis on practice rather than theory will require more attention to legal analysis and drafting skills, which will raise the base level of competence for young Chinese legal professionals. Such an effect could be garnered by increasing the role that practicing lawyers play in legal education.<sup>119</sup> Another important step would be to standardize the education that Chinese law students receive. The Chinese universities that offer majors in law do not, and are not required to, receive any form of accreditation.<sup>120</sup> Standardizing legal education will require a centralized body that would be forced to confront the most effective way to produce capable lawyers. Hopefully, such a centralized group would be able to raise educational standards. Moreover, simply having some form of standardized education for legal practitioners will help to establish and clarify what is expected of practitioners in the field, which will hopefully lead to increased competence within that framework. In considering the establishment of a centralized legal education standardizing body, however, one must be mindful that such a group would likely reflect a heavy government influence in its agenda.

Happily, there have been positive signs in recent years as efforts by the Ford Foundation and increasing exposure to foreign teaching methods by Chinese law professors have yielded dividends in the form of an increase in the instruction of legal skills to at least some students.<sup>121</sup> There is expanding interest in clinical education.<sup>122</sup> Such efforts should be promoted. If these trends are illustrative of the future of Chinese legal education,

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119. *Id.*

120. Ashby Jones, *Notes from China: Legal Education Playing Catch-Up, in a Hurry*, WALL ST. J. L. BLOG (June 5, 2008, 10:24 AM), <http://blogs.wsj.com/law/2008/06/05/notes-from-china-legal-education-playing-catch-up-in-a-hurry/> (last visited Jan. 11, 2012).

121. McMorrow, *supra* note 8, at 1087.

122. Jones, *supra* note 120.

the average Chinese law student of tomorrow will hopefully graduate with more practical competence to engage in the practice of law than the average one today.

### 3. *Improving the Rule of Law*

“Rule of law” is a loaded term in Chinese legal academia and is beyond the scope of this paper; yet it is a major issue in China and must be addressed, if only briefly. Although this issue is improving, the lack of effective implementation and enforcement of the far-reaching professional conduct provisions of the Lawyers Law (and other related laws designed to clean up the court system) nevertheless undermines the judicial process in such a way that rulings may be based on arbitrary factors such as corruption or *guanxi*. While there is improvement,<sup>123</sup> the problems with enforcement in the Chinese legal system have wide-reaching and complex roots. Causes include: friction between the central and local governments; an inconsistent regulatory framework; preferences for economic growth over legal compliance; local protectionism; and the simple fact that in a country that is developing as quickly as China, many laws are outdated and simple ignored.<sup>124</sup> Unfortunately, without systemic reform of the Chinese government and its organs, which is simply not feasible, these causes will not be easily addressed.

One integral step towards solidifying the rule of law would be a movement away from the vague drafting style that has characterized Chinese legislation, thus allowing for more consistent implementation and interpretation of the laws that Chinese lawyers interact with in the course of their jobs. Doing so would also lessen the amount of influence that *guanxi* may exert as local officials will have less freedom to interpret laws in a manner advantageous to their own interests. The lessened opportunity for the successful use of *guanxi* to achieve legal objectives should commensurately help to raise the level of competence among Chinese lawyers. Including the legal community more closely in the legislative drafting process may engender similar effects.

In the Lo and Snape survey of Chinese lawyers, some interviewees put forth suggestions as to how to improve the rule of law, which they see as being key to advancing the legal profession. Among those interviewed, two interpretations were put forth of how to implement greater rule of law. The first was to

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123. Randall Peerenboom, *Searching for Political Liberalism in all the Wrong Places: The Legal Profession in China as the Leading Edge of Political Reforms?* 5 (LaTrobe Law Sch. Legal Studies Research Paper No. 2008/7) available at <http://ssrn.com/abstract=1265080> (last visited Jan. 12, 2012).

124. McMorrow, *supra* note 8, at 1097.

reform the justice system to lessen the influence of *guanxi*, seek greater enforcement of judgments, and to improve the stance of government officials towards the legal profession. The second involved the National People's Congress releasing legislation specifying the legal status of lawyers; the courts improving the competence and professionalism of judges; the public security organs according proper respect to the law in handling cases; the Ministry of Justice heightening the standards required of lawyers, judges, and procurators; and implementing improved management systems to cut down on unfair competition and breaches of professional conduct among lawyers. This second proposal also stressed the need for the independence of the lawyers' associations, and placed the onus on lawyers themselves to directly improve their competence.<sup>125</sup> The rule of law is a popular subject for scholars of Chinese law, and much of the debate turns on what definition of the phrase should be controlling within the Chinese context. It is interesting to note that the discussion also appears to be occurring in China itself, as the two solutions for improving the rule of law propose very difficult cures: one seeks to limit improper contacts, heighten enforcement after cases have been settled, and raise the profile of the legal profession, while the other seeks a rigorous reworking and strengthening of the entire legal system.

It seems quite likely, however, that the factor that will most strengthen the rule of law in China is China's own economic growth. Peerenboom has shown that there is a strong correlation between higher GDP and increased rule of law, government effectiveness, lower corruption, and greater political rights among the populace.<sup>126</sup> Each country is, of course, different, and it would be naïve to imagine that continued growth will, in and of itself, be dispositive. Still, these correlations are highly encouraging in suggesting that the rule of law and associated issues will likely improve, particularly in this context, when continued strong growth has been the stand-out characteristic of the Chinese economy for so long.

## X. Conclusion

When he first appeared in 1980, the modern Chinese lawyer was a very different animal from the lawyers who walk the streets of Beijing today. Lawyers are now defined by their profession and the interests of their clients, rather than as servants of the state. They have edged out from under the thumbnail of the Ministry of Justice and have achieved a degree of self-regulation

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125. Lo & Snape, *supra* note 17, at 451.

126. Peerenboom, *supra* note 123, at 4.

through the lawyers' associations. Their level of professionalism and education, and by extension competence, has increased exponentially. They have tightened their hold on the monopoly of legal services in China. However, many of the same issues that confronted lawyers in 1980 remain the same. The influence of the state and its ideologies are pervasive throughout their profession, and they must be careful in which representations they accept if they want to avoid the animosity of the government officials who hold the lawyers' ability to practice in their hands. Overall, however, the trend has been and continues to be positive. With the 2008 amendments to the Lawyers Law, Chinese defense counsels now have a greater ability to meet with their clients in a neutral setting, without the watchful eye of the procurator or the public security bureau present. The client's right to confidentiality is expanding. The use of personal relationships to achieve legal objectives is being increasingly sidelined by legal competence. Ethical standards as a whole are being raised, and law firms are now being required to institute systems to monitor their lawyers for ethical violations and conflicts of interest, which will undoubtedly only raise the level of ethical standards even higher. It is difficult to forecast the future of the Chinese legal profession considering the rapidity with which it has developed and the speed with which the basic laws and regulations upon which the profession relies are changing. Nevertheless, the direction the Chinese lawyer is moving is a positive one: towards greater independence, competence, and higher professional standards.

