

*The role of [clinical] legal education in legal reform in the People's Republic of China:
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Jay Pottenger

China has a long and sophisticated “legal” history. This makes commenting upon it a daunting and humbling task, particularly for someone like me, who comes from a nation with only a fairly short and (relatively) straight-line story by comparison. Nonetheless, I shall begin by attempting both to describe the current situation in the People's Republic of China and to place it in some historical context.

China's current project of building a “rule of law” society began in earnest only about 25 years ago, after 20 years of what most have called a lawless society. Just how “lawless” was the PRC from the 1957 Anti-Rightist Campaign through the end of the Cultural Revolution? Most reports say that virtually no legal education took place, with the total number of lawyers in the country hovering between 2500 and 3000, and only two law schools even nominally “open” (albeit without active faculty or students). Even the Ministry of Justice was abolished for that whole twenty-year period. Some courts continued to operate for criminal law enforcement purposes, but there was no functioning “legal order” to speak of for two decades. In some ways, though, this period of a legal vacuum amidst social turmoil was not so unusual as westerners might suspect, for the dominant strand in historical Chinese tradition is itself deeply “negative” toward a formal ordering of society by means of law and legal process. For Confucians, the best way to achieve social order was not via “The FA” (a systematic set of laws, attaching standard rewards or, more commonly, punishments to particular behaviours) but through “The LI” (a set of rules of behaviour and rituals teaching propriety in social relations, usually shown by exemplary conduct of those duty-bound to set such examples for others).

Until the last two decades of Imperial rule, therefore, Chinese society managed rather well, thank you, without a formal legal profession and, thus, no system of legal education either. Even as a legal

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profession began to develop in the late Qing Dynasty (circa the 1890's) and its successor Republic, however, there was a clear instrumentalist motive: to strengthen the ruling regimes hold on power by deploying "law" in support of authority (and power). This harked back to the ancient legalist philosophical tradition in China, which competed with Confucianism by arguing that positive laws of universal applicability and applied coercively were essential to the successful ordering of the Imperial State. The ongoing debate between these two philosophies still shapes and frames contemporary discussions about the ROLE of law in Chinese society on both popular and scholarly levels. Reduced to what is admittedly a rather simplistic example (and thus twisted so badly out-of-shape as perhaps to be useless), a key feature of this debate is about how *The Law* is to be applied at the highest level of the State: Is the ruler subject to the law? This is an issue my English audience will recognise as having arisen here fairly recently, in the context of the Queen's ambiguous role in the Paul Burrell Trial. It was also, of course, at the heart of the legal dimensions to both the Clinton and Nixon presidencies in the United States. So perhaps these deep doubts about the ROLE & RULE of law are not so unique to China after all.

Let me return to China's current efforts to build a stronger legal system, including one for legal education. As of 1978, there were about 2,500 practicing lawyers in the whole of the People's Republic of China; that number has been exploding at an almost geometric pace, such that there were about 11,000 in 1984; 45,000 by 1992; 90,000 by 1996, and well over 150,000 today. In February of last year 360,000 candidates sat the first "unified" bar exam in China; they were seeking entrance into either a legal or a judicial career. Most were disappointed though, as only about 25,000 (under 7%) passed. Despite such tough tests, China added more new lawyers during just the last half-decade of the 20th Century than comprise the total number of current law practitioners in Germany, France, Belgium, the Netherlands and Denmark – combined! Many people, even (or particularly?) in the United States, would not necessarily describe this as a positive development. But it represents China's recognition of the vital role that legally trained individuals have come to play in a modern economy – even a "socialist" market economy.

Here I will digress (briefly, I promise) to explore why this is so. I do so because the answer should shed light on the nature, purpose and function of legal education in such a modern, and especially in a modernising, socialist market economy. As China has been moving from a planned toward a more market-oriented economy, the need for individuals (and individual enterprises) to structure the terms and conditions on which they interact with others increases markedly. So, too, does their need for legal guidance and advice, particularly as the social and economic context in which they are acting is itself also changing; these needs are even more pronounced where, as in China, these changes are quite considerably loosening and opening up the scope for such varied economic activity, and rapidly so. To meet these sorts of challenges, legal personnel will need to be able to problem-solve on an entirely new scale, for they will have to apply and adapt a shifting set of legal directives in a dynamic, rapidly evolving factual context. Not only that, they will have to exercise these new skills in social roles which are themselves brand new and also undergoing dramatic, essentially constant change. Mastering the law, even if it (once) were possible, is simply not enough for success in such an environment. Rather, legal training needs to equip its students, whether at university or an on-the-job stage, *both* to "think like a lawyer" and to "act" like one too.

It is this dual function of legal education, the mixing of theory and practice, the combination of action and reflection in (and on) role, which clinical methodology most effectively meets. Because clinical legal education requires teachers and students to solve real client problems together, by

developing facts, applying (or, often, creating) theory, exercising judgment and learning from these efforts, it has a great deal of promise in a society like China today. But how realistic are the prospects for its adoption? What are the opportunities and obstacles?

To answer these questions we need first to know where Chinese legal education is today and where it has been. Barely a century old, formal legal education has already been through several wrenching changes, and so combines an interesting mix of influences and styles. Against the backdrop of two millennia of debate between the Confucian and Legalist traditions, China's earliest efforts at developing "western style" systems of law and legal education drew most heavily on Japan's adaptation of Continental (especially German) civil law models. Although these were supplemented with some (mostly American) common law influences during the Republican period, most of this was swept away and replaced with Soviet-style legal arrangements between the 1949 revolution and the two decades of legal chaos that began fewer than ten years later. During the early 1950's, however, China did establish a handful of new legal training schools, the "Institutes of Law and Politics", which were founded (at least in design) to combine theory with practice in building a socialist legal system, which would serve the State's interests by furthering the economic and social development of the masses. Since 1978 the goals for legal education have expanded alongside the enhanced role envisioned for law itself. From setting a minimal framework for the maintenance of social order, the duties expected of "THE LAW" have grown to include facilitating the construction of a socialist market economy and, even, to the awesome responsibility of actually "governing the country" according to its dictates.

Not surprisingly, therefore, the legal and legal educational systems have changed as dramatically as they have grown. From two only nominally operating law schools and at most about sixty even potentially qualified law professors in the entire nation (circa 1978), the legal education sector today includes roughly 300 institutions, enrolling well over 150,000 students a year and staffed by over 3,500 professors (and another 8–10 thousand lecturers). A majority of these students are candidates for degrees, but there are also tens of thousands of additional trainees – many holding government jobs in the courts, procurate (prosecution) or ministries – who attend part-time or in-service programs designed to strengthen their legal knowledge and abilities. This is not surprising, since the ranks of these law-related institutions have swollen at least as rapidly as have the profession and its educational sector, and many of these staffers (or cadres) were recruited into their jobs despite having little, usually no, legal training whatsoever. As of 1985, for example, fewer than 8% of the nearly 50,000 judges even had a college degree. Their workloads have, of course, also expanded geometrically. For example, between 1990 and 1997 the number of civil lawsuits nearly doubled (to three and a quarter million dispositions annually), while the subset which included "economic cases" (mostly contract disputes) rose by 150%, to 1.5 million each year. The criminal law docket also increased apace; by now the annual number of formal dispositions well exceeds two million, pushed through by a large (and still growing) procurate, which employs perhaps 250,00 staff as lawyers, investigators, and administrative personnel.

It is into this huge, and still rapidly expanding, maw of law that clinical legal education is now beginning to venture. And only beginning it is, since barely a dozen university-based law schools are experimenting with clinical methodology, and the total number of students who have been taught in this way during the three years of clinical programs has not quite reached one thousand. But what a wonderful thousand they are! Let me turn now to describing this experimental effort by setting forth both its brief history and current state.

The source of Clinical Legal Education in China must be identified as the Committee on Legal Education Exchange with China (CLEEC). Operating with Ford Foundation support from the early 1980's to the late 1990's, CLEEC brought 219 Chinese scholars to the U.S; about one-third of them were degree candidates. Over two-thirds of these scholars returned to China, which is a high yield relative to other academic fields and considering the turbulent times involved; half of these returnees (i.e. over a hundred) remained in legal education. CLEEC also trained hundreds of legal educators and government officials through its in-country summer programs. CLEEC alumni have gone on to become the Deans at several top Chinese law schools (currently Qinghua, Fudan and Wuhan); top University administrators at Beida, Huadong and Jilin Universities; and several currently serve as Vice-Presidents of The Supreme People's Court. Others have highly responsible posts at the Chinese Academy of Social Sciences Law Institute, as well as in several ministries and local, regional and national legislatures.

One of these CLEEC alumni (from Yale Law School, of course) returned home to Wuhan, where he established the first Legal Aid Centre in the People's Republic. Although he is now in Beijing (on the Supreme People's Court), his Centre for the Protection of the Rights of the Disadvantaged celebrated its tenth anniversary last year. During that decade the Centre has advised over 30,000 clients; responded to over 20,000 letters and 30,000 phone calls; and handled over 1,500 cases. It has also presented scores of "Street Law" advice sessions and involved over 500 law student volunteers in its endeavours. The Centre has grown to where it now boasts over a dozen staff, many of whom are also faculty at Wuhan's famous law school. Although there were no formal curricular links between the Centre and the Law School until recently, when Wuhan became one of the first Chinese law schools to award academic credit for casework performed at the Centre (in conjunction with a new faculty-taught clinical course), there is no doubt that Wuhan was the pioneer for clinical methodology in China.

The formal Clinical Initiative was not launched until 1999, however, when the Ford Foundation began to work with students at Fudan and Huadong Universities (both in Shanghai) who had set up volunteer, extra-curricular legal aid organisations. The project gathered speed with a lecture tour to six University Law schools that Fall; at each school a presentation on clinical methodology was made to interested faculty and administrators, with extensive follow up by Ford's in-China staff. By the spring of 2000, seven law schools (three in Beijing and two each in Shanghai and Wuhan) had agreed to launch clinics the following academic year (on Ford's RMB, of course). A ten-day training program was held at the Yale Law School, followed by an extended August conference in Wuhan (one of the famous "furnace cities" of China).

That Fall saw all seven schools begin their experiment with Clinical Legal Education. Each school developed its own design, reflecting the interests and aspirations of the faculty who had decided to participate. Thus, Qinghua began with a mediation clinic focused on consumer complaints, while Renda chose to make criminal work the top priority for its faculty and students, although they have been willing to handle civil matters as well. Wuhan chose to deepen and strengthen the school's ties to the existing Centre, while Zhongnan decided to do civil tort cases. Fudan, Beida and Huadong decided to accept a variety of general legal aid cases. Ford required at a minimum, that at least two of a school's regular teaching law faculty commit to at least a full year's pilot project with a clinic (albeit always on only a part-time basis because of their other teaching duties). In the end several schools had three or four regular faculty involved from the outset; Renda also enlisted a handful of local judges. Several schools even put their senior faculty with decanal rank on this

exciting new clinical project, while Beida instead assigned the project to a young administrator with no faculty rank or other teaching duties. Student enrolments that first year ranged from twenty at Qinghua up to thirty each term (sixty in all) at Renda. While several schools (notably Renda) enrolled mostly undergraduate students, others sought a mix that that included many seeking advanced degrees.

In its second year of operations, the Clinical Initiative expanded to ten schools funded with Ford money as Zhongshan, Xibei and Chuanda began programs in Guangzhou, Xian, and Chengdu, respectively. Each of these new schools had its own focus: Labour Rights at Zhongshan; Elder Law (especially legislative work) at Xibei; and Criminal Defence in Chengdu. Enrollments stabilised at the existing programs, with Wuhan joining Renda at thirty new students each term while the others ranged from twenty up to forty new students a year. Each school also decided for itself how the new Clinic would fit into its overall curriculum, so that Qinghua and several other schools tilted their selection process toward students pursuing graduate degrees, while Renda and Zhongnan particularly aimed at third-year undergraduates. Qinghua also opened a new Labour Rights Clinic (adding a fourth faculty member in the process), while Zhongnan and Beida both redesigned their initial plans. Beida added additional part-time, adjunct teachers to its “general” legal aid clinic, and created a “Community Law Clinic” designed to work with village authorities to popularise the rule of law in Qianxi town of Hebei Province. Zhongnan restructured into several “clinics” and “units”, reflecting its decision to accept a more diverse range of civil matters. By the end of year two, therefore, the ten schools boasted over 400 enrolled students and well over 50 faculty participating for between a quarter and two-thirds of their teaching loads.

Today the Initiative is in the process of adding additional schools and new clinics at existing programs, as well as establishing its independence, both structural and financial, from the Ford Foundation. Yunda (in Kunmin) has opened a clinic and will be added to Ford’s funding list for next year. Jungfa may join as the fourth Beijing law school, and, thereby bring its existing Centre for the Protection of the Environment into the school’s mainstream, clinical curriculum. Further, Hwnam Normal (in Guangzhou) and law schools in Shandong and Hunan also have begun experimenting with faculty-supervised legal aid clinics. Both the Ministries of Justice and Education have been following these clinical experiments with interest, particularly as they offer some promise as a supplement to the growing (but still woefully inadequate to meet demand) number and capacity of legal aid programs around the country. Several schools with existing Clinical Programs also are expanding their range of offerings, their capacity, or both. Qinghua, for example, began a Civil Rights Clinic this year; it is specialising in Administrative Litigation cases referred by the “China Reform” organisation and a local Beijing TV station. Xibei (in Xian) is adding both Elderly Litigation and general Civil Clinics to its existing legislative clinic; with four new faculty also being added, the school expects to double its enrollment to over 150 clinic students per year.

Perhaps most significantly, however, clinical faculty from the participating schools met and formed their own new organisation at last summer’s training conference in Zhuhai. Now formally known as the China Clinical Legal Education Committee (CCLEC), and set up under the auspices of the Legal Education Institute (part of the prestigious Chinese Academy of Social Sciences), the CCLEC will be funded by a lump sum transfer of about one million U.S dollars from the Ford Foundation, and thereafter it will take over funding of all training, travel, “foreign expert” and new initiatives grants. The individual school’s direct budgets for clinical work (of about \$50,000 (U.S)

apiece, including primarily faculty salaries and administrative expenses) will continue to be funded directly by Ford for another two years, however. [ASIDE: These figures seem a bit paltry when contrasted to the multi-million dollar sums Ford allocated to the Council for Legal Education in Professional Responsibility (CLEPER), and the ten-year time frame on which it operated, at the time clinical legal education was launched in the U.S.A. over thirty years ago]. The new committee's assumption of financial responsibility also marks the transfer of project oversight responsibilities from Ford to the Chinese clinicians themselves. Already they have hired an administrator of their own to replace the Ford staff.

One further piece of this still-unfolding story should be mentioned: the role of so-called "foreign experts". We have been quite fortunate in having assembled a superb group of U.S clinical teachers and law schools to work on this exciting project. Experienced clinical teachers from Columbia, Georgetown, NYU, CUNY and George Washington Universities have joined me and my Yale colleagues in helping to design and implement a series of training conferences and extended site visits on both sides of the Pacific. Four series of "spring visits" have been held in the U.S, with Chinese clinical teachers staying for about a week at their "partner school's" clinical program, followed by a two-day wrapup conference for participants from all the U.S and Chinese schools. Alternate-year summer conferences have been held in the PRC for both groups, featuring a mix of teaching and lawyering training, leavened with the inevitable combo of practice and theory. The U.S partner schools have also visited their Chinese counterparts on one or more occasions, to get a better sense of how the new clinics are actually functioning. Opportunities to observe clinic students "perform" in court, at an arbitration or mediation, and with clients (and one another) have been an important part of these site visits. Although Ford has paid the lion's share of project expenses (including translation for these exchanges), the U.S faculty have all donated their time, and the U.S schools have themselves picked up the tabs for portions of the inevitable travel, hosting and administrative expenses. There has also been another aspect of these exchanges, because the Yale-China Association has established a Law Teaching Fellowship program, and these Fellows have played important roles in launching (and assisting) the nascent clinical programs at their host law schools. Now entering its fourth year, this Fellowship has sent six fellows to four different schools, where each has combined academic and clinical teaching.

Now for the fun part: a few cases. This discussion will be briefer than I would have liked, however, because any extended discussion of cases would demand so much context that my talk might never end...

First, the 'criminal defence' clinics at Renda and Chuanda have taken quite different routes. Almost all of the Renda cases have been efforts to reopen old cases in an attempt to overturn convictions. Although "new evidence" is allowed in these proceedings, it generally must be documentary in nature; this means that most of the work is put into investigating, shaping and drafting the petitioning party's statements which are submitted with these appeals. One successful appeal (and unusually so, since they usually lose these cases) concerned the conviction over fifteen years before of three brothers who were fishermen in Wa City. After serving their multi-year sentences for stealing fish and equipment, the brothers sought the clinic's help in establishing they had been framed by the local Public Security Bureau and their competitors, and that their "confessions" had been extracted by means of police brutality. Evidence (on paper) was presented, including pictures of broken facial bones, bloodied (apparently) by the local police chief, with whom the brothers already had an extended history of conflicts and disputes. Even though that

policemen had since been promoted, and the court personnel accordingly tried to dissuade the students from taking this case, the students nonetheless persisted and located a witness who claimed actually to have observed the police beatings. The court issued a not guilty verdict for the three brothers over 17 years after the events in question, and the brothers also obtained state compensation for their wrongful imprisonment.

In Sichuan, by contrast, the clinical teachers have been able to persuade three local courts to refer an occasional pending criminal case to the clinic. The judges have been reluctant to do so, however, because it means much more work for them if the defendant actually exercises his or her right to counsel. Nonetheless, the students and teachers handled more than a dozen such cases last year, including several robberies and larcenies and a number of sentence-reduction applications. Most of the clients have been convicted nonetheless, but the clinic's presence has had the salutary effect of forcing the courts actually to follow their own, official procedures – which are said to be often ignored. One ongoing obstacle has been the difficulty in the students gaining permission to visit the clients while they are in custody. But the local court and public security bureau have now agreed to allow such access, provided the supervising lawyer also goes along.

On the civil side, a couple of the labour law and administrative litigation cases will illustrate the sorts of matters students have been handling, as will the home repair cases which have cropped up in clinics in several different cities. One case involved a minivan driver whose van was seized by a state-owned taxi company because they claimed he had been operating illegally (i.e. without a taxi license). The client claimed he had been tricked and beaten into signing an untrue confession to such unlicensed taxi operations. In fact, he said all he really did was drive for a delivery company, handling materials and packages – not people! The students succeeded in persuading the local city Bureau charged with overseeing this industry that the records “showing” such taxi work were falsified, and that the driver's confession had been coerced. As a result, his 10,000-YUAN (about \$1,250.00 U.S. or £800) penalty was purged and his minivan ordered to be returned by the taxi company (which had confiscated it until the penalty was paid). One interesting feature of this case was that it was “won” at the Administrative Bureau, without filing suit, but only after favourable coverage of the case in the local media, and (even then) nearly two months after the minivan had been confiscated.

Labour cases involving unpaid wages were likewise usually won at the arbitration tribunal stage. One, though, went to the District Court, where the students won due to what they described (in a surprised tone!) as a “wonderful” and “very capable” judge. Perhaps significantly, the press had been called in to generate publicity (and pressure) in this case as well.

Finally, several schools' new clinics handled cases involving defective home repairs. In virtually every case, there were factual disputes between the parties as well as fundamental disagreements about the terms of contracts they had all supposedly agreed upon. These cases tested the students' understanding of contract law and their ability to interpret real contracts, as well as their “negotiation” skills—even though the cases often arose with the students supposedly acting in the mediator role. Nearly all these cases ended up in a compromise agreement, usually weighted in favour of the contractors; in the so-called Consumer Mediation Clinic, in fact, the students sometimes found themselves trying to persuade the consumers to accept an offer well below what had been their stated objectives for the mediation process. These mediation clinic students exhibited some rather deep confusion over their role in these cases: Were they “representing” or “assisting” the consumer/complaints? Were they helping the consumer protection agency (out of

whose offices they were working) to resolve cases brought to it? Was their “success” measured by achieving an agreement? In similar home repair cases in “litigation” clinics in other cities, although there was less role confusion, the students still found themselves “judging their clients” versions of events and then pressuring them to accept a compromise settlement. Just like an American lawyer operating in the ethical grey zone...

Now for a little analysis. But only a bit because I want to leave time for discussion and *your* analysis. First, to answer some of the questions posed in the CALL for the international conference: YES! In other words, I believe that the unfolding story of clinical legal education in the People's Republic of China shows why several of the central questions posed must be answered in the affirmative – certainly, this experience has persuaded me that law teachers *do* have a role in global legal education, and that exporting clinics can be a key part of that role. My discussions with Chinese students and faculty about their clinical experiences have repeatedly turned to the impact this work is having on both of their views about justice, law and legal education. Almost universally they have credited their clinical work with strengthening their own (and the others in their clinic's) “spirit of justice” and “sense of social duty”. This has happened partly because of the *service* nature of lawyering on behalf of a real client, and even more significantly because their clients have taught them new and important lessons about the social reality of life in the New China. Again and again, students report that their clients' and their own exposure to officialdom and bureaucracy have enabled them “to see the truth” about Chinese society and its legal system. Their teachers have said the same thing too. So I think there can be little doubt that “justice” can be furthered through such clinical legal education, and not just for the client or her individual case.

Indeed, the experiences of several schools' clinics demonstrate that valuable synergies with local courts, procurators and other governmental agencies can be built at the local, grass-roots level as part of starting up a new clinical program. Such developments may serve to “open up” otherwise (or usually) closed (even, “secret”) processes and settings to what Americans sometimes call the disinfecting powers of sunlight. Surely the pressure and participation of students and faculty at least improve the quality of the process that our clinics' clients are subjected to, even if the actual outcomes change less frequently. In fact, our clinics have been getting official cooperation at the highest levels; if only the U.N. weapons inspectors had been treated as well, there might have been no intervention in Iraq.

The mention of military power takes me to my penultimate point: the ‘rule of law’ can only be truly achieved when words have power. China has made great progress toward this goal in the past quarter century, for power in the PRC today does not only come from the barrel of a gun. Too often, however, power now flows instead from the size of one's wallet. One way to measure how close a society, a legal system have come toward the ‘rule of law’ is to see what that society truly thinks about the ‘role of law’. It is for this reason, then, that education and scholarship about Professional Responsibility, about the roles of legal actors, is so crucial. The Ford Foundation launched clinical methodology in the U.S. in large measure to try to foster and improve teaching and learning in this vital subject. Yet it is also here that international expertise, that foreign experts, must tread most carefully. One lesson that my Chinese colleagues have driven home politely, but quite clearly, is that the addition of “Chinese Characteristics” to clinical methodology is most crucial, most delicate in the area of Legal Ethics and Professional Responsibility. None of them gainsays its importance, its centrality to the mission of clinical education. But all emphasise that they must find their own path through this extensive minefield.

It will not be a short, nor an easy, path. After all, while it may take ten years to grow a tree, it takes a hundred to rear a person. I remain convinced, though, that Confucius had it right when he praised clinical legal education:

What I hear, I forget.

What I hear and see, I remember a little.

What I hear, see and do, I acquire some knowledge and skill.

What I hear, see, do and discuss with another, I begin to understand.

Thank you for your patience.

The Clinical Initiative: Developing A Context for Teaching Professional Responsibility in China.

It is well accepted within the clinical legal education movement in the United States that teaching and learning “professional responsibility” is at the very heart of our mission. That was what the Ford Foundation set out to achieve, and it has remained front and centre to this day. Even those who espouse the gospels of “skills training” or “justice education” would agree with me on this point. (Indeed, each might claim that their special focus is actually a subset of the broader field of Professional Responsibility).

Our core commitment to teaching professional responsibility, however, does not eliminate curricular and pedagogical choice – far from it. Rather, because the topic is so rich, the problems and issues so varied, it really only begins the processes of clinic design and course planning. At least four broad pedagogical goals may be balanced:

- Fostering Professional Values
- Clarifying Role Duties
- Raising Level of Practice
- Critique of Reality and Reform

This is true of any clinical course involving the representation of real clients in actual cases. No matter how narrowly focussed or intensively staffed the clinic may be, there is more “professional responsibility” to be taught than time allows. So it is essential to understand the contexts in which the clinic will operate in order to select, sharpen and maximise the learning opportunities.

This need to contextualise is, if anything, even more crucial in a trans-national setting. Certainly, it is more difficult. So I plan to put all of you to work, helping me get outside of my “American skin”, and working together to develop some strategies for instruction in professional responsibility in the People’s Republic of China. Of course, you’ll need some context yourselves, even to essay this task, so I have provided a short piece on the Clinical Initiative. More helpful, perhaps, I’ve also created a brief (under 5 pages) Appendix, which includes (a) 15 key sections of the “Lawyers Law” of the PRC, and (b) 25 “Questions about professional responsibility” posed by clinic students at Renmin (People’s) University in Beijing. The 25 questions were developed at the end of the students’ (mostly undergraduates completing their third year) clinical course, for possible use at an international training conference. (Don’t worry that I’ve left out sections of the

Lawyers Law that would answer several of the students questions; this is not a graded assessment.) I am more interested in your reactions to the questions, and to the “Lawyer’s Law” itself, because both tell us a great deal about the current climate in Chinese legal and legal educational circles.

What are those messages? Several of the most important, in my view, concern their deeply ambivalent sense (at least in translation) of the legal system, and the lawyer’s role in it. The Lawyers Law states that a “lawyer” is someone who “provides legal services to the public” (Article 2) – but who does so “subject to the supervision of the state, society and the parties concerned”. (Article 3) The very idea that lawyers serve the public (i.e. private individuals and entities) is new to China. After all, the previous version of the Lawyers Law, promulgated a few years after the end of the Cultural Revolution, defined lawyers as “legal workers for the State”. In fact, the vast majority of law-trained persons in China today are still State employees. So are most of those holding law licenses, and nearly all who work regularly in the legal system. Moreover, most of the 38 sections of the Lawyers Law I have not provided to you set forth the extensive web of continued State regulation over the legal profession, through constraints on licensing, practice organisations, bar associations and discipline.

So even a “lawyer” in private practice in today’s China is in an odd sort of legal limbo, partly a private-sector, economic and social actor but partly still a servant of society – and The State. Although this dual set of responsibilities also exists in the U.S. (and U.K) – indeed, is inherent in the lawyer’s role – the relative novelty of the private, independent dimension in China has important, and oddly contradictory, consequences. It has bred, on the one hand, a strongly private, commercial (i.e. money-oriented) ethos, which is quite consistent with the general society’s “get-rich-quick” spirit so widely observed and reported at home and abroad. To law students at top Chinese Universities, private law practice is all about making money – a great deal of money – and little else. On the other hand, the ongoing active involvement of the State in the affairs of the legal profession (again, as is the case throughout society) generates a continuing circumspection among many lawyers about “public law” activities, including those involving challenges to governmental authority (particularly criminal defence work) or, even, building professional independence.

Both the Lawyers Law and the students’ questions also highlight the still-undefined nature of the private lawyer’s role. As the questions confirm, the general, hortatory language in the Law (not at all atypical of such sets of rules in any land or language) raises more questions than it resolves. How does one “base himself on facts” while taking “law as the criterion” (Article 3)? What are the practical implications of the lawyers duty “to play a positive role” in developing “the socialist legal system” (Article 1)? (Emphasis added.) But the students’ concerns illustrate how much seems still to be open and unsettled – at least in their admittedly somewhat naive eyes. The tensions within the lawyer’s role are illustrated by their concern over both the “high risks” of some criminal defence work (Question 9), and the “illegal or immoral” aspects of the duty to represent “clients’ private interests” (Questions 16 & 17, among others).

Perhaps most worrying, both documents also illustrate what observers agree is the biggest problem in China’s legal system: corruption. Article 35 of the Lawyers Law explicitly forbids bribery, entertainment, and gift-giving to officials (subsection 4) or from opponents (subsection 2); it also restricts such payments from one’s own client (subsection 1). Yet a third (or more) of the student questions involve the propriety of just such activities. Why? Because they are rampant – and the students know they are. This becomes even more of a problem when “improper” influence –

particularly of Party or local officials – is added to the mix. How can one teach Professional Responsibility in such a climate? How should (and do) you handle this problem in cases (and with clients) in the course of your clinical work? One of the goals of late 19th Century bar associations in the U.S was to combat corruption and improper influence peddling in the courts and councils of government. Perhaps an independent bar, if one evolves in China, could serve a similar social function. But that day has not yet dawned.

This leads to the last – I promise – of my points about Professional Responsibility teaching in the context of the new Chinese Clinical programs: the intriguing relationships they are evolving with the media. This fits into place here because their use of the media is part of the answer to the two questions posed above: by bringing the glare of publicity onto a clinic case, the risks of an adverse outcome due to corruption or misconduct is substantially diminished. Interestingly, the Lawyers Law makes no explicit reference to the media, or its relationship to the legal and judicial systems. This omission stands in sharp contrast to the substantial (albeit rather ineffectual) attention paid to the “free press/fair trial” tensions in lawyers’ codes of conduct in the U.S. and Britain. But the Chinese rule forbidding a lawyer “to disrupt” a court “or interfere with” how litigation usually proceeds (Article 35 (b)) might be read to extend to a lawyer’s contacts with the media. Or the State’s “supervision” could cover – and restrict, or ban – such activities. So the links several schools’ new legal clinics have developed with the media could turn out to be more risky than they have been heretofore. What these links demonstrate, though, is the widespread perception that the media possess the power to influence (and oversee) the legal system, at least to a limited extent. In a way, therefore, the clinics actually possess an advantage in the current legal and social climate, because they often have an ability to stimulate media attention not possessed by run-of-the-mill practitioners. While there are, of course, also quite substantial constraints (both economic and political) operating on the media, too, this partnership does offer one possible, albeit partial, “solution” to the twin spectres of corruption and improper influence – at least in some cases.

Now I’ll stop talking and start listening. I hope that these brief remarks, together with the Appendix, will help stimulate a dialog among us about ways to approach the problems of teaching Professional Responsibility in these new clinical programs in China.

Thank you in advance for your help.

APPENDIX

Questions About Professional Responsibility from Chinese Clinical Students:

1. Should a lawyer perform her duty on the base of facts and in conformity with the law strictly as a judge does?
2. What is the proper choice for a lawyer if there are conflicts between clients' interests and ethical principles?
3. Must a lawyer be honest in the process of offering legal aid to her clients? Can she produce lies in good faith?
4. Is it possible for a lawyer to fulfil the entire client's due requirements? If not, how should the lawyer do?
5. Is it possible for a lawyer to employ special or unfair means to compete with other lawyers or with other legal service providers?
6. Can a lawyer receive presents when she practices law? In what condition a lawyer is regarded as being disinterested and self disciplined?
7. Should a lawyer work hard on all the expertise and service skills necessary for her practice? If the lawyer enhances her expertise through case by case method, does this mean she is not dedicated to her career?
8. Can a lawyer enter into a client retainer agreement in her own name and without informing her law firm?
9. Can a lawyer refuse legal aid to who is assigned by her law firm but cannot afford the fee?
10. Can a lawyer refuse to defend for a defendant assigned by the court because of high risks?
11. If there are few cases in hand, can a lawyer privately enter into a retainer agreement in a case that has interest conflicts with cases in which she formally is acting or acted as attorney?
12. Can a lawyer ask for or receive additional rewards or presents with remuneration nature (except normal lawyer's fee) from her clients or anyone that has interests in the present case?
13. Can a lawyer embezzle or usurp the law firm's business fees?
14. Can a lawyer bribe judges, prosecutors, police arbitrators or other related official staff? Can a lawyer induce or require her clients to do that? Can she invite the above mentioned people to dinner or reimburse their bills?
15. Can a lawyer bring the defendant's relatives with her when she interviews with the defendant in a detention place? Can the lawyer deliver letters, money or articles to the defendant at that time? Or can she convey any information related to the instant case to the defendant at that time?
16. Can a lawyer enter into a retainer agreement and provide service to her client, knowing that the client's motive and behaviours are illegal or immoral or involved fraud?
17. Can a lawyer make concessions without insisting on her principles just because of clients' private interests? Can she misinterpret the law so as to adjust the law to the client's undue requirements? Or can she teach her client the way to circumvent the law and prejudice the state's interests and other citizen's legal interests?

18. During the process of handling a case, can the lawyer delay her work or shrink her duties because of personal reasons?
19. Can a lawyer, for the convenience of case handling, divulge her client's information obtained during her service? (The information includes the client's privacy or any facts and materials that the client does not want to reveal to the public).
20. Can a lawyer exceed her delegated authority or utilise this authority to engage in activities unrelated to the case where her authority comes from, on the condition that she regards it as necessary but does not have any consent from the client?
21. When the opposite party and her lawyer carry out proper activities so as to perform their duties and defend their legal interests, can a lawyer interfere with or stop these activities if she feels they would do harm to her case?
22. When dealing with relationship with other lawyers, can a lawyer refuse to work with other lawyers in the same case, or even obstruct her client from retaining any other lawyer to work as a partner?
23. If there is any disagreement between lawyers in one case, can a lawyer or lawyers make decisions without notifying the client in advance?
24. Can a lawyer utilise unfair means to compete in the legal practice market? Such unfair means involve slandering other lawyers and law firms, providing free service with low price or even for free, offering commission to clients, presenting money or articles to clients, publicising oneself and repelling others by advertisement through mass media, boasting of her special relationship with the judicial agencies and so on.
25. Can a lawyer help a non lawyer citizen to engage in legal practice under the title of lawyer?

LAWYERS LAW OF THE PEOPLE'S REPUBLIC OF CHINA

Promulgation date: 2001 12 29

Effective date: 2001 12 29

Promulgation body: The Standing Committee of the National People's Congress

Status: Effective

Adopted by the 19th Session of the Standing Committee of the Eighth National People's Congress
Promulgated by: Order No 67 of the President of the People's Republic of China; revised by the 25th Session of the Standing Committee of the Ninth National People's Congress on 29th December 2001

Chapter 21 General Principles

Article 1

In order to improve the system governing lawyers, to ensure that lawyers practice according to the law, to standardise acts of lawyers, to safeguard the lawful rights and interests of parties, to ensure the correct implementation of law, and to enable lawyers to play a positive role in the development of the socialist legal system, this Law is hereby enacted.

Article 2

The term 'lawyer' as referred to herein means a practitioner who has acquired a lawyer's practice certificate pursuant to law and provides legal services to the public.

Article 3

In his practice, a lawyer must abide by the Constitution and the law, and strictly observe lawyers' professional ethics and practice discipline.

In his practice, a lawyer must base himself of facts and take law as the criterion.

Practice by lawyers shall be subject to the supervision of the State, society and the parties concerned.

Lawful practice by lawyers shall be protected by law.

Article 4

The administrative department in charge of justice under the State Council shall supervise and guide lawyers, law firms and bar associations in accordance with this Law.

Chapter 4 Business, Rights, and Obligations of Practising Lawyers

Article 25

A Lawyer may engage in the following business:

- (1) To accept engagement by the citizens, legal persons or other organisations to act as legal counsel;
- (2) To accept authorisation by a party in a civil or administrative case to act as agent ad litem and participate in the proceedings;
- (3) To accept engagement by a criminal suspect in a criminal case to provide him with legal advice and represent him in filing a petition or charge or obtaining a guarantor pending trial; to accept authorisation by a criminal suspect or defendant or accept appointment by a people's court to act for the defence; and to accept authorisation by a private prosecutor in a case of private prosecution or by the victim or his close relatives in case of publican prosecution to act as agent ad litem and participate in the proceedings;
- (4) To represent clients in filing petition in all types of litigation;
- (5) To accept authorisation by a party to participate in meditation and arbitration activities;
- (6) To accept authorisation by a party involved in non litigation legal matters to provide legal services; and
- (7) To answer inquiries regarding law and to represent clients in writing litigation documents and other documents regarding legal matters.

Article 26

A lawyer acting as a legal counsel shall provide opinions regarding legal issues to the person who has engaged him, draft and review legal documents, act as agent to participate in litigation, mediation or arbitration activities, handle other legal matters authorised by the person who has engaged him, and protect the lawful rights and interests of the person who has engaged him.

Article 27

A lawyer acting as agent in litigation or non litigation legal matters shall, within the limits of authorisation, protect the lawful rights and interests of the client.

Article 28

A lawyer representing a defendant in a criminal case shall present, on the basis of facts and law, materials and arguments to prove that a criminal suspect is innocent or is less guilty than charged, or that his criminal responsibility should be reduced or relieved, in order to protect the lawful rights and interests of the criminal suspect or defendant.

Article 29

A client may refuse to be further defended or represented by a lawyer, and may authorise another lawyer to act in his defence or to represent him. After accepting authorisation, a lawyer shall not, without good reason, refuse to defend or represent a client. However, if the matter authorised violates law, the client uses the service provided by the lawyer to engage in illegal activities or the client conceals facts, the lawyer shall have the right to refuse to defend or to represent the client.

Article 30

A lawyer participating in the litigation activities may, according to the provisions of procedure laws, collect and consult the materials pertaining to the case he is undertaking, meet and correspond with the person whose personal freedom is restricted, appear in court, participate in litigation, and enjoy other rights provided for in the procedure laws.

When a lawyer acts as agent as litem or defend clients, his right to argue or present a defence shall be protected in accordance with the law.

Article 31

When undertaking legal matters, a lawyer may, with the consent of the relevant units or individuals, address inquiries to such units or individuals .

Article 32

In practice activities, a lawyer's personal rights shall not be infringed.

Article 33

A lawyer shall keep confidential secrets of the State and commercial secrets of the parties concerned that he comes to know during his practice activities and shall not divulge the private affairs of the parties concerned.

Article 34

A lawyer shall not represent both parties involved in the same case.

Article 35

A lawyer shall not commit any of the following acts in his practice activities:

- (1) To accept authorisation privately, charge fees to the client privately, or accept money or things of value from the client;
- (2) To seek the disputed rights and interest of a party or accept money or things of value from the opposing party by taking advantage of providing legal services;
- (3) To meet with a judge, prosecutor, or arbitrator in violation of regulations;
- (4) To entertain and give gifts to a judge, prosecutor, arbitrator or other relevant working personnel or bribe them, or instigate or induce a party to bribe them.
- (5) To provide false evidence, conceal facts or intimidate or induce another with promise of gain to provide false evidence, conceal facts, or obstruct the opposing party's lawful obtaining of evidence; or
- (6) To disrupt the order of a court or an arbitration tribunal, or interfere with the normal conduct of litigation or arbitration activities.