

Chinese Law on Lawyers Amended: Progress Made and to Be Made

Chinese lawmakers accomplished much in 2007. Chief among their achievements include the promulgation of the Property Law, Anti-monopoly Law, Labour Contract Law, and amendments to the Law on Lawyers. In particular, they adopted significant changes to the Law on Lawyers, ushering in a brand new era in the legal profession in China.

By Jing "Brad" Luo

The Standing Committee of the National People's Congress of the People's Republic of China (SCNPC) adopted amendments to the Law on Lawyers (the Amendments) on October 28 2007 after three rounds of reading.¹ Since the promulgation of the original Law on Lawyers in 1996, it has gone through two phases of amendments in 2001 and 2007 respectively. The latest Amendments, as adopted, represent another step forward² in China's efforts to effect comprehensive regulations on the legal profession despite some outstanding issues in the law. Consistent with predictions of many commentators, the SCNPC adopted revisions in the Lawyer's Law to afford more protection for the attorney-client relationship, to raise legal ethic standards, to clarify lawyer professional liability, and to allow solo practice. However, the Amendments also introduced additional changes not previously addressed. This update aims to flesh out these changes and to point out a couple of shortcomings of the Amendments.

EXPANDED SCOPE OF THE DUTY OF CONFIDENTIALITY

Compared to its predecessor, the Amendments take a more expansive view of lawyers' duty of confidentiality to their clients. Before the Amendments, the Lawyer's Law required lawyers to keep confidential 1) secrets of the State, 2) commercial secrets of their clients that they come to know in the course of the representations, and 3) private affairs of their clients.³ Article 38 of the newly amended law tracks the original provisions on confidentiality under the original Lawyer's Law as set forth above; but, paragraph two of Article 38 inserts the difference—*with respect to confidential information of clients and other third parties that lawyers come to know in the course of representation, lawyers shall not disclose such information unless exceptions apply.*⁴ Obviously, protected information now includes personal privacy, commercial secrets, and any other information that clients want to keep confidential during the course of the representation. And the expanded scope of confidentiality adjusts the attorney-client relationship for better protection of clients' interests.

In comparison with other jurisdictions, such as the United States, the duty of confidentiality imposed by the Amendments is limited if not sparse since lawyers only have to maintain secrets of *current* clients,

and those of the State. The Amendments do advance clients' interest in confidentiality, but the protection afforded does not seem to go beyond current representation⁵ as confidentiality relative to former and prospective clients are not addressed in the Amendments. Under the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules), lawyers have the duty to keep confidential information of not only current clients, but also former and prospective clients unless such clients give informed consent or relevant exceptions apply.⁶ Furthermore, the ABA Model Rules by comparison set a low threshold for what constitutes confidential information—"information relating to the representation of a client"⁷ or "information learned in consultation."⁸ This liberal standard on confidentiality "contributes to the trust that is the hallmark of the client-attorney relationship."⁹ It remains to be seen whether China's All Lawyers

Bar Association will adopt governing rules with as expansive a view toward confidentiality as the ABA Model Rules, following the adoption of the Amendments.

STRICTER PROHIBITION AGAINST CONFLICT OF INTEREST

The Amendments also widen Chinese lawyers' duty of loyalty by imposing stricter standards on the avoidance of conflicts of interest. Under the previous version of the Lawyers' Law, a lawyer was prohibited from simultaneously representing clients with direct conflicts, for example, opponents of the same case. Pursuant to Article 39 of the Amendments, a lawyer shall not represent clients whose interests are adverse to those of the lawyer or the lawyer's family members, in addition to the proscription against representing clients with direct conflict. Furthermore, the Amendments specifically prohibit a lawyer from inappropriately accepting property or benefits from a party opponent or third party, and from colluding with a party opponent or third party to injure the interests of his or her client. With respect to law firms, the Amendments require them to establish a conflict checking mechanism to avoid conflicts of interests among their clients, which codifies similar mandates in the China Rules of Legal Ethics.¹⁰ Unfortunately, the Amendments do not define what constitutes a "conflict of interests", and for a practicing attorney in need of guidance, the answer lies in the current China Rules of Legal Ethics. Article 76 defines a conflict of interests as any situation where representing a new client might cause conflict with the representation of another existing client.¹¹

ALTERNATIVE ROUTE TO THE BAR

An alternative way to obtaining a bar license emerges in the Amendments. Previously, individuals could legally become lawyers only if they passed the national bar examination, or if they were professionals in legal research or education with special permission from the Ministry of Justice. Given a shortage of experienced lawyers in certain specialized areas, such as finance, securities, intellectual property, and international law,¹² the Amendments provide a practical measure to overcome such a critical shortage. Individuals with a bachelor's degree and more than 15 years of working experience in the above-referenced

shortage areas may obtain their law license in those specialized areas upon passing relevant tests conducted by the Ministry of Justice. And according to the Amendments, the State Council will issue regulations about the implementation of this alternative licensing program.

STATUTORY CONFLICT

Despite the many clarifications for and additions to the Lawyer's Law, the Amendments still leave an apparent conflict between the Lawyer's Law and the Criminal Procedure Law of the People's Republic of China (Criminal Procedure Law). As discussed, one goal of the Amendments is to expand the scope of the duty of confidentiality. However, Article 84 of the Criminal Procedure Law imposes an all-encompassing duty on all entities and individuals to report suspected criminals or incriminating facts to law enforcement authorities.¹³ Logically, lawyers have the duty to report any incriminating facts gathered in the course of representing their criminal defendants unless the Chinese Criminal Procedure Law provides them an exemption. Unfortunately, neither the Amendments nor the Chinese Criminal Procedure Law explicitly exempt lawyers from the crime-reporting duty. Paradoxically, a representative from the Ministry of Justice stated, in a press conference subsequent to the adoption of the Amendments, that the Amendments have accomplished major statutory safeguards for lawyers: better protection for lawyers' bodily safety, exemption from liability for viewpoints expressed in professional representation, and lawyers' right to non-disclosure of clients' confidential information.¹⁴ Furthermore, these accomplishments laid a firm foundation for improving the overall professional environment for lawyers, according to the representative. Nonetheless, without an express provision of immunity from the Chinese Criminal Procedure Law,¹⁵ Chinese lawyers might not be able to share the same kind of optimism as expressed by the representative in the press conference mentioned above.

THE ABSENCE OF RULES ON IN-HOUSE LAWYERS

Unlike the ABA Model Rules, the Amendments do not contain any provisions on in-house lawyers. In the context of lawyers' duties of confidentiality under Rule 1.6, ABA Model Rule 1.13 clarifies the duties and responsibilities of in-house counsel whose client is the organization itself. In the best interest of the organization, an in-house lawyer must "report up" to the management when he or she knows a corporate insider intends to act or refuse to act in a certain way which will likely injure the interests of the organization. Moreover, a lawyer for an organization may "report out" to shareholders and/or prospective investors relying on the lawyer's previous legal advice for the organization if "reporting up" did not resolve the relevant issues and he or she is "reasonably certain" that the organization will suffer substantial injury due to the unresolved issues. This rule provides additional guidance for in-house lawyers with respect to confidentiality, and is designed to protect the best interests of the organization as a whole. As more lawyers in China join the ranks of in-house counsel, a similar rule is warranted in China to protect organizational clients. As of yet, both the Amendments and the China Rules of Legal Ethics have no provisions or rules on in-house lawyers.

CONCLUSION

As China aspires to build a society ruled by law, lawyers will continue to play an increasingly more important role in that regard. With the number of Chinese lawyers growing at an unprecedented rate,¹⁶ the Amendments have come at a very critical time to recalibrate the

attorney-client relationship, to safeguard lawyers' rights in their legal profession, and to construct a better social environment for the practice of law. However, the Amendments do not eliminate all uncertainties, nor do they foreclose the prospect for more changes in the Lawyer's Law. In fact, conflict between the Lawyer's Law and the Criminal Procedure Law remains unresolved, and certain topics, such as detailed rules on in-house lawyers, are altogether absent from the Amendments. Until lawmakers work out these issues, lawyers in China will have to wait for the next round of amendments to the Law on Lawyers.

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Endnotes

- 1 See Law amended to make life easier for lawyers, available at: <http://www.npc.gov.cn/zgrdw/english/news/newsDetail.jsp?id=220101&articleId=373896> (last visited November 18 2007).
- 2 See Huen Wong & Adam H. Arkel, *China's Revised Lawyer's Law: Practical Benefits for a Strengthened Legal Profession*, *China Law & Practice* October 2007, pages 15-17. In the authors' view, the revisions, if adopted, would bring practical benefits for a "strengthened legal profession" and most of the anticipated revisions have been adopted.
- 3 See *Zhonghua Renmin Gongheguo Liushifa* [2001 Xiuzheng] [Law on Lawyers of the People's Republic of China (2001 Amendments)] (amended by the National People's Congress, December 29 2001, effective January 1 2002), available in Chinese at: http://www.law-lib.com/law/law_view.asp?id=16820 (last visited January 2 2008) [hereinafter *Lawyer's Law 2001 Amendments*], Article 33.
- 4 The added provision in effect codifies relevant requirements in the current version of the Rules of Professional Ethics and Conduct (Provisional) (2004), available in Chinese at: http://www.law-lib.com/law/law_view.asp?id=82747, (last visited January 2 2008) [hereinafter *China Rules of Legal Ethics*], Article 56.
- 5 The Amendments do not contain any provision as to protecting former clients' confidential information. However, Article 59 of the China Rules of Legal Ethics does provide such protection for former clients. Whether the China All Lawyers Association will revise the China Rules of Legal Ethics to address confidentiality relative to prospective clients is uncertain.
- 6 See *American Bar Association Model Rules of Professional Conduct*, Rules 1.6, 1.9(c)(1), 1.18 (2006) (Hereinafter *ABA Model Rules*).
- 7 See *id.*, 1.6(a).
- 8 See *id.*, 1.18(a).
- 9 See *id.*, 1.6, comment [2].
- 10 See *China Rules of Legal Ethics*, *supra* note 4, Articles 39, 44, 77-83.
- 11 See *id.*, Article 76.
- 12 See *Law Revised to Solve Three Difficulties in the Legal Profession*, available in Chinese at: <http://www.npc.gov.cn/zgrdw/common/zwjsp?label=WXLK&id=374001&pdm=1541> (last visited January 2 2008).
- 13 See *Zhonghua Renmin Gongheguo Xingshi Susongfa* [1996 Xiuzheng] [Criminal Procedure Law of the People's Republic of China (1996 Amendments)] (amended by the National People's Congress, March 17 1996, effective January 1 1997), available in Chinese at: <http://vip.chinalawinfo.com/NewLaw2002/SLC/SLC.asp?Db=chl&Gid=13912> (last visited January 2 2008) hereinafter *Chinese Criminal Procedure Law*.
- 14 See Ministry of Justice Press Conference Question and Answers Regarding the Revised Lawyer's Law, available in Chinese at: <http://www.npc.gov.cn/zgrdw/common/zwjsp?label=WXLK&id=374005&pdm=1541> (last visited January 2 2008).
- 15 The Chinese Criminal Procedure Law is currently undergoing intense debate before its next round of amendments. See *Amendments to the Criminal Procedure Law: from Divergent Ideas to Common Understanding*, available in Chinese at: http://www.legaldaily.com.cn/2007fxy/2007-11/18/content_743015.htm (last visited November 18 2007) (one area of concerns in the debates involves coordinating the Criminal Procedure with the Lawyer's Law to protect lawyer's rights to keep clients' confidential information).
- 16 Based on a report, China has more than 130,000 lawyers and 13,000 law firms by the end of 2006. Statistics available in Chinese at: <http://www.npc.gov.cn/zgrdw/common/zwjsp?label=WXLK&id=373851&pdm=1541> (last visited January 2 2008).