

INTRODUCING THE ESSENCE OF LAWYERING IN AMERICA TO CHINESE LAW STUDENTS

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A group of law students from Nankai University in Tianjin, China, spent a month at Oklahoma City University in the summer of 2007 to receive an introduction to the American legal system. In preparing the program, we asked ourselves, “Where should we begin?” Despite its enormous economic progress, China’s legal system is still undeveloped. The concept of private property has only recently been introduced. Private lawyers and private litigation are still something of a rarity. (China has fewer than 200,000 lawyers for a population of 1.3 billion; the United States has roughly five times as many lawyers for a population that is only one-fourth the size of China’s.) The adversarial system of adjudication does not exist in China. How could the Chinese students begin to comprehend the America legal system?

To understand how the American legal system works, one must first understand the role of lawyers in that system. After all, lawyers drive the system, whether they work in private practice, government service, a corporate legal department, or a public interest setting. So we started the program for the Chinese students with a short course on the American model of lawyering. It became my task to teach it – in just nine hours spread over only three days.

The task turned out to be a rewarding one. The students were highly intelligent, well-motivated, respectful, and curious. It was enjoyable to address their insightful questions and see them “get it.” After a brief review of the regulation of admission to

practice and the disciplinary system governing lawyers, we surveyed the range of responsibilities of American lawyers as set forth in the American Bar Association's Model Rules of Professional Conduct. Because of time limitations, the method of instruction was primarily lecture, including classic examples of how the Rules apply in practice. There were ample opportunities for questions. These responsibilities were organized under three broad principles: (1) A lawyer's first obligation is to his or her clients. (2) Lawyers owe certain obligations to the legal system that operate to limit the obligations owed to clients. (3) Even though they owe obligations to clients and to the legal system, lawyers are independent from both.

The survey began by observing that lawyers in America function primarily on behalf of some other person or entity – a client. Thus, principles of the law of agency apply with full force to the work of lawyers. These principles also permeate the Rules of Professional Conduct. They explain, for example, the duties of loyalty (found in our conflict of interest rules) and confidentiality. The same principles also explain the concept of the lawyer as an actor independent from both the client and the state. And yet, the lawyer has duties to both the client and the state.

It is helpful, however, to consider the first duty as that which is owed to the client. The client determines the objectives of a representation and must be consulted with respect to the means by which the objectives will be pursued. Rule 1.2(a). The lawyer is expected to assist the client in formulating objectives and making decisions concerning the representation, Rule 1.4, and to give the client independent professional advice as to the wisdom of what the client thinks about these matters. Rule 2.1. If client and lawyer cannot agree on the objectives and means, either party to the client-lawyer relationship

may veto it before it is consummated or (with certain limitations) terminate it after it has come into existence. Rule 1.16.

If the relationship moves forward, the lawyer is expected to pursue the client's objectives with reasonable competence, Rule 1.1, and diligence, Rule 1.3, and without subjecting herself to compromising influences. Rule 1.7. The primacy of the lawyer's duty to clients is emphasized in the obligations of confidentiality, which extend far beyond the contours of the attorney-client privilege and work product doctrine. Rule 1.6.

So the first principle of lawyering in America is that lawyers serve the interests of their clients. In doing so, they are understood to be serving the interests of society. But there are limitations.

If the client's objective is unlawful, the lawyer must so advise the client, Rule 2.1, and refuse to assist in the pursuit of such objective. Rule 1.2(d) and Rule 1.16(a). In fact, whether the client is an organization (such as a corporation) or an individual, the lawyer is expected to protect the client from the likely harmful consequences that will follow from unlawful conduct. Rule 1.13 and Rule 1.6 cmt. [2].

If the client wishes to abuse the legal system, the lawyer must not be an aider and abettor. The lawyer-agent's role neither requires nor allows bringing a frivolous claim or asserting a frivolous defense, Rule 3.1, failing to expedite litigation, Rule 3.2, obstructing access to or falsifying evidence, Rule 3.4, or deceiving a tribunal. Rule 3.3.

The second principle of lawyering in America, then, is that, in addition to their duty to clients, lawyers have certain narrowly-defined duties to the legal system and tribunals. These duties limit the scope of one's obligation and are designed to serve the

interests of society in maintaining the rule of law as well as trust and confidence in both the criminal and civil justice systems.

The reconciliation of the first two principles of lawyering (one's primary duty is to client, but there are also certain duties to tribunals and the legal system that impose limitations on that primary duty) was illustrated through a careful examination of the exceptions to the duty of confidentiality codified in Rule 1.6(b).

The duty of confidentiality does not prevent a lawyer from using or disclosing information relating to a representation when doing so is reasonably deemed necessary to prevent reasonably certain death or substantial bodily harm, Rule 1.6(b)(1), or to prevent a client from committing certain crimes and frauds. Rule 1.6(b)(2) & (3). With respect to the crime of perjury before a tribunal, disclosure is mandatory. Rule 3.3(b). Lawyers are at liberty to disclose confidential information about a client to the extent doing so is reasonably deemed necessary to defend the lawyer against claims of wrongdoing (perhaps in alleged complicity with a client), Rule 1.6(b)(5), to assert claims or defenses against a client, Rule 1.6(b)(5), to obtain legal advice concerning the lawyer's obligations under the Rules of Professional Conduct, Rule 1.6(b)(4), or to comply with the Rules, other law, or a court order. Rule 1.6(b)(6).

This leads to the third core principle of lawyering in America: a lawyer is independent and autonomous from the client as well as the state, while simultaneously owing obligations to both. A lawyer cannot assist a client's wrongdoing. Rule 1.2(d). The lawyer is an independent actor in these regards. Lawyers' independence from their clients is affirmed by Rule 1.2(b), which declares that one's representation of a client does not constitute endorsement of the client's views or activities. Lawyers' autonomy

with respect to clients is further emphasized by Rule 1.16(b)(4), which allows them to decline a representation if the client insists on taking action that the lawyer considers repugnant. Lawyers in America also have independence from the state. For example, a lawyer may contest a law or court order directed at the lawyer or the client, Rule 1.2(d), including an order to disclose confidential information about a client. Rule 1.6 cmt. [13]. We thought it was also useful to point out that subordinate lawyers are even autonomous from supervisory lawyers to a certain extent, in that they are not expected or even allowed to follow a supervisor's directive unless it is clearly consistent with the Rules or at least based on a reasonable resolution of an arguable question of professional duty. Rule 5.2(b). This is true for government lawyers, as well, including prosecutors.

It was clear from the questions that were asked that the students comprehended the intersecting relationships that exist between lawyer and client, lawyer and tribunal, and lawyer and society. Their understanding of these relationships was also evident when, in the fourth week of their program, they prepared and presented a mock criminal trial based on a simulated record. These principles of legal ethics had been further developed in weeks 2 and 3 through an introduction to legal research and writing with American legal materials.

Based on this experience, we conclude that the lecture technique for introducing the role of the lawyer in the American legal system was successful in facilitating the absorption of lawyering skills (research, writing, advocacy) with which the students previously had been unfamiliar.