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# The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work

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This article helps strengthen our comparative and theoretical understanding of lawyers as gatekeepers to justice by analyzing the screening practices of lawyers in a non-Western context. The explanation for Chinese lawyers' aversion to representing workers with labor grievances focuses on their own working conditions, on the organization of their legal labor, and on their evaluations of the moral character of prospective clients. By linking the screening practices of Chinese lawyers to their socioeconomic insecurity and to popular stereotypes informing and legitimating their screening decisions, this article identifies institutional and cultural obstacles not only to the official justice system but also to cause lawyering. After establishing motives for screening clients, this article then demonstrates lawyers' screening methods: by defining legal reality in strategic and often misleading ways, lawyers use the law as a weapon against the interests of the individuals who seek their help.

Male Lawyer 1 (L<sub>1</sub>): How could you have signed this [labor] contract? Were you scatterbrained?

Female Client (C): Yes, at the time, I signed it with my eyes shut. I didn't read it at all.

L<sub>1</sub>: Well, if you signed with your eyes shut you should face the consequences alone. What were you thinking?

C: Why would you ask something like this?

L<sub>1</sub>: Are you divorced? Or is it possible you have other issues? You can't let go of problems. In your everyday life, do you often get into arguments with people?

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C: You have a problem with your head, don't you? Everything is a big question mark in your head, isn't it?

L<sub>1</sub>: There's nothing wrong with my head.

C: When I ask you questions, you should just answer them! Why are you asking all these unrelated questions?

L<sub>1</sub>: You're consulting with me, aren't I answering your questions?

C: Why ask about my marriage?

L<sub>1</sub>: I've already answered your legal question. Let's conclude this consultation here, OK?

C: I don't think you have any principles!

L<sub>1</sub>: When someone asks you about your contract, do you have evidence? Evidence! Evidence! Evidence!

Male Lawyer 2: Let me tell you, you've passed the filing deadline; the labor arbitration committee will not arbitrate. The guy is right . . . I'm the lawyer, don't be so stubborn! . . . You have no chance! Get it? This is all I can say. If you still don't understand, seek the advice of someone wiser.

(Labor dispute consultation at the BC Law Firm, Beijing, August 23, 2001)

**I**t has been accepted as a scholarly truism that the question of access to justice cannot be assessed empirically on the basis of observations of courts alone. To answer questions about the overall accessibility of official justice, we must begin our analysis far upstream with the institutions that facilitate and limit the initial awareness of injuries and other violations, the escalation of these perceived transgressions to grievances, and the escalation of grievances to claims that may or may not end up in court (Felstiner et al. 1980–1981; Abel 1988). Building on a research tradition in which lawyers are seen to “hold the keys that open or close the gates of the legal system” (Jacob 1995:118, cited in Martin & Daniels 1997:26; also see Kritzer 1997), this article scrutinizes the role of lawyers and law firms in these access-enhancing and access-depriving processes. Using interview and ethnographic data from lawyers and lawyer-client interactions in China, my goal is to strengthen our comparative and theoretical understanding of motive and mechanism in the case-screening process, the reasons why and the methods by which lawyers in Western and non-Western contexts function as gatekeepers to justice by refusing to represent certain kinds of clients with certain kinds of problems.

First, with respect to motive, I use the case of China to confirm the theoretical centrality of economic incentives in the screening process and to refine this theoretical explanation by demonstrating how economic incentives are shaped by institutional and cultural context. Despite the ways lawyers can and do advance the interests

of individuals with legal needs (e.g., Cain 1979; Felstiner et al. 1980–1981; Seron et al. 2001; Munger 1994; Karsten 1997–1998), and a widespread willingness to represent the poor and the powerless (e.g., Trubek 1996; Besharov 1990; J. Katz 1982; Sandefur 2004) and to advance other “causes” (e.g., Sarat & Scheingold 1998, 2001; Scheingold & Sarat 2004), contextually specific institutional conditions may produce countervailing economic pressures that overwhelm their ideals and altruism. But the case of China also reaffirms a *cultural* logic to lawyers’ motive to screen out cases. In addition to the fee potential of the case, we know that American lawyers screen out cases according to the likelihood the client will elicit juror sympathy (e.g., Daniels & Martin 2002; Van Hoy 2004) or will be uncooperative or “difficult” (e.g., Mather et al. 2001) and, in the case of prosecutors, according to the likelihood the victim will be deemed “credible” (Frohmann 1991). Insofar as they are related to the probability of winning awards and settlements and to probable demands on lawyers’ time, such considerations do concern economic costs and benefits and economic risks and rewards. As we will see, however, they are also shaped by contextually specific social categories and cultural stereotypes.

Second, with respect to mechanism, Chinese lawyers, like their American counterparts, exercise power over their clients through the control of meaning. By replicating discursive patterns and strategies observed in Western legal systems, this study of China contributes to a research tradition that demystifies the work of lawyers, exposing the language they invoke in client conferences as legal smoke obfuscating and thereby denying important rights on the books (Sarat & Felstiner 1995; Mather et al. 2001; Mather & Yngvesson 1980–1981; Rosenthal 1974; Hosticka 1979; also see Bourdieu 1987, and Merry 1990), and in so doing it takes us a step further toward a generalizable theory of case screening. Legal discourse is a double-edged sword: it both facilitates and deprives access to justice. The study of lawyers’ use of language, how they reframe, reinterpret, and deny the legal legitimacy of claims asserted by the poor and the powerless, explicitly links microlevel discourse to the macrolevel issue of access to justice.

### **Issues at Stake: The Example of Labor Disputes**

In the wake of China’s economic reforms and restructuring of the state sector, the growing volume of labor disputes involving pensioners, laid-off workers, injured workers, and workers owed back wages has received both heightened scholarly (e.g., Lee 2000a, 2000b, 2002; Chan 2001; Hurst 2004; Hurst & O’Brien 2002; Cai 2002; Solinger 2002, 2004; Blecher 2002; Weston 2000,

2004; Kernen 1999) and media attention (e.g., Ma 2004a, 2004b, 2004c; Chow 2004). Against this backdrop, observers of China sometimes assume that more lawyers equals more justice and that legal reform will improve the lot of aggrieved individuals, including workers (see Gallagher 2005; Guthrie 2000, 2002, 2003; Chan 2004; see Johnson [2004] on the role of lawyers in alleviating the plight of the Chinese peasant).

To be sure, much progress has been made in recent years. The explosive growth of the bar since its revival in 1979 has fueled rising levels of legal representation in labor disputes. Over the past 10 years, the volume of labor cases entering the legal system—both formal labor arbitration and the civil courts—has multiplied at breakneck speed (see Fu & Choy 2004 and Gallagher 2005). Although enforcement remains a serious problem, the worker wins in about half of all arbitration cases (Fu & Choy 2004:19; Chan & Senser 1997:112). It has also become easier and more common to circumvent the arbitration system altogether and to take labor disputes directly to court (Thireau & Hua 2003:84; Gallagher 2005), where workers are even more likely to win (Fu & Choy 2004:21).<sup>1</sup> Clearly workers are using the legal system increasingly frequently.

But does the emergence of new rights and opportunities on the books and growth in the formal adjudication of labor disputes allow us to draw conclusions about workers' access to justice? Data on arbitration and court cases tell us only about the numerator but nothing about the denominator. A proper evaluation of the rights of workers and the resolution of labor disputes requires considering the number of aggrieved workers from which these full-blown disputes are selected. As Felstiner et al. have argued, "A theory of disputing that looked only at institutions mobilized by disputants and the strategies pursued within them would be seriously deficient" (1980–1981:636). In other words, we need to consider the extent of attrition as grievances escalate to claims and ultimately to disputes in the legal system (e.g., Miller & Sarat 1980–1981).

Rather than celebrating labor rights on the basis of what occurs at only the very tip of the dispute pyramid, this article addresses the question of why so few labor grievances become legal claims that climb to the top.<sup>2</sup> Among the many forces militating against

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<sup>1</sup> This represents a dramatic shift since the mid-1990s, when labor disputes were still processed overwhelmingly through enterprise mediation and government labor arbitration committees and when less than 10 percent of labor arbitration cases were appealed to courts. Even when courts did accept appeals, most of the time they simply upheld the original arbitration decision (Oakley 2002:125; also see Lee 2002).

<sup>2</sup> See Thireau and Hua (2003:84) for the case of China. Evidence from other parts of the world reveals similarly flat dispute pyramids for work-related problems (e.g., Miller & Sarat 1980–1981; Kritzer et al. 1991a; Kritzer 1991b, 1991; ABA 1994; Cantril 1996; Genn 1999; Silbey et al. 1993).

ordinary people taking their problems to legal institutions is the law firm. To be sure, Chinese workers use the law as a weapon to advance their rights and interests (Gallagher 2005). Yet despite the ubiquitous official exhortation to “use the legal arsenal to protect your lawful rights and interests,”<sup>3</sup> the law must also be viewed as a weapon lawyers use more effectively to refuse representation to, and therefore to undermine the rights and interests of, aggrieved citizens (Turk 1976:284; Bourdieu 1987:827, 835–6). The upshot is that lawyers serve as a gateway—which they frequently slam shut—to the legal system (Jacob 1995:131). Law firms are both a site of work and a sorting site where certain cases are systematically denied legal representation.

### **Theoretical Expectations**

Survey research shows that American lawyers refuse cases that fall outside their areas of expertise, have low damages or inadequate fee potential (Kritzer 2004:84–5), and violate their personal values or professional ethics (Nelson 1988:255–6, but see Heinz 1983). But by far the most frequently cited reason for refusing cases is the weak legal merit of the case (Kritzer 2004:84–5). Survey data from China show a similar pattern: among several hundred lawyers interviewed in Beijing, the most important reason cited for refusing a case is its “lack of legal merit” (Michelson 2006). Many cases brought by aggrieved individuals are genuinely unsustainable from a legal standpoint. However, the boundaries of “legal merit” are flexible and malleable; technical-legal discourse is often invoked to supply a legal pretense to justify and legitimate refusing commercially undesirable yet legally viable cases brought by socially undesirable prospective clients.

### **Motive: Why Lawyers Screen Cases**

Research on case screening in the American bar identifies the character of the client as an important consideration (Kritzer 2004:86; Mather et al. 2001:38, 93–4; Van Hoy 2004; Daniels & Martin 2002:1817–9) for at least two reasons. First, lawyers are concerned about malpractice suits. While the scholarly research has paid little attention to the threat of malpractice suits as an incentive to screen cases, this is an issue of great salience in the trade press (e.g., Gibeaut 1997; Kunzke 1998; Robinson 1998;

<sup>3</sup> Gallagher’s (2005) translation of this exhortation into “use the law as your weapon” implies the official sanctioning, even encouragement, of social conflict. In fact, the Chinese state’s overriding priority is the opposite—to preserve social stability. To “use the legal arsenal” (or “to use the weapon of the law”) more accurately captures the official goal of popular legal empowerment without jeopardizing social stability.

Bassingthwaighte 2003).<sup>4</sup> Second, lawyers are concerned about collecting legal fees. Insofar as they collect their fees from awards paid out by insurance companies, contingency-fee lawyers doing tort work consider the impression their clients would make to jurors and insurance adjusters. When legal fees are paid directly by the client using the client's own resources, however, as is often the case in hourly- or fixed-fee arrangements, lawyers become concerned about getting stiffed (see Kidder 1974:21–2; Kritzer 1998b:117–8; Blumberg 1973:72–3, 1967:24–7; Mather et al. 2001:142–3).

Tort reform measures in most states imposing caps on non-economic and/or punitive damages awarded by courts have intensified competition and heightened the imperative in the American bar to adopt entrepreneurial strategies, including the screening of prospective clients (Daniels & Martin 2000, 2001, 2002; Van Hoy 1999). Not surprisingly, an estimated one-half to two-thirds of cases brought to contingency-fee lawyers are rejected (Kritzer 2004:71, 1997:24). Owing in part to economic disincentives produced by award and fee caps, refusal rates are highest in the fields of medical malpractice and labor (Martin & Daniels 1997:28; Kritzer 1998b:25, 2004:69).

Yet it would be a mistake to explain case screening in purely economic terms. Lawyers' assessment of economic risk (the probability of winning an award or settling out of court) is, to a significant measure, culturally shaped. For contingency-fee lawyers, screening decisions are made to a large extent according to how well prospective clients match jurors' and insurance adjusters' cultural stereotypes of worthiness and deservingness (Van Hoy 2004; Daniels & Martin 2000, 2002; Gawande 2005:66; also see Lees [1994] on gender stereotypes in court).<sup>5</sup> For lawyers billing by the hour or according to fixed fees, the assessment of risk—who is a potential troublemaker, who is unworthy of legal representation, and who is likely to renege on a fee agreement or file a malpractice suit—is driven at least in part by their own cultural stereotypes. In other words, “client profiling” is a common practice in the bar. Just as the “deserving poor” is a cultural construction (e.g., M. Katz 1989; Mohr 1994), so, too, at least to some degree, are the “problem client” and the “frivolous plaintiff” (Lofquist 2002; Haltom & McCann 2004). Criminal prosecutors, too, screen cases according to their evaluations of the moral character of victims. Research on why prosecutors reject sexual assault cases reveals the importance

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<sup>4</sup> I thank Mary Nell Trautner for bringing some of the trade publications cited in this article to my attention.

<sup>5</sup> Compare to Black's “sociological lawyer” who “screens clients and selects cases according to their social characteristics” (1989:25).

of gender stereotypes and the need for injured parties to be perceived as “stand-up victims” and “good witnesses”—i.e., articulate and credible (Stanko 1982; Frohmann 1991). Workers in shelters for battered women, too, screen clients according to similarly fuzzy moral categories (Loseke 1992: Ch. 4). Screening methods in government offices, where economic considerations are almost entirely irrelevant, support this cultural argument. Serber (1980:328–30) finds that calm and articulate middle-class white complainants are far less likely to get screened out than “hysterical” working-class minority females.

On the basis of the foregoing, we should reasonably expect that case screening in the Chinese bar is a function of lawyers’ financial insecurity and the fee potential of the case. We should also expect that disputes with low fee potential (including but not limited to labor disputes) are screened out at much higher rates than disputes with high fee potential (including but not limited to commercial disputes). More important, lawyers’ calculation of fee potential includes an assessment of the value of the dispute itself and of the extent to which the client matches cultural stereotypes of “a difficult client”—the angry troublemaker and the deserving victim. Heumann and Cassak (2000–2001:915–9) argue that the profiling practices of police are based on actual (first- and secondhand) experience as well as hunches and prejudices. The profiling practices of lawyers are no different: they learn from their own experiences and those of other lawyers, and they also adopt and reproduce the cultural stereotypes of the societies in which they are situated.

### **Mechanism: How Lawyers Screen Cases**

But precisely how do lawyers screen cases? One strategy common among American divorce lawyers is to scare off prospective clients by talking about fees, sometimes tactically inflating them to unaffordable levels (Mather et al. 2001:95, 102–3, 148–9). Owing to an asymmetry in legal knowledge, however, the exercise of power through the control and manipulation of legal meaning is less subject to client challenge and contestation and therefore at least as effective as the exercise of power through the control and manipulation of the legal fee.

While lawyers use rhetorical strategies in the service of their clients (by translating problems into the legal language demanded by the courts), they also use legal discourse against the interests of their clients and prospective clients by reframing, reinterpreting, and denying the legal legitimacy of their claims (Cain 1979; Mather & Yngvesson 1980–1981). Lawyers often try to put aside the client’s discourse of everyday reason and feelings and redefine their problems in strictly legal terms, a strategy that Sarat and Felstiner

(1995) call an “ideology of separate spheres.” After removing emotions from consideration and redefining the problem as a strictly technical-legal matter, lawyers can more easily exercise the power to “educate” the prospective client about legal “reality”—reality as defined by the lawyer to serve the lawyer’s interests (Hosticka 1979). Misinformation and miseducation about the legal merit of the case become the basis for refusing or discouraging representation, or for setting more “reasonable” and “realistic” goals and expectations for clients (Mather et al. 2001:38, 93–4, 96–8; Kritzer 1998a; Sarat & Felstiner 1995:56; Rosenthal 1974).

This is how lawyers use law as a weapon. Just as the court clerks whom Merry (1990) observed in New England deflected problems away from the courthouse by stripping them of legal legitimacy, we might expect that Chinese lawyers, like their American counterparts, also use rhetorical strategies to exercise power in the realm of meaning in their efforts to refuse representation to undesirable clients with undesirable cases (Sarat & Felstiner 1995). But this is not to say that prospective clients are hapless subjects lacking agency. On the contrary, prospective clients often successfully appeal to the human sympathy of lawyers (Mather et al. 2001:143), revealing another economically irrational dimension of lawyering. Threats of nonpayment and malpractice suits also give prospective clients some degree of control over the lawyer-client relationship, even if this source of power backfires by encouraging lawyers to refuse representation.

## **Data and Methods**

Observations of interactions between lawyers and clients at a Beijing law firm I call the BC Law Firm serve as the primary source of data. Between March and August 2001, two Chinese undergraduate sociology students (at a major university in Beijing) hired and trained by me observed 48 legal consultation sessions (representing 45 unique cases) at the BC Law Firm. They tape-recorded approximately half of all 48 consultation sessions; on the basis of notes taken by hand during the consultations, they were able to reconstruct each remaining session in its entirety. (Five sessions were recounted after the fact by the attending lawyers.) To avoid any bias introduced by the presence of a foreign observer, I developed this research strategy so that data could be collected without my on-site presence. As part of this project, the research assistants also conducted separate, open-ended, semi-structured interviews with 35 of this firm’s lawyers.



Of all 48 consultation sessions we observed, five (10%) were labor disputes. Two of the sessions concerned wrongful termination and were pursued as labor contract violations, one a pension dispute, one a dispute over wages owed, and the remainder representation in labor arbitration. Of all 48 sessions, nine had clients who could be identified as either migrants residing in Beijing or residents of other locations outside Beijing. The clients in all labor consultations appeared to be Beijing residents. The consultations were split fairly evenly by gender, with 22 involving female clients, 17 involving male clients, and eight involving clients of both genders. There was no clear difference in the kinds of disputes brought by men and women. The estimated age of the client ranged from mid-twenties to early eighties, with the median age being in the mid-forties. The only pattern with respect to age was that clients with housing inheritance disputes tended to be older and those with economic disputes tend to be younger.

The 48 consultation sessions I analyze involved a total of 27 lawyers. This was a very diverse group: some had worked only as lawyers, while some held careers before switching to law. Some had experience in other law firms. Some were from Beijing, some were from distant provinces. They were at different career stages: some were fully-licensed lawyers, some were interning lawyers, and one was a partner. Only four were female. The average age was about 33; the oldest lawyer was in his mid-forties and the youngest were in their early twenties.<sup>6</sup> The names of all lawyers cited in this article are pseudonyms.

The plurality of the consultation sessions concerns housing disputes. This category includes nine disputes with other residents or tenants over property rights, many of which originated during the Cultural Revolution (1966–1976) or earlier. Economic disputes, the second-largest category, consists, for the most part, of debt and contract disputes. The administrative category includes a family planning case (a botched tubal ligation), a dispute over irregular fees levied by a local government office, and the case of an old man seeking reparations from the Japanese government for performing forced labor service in Japan during the Sino-Japanese War (1937–1945). The police disputes include the assault of a woman by a police officer, an administrative detention case, and a police shooting in which a teenage boy was killed. The criminal disputes include several serious assault cases and an incest case.

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<sup>6</sup> This reasonably approximates what we know about the true age and gender distributions of the Beijing bar. The mean age of Beijing's lawyers at the time was well below 40; at least three-quarters were younger than 40. About 30 percent were female (Michelson 2003:41–2, 237).

The financial stakes were quite high in many of these disputes. In housing disputes they were typically between ¥150,000 and ¥500,000. In assault and personal injury disputes, hospital and other medical costs at issue can total anywhere from several thousand to several hundred thousand yuan. Contract disputes between firms or matters of debt obligation can similarly range from several thousand to over one hundred thousand yuan.<sup>7</sup>

I also marshal evidence from sources outside the BC Law Firm. In addition to data from 33 unstructured in-depth interviews I conducted alone with lawyers, legal scholars, government officials, and journalists in Beijing outside the firm (in 1999–2001 and 2004), I also draw on data from a survey of almost 1,000 lawyers in 25 cities across China conducted in summer 2000 (see Michelson 2003).

With respect to the notation in this article, “E” refers to interviews I conducted myself, “I” to interviews carried out by my research assistants, and “C” to the 48 lawyer–client consultation sessions.<sup>8</sup> Thus, E18 (for example) refers to my interview number 18.

## The Solo Character and Financial Insecurity of Chinese Lawyers

The financial success of lawyers in China’s top corporate law firms working on international commercial transactions belies the grim reality that most Chinese lawyers are struggling for survival. At the root of this struggle is a model of organization giving rise to a life-and-death imperative to bill. We cannot understand why lawyers screen cases without understanding the pressure engendered by the organization of the Chinese law firm to generate legal fees.

Lawyers classify themselves according to their method of remuneration—salaried lawyers versus commission-based lawyers

<sup>7</sup> To put this in perspective, in 2000 the average annual industrial wage in Beijing was ¥15,276; according to the Beijing Statistical Bureau’s 1,000-household sample, the average annual cash income was ¥12,560 in the same year (*Beijing Tongji Nianjian* 2001: tables 3–10 and 19–3). In 2001, the official exchange rate was about ¥8.3 per US\$1.

<sup>8</sup> There is no English-language equivalent for the Chinese term “*dangshiren*,” literally meaning “involved party.” *Dangshiren* is the word used universally by Chinese lawyers, while *kehu*, the literal translation of *client*, is used less often (and is normally limited to commercial nonlitigation). Although *dangshiren* is the word used by the people whose experiences are captured in this article, I nevertheless use the word *client* for the convenience of the English-language reader, even when referring to “potential” or “prospective” clients. The dictionary definition of *dangshiren* is: “(1) refers to any side participating in litigation, such as the plaintiff or defendant in civil litigation, or the prosecutor or defendant in criminal litigation; (2) a person with a direct connection to a thing” (*Xiandai Hanyu Cidian* [*Modern Chinese Dictionary*] 1996:250).

(E26). Commission-based lawyers are typically called “lawyers who take a cut” (*ticheng lüshi*), but they sometimes also go by the name “cooperating lawyer” (*hezuo lüshi*), referring to a status more closely resembling that of loosely affiliated contract workers than that of stable, full-fledged firm members. While about half of all lawyers in Beijing in summer 2000 were paid exclusively on a commission basis (Michelson 2003:209–10), almost all (93 percent) of the lawyers I interviewed in the BC Law Firm reported getting paid this way. With the exception of the firm director, not a single lawyer in the firm had any fixed or base salary; all were paid on a commission basis (E25). Larger firms organized in divisions handling larger, more complex commercial cases tend to employ more salaried lawyers, while the far more representative smaller firms handling smaller, run-of-the-mill civil cases tend to consist of more commission-based lawyers. In the smaller cities outside Beijing with fewer large commercial transactions, 80 percent of lawyers are paid on a commission basis (Michelson 2003:191). Salaried lawyers—who are called precisely this (*xinjin lüshi*), “lawyers that draw a salary” (*lingxin lüshi*), or “hired lawyers” (*pinyong lüshi*)—are found almost exclusively in the elite corporate law firms of China’s big cities. They remain the exception to the rule. Commission-based lawyers, by contrast, account for the majority of Chinese lawyers.<sup>9</sup> Most Chinese lawyers “eat what they kill”; despite mandatory firm membership, they operate like solo practitioners, solely responsible for finding and representing clients from beginning to end.

A popular expression used to describe the life of commission-based lawyers is “fighting the battle alone” (*dan da du dou*), which fits into a larger rhetorical trope of fighting and hunting, of the combat character of lawyering. The physical layout of law firms reflects the solo character of legal practice. The majority of Chinese law firms have fewer desks than lawyers, and the desks that are available for lawyers tend to be shared, common desks. The physical layout of most law firms is centered on the reception area, where clients are greeted and made comfortable on sofas. While Chinese lawyers spend a lot of time working (an average of 44 hours per week), they spend only about half of these work hours in their firms (Michelson 2003:190).

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<sup>9</sup> In Beijing, an estimated 12–17 percent of lawyers are paid a fixed salary and 30–39 percent a combination of base salary plus commission. Outside Beijing, only an estimated 3 percent of lawyers are paid a fixed salary and 15 percent a combination of a base salary plus commission (Michelson 2003:43). It is worth mentioning that, for the most part, “rural lawyers” is an oxymoron. Lawyers (*lüshi*) are overwhelmingly concentrated in cities, while legal practitioners in the countryside go by the name “law workers” (*falü gongzuozhe*) and fall under a different licensing and regulatory regime.

The Darwinian struggle in the Chinese bar has been exacerbated by its rapid privatization (Michelson 2003; Zhu 2003).<sup>10</sup> Like China's small-scale private entrepreneurs, Chinese lawyers, too, are autonomous, independent, and self-reliant. Known as *geti hu* (literally, "independent households"), these "[i]ndividual enterprisers are people who do not have formal positions at any state- or collective-owned work unit, but make their living solely from the market" (Yang 1994:160). A popular professional nickname captures the plight of Chinese lawyers: "geti hu who know the law" (E14, E18, and I13). Indeed, the official status of lawyers closely resembles that of *geti hu*. In 1997, law firms became recognized officially as business units rather than units of public administration (Liu 2001). From a tax collection standpoint, lawyers, *geti hu*, and private enterprises share the same status.<sup>11</sup> As one lawyer informant (also working as a journalist for a major national newspaper) summarized in 2001, "Lawyers are *geti hu*, just like those who set up stalls on the side of the road, like *geti hu* who sell fruit" (E14).

Given the difficulty that most firms have providing basic resources such as law libraries and computers, it should not be surprising that firms are even more hard-pressed to provide social security benefits. Among 283 law firms I surveyed in 25 cities across China in summer 2000, 30 percent failed to provide a single item from a list of five perks and fringe benefits, and only 13 percent provided at least two of the five items.<sup>12</sup> The situation at the BC Law Firm exemplifies the solo character of the Chinese bar: not only are almost all paid exclusively by commission, but not a single fringe benefit or social security item was reported by any of the 17 BC lawyers I interviewed. As might be expected, of 14 items lawyers were asked to rate in terms of their level of satisfaction, "social security benefits provided by my firm" rated far and away the lowest. The almost 1,000 lawyers I surveyed across China were twice as likely to say they were "very unsatisfied" with their firms' provision of social security items than they were with the item generating the second-highest levels of dissatisfaction (Michelson 2003:224).

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<sup>10</sup> Between 1993 and 2002, the proportion of state-owned law firms in Beijing shrank from 41 percent to zero. Across China as a whole, 23 percent of law firms were still state-owned in 2001, a precipitous drop from 65 percent in 1997 (Michelson 2003:470–1).

<sup>11</sup> A 2002 directive entitled "State Administration of Taxation Notice Regarding Strengthening the Levying and Auditing of Personal Taxes of Investors in Law Firms and Other Intermediary Organizations" makes it clear that lawyers fall under the same tax regulations that govern the private economy.

<sup>12</sup> These five items are retirement pension, medical insurance, unemployment insurance, life insurance, and housing (Michelson 2003:219).

Like many if not most Chinese law firms, the BC Law Firm imposes minimum annual billing quotas.<sup>13</sup> In 1996, lawyers at BC were required to bill at least ¥15,000–20,000 per year to stay in the firm, and these billings were collected directly by the firm, half of which then went back to the lawyer. Within a few years, minimum billing requirements had risen to ¥40,000. To put this in perspective, I estimate that the median pretax, take-home income of lawyers in Beijing (i.e., above and beyond what their firms take from their gross billings) was ¥38,000 in 2000 (Michelson 2003:336). In Beijing, a 50 percent rule governing lawyer commissions (or fee retention) was the general policy across law firms in accordance with Bureau of Justice regulations. Later this policy was loosened to enhance law firm discretion over lawyer remuneration, and some law firms increased commission rates to 60 percent to attract legal talent. Elsewhere, commissions have been as low as one-third of total billings (E25). At the BC Law Firm, the commission was still 50 percent in 2001 (I14).<sup>14</sup>

Regardless of how lawyers are paid and the client is billed, legal fees are almost always paid from the client's own resources or from funds recovered or collected from the client's adversary in the dispute. In China, there is no norm or expectation of fee shifting; neither the English rule of two-way fee shifting (in which the loser unconditionally pays the winner's legal fees) nor the common American practice of one-way fee shifting (in which the loser pays the winner's legal fees if the loser is the defendant but not if the loser is the plaintiff) applies in China (see Kritzer [2002] for a helpful typology of fee arrangements and fee shifting regimes; also

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<sup>13</sup> An official reason often cited for the emergence of billing quota systems is to prevent lawyers from billing clients directly and pocketing the entire fee. Of course quota systems cannot entirely prevent the various and widespread forms of kickbacks generated by overbilling (Wang & Gao 2000). Nor can they prevent lawyers from directly billing clients after they fulfill their quotas. Perhaps more important than its function of preventing lawyer malfeasance is the minimum billing quota's quasi-coercive function of compelling lawyers to generate billings for their firms, an exploitative rent-seeking function many law firm directors are probably reluctant to acknowledge openly. In light of the de facto solo character of legal practice in which firm membership is more in name than in substance and in which law firm owners (typically the firm's senior partners) split fees with their affiliate lawyers forced to comply with regulations requiring membership in a law firm as a condition of maintaining a valid lawyer's license (Michelson 2003:67–8), many, if not most lawyers, given the choice, would choose liberation from law firms and bona fide, de jure solo practice in which they could retain more of the rewards of their legal labor. In 2002, five solo-practice firms were established in Beijing on a trial basis (Michelson 2003:67).

<sup>14</sup> A major law firm in Beijing represents another useful illustration. In 2001, an absolute minimum of ¥100,000 in annual billings was required to remain a member of the firm. If annual billings were less than ¥150,000, the lawyer was entitled to membership only; 50 percent of billings were retained as income, and no other resources or benefits were provided. Starting at ¥150,000, the lawyer was entitled to a desk and a telephone, and the commission increased to 55 percent. After exceeding ¥200,000 in billings, the lawyer retained 60 percent as income (E09).

see *Law and Contemporary Problems* 1984).<sup>15</sup> In contrast to American plaintiffs' lawyers who survive on awards underwritten by insurance companies, the incipience of the liability insurance industry in China solidifies lawyers' dependence on clients rather than on an insurance payout. But even if lawyers could count on an insurance payout, the courts neither execute fee agreements nor withhold the fee from awards, but rather leave it to clients to adhere to such agreements on their own accord.<sup>16</sup> Consequently lawyers experience great difficulty collecting their fees and try to avoid "risky" clients.

All the foregoing—the solo character of legal practice, the scarcity of resources supplied by most law firms, the pressure to meet minimum billing quotas, and lawyers' extreme dependence on the goodness of the client to pay the agreed-upon legal fee—encourages lawyers to screen out commercially undesirable cases. The imperative to screen cases is heightened by the absence of fee shifting, the absence of court involvement in the execution of fee agreements, and the newness and rarity of liability insurance in China. Lawyers' profound financial and social insecurity and the enormous pressures they face to generate billings undermine their ability to defend the rights and interests of the poor.<sup>17</sup> Many lawyers echoed the sentiment that their first task is to ensure their own financial security (E02). "Lawyers are hunting and killing each other. At the same time, I'm also on the hunt. Lawyers are not like people think they are. They do not find justice, they do not bring the truth out, and they do not restore the truth of law . . . Most lawyers consider only their basic survival" (I02).<sup>18</sup>

<sup>15</sup> The absence of fee shifting is the general rule in China. However, there are some important, albeit patchy, exceptions to this general rule, such as personal injury cases heard in some but not many courts (Liu & Chen 2004), when courts enforce private contracts stipulating lawyer fee shifting (Hu & Rui 2004), and in intellectual property rights litigation.

<sup>16</sup> To minimize losses and prevent working for nothing, commission-based lawyers typically charge an up-front base fee of ¥2,000–3,000 per case plus some sort of commission, often 5 percent of the value of the case (i.e., the value of the object in dispute or the amount recovered or collected, known as the *biaodi*). However, it is important to emphasize the enormous variation with respect to the amount of both the base fee and the commission. Despite official fee standards set by the government, the general practice is to negotiate fees (Michelson 2003:200–1).

<sup>17</sup> Chinese lawyers not only have the financial incentive to screen cases but, as the boundaries of law continue to take shape, also enjoy considerable regulatory freedom to screen cases. Once they choose to accept a case, however, lawyers cannot back out without violating the law, unless "the case commissioned is illegal and if the client uses the services provided by a lawyer to conduct illegal activities or conceal a fact" (Article 29 of the 1997 Law on Lawyers).

<sup>18</sup> A lawyer I interviewed asserted that 90 percent of lawyers in Beijing are barely making a living. As he put it, "They don't know where their next meal is coming from" and are "hustling for the sake of survival," estimating that only 9 percent enjoy high incomes (E19). According to my survey data, in Beijing the top 20 percent of the bar earns 70

The economic pressures produced by this remuneration and billing system overwhelm lawyers' ideals to represent aggrieved individuals. As Lawyer Mu described it, "When I first started working as a lawyer, I believed my interests and my clients' interests were united. At the time, if I lost a case I was devastated. Now I understand things better. My interests are not the same as my clients'. When I do my work, it's enough just to make some money" (I23).

### **Refusing Cases with Low Fee Potential**

The consequences of lawyers' financial insecurity are not surprising: Cases with low fee potential such as labor cases representing workers are particularly undesirable. Labor disputes may be about the reimbursement of medical expenses or about a pension of several hundred yuan. Indeed, one consultation concerned a pension payment of a little over ¥700 (C10). Some disputes concern back wages amounting to several hundred to several thousand yuan. Although the total volume of back wages owed to migrant workers (a population of over 100 million, but only one part of the total labor force at risk) is estimated at a staggering ¥100 billion (Xing 2004; also see Chan 2001:6), the individual amounts in dispute are not much. In short, labor disputes rarely involve large amounts of money. They are often about nonmonetary issues such as wrongful termination of employment or illegal working conditions. Yet they are fought by clients for whom the small amount of money at stake is financially important. Sometimes these matters are fought on principle, to defend a sacred socialist entitlement. In the words of a retired cadre in his seventies who was fighting for a small retirement bonus promised to Revolutionary veterans, "I have over 50 years of Communist Party membership. How can I take this quietly? . . . This is not about my one month's pension. I'm not short of money . . ." (C31). Given the small sums of money involved, however, lawyers are rarely interested in cases of this sort.<sup>19</sup>

In summer 2004, the absolute minimum fee for legal representation was ¥2,000 at a similar law firm (led by a former director of the BC Law Firm). Legal fees for criminal defense, especially for economic crimes, could be as high as ¥10,000. Legal fees for economic cases were typically charged on a sliding scale according to

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percent of total income, while the top 5 percent of the bar earns 39 percent. The bottom 60 percent earns only 15 percent of total income, while the bottom 80 percent earns only 30 percent (Michelson 2003:338), a level of inequality even more extreme than that of the Chicago bar (Heinz et al. 2005: Ch. 7).

<sup>19</sup> Indeed, many Shanghai law firms have policies prohibiting their lawyers from representing workers in labor cases (Mary Gallagher, personal correspondence, August 23, 2004).

the value of the object in dispute or the amount recovered or collected. Without any prompting, the firm's director explained that the firm's lawyers were inclined toward economic cases because of their potential to generate lucrative fees. As he put it, a labor case, by contrast, may involve recovering a month's salary, perhaps amounting to ¥2,000—a little more than employed workers' average monthly income in Beijing and just enough to pay the firm's minimum fee. Under these circumstances, the lawyer lacks an incentive to accept the case; at the same time, the client lacks an incentive to hire the lawyer (E35; Zhang 2005:538–9). The story of a woman's quest for legal assistance recovering a bonus of ¥3,000 withheld after she resigned illustrates this point well:

Since the monetary value of labor conflicts is relatively small, most lawyers are unwilling to take this kind of case. On this occasion I approached several law firms, but when they heard that the case involves only ¥3,000, they all suggested I either approach my former company and resolve this matter informally or apply for labor arbitration . . . It was plain to see that these lawyers refused representation because they regarded my case as bad business, requiring great effort with no return. Even if they were willing to accept the case, doing so would be financially irrational. (posted on <http://www.laodongfa.com> on October 2, 2003, accessed October 31, 2004, on file with author)<sup>20</sup>

In the field of labor disputes (representing workers), only work accidents, especially those involving dismemberment and wrongful death, offer the hope of a large award or settlement (see Kahn 2003). Yet even lawyers who accept and win such cases report difficulty collecting fees.

Cases that are financially valuable on paper are not always convertible to cash. This is especially true for housing cases. Even if a housing property in dispute is of great value, the client may intend to live in it, in which case lawyers will tend to display only lukewarm interest, at best. However, if the client intends to sell the property (or collect compensation from the property's occupant) or rent it out at market price, lawyers will tend to be far more enthusiastic. Lawyers are often interested in straightforward debt collection cases, especially when the debtor has the financial means to pay his or her obligation. In short, to lawyers concerned about how they will collect their fee, the paper value of a case is less important than the amount of cash it will generate. Whether or not the case involves recovering cash or convertible property is a critical determinant of how it will be screened by a lawyer.

<sup>20</sup> As Mather et al. (2001:94–5) argue, lawyers try to avoid clients who have already been refused at other firms because a prior refusal may be the mark of a “difficult” client (also see Kritzer 2004:73).



Among the 48 consultations we observed at the BC Law Firm, three-quarters of the economic cases—more than any other type of case—involved recovering cash or convertible property. At the same time, less than one-fifth of the housing disputes involved property that the client hoped to sell or use to earn cash. Not a single labor dispute involved collecting any significant amount of money or compensation.

Problems involving the recovery of cash or convertible property are far more likely to arouse lawyers' interest and enthusiasm. If either or both of the following two elements are present in a consultation session, the lawyer is presumed to have expressed some interest in accepting the case: clearly indicating a desire to take the case (e.g., making a sales pitch for his or her services) or discussing a fee (either a fee amount or a contingency fee). According to this definition, attending lawyers expressed interest in 42 percent of all 48 consultation sessions. However, they expressed interest in 75 percent of the economic cases and in none of the labor cases. At the same time, while the attending lawyers explicitly refused the case in 21 percent of the 48 consultation sessions, they did so in 40 percent of the labor cases and in none of the economic cases.<sup>21</sup> The likelihood that the lawyers expressed some interest in accepting the case was more than three-and-a-half times greater if the problem involved recovering cash or convertible property (92 percent versus 25 percent). While the attending lawyers explicitly refused the case in 28 percent of the consultation sessions that did not involve recovering cash or convertible property, they did not explicitly refuse any case that did involve recovering cash or convertible property. In this small sample of consultations, the cases of aggrieved workers were screened out and economic cases were screened in. As we will see in the following section, however,

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<sup>21</sup> Examples of lawyers expressing interest by making a sales pitch for their legal services included: "I'll do my best to see that you get extra compensation. Now if you'll just sign this representation contract" (C30, a criminal assault); "I can tell you're a morally upright individual"; "Pursuing justice through the law is better than any other method" (C37, a neighbor dispute); "For legal experts like us, this kind of case is very easy to win" (C38, a personal injury); "Do you want the money back or not?"; "Given that you're owed ¥140,000, what's a mere ¥10,000 [in legal costs]?" (C42, an economic dispute); and "This lawsuit is definitely worth pursuing. You only pay a few thousand yuan for legal counsel and if you win back a single room there's over ¥100,000 in it for you" (C34, a housing dispute). On a methodological note, I assigned a code of "1" when evidence of the respective characteristic was present (in this case, when evidence of "some interest in accepting the case" was present). Owing to varying amounts of detail in the consultation transcripts, the codes are conservative. For example, if a consultation session was assigned a code of "1" for "lawyer explicitly refused the case," we can be sure the lawyer refused the case. A code of "0," however, does not imply that the lawyer did not refuse the case, much less that the lawyer accepted the case, but indicates only that no evidence of explicitly refusing the case was present in the consultation transcript. Likewise, a code of "0" for "lawyer displayed impatience with client" implies not that the lawyer was gracious and polite, but only that no evidence to the contrary was present in the consultation transcript.

economic considerations are sometimes trumped by cultural considerations.

### Refusing the High-Risk Client

In light of lawyers' dependence on clients to pay their legal fees on their own accord and the client's weak incentive to pay, the lawyer-client relationship is antagonistic and adversarial. Lawyers and clients are mutually suspicious. Experience is critical to the successful practice of law. But, as Lawyer Bo described it, this experience does not represent specialized knowledge or technical expertise, but rather dealing with uncooperative and crafty clients (C06). Lawyer Zhong, male, in his late thirties, and one of the more successful lawyers in the firm, said that lawyers need to treat their clients as their greatest enemy, to defend themselves against and be in charge of their clients (I01). In a separate interview, Lawyer Zhong said, "Some clients need to be taught a lesson. The worst that can happen is that my lesson will send them out the door and I'll lose the work" (C19). In yet another interview, Lawyer Zhong summarized the wisdom he had gained in his many years of practice: "As a lawyer, you must conquer your client. 70 percent of a lawyer's time and effort is spent on clients . . . . The contradictions between lawyers and clients are the most concentrated. If the lawyer loses control, the lawyer will suffer the most harm of all . . . . This is ten years of experience in a nutshell" (I39).

An important source of power clients wield is the threat of nonpayment. It is not uncommon for clients to refuse to pay lawyer fees (I01; Wang & Gao 2000:7–8). One lawyer in Wuhan stated that about 30 percent of his billings are lost this way (Wang & Gao 2000:8). After hearing a client present her tragic case in the most heart-wrenching manner, Lawyer Liang took pity on her and agreed to charge only ¥500 up front and collect an additional ¥5,000 upon a successful conclusion. In the end, however, after winning the case, the client paid only ¥3,000, cheating him of ¥2,000 (I01).<sup>22</sup>

The experience of Zhou Litai is instructive. Rising to domestic and international prominence thanks to his specialization in recovering compensation on behalf of migrant workers dismembered in industrial accidents, his celebrity has extended as far as *The New York Times*, *The Washington Post*, *Newsweek*, *USA Today*, and other foreign media outlets. Despite his tremendous success in repre-

<sup>22</sup> A group of 62 workers in Fujian Province reportedly agreed to pay their lawyer an upfront sum of ¥10,000 plus 50 percent of recovered injury compensation in a lawsuit against their employer, an electronics manufacturer. After winning an award of ¥62,000, the workers refused to pay the contractually stipulated ¥31,000 (Lu 2004). Similar cases abound (e.g., Wang & Chang 2004).

senting more than 800 migrant workers injured on the job, including winning a record-setting award of ¥1.58 million (or almost US\$200,000) in 2001 on behalf of a worker who lost both arms in an industrial accident (Yao 2004), Zhou Litai has more recently proclaimed, undoubtedly with more than a tinge of hyperbole, “I have been judged China’s most famous lawyer, but I am absolutely the poorest lawyer” (Li & Xun 2003:n.p.). Asserting that 161 clients owe him a total of ¥5 million (or US\$605,000), he has started filing lawsuits against clients who fled after collecting their awards (Yao 2004). This amount dwarfs those owed to the American divorce lawyers interviewed by Mather et al. (2001:143), which ranged from \$30,000 to \$125,000. Zhou Litai claims to lose 60 percent of the fees he bills. As a consequence, he is perhaps the most vocal advocate of the establishment of a system by which the courts withhold the lawyer fee from the collected award after taxes are deducted and paid to the tax authorities. Given the almost universal problem of tax evasion in the Chinese bar (Michelson 2003:364; Wang 2004), Zhou Litai is mystified by the tax administration’s apparent lack of enthusiasm for such a reform (Li & Xun 2003).

Clients not only refuse to pay; they also may retaliate by suing their lawyers after an undesirable outcome (Zhao 2001; Ye 2001; Tian 2002; Chen & Yang 2004). According to an official in the Guangzhou Bureau of Justice, 60–70 percent of all administrative complaints against lawyers in the late 1990s were filed by clients who lost their cases and blamed their lawyers. In the typical language of a complaint, “The lawyer originally said the case would be handled in such-and-such way, but this is not how things turned out” (Bai 1998:n.p.). In consultations with clients, lawyers are on the lookout for signs of implacable, uncooperative clients. The warning signs of a troublemaker include anger, ranting and raving, and “hysterical” outbursts couched in moralistic language about right and wrong, good and bad, and unfulfilled state obligations.

According to a lawyer I interviewed in summer 2004, the threat of official complaints lodged against lawyers by clients demanding a refund has grown over time. Clients, he argued, have become increasingly savvy, heightening the importance of screening cases (E34). The imperative to screen out potential troublemakers has further intensified following the 2004 decision of a municipal court in Sichuan Province requiring a lawyer who failed to provide adequate legal representation to refund double the fee he collected as compensation to the client (Sun 2004).<sup>23</sup>

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<sup>23</sup> This decision came after a similar case was dismissed in 2003 by a municipal court in the city of Dalian in Liaoning Province (Jiang et al. 2003).

Although business clients may also cheat lawyers out of their fee (e.g., Bo 2004; Zhou 2004), lawyers' overwhelming response has been to screen individual clients. In a 1990 issue of *Lawyer World*, the author of an article entitled "Do Not Represent Unreasonable Clients" recounts cautionary tales of individuals approaching lawyers with the goal of exacting retribution against personal enemies (Wang 1990). Similarly, although he considered all cases that he felt would generate fees, Lawyer Mu tried to avoid representing clients who are unreasonably demanding and present unreasonable cases (I23). When explaining why they refuse clients, Chinese lawyers reported an aversion to: "clients of low quality [*suzhi di*]; "clients with whom I have difficulty communicating"; "clients who try to direct my work"; "clients who have a foul moral character"; and "clients who won't stop pestering me."<sup>24</sup>

The discourse of low quality reflects a practice of "profiling" clients according to cultural stereotypes of workers and peasants with lower levels of education. As Zhou Litai states, "The critical problem is how to elevate the quality [*suzhi*] and cultivation [*suyang*] of these people" (Li & Xun 2003:n.p.). According to Wei Feng, a law professor at Southwest University of Law and Political Science, "due to migrant workers' lack of education and other problems, the time is still not ripe for Zhou [Litai] to charge clients on a contingency basis" (Yao 2004:n.p.).

A lawyer I interviewed used the term *diaomin* to characterize clients who fight their employers tooth and nail for wages and pensions, for example.<sup>25</sup> *Diaomin*, who are deemed more likely to challenge their employers and pursue labor grievances, are the most contentious and recalcitrant category of clients, precisely the troublemakers lawyers try to avoid; the difficulties they pose to their employers are the same difficulties they ostensibly pose to lawyers. According to this lawyer, *diaomin* who challenge their employers are also more likely to challenge the lawyers they hire to do so and to demand a refund of their fees if their wishes are not completely fulfilled (E34). To be sure, lawyers "profile" prospective clients not only on the basis of prejudicial stereotypes but also, to some degree, on the basis of experience. Indeed, Lawyer Zhong's experience representing a client in a labor dispute seems to confirm the stereotype of the *diaomin*. After Lawyer Zhong applied for labor arbitration and wrote letters to the Deputy Party Secretary of

<sup>24</sup> These are some of the verbatim responses written on questionnaires I administered in 25 cities in summer 2000. On complaints about "high-maintenance clients" in the American context, see Kritzer (2004:86); Mather et al. (2001:94); and Bassingthwaight (2003).

<sup>25</sup> O'Brien and Li (1996:30–1) have defined the term *diaomin* as "shrewd and unyielding people" who mobilize legal resources to protect their rights and interests.

the Beijing Municipal Party Committee and to leaders of the responsible enterprise, apparently to no avail, his client filed a formal complaint with the Beijing Lawyers Association, claiming that the legal fee was too steep (C19). With respect to the moral quality of migrant workers, on April 8, 2004, a lawyer posted the following message on the official electronic bulletin board of the All-China Lawyers Association (ACLA): “Support Zhou Litai. Nowadays the quality of peasant clients is too low. The following captures my feeling of late and the recent news of Zhou Litai: Barren mountains and unruly water [i.e., poor and remote places] give rise to diaomin!”

As we saw in the quotation that opened this article, lawyers even invoke and perpetuate stereotypes about the questionable moral quality of divorcees. In this particular example, by indicating that the client fit the profile of a divorcee, the lawyer effectively labeled her a “problem client.” Divorcees in China continue to be evaluated as morally dubious, as troublemakers who have difficulty getting along with others, and as less fit to be good parents and productive citizens (Xu 2004; Honig & Hershatter 1988:212, 224, 237–9). This, of course, is a cultural stereotype that becomes a reason and pretense for refusing representation.

Yet lawyers are not always stone-cold and heartless; they do respond with human sympathy. Presenting their case in a way that elicits lawyers’ sympathy is a major source of power wielded by clients. Some lawyers view such efforts to secure their sympathy as evidence of how crafty and emotionally manipulative clients can be. But other lawyers do try to help “deserving” clients in seemingly desperate circumstances, even if they are unable to pay the legal fee. As a lawyer stated in a message posted on the ACLA bulletin board on October 9, 2004, “I’ve been a lawyer for over twenty years. Every year some of my cases produce no fee or a smaller fee. If the client has genuine difficulty paying, I swallow the loss.” This phenomenon is what Kritzer calls “*de facto pro bono*” (2002:1945) work (also see Mather et al. 2001:143).

In this section, we have seen that economics sometimes trumps culture: lawyers such as Zhou Litai accept cases with high fee potential, even—indeed, exclusively—from “risky” clients. Lawyers often tolerate such risk and the annoyances associated with “difficult” clients if the fee potential of the case is sufficiently attractive. At the same time, however, we have also seen that culture sometimes trumps economics: lawyers not only report representing morally worthy clients even when their cases are unprofitable, but, as we continue to see in the following section, they also, and more typically, report refusing to represent clients who fit the profile of the diaomin regardless of the fee potential of the case.

## How Lawyers Use Law as a Weapon

The prior two sections concern the question of screening motive: commercial motive and cultural motive, both of which matter. Now I turn to the question of mechanism. Refusing a case may be direct and explicit, but more often lawyers use less direct methods. Lawyer Hou described how he quotes excessively high fees—such as ¥8,000 for a case for which he would normally charge ¥3,000—as a way to refuse cases (I12). After initially agreeing to accept what appeared to be a straightforward housing inheritance dispute for ¥1,000 (in part because of sympathy for the elderly client), Lawyer Yan regretted her decision and spent the remainder of the consultation session persuading the client not to waste money on an unwinnable case: “If you litigate, the chances of winning are very low. If you spend the money and lose, you would feel horrible! So I suggest you not spend the money” (C16).

Miseducating and misinforming the client in an effort to redefine the problem as one beyond the scope of the law is another common technique and, compared to inflating fees, a more important source of lawyers’ power. Lawyers use law as a strategic weapon in their battles with clients to placate and vanquish clients who themselves are trying to assert some degree of control over the legal process. Legal discourse—what Sarat and Felstiner (1995) call “law talk”—is a tool lawyers use to control the situation. A common tactic is to undercut the “legal merit” of the case, to invoke evidentiary issues, filing deadlines, a low probability of winning, and a high probability of court rejection as pretenses for denying the legal legitimacy of the case and for discouraging clients from pursuing redress by way of actual legal opportunities that may exist.

Clients talk about moral rights, about justice, about feelings, about relationships. But for lawyers to gain full control, such discourse must be purged from consideration. In an effort to impose the discourse of law and rules on the situation, lawyers often contrast “feeling” and “reason” with “law”; they emphasize the need to separate what is reasonable from what is legally feasible and permissible. Chinese lawyers use words like “rambling” and “annoying” to describe clients who try to gain their sympathy with long-winded sob stories. At best, lawyers deem these stories irrelevant blather and interject impatiently, demanding that the client stick to the relevant facts. At worst, lawyers view this discourse as an indication of a “problem client.”

A client in a consultation session pleaded for help with a housing dispute that had eluded resolution for decades: “But he’s so old and in poor health.” To this Lawyer Ni replied, “The court doesn’t care about feelings, the court cares only about evidence.” About 10

minutes further in the consultation the client said, “My father took family very seriously.” Lawyer Ni responded, “The court doesn’t consider the goodness of people. For all those years you didn’t do anything. Why didn’t you stand up for your rights? Frankly speaking, the court doesn’t care about feelings.” Earlier in this consultation, the lawyer said: “Evidence; the court doesn’t care about feelings, it only cares about evidence” (C07).

When efforts to (mis)educate and “talk sense” into clients fail, lawyers display impatience, condescension, and exasperation. Yet impatience with clients is not distributed equally across case types: it is far less likely when the case is lucrative and far more likely when the case is not financially attractive. The probability that the attending lawyers expressed impatience was more than three times greater if the case did not involve recovering cash or convertible property than if the case did involve recovering cash or convertible property (25 percent versus 8 percent).<sup>26</sup>

The relationship between case screening and fee potential is not always so simple and direct, but is often mediated by evaluations of the character of the client. A red flag for lawyers is raised when a client invokes emotionally charged language and expresses anger and moral outrage.<sup>27</sup> This particular client discourse is, from the lawyer’s standpoint, a sign of potential trouble from a recalcitrant client. Lawyers, as a consequence, react in a way aimed at discouraging clients. While they are slightly more likely to refuse representation explicitly when clients express moral outrage (25 percent when the discourse of moral outrage is present versus 20 percent when this discourse is not present), lawyers are far more likely to use less direct tactics of discouragement to screen out cases they deem risky and undesirable: they are about half as likely

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<sup>26</sup> Impatience is manifested in different ways: lawyers may become patronizing and insulting (e.g., “You have serious problems!” [C35, a boyfriend/girlfriend problem]). They may interrupt clients (e.g., “Let’s stick to material issues!” [C31, a labor dispute]). They also may raise their voices or rapidly and loudly tap their pens on their desks (C35). Compare to legal aid attorneys in Chicago displaying impatience when trying to determine the “relevant facts” and cutting off clients with, “In one sentence, what’s your problem?” (J. Katz 1982:26, 28).

<sup>27</sup> Examples of emotionally charged language and moral outrage include: “It’s just that I can’t hold back my anger. This guy is just rotten” (C05, an economic dispute); “Now good things do not come to good people. When I was still working, I was honest and pure, I was the stupid cow of society! Nowadays only the conniving get ahead in society, and the law protects these people!” (C14, a housing inheritance dispute); and “We’re dying of injustice here. My younger brother is already 30 years old. Since he has no housing he can’t get married. His mental state has already lapsed. If I had known this beforehand I would have rather been beaten to death than enter the court system” (C34, a housing property rights dispute). Although I found no evidence that a common discourse of “releasing anger” and “unjust treatment” varies by gender (either the gender of the client or the gender of the attending lawyer), the data do show clearly that older clients are more likely to invoke such emotionally charged, morally laden language (also see Serber 1980; Merry 1990; Mather et al. 2001; Sarat & Felstiner 1995; Lees 1994).

to express interest in accepting the case (25 percent versus 45 percent), more than three times as likely to display impatience (50 percent versus 15 percent), and, consistent with the quotation that opened this article, almost three times as likely to invoke evidentiary problems or filing deadlines (50 percent versus 18 percent). Importantly, even when the case entails recovering cash or convertible property, lawyers nonetheless send discouraging signals—disinterest, impatience, and a mention of evidentiary problems and filing deadlines—to clients who express moral outrage. When the case is not lucrative *and* the character of the client is undesirable, it is a virtual certainty that the lawyer will dodge representation.

The general empirical pattern is unambiguous: lawyers are more likely to turn away (both explicitly and indirectly) clients who bring cases that do not involve cash or convertible property and who are deemed potentially troublesome. Although we cannot draw definite conclusions from so few cases, the implications are nevertheless clear: insofar as labor cases typically involve small amounts of compensation pursued by urban China's most economically needy, this is precisely the category of dispute we would expect lawyers to shun the most. Of the four consultation sessions (among all 48 we observed) in which the attending lawyer invoked filing deadlines as a reason for refusing representation, three were labor disputes.<sup>28</sup> Institutional norms and legal doctrine do, to some degree, hinder lawyers from accepting labor disputes. But by obscuring the real opportunities to pursue labor disputes in the legal system, legal doctrine simultaneously serves as a tool for lawyers to screen out these undesirable cases.

## Discourse and Deception

Lawyers' discourse of the evidentiary imperative of litigation and of strict legal standards contradicts much of what we know about the actual operation of Chinese courts. Lawyers strategically manipulate information. They portray a legal system that is rigidly by-the-book and that offers little in the way of wiggle room for negotiation, persuasion, and informal influence.<sup>29</sup> To be sure, their

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<sup>28</sup> Among all 48 consultation sessions we observed, evidentiary problems (including filing deadlines) were invoked as reasons for refusing representation in 11 (or 23 percent). Among the five consultations over labor disputes, however, evidentiary problems were invoked in three (or 60 percent).

<sup>29</sup> This rhetorical strategy stands in sharp contrast to a strategy common among American divorce lawyers, who gain power and secure client trust by portraying the courts as subject to the peculiar inclinations of individual judges, and by presenting themselves as privileged "insiders" to the culture of a court and to the idiosyncrasies of the presiding judge (Sarat & Felstiner 1995; also see Kritzer [1998b] on "people knowledge"). At other



collective professionalization project—their efforts to distance themselves from para-lawyers and nonlawyers who appear interchangeable and functionally substitutable in the eyes of many prospective clients—helps explain why lawyers portray a legal system that operates strictly according to legal rules that only lawyers understand (Abbott 1988; Freidson 1970). But their discourse of the evidentiary imperative of litigation is also part of an effort to strip cases of their legal significance and to negate the merit of clients' legal claims. In contrast to the image of the courts portrayed by Chinese lawyers, however, there is actually significant discretion, flexibility, and freedom to pursue a variety of strategies within the scope of the law. In short, the doctrinal explanation for lawyers' propensity to refuse labor cases is incomplete.

As we have seen, a common tactic deployed to refuse labor cases is to claim that a statutory 60-day filing deadline (stipulated by Article 82 of the 1995 Labor Law) has been exceeded. What lawyers do *not* say, however, is that this filing deadline is actually quite flexible. Article 85 of the Ministry of Labor's 1995 Opinion Regarding Some Problems in the Implementation and Enforcement of the Labor Law states, “‘The date on which the labor dispute arose’ shall mean the date on which a party knew or should have known that his rights had been infringed on” (*Chinese Law & Government* 2002:70). The legal difficulties associated with establishing when a client “should have known” of a certain event introduces freedom and flexibility into the labor arbitration process:

“The date on which the labor dispute arose shall mean the date on which a party knew that his rights had been infringed on” is a flexible rule. This flexible rule gives labor arbitrators and judges great freedom in their authority to make rulings. Furthermore, this freedom of arbitrators and judges in their authority to make rulings means the same case may be decided in favor of the rightsholder or against the rightsholder, thereby adversely affecting public confidence in the law. (Li 2004:44)

The following message posted on the ACLA bulletin board by a lawyer on October 19, 2003, underscores the extent to which this seemingly inflexible filing deadline belies significant flexibility in practice:

Regarding the question of “time limits,” in concrete practice the arbitration courts normally do not actively investigate the time validity of the petition. Your petition will not be rejected because of the filing deadline so long as one of the following conditions is satisfied: you can prove that you became aware of the fact of the infringement of your rights within sixty days of filing the petition;

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times and for other purposes, Chinese lawyers, too, advertise their special insider connections to key players in the judicial system (Michelson 2003:196).

even if your petition was not filed within the time limit, your adversary does not make an objection; or even if your adversary does make an objection, he or she cannot support it with counter-evidence. (ACLA 2003)

Furthermore, a 2001 opinion passed by the Supreme People's Court makes it easier than ever to bypass the arbitration system and to take a labor dispute straight to court (Gallagher 2005; Thireau & Hua 2003:84). Many lawyers have even brought labor disputes to court cloaked as ordinary civil cases (by calling non-payment of wages a debt case) and as general torts (by calling an industrial accident a personal injury) (Fu & Choy 2004:21).<sup>30</sup> The upshot is that even moderately creative lawyers can find ways to get around the technical-legal obstacles they routinely invoke as pretenses to refuse the neediest clients (Fu & Choy 2004:21; see McBarnet [1994] on lawyers' creative and strategic manipulation of legal rules more generally).

When clients argue that the sentimental merits of a case outweigh its legal demerits, the attending lawyer often counters with the discourse of the evidentiary imperative of litigation, denying the centrality of "sentiment and feelings" in a court system that has been characterized as flexible, accommodating, and conciliatory (Woo 1999; Thireau & Hua 1997; Cheng & Rosett 1991; Su 2000). Thus, the forceful negation of claims that "the law also considers sentiment and feelings" is part of lawyers' strategic efforts to mis-educate clients and to strip their problems of legal legitimacy. Such a conclusion would certainly not emerge from a naïve legal formalist approach in which lawyers' word is taken at face value and in which there is minimal distance between the law in action and the law on the books. Rather, such a conclusion can only emerge from an *interpretive* or *constitutive* or *constructionist* approach to sociolegal studies in which law is treated not as a reified, stable, and transparent entity, but rather as the product of a struggle between competing actors over naming the problem, over defining the problem as one that merits a legal solution, some other kind of solution, or no solution at all. Law is a fluid and contested process constituted by the actors who imbue it with meaning and derive meaning from it through their actions, interactions, and struggles. In short, the power of law includes the power to obfuscate; law both reflects and reinforces power (Mather & Yngvesson 1980–

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<sup>30</sup> Medical malpractice litigation represents another field in which the administrative forums with primary legal jurisdiction are often circumvented. While the 1987 Measures for Handling Medical Accidents requires that all claims begin at a formal medical appraisal committee in the government health administration, in practice medical malpractice claims often go directly to court in the form of both ordinary personal injuries (falling under the scope of the General Principles of the Civil Law) and consumer disputes (falling under the scope of the Consumer Protection Law) (Chang 2002; Fan & Dou 2004).

1981; Harrington & Yngvesson 1990; Bourdieu 1987; Nielsen 2000; Merry 1990; Dezalay & Garth 1997). The practice of law is a confidence game in which “truth” and “reality” are manipulated for strategic purposes (Blumberg 1967; Hosticka 1979).

## Discussion and Conclusions

My goal in this article has been to use the screening practices of Chinese lawyers as a vehicle to advance the effort to build a comparative and more generalizable theory of lawyers as gatekeepers to justice. As gatekeepers to the legal system, lawyers work to educate and to miseducate people to the realities of legal institutions. By removing emotions and everyday reason and narrowing the scope of discussion to the relevant “legal” norms (as they variously and inconsistently define them), Chinese lawyers act as lawyers do elsewhere in time and place. Their use of rigidly legalistic discourse to negate the legal validity of claims advanced by clients is to some degree a function of institutional norms and legal doctrine privileging enterprise mediation committees and government labor arbitration committees. But this normative and doctrinal explanation is far from complete. Not only is it inconsistent with the reality that labor dispute mediation within industrial enterprises has all but disappeared (Fu & Choy 2004), but it is also incongruent with the more flexible and more accommodating realities of the Chinese legal system as it operates on the ground. Legal doctrine is an important tool of obfuscation wielded by lawyers to manage and screen out commercially undesirable cases brought by socially undesirable prospective clients.

Why do lawyers screen cases? Case screening is the manifestation neither of an inherent unwillingness to represent the poor and the powerless nor of a lack of social justice ideals. Rather, it is the result of an institutional context in which lawyers are under enormous economic pressure and receive scant institutional support to protect the rights of the most vulnerable members of society. Yet lawyers’ decisions do not adhere to an economic logic alone (on the lawyer as *homo economicus*, see Kritzer & Krishnan 1999; Kritzer 1998c, 2004); the case of China also reveals a clear cultural logic. By “profiling” prospective clients, lawyers are defending and reproducing cultural categories and boundaries and are thus reproducing inequalities (Gieryn 1999; Lamont & Fournier 1992; Lamont & Molnár 2002). Their use of cultural stereotypes to sort and filter cases brought by “undeserving” or “troublesome” clients reinforces barriers to justice and undermines the rights and interests of China’s laborers by blocking access to the legal arsenal that has developed for the redress of their work-related grievances.

Yet clients are not hapless subjects. Taking labor disputes to lawyers in the first place is a reflection of the agency of aggrieved workers. Agency is also reflected in clients' efforts to exert some degree of control throughout the legal process. They emotionally recount tales of injustice to appeal to the human sympathy of lawyers. They exercise power by refusing to pay or even by suing their lawyers. The perverse irony is that, in their efforts to exercise agency, clients become agents of their own defeat by reinforcing lawyers' need to screen out potentially troublesome clients and their commercially undesirable cases. The state's paramount goal in China's legal reform is to preserve social stability by resolving popular grievances and complaints. Yet insofar as the development of the Chinese bar serves systematically to deny justice to a potentially volatile segment of society, the legal reforms may to some measure undermine this official goal.

After this extended argument about the undesirability of labor disputes (representing workers), an obvious question to ask is, why do lawyers ever accept them? Almost half of all lawyers in Beijing report at least some billings from representing aggrieved workers (although this may include lawyers who offer legal advice for a small fee and then refuse further representation), and about one in 20 lawyers receives at least 10 percent of billings from workers' cases (Michelson 2003:132). These somewhat surprisingly high rates of representation may reflect a general desperation for *any* cases. As one lawyer put it, "When there are few cases to choose from, we can't be picky. Beggars can't be choosers" (I23). Another possibility is that lawyers who represent aggrieved workers try to limit the scope of their counsel to paperwork: In two of the five labor consultations we observed, the attending lawyers limited their services to drafting formal petitions. More important, however, lawyers in the United States often represent large groups of poor complainants as a way to enhance public recognition in the hopes of attracting new, more lucrative cases (Kritzer 2004:250). With respect to Chinese lawyers who accept class action suits on behalf of the poor, Liebman highlights the "significant economic benefits from high profile cases regardless of the small fees the cases generate, as publicity from such cases may lead to future business for the attorneys" (1997–1998:1538).

Official efforts to improve access to justice for the poor have been concentrated in the legal aid system. China's legal aid system is developing slowly but surely in an attempt to fill the hole left by private legal practice (Liebman 1999), especially following the 2003 enactment of the Regulations on Legal Aid. Although, in principle, legal aid lawyers are not supposed to refuse representation to qualifying clients, the very question of qualification is subject to the same discursive manipulation that occurs in the private bar.

Anecdotal evidence suggests that, in practice, intolerance for and cultural stereotypes about “annoying” clients are even more prevalent among legal aid lawyers on the government payroll for whom fee potential and fee collection are less relevant concerns than among commission-based private-sector lawyers for whom the legal fee is the paramount concern.<sup>31</sup> Indeed, legal aid attorneys in Chicago not only rationalized screening out clients with whom they had difficulty communicating by labeling them “crazies,” but also screened out clients perceived as shifty, of questionable moral character and credibility (J. Katz 1982:29–32).

Consistent with previous research (e.g., Kritzer 2002, 2004), this article has shown that fee potential and fee arrangements are at the heart of the issue of case screening. Outside the legal aid system, courts sometimes waive litigation fees for the poor (on the basis of the 1989 Measures of the People’s Court on Litigation Fees) and sometimes shift litigation fees to the loser. However, there is less systematic, doctrinal flexibility with respect to *lawyers’* fees. On December 6, 2004, in recognition of the magnitude of the problem, the Ministry of Justice promulgated a directive calling on lawyers in the private bar to accept more cases from migrant workers trying to collect back wages and to reduce or waive legal fees when doing so.<sup>32</sup> The remission of legal fees in such cases remains voluntary and strongly encouraged, but not mandatory.

Access to legal remedies is at stake. Insofar as aggrieved individuals are diverted away from the courts in far greater numbers than those gaining entrée, the question of how well they do at the top of the dispute pyramid is far less important than the question of what happens in the rest of the pyramid, almost the entire landscape of grievances and disputes. Students of contemporary China have uncritically assumed that lawyers open courtroom doors and that improving procedural and distributive justice in the courtroom improves justice writ large. This article, by offering a corrective to this fallacious tendency, points to a more useful research agenda: Why are so few grievances transformed into legal claims? What is the role of lawyers in this transformation process? I encourage efforts to replicate and to test the generalizability of the research findings reported in this article not only by studying lawyer-client interactions in other law firms in a variety of contexts and

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<sup>31</sup> I am indebted to Sida Liu and Mary Gallagher, both of whom have participated in and extensively studied Chinese legal aid work, for contributing this point.

<sup>32</sup> The 2004 Circular on the Provision of Legal Services and Legal Aid to Resolve the Problem of Construction Fee Arrears in the Construction Industry and the Problem of Back Wages Owed to Migrant Workers (Ministry of Justice Document No. 159) was jointly promulgated with the Ministry of Construction for the purpose of implementing the 1993 Circular of the General Office of the State Council on Intently Resolving the Problem of Construction Fee Arrears in the Construction Industry (State Council Decree No. 94).

practice settings, including legal aid offices, but also by studying interactions with complainants in other organizational settings. For example, a similar study of interactions of complainants and court clerks in the petition filing sections of local courts would be highly feasible and would make an important contribution to our understanding of the causes and the methods of screening cases.

An additional direction for future research is to tease out more clearly the dialectical interplay between economics and culture, to specify more rigorously and definitively the relative importance of economic and cultural considerations. These effects, to be sure, are additive (and possibly multiplicative): clients who are both socially undesirable *and* whose cases are commercially undesirable are almost guaranteed to get screened out of the law firm. Under what circumstances does a desirable potential fee outweigh an undesirable cultural profile? Conversely, under what circumstances does a desirable cultural profile erase the disincentives brought by low fee potential? Such questions are not only among those awaiting future research, but also among those subject to policy influence.

Would any policy measures introduced in the private bar improve access to justice and the prospects for cause lawyering? There is currently a push to introduce a fee shifting measure that would require the payment of lawyer fees by the losing party (He et al. 2004; Liu & Chen 2004), although superior courts have thus far stymied reform efforts (Tian 2004). At the same time, lawyers' incentives to represent aggrieved workers are likely to be greater if more law firms were to establish base salaries and pro bono systems to pay their lawyers for devoting some time to the protection of the legal rights of the poor and powerless (on the American context, see Sandefur 2004). Finally, lifting the ban on solo practice would hamper the widespread fleecing of affiliate lawyers by the owners of law firms and, concomitantly, would permit more lawyers to retain a greater share of their legal receipts. Any of these reforms, if adopted, would likely help reduce disincentives for lawyers to accept labor disputes and other cases of the poor.

Even if adopted, however, such reforms would not address formidable *political* disincentives. China's socialist legality, by demanding that the law serve the interests of the state above all else (Potter 1994, 1999; Michelson 2003), produces a fundamental conflict of interest between lawyers' loyalty to the state and their loyalty to their clients (also see Friedman & Zile 1964:35–6; on state-centered approaches to studying lawyers generally, see Rueschmeyer [1989]). Pressure from the state to preserve social stability at all costs appears to have trumped the socialist duty to "serve the people": it is a cruel irony that, despite China's official ideology of advancing the class interests of workers, legal practitioners—touted well into the 1980s as "people's lawyers," held up as exemplars

of socialist selflessness, especially relative to the image of greedy lawyers in the capitalist West—now represent an obstacle to justice and, to some measure, function to undermine the legal needs of “the people.”<sup>33</sup> Politics as a reason for refusing clients, however, is a topic beyond the scope of this article and treated more thoroughly elsewhere (see Cai & Yang 2005; Michelson 2006).

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<sup>33</sup> Such political disincentives to represent aggrieved workers in labor disputes are not limited to the socialist context, but are also found in other authoritarian contexts (Santos 2000:258). In the Chinese case, Fu and Choy (2004:21) also discuss circumstances under which serving the interests of the state compels lawyers to do exactly the opposite: there are countervailing political pressures to accept labor cases when failing to do so might place social stability in even graver jeopardy.

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