

CHINA

Criminal Defense Manual



International Bridges to Justice
64 rue de Monthoux,
CH-1201 Geneva Switzerland
Tel: +41 22 731 2441
Fax: +41 22 731 2483
www.ibj.org
internationalbridges@ibj.org

LEGAL AID CRIMINAL DEFENDER TOOLKIT

International Bridges to Justice



In Cooperation with the
Research Center for Procedural System and
Judicial Reform of Renmin University of China



LEGAL AID CRIMINAL DEFENDER TOOLKIT



TABLE OF CONTENTS

PRETRIAL PREPARATION (INVESTIGATION AND TRIAL PROSECUTION)

CLIENT INTERVIEW

CLIENT INTERVIEW QUESTIONS

CLIENT BACKGROUND QUESTIONNAIRE

INTERVIEWING YOUR CLIENT'S FAMILY MEMBERS

SIGNS INDICATING POSSIBLE MENTAL HANDICAP IN THE CLIENT

CONFLICT OF INTEREST

BAIL

DEVELOPING A DEFENSE FOR TRIAL

DEFENSE ISSUES FOR THE LAWYER

REVIEWING THE DISCOVERY

INVESTIGATION TO COLLECT EVIDENCE

THEORY OF DEFENSE AND STORYTELLING METHODS

VARIOUS DEFENSE STRATEGIES

EXPERT WITNESSES

QUESTIONING THE WITNESSES

PROSECUTION WITNESS EVALUATION

DEFENSE WITNESS EVALUATION

PREPARING FOR THE PROSECUTION TO QUESTION YOUR CLIENT

QUESTIONING WITNESSES DURING TRIAL

DIRECT AND CROSS- EXAMINATION

DEFENSE OF SPECIAL CASES

SPECIAL CONSIDERATIONS IN JUVENILE CASES

CASES INVOLVING A POSSIBLE DEATH PENALTY

**RIGHTS AND DUTIES OF THE CRIMINAL DEFENSE LAWYER: RELEVANT
LAWS OF THE PRC**

PRETRIAL PREPARATION

CLIENT INTERVIEW

Legal Stipulations

In the pretrial stage, Chinese law pertaining to the client interview allows the criminal defender to:

1. Meet with his client after the initial interrogation or from the day on which compulsory measures are adopted against the client (CPL Article 96). This initial meeting should be arranged within 48 hours by the public security organ. If the client is suspected of organizing, leading or participating in organized crime, terrorist acts or complex crimes involving more than two people such as smuggling, narcotics crimes, graft and bribery, the meeting should be arranged within five days. (*Regulation Concerning Questions Arising in the Implementation of the Criminal Procedure Law*, Article 11)
2. Limitations to Lawyer and Client Conversations:

Provisional Stipulations Concerning the Criminal Defense Lawyer's Practice Guaranteed by the People's Procuratorate (approved by the Supreme People's Procuratorate on Dec. 30, 2003), draws from the provisions on the client interview in *Rules on Lawyers Handling Criminal Cases* to define, for the first time in judicial interpretation, the constraints for questions directed to the suspect in the client interview, including:

- a. basic facts about the criminal suspect;
- b. whether criminal suspect has committed or participated in the crime he has been accused of;
- c. the criminal suspect's statements relating to the facts and circumstances of the case;
- d. the criminal suspect's statement of innocence or pettiness of his crime;
- e. whether the legal procedures were complete or lawful when compulsive measures were taken against him;
- f. whether his personal rights and litigious rights were infringed upon when compulsory measures were taken against him;
- g. other facts necessary and relevant to the current case.

The above stipulations aim to counter formerly unreasonable limits on lawyer and client conversations and seek to specify the items of fact that the lawyer is

entitled to obtain from the criminal suspect during the client interview. At the same time, the last provision, as a general clause, permits the lawyer to speak with the client about any other facts that the lawyer deems necessary.

The Purpose of the First Client Interview

The defense counsel should meet with the client as soon as possible in order to gather preliminary information for building an effective defense. In the first interview, the lawyer should inform the client of the legal procedures of his case and explain his role as the defense counsel. If possible, the counsel should meet with the client within 48 hours after the latter has been placed in custody.

Establishing the Lawyer-Client Relationship

The initial interview is the most important meeting that the defense counsel will have with the client. The first impression is lasting and is key in shaping the client's judgment of the lawyer. Therefore, the lawyer's primary objective in the initial interview is to establish an attorney-client relationship grounded on mutual confidence, trust and respect.

Listen to the client's story.

To be an effective interviewer and communicator, you must learn to use basic listening skills. Try to understand your client's goals and concerns. Tell your client that you are not there to judge him but are, in fact, trying to get him out of trouble using the most painless methods possible. Let the client know that he has control of the interview, for example:

1. "Let's do this: why don't you tell me first why you think the police arrested you. I'll take a few notes and then ask you some questions. Then, we'll try to figure out what we can do to help you. Does that work for you?"
 - a. Encourage the client to give a full narrative of what happened.
 - b. If possible, have your client write down his version of what happened.
2. Listen and observe. By listening to others, you show your respect for them. Use body language that demonstrates you are listening and seeking to understand what he is saying.
 - a. Do not fold your arms. Lean forward as he talks. To show him you're listening and to encourage him to share more, nod your

head and say, "Uh huh," "I see," or "I understand." Echo back what the client said. Look directly at the client and make steady eye contact, indicating your interest and concern.

- b. Take brief notes to guide you in asking follow-up questions. Note taking also expresses your interest.
 - i. Before taking notes, remember to ask if they mind and explain that you are only taking notes in order to remember the details.
 - ii. Avoid long, silent pauses when recording notes.

Cede some control to the client during the beginning portion of the interview.

As mentioned, it is helpful to give control of the interview to the client at the beginning of the narrative segment of the interview. This allows the client to get his troubles "off his chest" by sharing it with you, the problem-solver, and most clients appreciate the opportunity to vent their frustrations, fears, anger, and anxieties. The only negative aspect of giving the client control is that he may tell you more than you need to know at this early stage.

After listening to the client's narrative, repeat it back to him. In this way, the client will know that you have been carefully listening and that you understood his narrative.

In the client interview, what responsibilities does the legal aid lawyer have?

When interviewing the client, the criminal defender must inform the client about what he can and cannot legally do to assist the client and must advise the client of his client's rights.

1. Advise the client that it is the criminal defender's responsibility to protect the suspect's legal rights and to present, according to the facts and the law, materials and opinions proving the client's innocence, the pettiness of the crime and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the client. (CPL Article 35)
2. Assure the client that what he says to the criminal defender will remain confidential. Advise the client that he must not discuss the case with anyone other than the investigators and the defense lawyer. (Lawyers Law Articles 33, 44(6))
3. Explain to the client that the criminal defender must do his best to provide the client with legal assistance, but that the lawyer cannot make deals with judicial personnel for the purpose of influencing the trial and judgment of

the case. (*Regulations on the Professional Ethics and Practicing Discipline of Lawyers*, Article 18)

4. Inform the client that the lawyer shall not help the client conceal, destroy or falsify evidence or to tally his confession, and that the lawyer cannot intimidate or induce witnesses to modify their testimony or give false testimony or commit other acts to interfere with the proceedings of the judicial organs. (CPL Article 38)
5. Advise the client of his rights:
 - a. The presumption of innocence—that the client is presumed innocent until judged guilty by a People’s Court according to law (CPL Article 12)
 - b. The right to have a lawyer protect the client’s lawful rights and interests. (CPL Articles 11, 32, 34, 36, 96; *Lawyers Law* Articles 26, 28) The lawyer will work his utmost to defend the client’s innocence or mitigate the client’s sentence. (*Lawyers Law* Articles 26, 28)
 - c. If a defendant has not entrusted anyone to be his defender due to financial difficulties or other reasons, the People’s Court may designate a lawyer obligated to provide legal aid and serve as a defense lawyer. (CPL Article 34)
 - d. Where people of a minority nationality live in a concentrated community or where a number of nationalities live together in one area, court hearings shall be conducted in the spoken language commonly used in the locality, and judgments, notices and other documents shall be issued in the written language commonly used in the locality. (CPL Article 9)
 - e. The evidence that the prosecution can present to the People’s Court is limited to 1) material and documentary evidence, 2) witness testimony, 3) statements of victims, 4) statements and exculpations of the accused, 5) expert evaluations, 6) records of inquests and examination, and 7) audio-visual materials. (CPL Article 42)
 - f. Defense lawyers may, with the consent of the witnesses or other units and individuals concerned, collect information pertaining to the current case from them and they may also apply to the People’s Procuratorate or the People’s Court to inform the witnesses to appear in court and give testimony. (CPL Article 37)
 - g. The client in custody and his legal representatives or near relatives shall have the right to apply for obtaining a guarantor pending trial. (CPL Article 52)

- h. The client has the right to reject an unlawful search. If the client is not shown a search warrant before the search is to be conducted, then the search is unlawful. A search may be conducted without a search warrant if an emergency occurs at the time of arrest or detention. Any articles and documents discovered during an inquest or search that may be used to prove a criminal suspect's guilt or innocence may be seized, but articles and documents that are irrelevant to the case may not be seized. All seized articles and documents shall be carefully checked by the investigators jointly with the eyewitnesses and the holder of the articles; a detailed list shall be made and duplicated on the spot and shall be signed or sealed by the investigators, the eyewitnesses and the holder. One copy of the list shall be given to the holder, and the other copy shall be kept on file for reference. (CPL Articles 111-115)
- i. Although the client must cooperate with the investigators and answer their questions truthfully, the client has the right to refuse to answer any questions irrelevant to the case. (CPL Article 93)
- j. If there are errors or omissions in the written record of an interrogation, the client may make additions or corrections to it. When the criminal suspect acknowledges that the written record is without error, he shall sign it, and the interrogators shall also sign it. The client is also permitted to write a personal statement upon request. (CPL Article 95)
- k. Judges, procurators and investigators must, in accordance with the legally prescribed process, collect various kinds of evidence that can prove the client's guilt or innocence and the gravity of the crime. It shall be strictly forbidden to extort confessions by torture and to collect evidence by threat, enticement, deceit or other unlawful means. (CPL Article 43)
- l. Within 24 hours after a person has been detained, the client's family or work unit must be notified of the reasons for the client's detention and the location of custody, unless such notification would hinder the investigation or there is no way of notifying them. (CPL Articles 64, 71)
- m. A public security organ shall interrogate the detainee within 24 hours after detention. If it is found that the client should not have been detained, he must be immediately released and issued a release certificate. (CPL Article 65)

Information to be obtained in initial client interview:

1. Facts of the case relating to your client;
2. Any witnesses or co-defendants who should be found;

3. Any evidence of misconduct by the police or prosecutor that has infringed on the client's rights;
 4. Any evidence that can be preserved;
 5. Whether your client is capable of attending the trial and his mental state at the time of the alleged crime;
 6. Try your best to answer your client's most pressing questions;
 7. Try your best to meet your client's most urgent needs, for example, providing contact with his family members or employer, or providing him with medical or mental treatment.
-

CLIENT INTERVIEW QUESTIONS

Circumstances of the Arrest

1. First Interview
 - a. When were you arrested?
 - b. Where were you arrested?
 - c. Who arrested you?
 - d. Were you informed of the reason for your arrest?
 - e. Did you understand the reason for your arrest?
 - f. At the time of your arrest, were you shown an arrest warrant or summons?
 - g. Were you able to read and understand the arrest warrant?
 - h. Were you provided a copy of the warrant or summons?
 - i. Were you informed of your legal rights?
 - j. Was your family or work unit notified of the reasons for your detainment and of the place of custody within 24 hours of your detainment?
 - k. Was anyone else arrested at the same time you were? If so, do you know their names, addresses and telephone numbers and how to contact their family members? Do you know what offenses they were charged with?
2. Search and Seizure
 - a. Were you strip-searched?
 - b. What has been taken from your person?
 - c. Were any of your clothes seized? Were any articles taken from your clothes?

- d. Were any of your bodily fluids or hairs taken for testing?
- e. Was a search conducted at the place of your arrest?
- f. Was a search conducted at your residence?
- g. Was a search conducted at your workplace?
- h. Do you know of any other people or places that were searched? If so, what are the people's names, addresses and telephone numbers? What are the addresses of the places searched, and what types of places are they (e.g., residences, workplaces)?
- i. Did you see the police or investigators seize any evidence?
- j. What objects were seized?
- k. Was there a search warrant, and did you see it? Did you understand it?
- l. Were there any witnesses present at the time of the search? If so, what are their names, addresses and telephone numbers?
- m. Was the search recorded? Did the investigators sign it? Did you sign it? Did anyone else sign it? Did anyone refuse to sign it, and if so, why?
- n. Did the investigators make a detailed list and duplicate copy of the articles and documents seized at the scene? Did they give a copy of the list to the owner of the seized items?

3. Interrogation

- a. What was said to you at the time of your arrest?
- b. What was said to you after your arrest?
- c. Were you interrogated within 24 hours after your arrest?
- d. Who interrogated you? How many people interrogated you?
- e. Who initiated the conversation with you?
- f. How did you respond to them?
- g. What was your state of mind at the time?
- h. Were your statements recorded?
- i. Did you write your statement yourself?
- j. Were you allowed to adequately review and modify your statements?
- k. Were you allowed to write down your opinions?
- l. Have your co-defendants been interrogated? If so, do you know what they said about you?

4. Requests for legal aid and family

- a. Did you ask for a legal defender?
- b. Did anyone inform you that you could have a legal defender?
- c. When were you informed that you could have a legal defender?
- d. After your arrest, did you request to see a family member, friend or co-worker?

- e. Have you seen your family members, friends, or co-workers after the arrest?
- f. Was your family notified of the circumstances and the place where you were being held within 24 hours of your detention and arrest?

5. Detention

- a. Describe the place where you were detained after your arrest.
- b. How many public security officers were present during your arrest?
- c. Were any compulsory measures taken against you before your interrogation?
- d. Were you threatened with physical abuse during and after the arrest?
- e. Were you treated with violence during or after the arrest?
- f. Were you verbally abused or threatened during and after the arrest?

6. Information about the alleged victim

- a. Do you know the alleged victim? If so, describe your relationship with the alleged victim.
- b. Do you know the alleged victim's name, age, address, telephone number, and vocation? Does he have a criminal record?
- c. Has the alleged victim been physically or mentally injured? If so, what type of injuries and how serious are the injuries? Has the alleged victim recovered? Has the alleged victim suffered any property damage? If so, tell me about the nature and the extent of damage.
- d. Has the alleged victim received any compensation? If so, when, how much and who paid the compensation?
- e. What are your feelings towards the alleged victim?

7. Information about the co-defendants

- a. Do you know the co-defendants? If so, describe your relationship with them.
- b. What are the names, ages, addresses, telephone numbers, vocations and criminal histories of the co-defendants?
- c. Do you know whether the alleged co-defendants have been arrested? If so, do you know what items, if any, were seized from them?
- d. Do you know what statements, if any, the co-defendants made about you? What is your response to their version of events?

The Criminal Charges

- 1. Do you understand the nature of the criminal charges against you?

2. Do you understand the legal meanings of the charges?
3. Do you understand the defenses you might have to the charges?
4. Is there anyone who can attest that they were with you at the time of the crime, but away from the scene of the crime? If so, what is their name, address and telephone number?
5. What part of the charges do you believe to be inaccurate?
6. Is there anyone else who was charged or who should be charged? If so, what are their names, addresses and telephone numbers? How would you describe their involvement in the case?

Quick Investigation

1. Who should I contact? What are their names, addresses and phone numbers?
2. Are there any witnesses I should talk with? If so, can you give me their names, addresses and telephone numbers? What information do you think they might be able to provide? Do you think they are credible?
3. Is there any evidence that must be secured? If so, can you tell me what it is and where I can find it? Do you know whether it has already been seized?

In order to prevent unnecessary trouble or risks, we advise the lawyer to avoid the following actions and behavior during the interview:

1. To leak information about the case to the client, including information relating to written accusations and exposure;
2. To instigate the client to lie about his part in the case;
3. To lend your own cellphone to the client;
4. To give material articles to the client in private;
5. To bring a non-lawyer or the client's family members when meeting the client.

The following questionnaires will help you collect preliminary information about your client.

CLIENT BACKGROUND QUESTIONNAIRE

Date of Interview:

Name:

Birthdate:

Identification Number:

Address:

Telephone:

Education (Degree) (School Name):

Vocational Training (Skills) (School Name):

If applicable:

Driver's License Number:

Automobile Model:

Automobile License Plate Number:

Who would you like to contact about your arrest? Please provide their name, address and telephone number.

Is Mandarin the dialect you use on a daily basis? If not, what is? Can you read and write? Do you need an interpreter?

Have you contacted another lawyer about this case? Please provide details.

Have you received the arrest warrant? Please provide details.

List all prior arrests and the corresponding sentences.

Offense	Date	Result

Family

Name	Address	Telephone	Birthdate	Place of Employment
Father				
Mother				

Brothers/Sisters				
Spouse				
Children				

Who should be contacted in case of emergency? If it is not a family member, please provide their name, address and telephone number. How long have you known them?

Employment History (List in sequential order, beginning with the most recent position)

From/To	Name of Employer	Address	Telephone	Job Type	Position and Salary

List personal reference with complete addresses (people who know you, other than your relatives, such as friends or co-workers).

Name	Address	Telephone

Description of the Charged Offense

Circumstances of the arrest, searches, and statements made to the police

Did anything unusual happen when you were arrested? Were you, anyone with you, or any place searched? Did the police seize any items? Did the police make a detailed list of the seized items? Did you make a statement to the police? Did any of the co-defendants make statements to the police?

Did you know the alleged victim? If so, describe the nature of your relationship. Did you know the alleged co-defendants? If so, describe the nature of your relationship.

Physical, Mental, Emotional, and Marital Problems and Drug and Alcohol Abuse

Do you have a problem listed above that may be related to your case?

Y__ N__

If yes, please explain:

How long have you had this problem? Who first diagnosed it and when?

Are you currently undergoing treatment or seeing a counselor? Y__N__

Name:

Telephone:

Are you currently taking medication for this problem? If so, what kind of medication, how much are you taking, and what is the daily dosage? When was this medication first prescribed? Who prescribed it?

Witnesses: Please list all the names, addresses, and telephone numbers of people who can provide evidence or information about the case.

Name	Address	Telephone

Co-Defendants: Please list all the names, addresses, and telephone numbers of people who were involved in the alleged crime. What was the extent of their involvement? Have they have made statements to the police? What did they say? Are they currently in custody? Do they have previous criminal records? What is the relationship between the co-defendants and the client?

Name	Address	Telephone

Bail

What finances do you have for bail?

Are there family members or co-workers who can guarantee that you will not

escape prosecution.

Client's physical features

Height	Weight	Appearance	Other information pertaining to eyewitness identification

INTERVIEWING YOUR CLIENT'S FAMILY MEMBERS*

* The information from this section is adapted from a presentation at the 2003 NLADA "Life in the Balance" Conference given by Marie L. Campbell, Licensed Private Investigator, New Orleans, Louisiana.

Introduction

Establishing a good relationship with the client's family members during the early stages of the case can provide the criminal defender with valuable information about the client and the case that will help him develop a winning defense theory. The following are some practical suggestions for how to conduct an effective first interview with your client's family members.

Goals of the First Family Interview

1. Get permission to return for follow-up interviews.
2. Begin to establish a mutual relationship.
3. Obtain your client's life history. (if time permits)
4. Create a family tree in order to understand the relations between individual family members.
5. Obtain individual family members' names, addresses, telephone numbers and relationships to your client;
6. Family members' ages, birthdates and birthplaces;
7. Dates and locations of marriages and divorces;
8. Family members' identification numbers;
9. Family members' medical history (including mental health history and history of substance abuse);
10. Family members' employment history;

11. Family members' educational background;
12. Family members' criminal records.

Where

The client's home is often the optimal place to conduct the interview, because you want to make the witness feel as relaxed and in control as possible. In addition, observing the client's home may provide important information about your client and his family.

If it is not possible to interview the witness at home, it is best to choose a safe and neutral location that will afford some privacy, such as a park or a teahouse. It is best not to conduct interviews at your office, as this might increase the sense of the imbalance of power that exists between you, the lawyer, and the witness. If the witness feels insecure, he is less likely to speak openly and honestly with you.

Arranging the Interview

It is recommended that you do not call to arrange the initial interview. Once you have met the client's family members, it is both respectful and considerate to schedule follow-up interviews at mutually convenient times. Because people find it easier to reject requests made over the phone than in person, it is better not to call to schedule the first interview. Be sure to apologize for your intrusion.

What to Wear

Be careful about the way you dress. Wearing formal clothing such as a business suit can make people feel uncomfortable, while wearing clothes that are too casual can be interpreted as disrespectful and unprofessional. Ideally, choose clothing that is neither too formal nor too casual, and avoid wearing clothes that are tight-fitting or revealing.

Dos and Don'ts

DO:

Try to understand the witnesses' background before interviewing them.

Try to keep note taking to a minimum. Witnesses may limit what they say when they know that their words are being documented. The goal is to establish a rapport with the witnesses while obtaining as much information as possible.

DON'T:

Do not interview people in groups. It is better to interview people individually. The reason for this is that families usually have one member who will dictate, either directly or indirectly, what family members can and cannot say. Therefore, it is important to interview family members individually in order to get a more complete disclosure of information.

Do not assume that all of the family members you interview want to help you or your client.

Do not assume that family members know what information will be most helpful to you and your client. As the interviewer, you must provide them with guidance as to what information is and is not important through the questions you ask.

Do not express urgency or apprehension about your client's case.

Barriers to Effective Communication

Knowing what things may limit effective communication will better enable you, the interviewer, to overcome these barriers.

Demographics

Differences in age, sex, race, socio-economic status and culture may exist between you and the witnesses that you will be interviewing.

It is essential to treat all people with respect. If you are interviewing a minor, you should probably have his parent in the room with you and the minor during the interview. Be sure to bring a friend of the same sex with you when interviewing members of the opposite sex. Ask witnesses how they would like to be addressed (by title or by first name) before beginning to speak with them. If there are cultural differences, be sure you know what they are in advance to avoid making errors.

Psychological Barriers

Many witnesses find it difficult to disclose information that causes them emotional stress. Many issues that we investigate in our cases evoke feelings of guilt, shame, fear and anxiety. The interviewer must convey to the witnesses, through body language and empathetic words, that the witness can safely disclose emotionally charged information.

Personal Barriers

Like the witnesses we interview, we, as interviewers, have our own experiences, thoughts, beliefs, emotions, biases and prejudices. The interviewer, therefore, must know himself well enough and be able to remain focused, especially when the witness experiences an internal conflict.

How to Bridge the Gap

1. Overcoming barriers to communication takes time. The following suggestions can help the interviewer bridge existing communication gaps between himself and witnesses:
2. Establish trust by keeping your word and by maintaining the confidentiality of any information the witnesses provide;
3. Never share information with your family members and with your client;
4. Remain calm but alert during the interview;
5. Maintain an interested, empathetic, non-judgmental attitude;
6. Let the witness know that you understand how painful the interview process can be for them;
7. Convey with modesty that you are a competent person;
8. Show courtesy and respect to the witnesses;
9. Listen patiently when the witness goes off on tangents;

ASKING QUESTIONS

Open and Closed Questions:

Open-ended questions usually require a more detailed answer than “yes,” “no,” date or place.

Closed-ended questions can be answered simply with a “yes,” “no” or a simple fact.

In general, you want to ask open-ended questions rather than closed-ended questions in your interviews, because the answers to these questions provide much more of the information that you want to know. Also, these questions invite the witness to converse with you instead of simply answering questions. By asking a general question that requires a narrative answer, you will also learn unexpected information. Examples:

OPEN	CLOSED
Tell me about your family	Where were you born?

background?	
Could you describe one of the arguments you had with your husband?	Did your husband hit you?
Can you tell me about the first time you drank alcohol?	How old were you when you started drinking alcohol?

When to Use Closed Questions

When you need to obtain specific information such as birthdates or identification numbers, a witnesses' short response is fitting. You will also probably use more closed questions toward the end of the interview. Additionally, some witnesses may be confused by open-ended questions. In these situations, you will need to adapt your questioning to fit the witness's ability to answer questions. You may find it easier to get the information you need by asking the witness a series of very specific closed-ended questions.

Leading Questions

Leading questions will often elicit unreliable answers.

LEADING	REPHRASED
I'm sure you loved all of your children equally, didn't you?	When your children were small, how were they different from each other?
You never knew what Wang and his friends were up to, did you?	Tell me about your relationship with Wang before he was arrested.
Wang does not know how to read, does he?	What kind of student was Wang?

Follow-up and Probing Questions

The following are ways of eliciting more information from the witness when answering one of your open-ended, non-conclusive questions:

Nudging or encouragement: Verbal encouragement in the form of "uh huh" and "go on" will let the witness know that you are following and are interested in what he is saying, and that you do not wish to interrupt him.

Silence: You may choose to remain silent for a moment, signaling to the witness that you are waiting for him to elaborate, perhaps nodding and wearing an expectant look on your face.

Clarification: You can seek clarification from the witness in a number of ways that lets the witness know that you are interested in what he has said and that you want to make sure you correctly understand what he has said. For example:

- Ask the witness to define his terms: “What do you mean by ‘not very long’?”
- Ask the witness to provide a more thorough answer: “Tell me more about that,” “What else happened that day?”
- Ask for missing details: “I don’t understand. How did Xiao Wang get home from the hospital?”
- Ask for additional details: “What did you see Xiao Wang do when the fight started?”

“Why” Questions

It is usually a bad idea to ask people “why” questions about life events. “Why” questions often place blame and put a witness on the defensive. Many witnesses simply do not know the answer to why something happened and will invent a seemingly rational reason for their behavior when, in fact, they have no idea what really motivated them. Such answers then become facts that are not particularly helpful to the client. Examples:

“WHY” QUESTIONS	REPHRASED
Why didn’t you leave your husband?	Was there a time when you thought about leaving your husband?
Why did your husband hit you?	Can you tell me what happened between you and your husband that day?
Why do you think you married an alcoholic?	Tell me about your relationship with your husband.

Confrontation

Pursuing a direct line of questioning is usually not the most effective way of eliciting the witnesses’ true account. Confronting the witness by pointing out all the contradictions in his account or inconsistencies with other witnesses’ accounts can be a very serious mistake. For example, by asking direct questions about abuse, you may push the witness into a state of denial, which would make it difficult for him to disclose the actual situation afterwards. Examples:

- Your nephew told me that you molested him when he was seven years old, is that true?
- You said that you quit drinking two years ago, but your wife told me that you were drunk this past weekend. Why did you lie?

- You're just pretending to read that. You cannot really read, can you?

Do Not Talk Too Much!

Inexperienced interviewers tend to talk too much. During the interview, you should aim to spend 80% of the time listening to the witness and 20% of the interview talking with the witness.

Listen Attentively

Listening intently requires discipline and practice. Listening, unlike hearing, is not automatic. Listening to a witness answer questions during an interview is entirely different from listening to friends chat. In social settings, you are able to multitask while listening to a friend; for example, while formulating a response, you might also be observing your surroundings or having an internal dialogue that has nothing to do with the other person. During an interview, however, you need to focus on listening to your witness with total concentration and must really pay attention to what they are saying, instead of formulating the next question, looking around the room, or figuring out how the witness' account fits into your theory of the case.

Listen with an Open Mind

Sometimes we only hear what we expect to hear, rather than what was actually said. If you have already reached certain conclusions about who your witness is and what he will say even before the interview, you will unconsciously filter out information that is not consistent with your preconceived ideas. If the witness belongs to a certain group, you might make assumptions about him based upon your own impressions of that group. You might assume that the witness is racist, ignorant, provincial or superstitious. Once you think you can predict what the witness will say, you will not carefully listen to him. You may also mistakenly form a negative opinion of the person's value as a witness. If the witness' information does not conform to your understanding of the situation, you might dismiss it as an aberration, thus forfeiting an opportunity to develop an important relationship with the witness, one that could result in testimony helpful to your client's case.

Become Comfortable with Contradictions

You should be aware of and keep track of any contradictions, but do not directly question the witness about these contradictions. Different people will often describe the same event very differently, and one person may even describe the same event differently with each telling. Contradictions may actually result from

miscommunication. For example, a witness might tell you that she had never consumed alcoholic beverages, but later, she tells you how she once went out to drink beer. Although this might be inconsistent, you may discover that the witness thought that drinking alcohol only meant drinking hard liquor, not beer.

Double-Checking

Communication between any two people is a complicated process that can lead to both trivial and serious misunderstandings. During an interview, everyone communicates, receives and decodes information, and misunderstandings are liable to occur at every stage of the process. Since every piece of information is based on any previous information, any miscommunication that is not addressed will have long-term consequences.

It is essential that you, the interviewer, confirm that the witness understands your questions and that you understand his answers. In the following example, the interviewer is checking to see if he and the witness are discussing the same thing, because they each give different meanings to a word:

WITNESS	INTERVIEWER
My father used to beat me but treated Wang better.	Do you mean he didn't beat Wang?
Right, only me, with his fists. He didn't do that to Wang.	Do you mean he never hit Wang at all?
Oh, he would whip him, you know, with his belt.	You mean he would punish Wang by whipping him but not by punching him with his fists?
Yes.	Can you describe one time when you saw him whip Wang?

In this example, the witness has a specific meaning for the word "beat" (hitting using one's fists) that the interviewer needed to clarify.

Reflecting

Reflective dialogue, or mirroring, is the immediate repetition of part of the conversation, which allows what has just been said to be adjusted or confirmed.

WITNESS	INTERVIEWER
I never knew my father. Well, I kind of did, but that was later. I met him once with my cousin, and she said, that's	You didn't grow up with your father?

your daddy.	
Right, he never even saw me.	Who told you that your father never saw you as a baby?
My mama	But your family knew who he was.
Oh yes, they knew. Of course they knew. Only I didn't know.	You said you met him with your cousin?
Yes, once in Hefei.	Tell me about that.

CONCLUSION

Interviewing requires mutual communication. Although your goal is to gather information, you, the interviewer, are also unconsciously and consciously communicating a great deal of information to the witnesses through your words, your clothing, your body language and facial expressions, and the types of questions you ask. It is essential that you refrain from using judgmental or critical language, whether verbal or non-verbal.

While conducting interviews of your client's family members, keep in mind that you are asking witnesses to go through a painful process to help someone they may or may not want to help and are asking them to provide information that may think is irrelevant to the case. They have the right to provide or withhold private information. People are usually not willing to share their most traumatic memories and secrets without deriving some benefits for themselves. The benefit has to come through the interviewing process itself. You must convey to the client's family members your desire to help and seek to understand and sympathize with them. In this way, the interview process can be a mutually beneficial experience.

SIGNS INDICATING POSSIBLE MENTAL HANDICAP IN THE DEFENDANT

A mentally handicapped defendant poses unique challenges to his legal aid lawyer. Evidence of mental handicap can be used to prove that the client lacked the faculty for criminal intent or that he was not the principal offender in the criminal act, and it can further prove that the client has a physical or mental disability.

The legal aid lawyer should immediately seek out an expert's diagnosis if he suspects that the client suffers from any mental handicap. The following steps of trial preparation must be, without exception, based on expert diagnosis:

1. Understanding the prosecution's case;
2. Rebutting the prosecution's case;
3. Investigating the client's ability to act and his mental state at the time of the alleged crime

How should a legal aid lawyer judge whether or not a client has a mental handicap? While interviewing the client and family members, the lawyer should closely observe whether or not the client displays the following signs of mental handicap. The lawyer should further decide whether or not to call in an expert to evaluate the client's mental condition.

Reality Disorders

_____hallucination

_____phonism

_____photism (illusory images of humans, objects or other shapeless things, such as lightning)

_____olfactory hallucination

_____tactile hallucination (feeling touched by non-existent objects or persons)

_____taste hallucination (tasting non-existent flavors)

_____falsely feeling threatened by harmless pictures

_____unreasonable fears (such as fear of leaving the prison cell, fear of heights)

_____feeling confused about people or things in his surroundings

_____longstanding mistaken perceptions, such as:

- The lawyer wants to harm him;
- The prison warden or other people worship him;
- feeling controlled by an otherworldly power;
- being the target of people's gossip

Linguistic Problems

Unintelligible Language

- _____ disorganized language
- _____ fabricating nonexistent phrases
- _____ using “non-words”
- _____ stringing together unrelated phrases
- _____ making up conclusions based on fallacies

Incomplete Answers

- _____ Short, abrupt answers lacking further explanation
- _____ only “yes” or “no” answers
- _____ vacuous, repetitive and general answers
- _____ long-winded answers lacking any real information
- _____ talking about “nonsensical philosophical thinking”

Disoriented Conversation

- _____ switching topics mid-sentence in response to any stimulation
- _____ irrelevant responses
- _____ broken sentences
- _____ unrelated thoughts alternately occurring at random
- _____ ideas expressed in cyclic, indirect or hesitant ways
- _____ tedious details
- _____ long-winded language

_____concluding a thought only with prompting

_____constant deviation from the main topic

_____ persistent in using inappropriate methods to repeat certain words, ideas or topics

Rapid Speech

_____speaking quickly without pause

_____jumping to the next topic prematurely

_____negligent of other's efforts to interrupt

_____frequent loud and extremely assertive speech

_____talking too much and interrupting others often

Slow or Broken Speech

_____speaking slowly

_____long hesitation before reply

_____inability to find correct wording

_____inarticulate speech

_____indifferent speech, even when discussing emotional topics

_____being pretentious

_____using archaic and obscure language

Other Language Problems

_____small handwriting

_____rushed writing

_____reading problems

_____ spelling errors

Memory Lapses and Attention Deficits

_____ unable to recall childhood memories

_____ unable to recall what has happened in the past few months

_____ unable to recall what has happened in the past few days

_____ unable to recollect facts related to the case

_____ memories are inconsistent with case records

_____ inventing stories to fill in memory gaps regarding the case

_____ tending to lie about events relating to the case

_____ seemingly too clear memory

_____ unable to concentrate

_____ always focused on trivial details

_____ forgetful trains of thought

_____ unable to concentrate upon mention of emotional topics

Medical Complaints

_____ overly concerned about personal health

_____ self-inflicted injury or suspicious scars

_____ "accidents"

_____ insomnia

_____ poor sleep quality

_____ oversleeping

- _____ changes in eating habits
- _____ increasing or decreasing appetite
- _____ blurred vision
- _____ narrowing eyes or holding material too closely when reading
- _____ hearing problems
- _____ humming ears
- _____ headaches
- _____ dizziness
- _____ nausea
- _____ fatigue

Self-Perception and Ability to Handle Affairs

- _____ extremely low self-esteem
- _____ extremely high self-esteem
- _____ unrealistic goals, ignoring one's weaknesses
- _____ reluctant to admit mental problems
- _____ unable to plan in advance
- _____ disordered working patterns
- _____ unresponsive thought patterns
- _____ unable to adapt one's plans according to reality
- _____ unable to foresee the consequences of one's action
- _____ irritable

_____unable to learn from past errors

Physical Gestures

_____restless movements

_____many small movements

_____frequently raising one's legs or waving one's arms

_____speaking too much

_____overly quick responses

_____sensitive to one's surroundings, frequently looking around

_____slow movements and speech

_____slow responses

_____poor balance

_____lack of coordination

_____nervous body movements or expression

Interaction with Others

_____cheerless family environment

_____no regular visitors or mail

_____lacking normal interaction with ward mates and interactions marked by abnormal responses

_____too accommodating

_____unable to have relationships with others, lacking the ability to communicate directly

_____ words and actions that are counter to accepted norms (including sexual behavior or too extroverted)

_____ unable to understand the impropriety of his words and actions

Other Observations

CONFLICT OF INTEREST

Introduction

Article 5, Chapter Two of the section “Principles for Professional Ethics of Lawyers” in *Regulations on the Professional Ethics and Practicing Discipline of Lawyers*, stipulates that the counsel shall be honest and responsible, making every effort to safeguard the client’s legal rights. To fully perform his duties, the counsel shall be loyal to his client and to the client’s interests. This section discusses the principles to follow in case of conflict of interest and lists circumstances in which conflict of interest may possibly arise.

Representing the Opposing Parties at the Same Time

Article 44, Chapter Seven in *Lawyers’ Law* specifies that one lawyer and one law firm shall not represent the two parties of one case at the same time. But this provision shall not take effect in remote areas with only one law firm. Violation of this provision shall result in the suspension of the offending lawyer’s license from three months to one year.

The Lawyer Cannot Act as Guarantor

The Provisional Regulations on Lawyers in Participating in Criminal Proceedings issued by the All-China Lawyers’ Association prohibits the lawyer from acting as guarantor for his client when the client is eligible for bail pending trial. If a lawyer acted as guarantor, he would have personal interests relating to the case, leading to conflict of interest.

Can the same criminal defense lawyer or the same legal aid center represent more than one defendant in the same case?

Article 35 in *Interpretations on Problems Arising from Implementation of Criminal Procedure Law of the P.R.C.* stipulates that in a complicated case, one lawyer shall not represent two or more defendants at the same time. Such a situation would more than likely lead to a serious conflict of interest. When the two defendants make charges against each other, the lawyer cannot be loyal to both clients at the same time, nor can he protect the privacy of either side. In addition, different lawyers from the same legal aid office shall not, in a single case, represent defendants (more than two) with conflicting interests. In such a situation, it is impossible to protect each defendant's privacy and legal rights. Moreover, if the defendants' defense lawyers belong to the same office, the defendants may doubt their individual lawyer's dedication to their defense. Lastly, if colleagues from one legal office represent different defendants of the same case, these legal aid lawyers may be reluctant to accuse their colleagues' clients. This will ultimately prevent lawyers from defending their clients with loyalty and devotion.

Maintaining Professional Independence

A legal aid lawyer shall not allow those who recommend or hire him, or those who hire him on behalf of another person, to interfere with or limit his professional judgment. He shall maintain his professional loyalty towards his client, not any other person. In the case of a juvenile defendant, his parents will, from time to time, ask for information regarding the juvenile's words and actions. Under such circumstances, the lawyer shall keep in mind his duty to protect his client's privacy, and his professional loyalty to the client shall not extend to the client's parents. To avoid potential difficulties, the lawyer should explain these principles in detail to the client and his parents when the lawyer first takes the case.

Remaining Professionally Loyal to Former Clients

A legal aid lawyer shall not use the information he collected on behalf of a former client in a way that unfavorably influences the same client, except when such information has already been made public through legitimate channels or in particular cases where protecting the client's privacy infringes upon the lawyer's professional ethics.

Conclusion

Legal aid lawyers shall, as stipulated within legal parameters, remain loyal to their clients without condition. Once conditions arise that may threaten this

professional loyalty, the lawyer shall avoid representing another defendant in the same case and any other person or organization whose interests conflict with that of the client.

BAIL

Introduction

Bail pending trial is a compulsory measure adopted by the public security organ, People's Procuratorate and People's Court who require that the criminal suspect provide a guarantor or deposit a security to guarantee that the suspect will not escape from either the case investigation or trial during the bail period and that he will appear as soon as summoned. Although personal freedoms are restricted when the suspect is out on bail, such restrictions are far less severe than the restrictions placed on those in custody. If the client is unlikely to try to escape trial or commit another crime during the bail period, and furthermore satisfies the other requirements for bail, the legal aid lawyer should apply for his client's bail as soon as possible.

Under What Circumstances May a Client Apply for Bail Pending Trial?

The defendant may be granted bail under any of the following circumstances:

1. Possible sentence of public surveillance, criminal detention or supplementary punishments (CPL Article 51(1));
2. Possible sentence of fixed-term imprisonment at least, and on condition that the public would not be endangered if the defendant is granted bail pending trial or is placed under residential surveillance (CPL Article 51(2));

"Not constituting a danger to the society," according to the legislator's interpretations, principally means that the criminal suspect, or defendant, after he is granted bail, will not commit another crime, threaten the alleged victim, the witnesses or judicial officials, hinder the normal investigation and trial process by falsifying evidence or tallying confessions, or committing other acts that may endanger the public. The consideration of such dangers shall correspond with conditions for making an arrest.

3. When a suspect may warrant arrest but is suffering from serious illness (CPL Article 60);

4. When a suspect that may warrant arrest is pregnant or breast-feeding her own baby (CPL Article 60);
5. If a case involving a criminal suspect or defendant in custody cannot be closed within the time limit stipulated by law for keeping the criminal suspect or defendant under custody for the purposes of investigation, conducting examination before prosecution, or for the procedure of first or second instance, and thus further investigation, verification and handling are needed, the criminal suspect or defendant may be allowed to obtain a guarantor pending trial or be subjected to residential surveillance. (CPL Article 74);
6. Cases in which the procuratorial organ and the public security organ lack sufficient evidence to arrest a criminal suspect who has been detained and require further investigation. (CPL Article 69-~~Jennifer-this clause does not seem to match up with the text~~) If the suspect meets the conditions for applying for bail, according to the law, he may be granted bail pending trial;
7. When a suspect who is not eligible for arrest holds a valid passport or exit document and there is concern that the suspect will leave China to evade investigation, the Procuratorate can place the person on bail pending trial without the lawyer having to apply for bail (Article 37, paragraph 7 of *the Rules of Criminal Proceedings of the People's Procuratorates*);
8. When the Procuratorate does not approve the request for arrest or decides not to prosecute, requiring the case to be reviewed once more, public security organs can place the suspect on bail pending trial without the lawyer having to apply for bail (Article 63, paragraphs 5 and 7 of *the Rules on the Procedures for Public Security Organs in Handling Criminal Cases*).

What methods exist for applying for bail pending trial?

CPL Article 53 provides for two ways to obtain bail pending trial: (1) through a guarantor; or (2) through a deposit in security.

1. **Guarantor:** Bail guaranteed by a person, who submits a letter to the proper authorities promising that the guaranteed person will not escape or obstruct the investigation, prosecution and trial and will appear whenever summoned. Granting of bail is based upon the character, reputation and credit of the guarantor, who must be willing to act as guarantor and must be approved by the applicable authority.

A guarantor shall meet the following conditions (CPL Article 54):

- a) Must not have any involvement in the current case;
- b) Able to perform a guarantor's duties;

- c) Is entitled to political rights and not subject to restrictions on personal freedoms;
 - d) Has a fixed domicile and steady income.
2. **Bail guaranteed by property (security deposit):** Under the bail system, the proper authorities have the criminal suspects or defendants deposit a security along with a written pledge promising not to evade investigation, prosecution and trial and promising to appear as soon as summoned during the course of bail. According to the CPL and relevant judicial interpretations, the suspects or defendants should deposit the security in the form of renminbi (RMB) with the minimum amount being 1,000 RMB. The amount of the security shall be determined by the decision-making body, which will take into account how much of a threat the suspect or defendant poses to society, the nature and circumstances of the case, the financial situation of the suspect or defendant, and the state of local economic development. The security deposit shall not be excessive.

What conditions must a guarantor satisfy? What happens if the guarantor fails to meet his obligations?

CPL Article 55 imposes the following obligations on a guarantor:

1. To supervise the guaranteed person in observing the provisions of CPL Article 56;
2. To immediately report to the executing organization when finding that the guaranteed person is likely to commit or has already committed an act in violation of CPL Article 56.

The guarantor shall fill out a letter of guarantee and add his signature or seal to it. When the guaranteed person acts in violation of CPL Article 56, and the guarantor fails to report him in a timely manner, a fine between 1,000 RMB and 20,000 RMB shall be imposed on the guarantor by the executing organization. When the failure constitutes a criminal offense, the guarantor shall, according to the law, be investigated for criminal liability.

What conditions must a client satisfy in order to remain released on bail pending trial? What happens if the client fails to comply with the conditions of release?

CPL Article 56 provides the legal obligations that must be met by the criminal suspect or defendant on bail pending trial:

1. The defendant cannot leave his city or county of residence without the permission of the executing organ;
2. The defendant must be present in court when summoned;
3. The defendant cannot interfere with the witnesses giving testimony;
4. The defendant must not destroy or falsify evidence or tally confessions.

If the suspect or defendant being released upon bail pending trial violates the above provisions and has already made a security deposit, the security deposit shall be confiscated, and taking into account different circumstances, he shall be ordered to write a statement of repentance, make another security deposit, provide a guarantor again, or be subject to residential surveillance or arrest.

Regarding the determination to make an arrest due to breach of bail, the Supreme People's Procuratorate provided further clarification and ruled that suspects who perform the following actions shall be arrested:

1. Attempting to commit suicide or escape in order to evade investigation;
2. Engaging in acts of destroying or falsifying evidence, giving false testimony, or influencing witnesses in order to hinder the investigation;
3. Leave the city or country of residence without authorization, thereby leading to severe consequences, or failing to appear after being summoned twice;
4. Committing new criminal acts.

What procedures must the criminal defender follow to apply for the client's release on bail pending trial?

1. **Determine whether the client is eligible for bail:** The lawyer should approach the authority handling the case without delay to find out what criminal charges are being held against the suspect or defendant, and then the lawyer should meet with his client. During the interview, he may make further inquiries into the case: the duration and reason for custody, the nature and circumstances of the criminal charges, the range of the possible sentencing, as well as information relating to the client's conduct, state of health, income and family of the client. After the investigation, if the lawyer finds the client suitable for bail pending trial, he may submit, on his own initiative, an application for his client's bail. If the client, the client's legal agent or close relatives request that the lawyer apply for bail on behalf of the client, and furthermore, the lawyer finds the client qualified, the lawyer may either apply for his client's bail in his own name or assist his client in applying directly to the authorities.
2. **Decide on the form of the guarantee:** When applying for bail pending trial, a lawyer shall try his best to use a guarantor. In legal aid cases,

clients are often very poor and cannot afford to put down a security deposit. In addition, applying for bail with a guarantor is convenient and efficient and may avoid unnecessary trouble created by economic incentives. If it is not possible to get a guarantor, e.g. there is no suitable guarantor available, the lawyer shall advise the client in custody and his close family members on how to prepare a security deposit for bail. Note that the *Provisional Regulations on Lawyers in Participating in Criminal Proceedings* issued by the All-China Lawyers' Association prohibit the lawyer from acting as guarantor.

3. **Submit the written application for bail pending trial to the organization handling the case:** In the investigation stage, the application shall be submitted to the public security organ or the People's Procuratorate undertaking investigation of the case. During the examination and prosecution stage, the application shall be made to the People's Procuratorate in charge of examination and prosecution. After the case is transferred for trial, the application shall be made to the People's Court.

The lawyer's written application shall include the following main elements:

- a) the lawyer's name and the name of his law firm or legal aid institution;
- b) the applicant's name and the place of custody;
- c) the client's physical condition;
- d) the facts and reasons supporting bail, including information regarding the client's qualifications for bail pending trial and any related legal grounds.

If the bail is to be guaranteed by property, the source and reliability of the security deposit shall be specified. Next, the organization to which the application is submitted shall be specified. The end of the application shall include the seal of the legal aid institution or law firm, the signature of the lawyer and the date of application. The written application shall be submitted with identification proof for both the guaranteed and the guarantor (or security deposit).

4. **Examination and approval for bail pending trial:** After receiving the written application for bail, the relevant authority shall examine the application and reply within seven days. For applications that are rejected, the lawyer may request a review of the decision or apply to a higher authority for re-examination.

What is the lawyer's duty after the application for bail pending trial is approved?

After the application is approved, the lawyer must:

1. Direct the defendant on how to abide by CPL Article 56;
2. Explain to the defendant the importance of abiding by these provisions and the consequences of violating them;
3. Explain to the guarantor the legal consequences for the guarantor if the defendant violates the provisions;
4. Ask the relevant authorities to lift the bail pending trial when either the statutory time limit for bail has expired or upon discovery of new circumstances requiring bail to be lifted.

Under what circumstances can bail pending trial be lifted, terminated or altered?

According to CPL Article 58, the public security organ, People's Procuratorate and People's Court shall promptly terminate the bail pending trial period upon the expiration of the bail pending trial period or upon discovery of circumstances that clear the suspect of criminal liability. The authorities must terminate the bail period upon closure of the case. The expiration of the statutory time limit is an important requirement for lifting of bail. The criminal suspect, his legal agent, close relatives, lawyer or other defenders have the right to request the above organizations to lift the bail if the bail has exceeded the statutory time limit. CPL Article 58 stipulates that the period for release upon bail pending trial granted by the People's Court, People's Procuratorate and public security organs must not exceed 12 months.

The alteration of bail refers to bail being changed to arrest or residential surveillance, as a result of the violation of certain legal provisions during the bail period. In litigation practice, circumstances leading to alteration of bail mainly consist of the following:

1. Evidence indicating that the defendant's behavior may lead to a punishment greater than the previous set term of imprisonment;
2. Evidence that bail is not adequate to prevent the person from posing a danger to society;
3. Evidence that the suspect on bail should have been arrested but was approved for bail due to serious illness, and at present, the illness has been cured;
4. Once the legally prescribed time period for the nursing or recovery period has concluded for a female, who should have been arrested but was approved for bail in order to breastfeed her baby or to recover from an abortion procedure;

5. If the guarantor demands to retract his letter of guarantee and be relieved of his legal obligations.

According to CPL Article 56, if the bailed suspect violates the relevant regulations, the relevant authorities may alter the compulsory measures. After alteration, the original bail period will expire. The public security organ, People's Procuratorate or People's Court shall, at the same time, refund or confiscate the security deposit. If the original bail had a guarantor, the guarantor shall be notified that he is relieved of his legal obligations.

Conclusion

If a client meets the applicable conditions for bail, the criminal defender should make every effort to secure the client's bail as early as possible. Although the right to bail pending trial is often overlooked in China, more frequent applications will insure that more eligible defendants can avoid unnecessary detainment pending trial. The right to bail is a right that, if exercised, can greatly enhance the criminal defender's ability to prepare and present an effective defense at trial.

DEVELOPING A DEFENSE FOR TRIAL

DEFENSE ISSUES FOR THE LAWYER IN THE CLIENT INTERVIEW

The following questions may provide ideas for how to utilize the information gathered during the client interview to build a defense.

- Does the defendant have a codefendant or codefendants (someone charged with committing the same alleged crime as the defendant)?
 - If so, obtain as much information as you can about the co-defendant(s), including their previous criminal records.
 - Consider whether it would be favorable to the defendant to testify against the co-defendant(s) in exchange for a dismissal or mitigated sentence.
 - Be aware that the codefendant(s) may testify against the defendant.
 - Be aware that the codefendant(s) may tell authorities what the defendant tells him. Warn the defendant not to discuss the case with the codefendant(s) or anyone else, other than the lawyer and the investigators.

- Did the police follow the proper legal procedures when the defendant was arrested and detained?
 - Was an arrest warrant or a detention warrant shown?
 - Was the defendant's family notified of his arrest and detention within 24 hours and also notified of the location of custody?

- Did the defendant make a statement to the police?
 - Did the interrogation occur within 24 hours of the defendant's arrest?
 - Were there at least two interrogators present?
 - What was the primary substance of the defendant's statement?
 - Have coercion, duress, threats, torture or any form of cruel, inhumane or degrading treatment and punishment been inflicted on the defendant during the period of detention or interrogation? Consider making a petition if the statement was obtained illegally.
 - Did the defendant review and sign the interrogation record?
 - Was the statement oral or written, taped or videotaped? Arrange to obtain a copy.
 - Did the defendant write his own personal statement?

- Did the police take any bodily fluids from the defendant?
 - Did the police take any of the defendant's bodily fluids, e.g. blood, breath, urine, or semen? If so, obtain a copy of the medical report.
 - Take the initiative to preserve the samples, and consider retesting them.
 - Did the police take any other items related to the crime?
 - Was material evidence collected? Was there a search warrant? Was a complete record made of the search? Was an inventory made listing the items seized?

- What is the client's defense?
 - If there are witnesses who can attest that the defendant was not at the scene of the crime, get the names, addresses, and phone numbers of these witnesses. Have an investigator contact them immediately.
 - If the defendant claims that he acted in self-defense or acted to avert immediate danger and was injured as a result, take photos of his injuries right away. (CL Article 20, 21)
 - Find out if the prosecution's witnesses (including the victim) are credible. For example, do they have a criminal record? Do they have a history of poor relations with the defendant? Has any compensation been paid to the victim? If so, how much was paid, when was it paid, and who paid it? If the defendant claims that a third person committed the crime, find out as many details as possible, and have an

investigator ascertain whether or not the defendant's claims are truthful.

- Does the defendant need any examinations?
 - Does the defendant need a mental or physical examination? Is a specialist, such as a neurologist, required? Arrange for the appropriate examinations.
- Does the defendant have any prior convictions?
 - Prior convictions can add a great deal of time to the defendant's sentence. Immediately investigate and make copies of the defendant's prior criminal record.
- Is the defendant in custody?
 - Find out if the defendant is eligible to apply for bail pending trial. Counsel should obtain the necessary materials that will help the defendant obtain bail, including finding possible guarantors and property available for the security deposit.

REVIEWING THE DISCOVERY

1. The right to review the discovery refers to the right of the defense counsel to consult the judicial documents and materials pertaining to the current case made or controlled by the governing authority. In China's criminal prosecution process, every litigious act carried out by a public security organ, People's Procuratorate or People's Court must be documented, including all the relevant evidence and procedural steps. The official records and files constitute the basis from which public security and judicial officers manage the case, and these are also important reference documents for the counsel to develop his client's defense. According to CPL Article 36, starting from the date on which the People's Procuratorate begins to examine the case for prosecution, the defense counsel may consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material; starting from the date on which the People's Court accepts the case, the defense counsel may, consult, extract and duplicate material of the facts relating to the current case's criminal charges. According to CPL Article 150, "the material of the facts of the crime accused in the current case" does not refer to all of the case files, but includes a "list of evidence, a list of witnesses and duplicates or photos of major evidence" which the People's Procuratorate has

transferred to the court for trial. The People's Procuratorate independently decides which files to transfer.

2. CPL Article 36 stipulates the defense counsel's right to review the discovery in the examination and prosecution stage. "The defense counsel may, from the date on which the People's Procuratorate begins to examine a case for prosecution, consult, extract and duplicate the judicial documents pertaining to the current case and the technical verification material." Obviously, the range of files that the defense counsel can review during the examination and prosecution stage is limited to "the judicial documents" and "the technical verification material." Article 319 of *The Regulations on Criminal Proceedings Handled by the People's Procuratorate* specifies the range of "the judicial documents": the procedural documents for legalizing filing a case, adopting compulsive measures and investigation measures, and initiating examination and prosecution, including the paper of decision for placing a case on file, detention warrant, paper of decision for approving an arrest, paper of decision for arrest, arrest warrant, search warrant, and letter of proposal for prosecution. "The technical verification material" refers to recorded evaluations and conclusions made by qualified experts regarding the suspect, items and other relevant materials used for evidence, based upon medico-legal expertise, psychiatric expertise, technical expertise on material evidence, etc. In the practice of defense, among the above documents, the counsel should first consult the letter of proposal for prosecution, because the letter is a conclusive file made by an investigation organ and provides reasons for the investigation organ to transfer the case to a prosecution organ. As the letter of proposal of prosecution reflects the investigation organ's primary alleged facts against the client, the lawyer should review it to get a general understanding of the legal details of the client's suspected offense.

The counsel should be aware of two points while reviewing the discovery. First, according to *Provisional Stipulations Concerning the Criminal Defense Lawyer's Practice Guaranteed by the People's Procuratorate* (Dec. 30, 2003), the public prosecution organizations shall grant, without delay, the defense lawyer's request for consulting, extracting and duplicating the files and the technical verification material pertaining to the current case. If the request cannot be granted on the day it is made, the lawyer shall be notified of the reasons, and the requested review shall be granted within three days, upon which the lawyer must be promptly notified. Second, according to Article 14 of *Regulations Concerning Issues Arising in the Implementation of the Criminal Procedure Law*, when the defense counsel consults, extracts and duplicates the judicial documents and the technical

verification material pertaining to the current case, the organizations handling the case can only charge for the duplication costs and are forbidden to charge any other fees. The rates for duplications costs shall be uniform nationwide, after the Supreme People's Court and the Supreme People's Procuratorate report the rates to the national department in charge of pricing for checking and ratification.

INVESTIGATION TO COLLECT EVIDENCE

Legal Stipulations

Chinese law allows the criminal defender to:

1. Review the judicial files and the technical verification material after the People's Procuratorate examines and initiates prosecution (CPL Article 36);
2. Conduct independent investigation to verify the evidence gathered by public security organs and prosecution organizations (CPL Article 37);
3. Evaluate the testimony of the expert witness (CPL Article 121);
4. Independently collect a separate statement from witnesses and the victim (CPL Article 37).

The following suggestions may help you in the investigation of the relevant evidence:

- **Take Prompt Action**
 - Begin the investigation as soon as possible;
 - If you delay investigating, you risk losing material evidence;
 - Witnesses can easily recall more recent events.
- **Guard against Risks**
 - Conduct your investigation with a companion;
 - Get the signature of any person who provides evidence;
 - Tape-record the whole course of collecting evidence;
 - Refrain from investigating and collecting evidence during the investigation stage. The law specifies no such clear right to conduct such activities. In addition, the judge may question the validity of the evidence collected at this stage;
 - It is best to apply to a public security organ, People's Procuratorate or People's Court for collecting evidence.
- **Valuable Sources of Information**

- letter of proposal for prosecution
- legal investigation
- statements of the co-defendant(s)
- client interview
- witnesses
- experts' conclusions
- Visit the Scene of the Alleged Crime
 - If permitted and possible, visit the scene of the alleged crime as soon as possible;
 - Use sketches, charts, photos, videotapes, measurements, etc., to record evidence found at the scene;
 - Search for undiscovered evidence;
 - Confirm who witnesses are and write down how to contact them in the future;
 - Search for witnesses who have not been questioned by the police;
- Witness Interview
 - In addition to the lawyer, at least one person shall be present for the witness interview. The All-China Lawyers' Association advises two or above;
 - Record the witness interview with videotapes or cassette tapes;
 - Is the witness capable of providing testimony? A mentally handicapped person, a minor who lacks the ability to distinguish right from wrong, or a person who cannot clearly and correctly express himself cannot act as a witness (CPL Article 48);
 - If possible, interview the prosecution's witnesses (CPL Article 37);
 - Meet the eyewitnesses;
 - Draw on your own personality when encountering a witness who may be reluctant to give evidence and persuade him to do so;
 - The interview should be conducted in a safe and comfortable environment;
 - Make a record of the witness' background and details of current employment.
- Statements of the Witness and the Victim
 - Are there any videotape or cassette tape records of the statements made by the witness and the victim?
 - Which part of the statements did the police extract?
 - Did the witness and the victim themselves personally write their statements?
 - What motives do the witness and the victim have to provide testimony? Does the witness have any personal interests relating to the case?

- Has the victim been injured? If so, has the victim provided detailed information relating to the degree of his injury?
- What is the relationship between the victim and the defendant? The witness and the defendant? The witness and the victim?
- Has the victim been compensated in any form? If so, when, how much and who paid the money?
- What is the mental condition of the witness and the victim?
- Is the witness' statement based upon the witness' and the victim's own firsthand observation or based upon hearsay?
- Has the witness' and the victim's testimony been obtained in legal ways? Has the testimony been obtained through torture, coercion, inducement, deception or other illegal ways?
- Is the witness' testimony consistent with the victim's testimony? If not, what are the contradictions? Are the inconsistencies helpful or harmful to the defense of the client?
- Are the witness' and victim's testimonies consistent with the defendant's statement? Are they consistent with the co-defendant's statement? If not, what are the inconsistencies? Are the inconsistencies helpful or harmful to the defense of the client?
- Material Evidence
 - How did the police obtain the material evidence?
 - Was the search warrant that the police used valid?
 - Is there a detailed list of all the seized articles? Do the listed articles match the material evidence gathered by the prosecution?
 - Is there any relevant material evidence?
 - Can more than one interpretation be applied to the evidence?
 - Is the collected evidence first-hand or second-hand evidence?
 - Is the evidence of a fragile or stable nature? If fragile, have proper steps been taken to preserve it?
 - Has the evidence undergone any changes due to the passage of time, changes in the environment or any other factors?
 - If evidence was obtained through photography or filming, were there at least two participants at work? Has the photographer or the videotape recorder made a complete record of the evidence?
 - Has the evidence been verified? Will the evidence used for the defense hold its ground at trial?
- Documentary Evidence
 - Was the search warrant that the police used valid?
 - Is there a detailed list of all the seized documents? Are the listed documents consistent with the evidence gathered by the prosecution?
 - Is there relevant documentary evidence?

- Are there different interpretations of these documents?
 - Are these documents genuine or fabricated?
 - Are the signatures and seals on the documents genuine and complete?
 - If the documentary evidence is a duplicate or photocopy, why has the original not been submitted as evidence? Have the duplicates or photocopies been made with at least two persons present? Does the person who duplicated or photocopied the documents have any interests related to the case? Are the signatures or seals genuine and valid?
 - Are the duplicates or photocopies entirely identical to the original?
 - Have the duplicates or photocopies been verified as genuine?
 - If a public security organ or a prosecution organ seized mail or telegraphs, were their procedures consistent with the provisions of CPL Article 111? Has the post office examined and delivered the items? Is there a possibility that the seized mail or telegraph has been fabricated, altered, or replaced?
- Expert Evaluation
 - Has the expert obtained judicial permission to conduct the evaluation?
 - What evidence has the expert examined?
 - What are the expert's fields of expertise?
 - How long has he been considered an expert in his field?
 - What are the expert's qualifications? Has he been authorized and does he have the credentials to be an expert evaluator?
 - Is the expert equal to the work of his own field? Are the expert's methods and techniques in accordance with the relevant national or professional standards? Has the expert used up-to-date technology to conduct his evaluation? Does the evaluation require the expert to cover subjects beyond his area of expertise or beyond the technical and evaluation capacity of the judicial expert examination apparatus?
 - Are the materials that are the foundation for the expert's conclusions sufficient and authentic? Are the materials suitable for evaluation or assessment, or do the materials conflict with the evaluation requirements?
 - Consider whether there is a need to advise the defense expert to independently verify the evidence.
 - Does the client have any physical or mental injuries that need an expert evaluation and technical explanation? If so, apply for the court to provide expert evaluation on the client's physical health or mental state. Provide the expert with the client's relevant medical records and biographical data.
 - Witness' Character Traits and the Scene of the Alleged Crime

- When reviewing an eyewitness testimony, focus on the following aspects listed below. An understanding of the witness' character traits will help the lawyer narrow the range of investigation and identify the strengths and weaknesses of the witness' testimony. The items listed below affect how the witness might have observed facts of the case.

Witness' Character Traits	Surroundings of the Scene
<ul style="list-style-type: none"> <input type="checkbox"/> gender <input type="checkbox"/> intelligence <input type="checkbox"/> memory capacity <input type="checkbox"/> educational background <input type="checkbox"/> employment history <input type="checkbox"/> language <input type="checkbox"/> speech impediment <input type="checkbox"/> age <input type="checkbox"/> temperament <input type="checkbox"/> mental state <input type="checkbox"/> state of health <input type="checkbox"/> alcoholic consumption <input type="checkbox"/> trauma caused by medicine or illegal substance abuse <input type="checkbox"/> eyesight <input type="checkbox"/> hearing <input type="checkbox"/> relationship with the victim <input type="checkbox"/> relationship with the defendant <input type="checkbox"/> relationship with the co-defendant <input type="checkbox"/> motive <input type="checkbox"/> partiality towards the client, victim or codefendant <input type="checkbox"/> bias towards the victim or <u>witness</u> <input type="checkbox"/> was threatened before, during or after the alleged crime 	<ul style="list-style-type: none"> <input type="checkbox"/> lighting conditions <input type="checkbox"/> daytime or nighttime <input type="checkbox"/> exact time during the day or night <input type="checkbox"/> moonlight <input type="checkbox"/> rain <input type="checkbox"/> fog <input type="checkbox"/> coldness <input type="checkbox"/> heat <input type="checkbox"/> number of people present <input type="checkbox"/> duration of observation of the occurrence <input type="checkbox"/> realistic ability to see all the people present and their activities at the scene <input type="checkbox"/> criminal weapon <input type="checkbox"/> natural plantlife <input type="checkbox"/> buildings <input type="checkbox"/> automobiles <input type="checkbox"/> traffic conditions <input type="checkbox"/> observation angle or position <input type="checkbox"/> bird's eye view <input type="checkbox"/> upward view

THEORY OF DEFENSE AND STORYTELLING METHODS

Introduction

During the course of investigation and preparation for trial, a defense counsel should gradually build and develop a theory of defense, as well as continually revising it. A theory of defense consists of three parts: the relevant law, facts of the crime and emotional factors. In the court, a defense counsel uses a theory of defense to tell the client's story. The storytelling is composed of three parts: the general theory of defense, several supporting sub-theories, and the oral

presentation to the court. Varied tones of voice, proper rhythm and tempo in questioning, body language, communication with your eyes, and application of different rhetorical skills, these factors make for effective storytelling, creating an atmosphere that both keeps the audience in suspense and engaged and builds a positive environment for the argument of defense. It is in such an environment that the court will evaluate the evidence.

Execution:

1. A defense lawyer should build a general theory of defense centered on the client's best interests and based upon the actual situation, which will help him evaluate what choices to make throughout the defense process.
2. The counsel should allow the theory of defense to guide his focus during the investigation and trial preparation process. The counsel should dig into and expand upon the facts and evidence forming around the theory of defense. Nevertheless, the counsel should not become a "prisoner" to his theory of defense.

Work Form for Developing a Theory of Defense

The following questions may help a legal aid lawyer to build a complete and coherent theory of defense:

1. What is your theory of defense? (e.g. innocence, alibi witness, misidentification)
2. Why do you believe this is the best theory of defense?
3. What is the relevant law? What are the elements of the offense? How will your theory of defense prove the client's innocence?
4. What are the unalterable facts that you need to confront and explain in the theory of defense?
5. What are the facts in favor of the client?
6. What is the key emotional theme in the case?
7. What emotional themes is the prosecutor most likely to use in his argument? How will you use your theory of defense and emotional theme to refute these emotional themes?
8. Make a list of the prosecution witnesses with specific questions attached to their names. Briefly point out the questioning styles.
9. Make a list of the defense witnesses, and under each of their names, write out how you plan to question them. Finally, briefly indicate the style of questioning.
10. List your main desired objective when directly questioning the defendant. How will the defendant's testimony strengthen your theory of defense?
11. What further investigation do you need to do to complete your theory of

defense?

12. Do you need to solve any problems with the evidence? Are these problems likely to strengthen or weaken your theory of defense? How will you explain the evidence that is inconsistent with your theory of defense?
13. Make a brief, effective statement for your theory of defense.

Storytelling: Test Your Theory of Defense and Themes at Court

To defend your client effectively, the lawyer must understand how to tell a story to the court. The more convincing and touching the story is, the more persuasive the argument becomes to the judges, who ultimately decide the facts of the case. Every well-knit story needs a plot, and for a defense argument, a plot provides the best tool for explaining the facts of your theory of defense.

Why must the legal aid lawyer use storytelling methods in the court?

Storytelling allows the legal aid lawyer to set the stage, introduce the characters, create an atmosphere, and organize ideas into a carefully crafted narrative format, thereby impacting the way each judge perceives a given case. Without such a framework, judges will understand the evidence and testimony in accordance with the prosecutor's argument. Once the defense lawyer successfully executes a framework, he can use the client's experiences to influence the judges' imagination, leading most judges to understand the evidence in the context of the client's past experiences.

More importantly, storytelling will cause judges to use both their hearts and minds in considering the defense's argument. "One who relies on reason" is more likely to change their judgment, because they often use the following thought pattern to reflect on and analyze a case: "My (the lawyer's) view is based on logic. Therefore, if you (the judge) reasonably point out any flaw in my thinking, I will consider changing my views." In contrast, "one who relies on his heart and emotions" will reflect on and analyze a case in a different way: "I am right, and you are wrong, so you must change your view." And these people will be your most powerful allies in the court.

Use Effective Language in Storytelling

The following suggestions may help you to decide what language to use or avoid in stating your theory of defense on behalf of the client.

1. The language for storytelling and the language the lawyer usually uses have obvious differences. The lawyer should tell the story as if he is

- casually speaking with friends.
2. Speak accurately. What you actually say should match what you intended to say.
 3. Translate legal terms or abstract concepts into clear, common and simple language.
 4. Use effective language.
 - a. Avoid words or phrases with reserved meanings, for example, "I think," "I believe," "I will try to prove..."
 - b. Use active tense.
 - c. Try your best to express yourself using nouns and verbs.
 - d. Avoid unconscious hesitation or useless verb pauses.
 - e. Use language that has the appropriate emotional and appealing elements.
 5. Use vivid language.
 - a. Use concrete rather than abstract language.
 - b. Use detailed and accurate rather than general and vague language.
 - c. Create lively images with language:
 - i. First visualize the images you wish to describe before describing them at court.
 - ii. The capacity to visualize details will increase your power of persuasion.
 - iii. Verbal images are better than subjectively using abstract, vague and general terms.
 6. There should be sentence variety, but short sentences are best. Written sentences are usually longer than oral sentences.
 7. Do not refer to your notes while speaking: this would eliminate all the advantages of storytelling.

Conclusion

To develop a theory of defense, the counsel should objectively evaluate the prosecution's case, and then, in accordance with applicable laws, structure a moving story based on the facts of the crime and emotions that will serve as a rebuttal. The theory of defense will influence the investigation, which witnesses will testify at trial, and what demonstrations will be held in court. Through telling a reasonable and convincing story, the lawyer can persuade the judges to find the client innocent, mitigate his sentence, or exempt him from criminal responsibility.

VARIOUS DEFENSE STRATEGIES

Introduction

In the process of developing a theory of defense, a defense counsel shall decide whether it is possible to exonerate the client from guilt. If so, the lawyer shall further consider how to prove the innocence of the client at trial. The following are possible defenses for exonerating a defendant from criminal liability under the Chinese legal framework and applicable circumstances to raise such defenses.

Burden of Proof on the Prosecution

Remember that your client is entitled to the right of being innocent until proven guilty. No person shall be found guilty without being judged as such by a People's Court according to law. (CPL Article 12) It is the prosecution's duty to prove that the client is guilty of the charges against him. It means the prosecution must prove that the facts are clear and the evidence is sufficient.

Has the prosecution already borne the burden of proof?

Before forming other defenses, the counsel should critically scrutinize the bill of prosecution to confirm whether the alleged crime has really occurred or not. If it has occurred, further consider whether the prosecution has presented evidence sufficient enough to support the charge. Consider whether another charge (a lighter charge) fits better with the case evidence. The following are necessary questions for your consideration:

- What are the elements of the accused offense? For example:

Self-driven act: Did the client act from his own free will? What evidence has the prosecution presented to prove that the client acted of his own accord?

State of mind: Under what state of mind would the client's act constitute a crime (for example: intentionality, disregard of the outcome, negligence)? Is the crime a strict liability crime (The prosecutor has no burden to present evidence concerning the defendant's intent)? What evidence has the procuratorate presented to prove that the client in his actions had the requisite criminal intent, had specific knowledge or skill necessary for committing the act, or was criminally negligent?

Cause and effect: Did the client's act result in the ultimate injury?

Direct cause: Were the client's actions far enough from the charged crime that he should not be subject to any legal responsibility?

Legal obligation: In this situation, does the law stipulate that the client must act in specific ways to exercise his distinctive legal obligation?

- What laws define the elements of a crime? Are these laws contradictory with each other?
- Should the prosecutor have charged the client with a lighter offense?
- How much evidence must be presented in order to sufficiently meet all the required elements of the accused crime? What are the elements of the crime that the client should have been charged with, but was not?
- Does the evidence presented meet the evidence requirements for all the elements of the alleged offense? What are the legal stipulations regarding evidence for elements of the accused crime? What evidence supports the prosecution's case? What evidence is not consistent the prosecution's argument?
- If the prosecutor cannot present sufficient evidence to support the charged offense or even support a lighter offense, the defense counsel shall point out the insufficiency of evidence to the court and request that the court either judge the client as innocent or dismiss the charges.

Does the defendant's act constitute a crime?

Another important consideration is whether or not the defendant's act constitutes a crime. Article 13 of *The Criminal Law* defines what constitutes a 'crime': "if the circumstances are obviously minor and the harm done is not serious, the act shall not be considered a crime." Moreover, Article 16 of *The Criminal Law* stipulates: "An act is not a crime if it objectively results in harmful consequences due to irresistible or unforeseeable causes rather than intent or negligence." If the defendant's situation fits Article 13 or 16, the defense counsel should request that the court declare the innocence of the defendant, as the court has no right to convict him for a nonexistent offense. (CPL Article 15(1))

Has the statutory time limit for criminal prosecution expired?

If the statutory time limit for criminal prosecution has expired, the defense counsel shall raise a defense upon this expiration based on the relevant laws. CPL Article 15(2) stipulates: " In any of the following circumstances, no criminal

responsibility shall be investigated; if investigation has already been undertaken, the case shall be dismissed, or prosecution shall not be initiated, or the handling shall be terminated, or innocence shall be declared...if the limitation period for criminal prosecution has expired.”

Article 87 of the Criminal Law stipulates crimes not to be prosecuted if the following periods have elapsed:

1. Five years, when the maximum punishment prescribed is fixed-term imprisonment of less than five years;
2. 10 years, when the maximum punishment prescribed is fixed-term imprisonment of not less than five years but less than 10 years;
3. 15 years, when the maximum punishment prescribed is fixed-term imprisonment of not less than 10 years; and
4. 20 years, when the maximum punishment prescribed is life imprisonment or death penalty. If after 20 years it is considered necessary to prosecute a crime, the matter shall be submitted to the Supreme People’s Procuratorate for examination and approval.

No limitation on the period for prosecution shall be imposed with respect to a criminal who escapes from investigation or trial after a People’s Procuratorate, public security organ, or national security organ files the case or a People’s Court accepts the case.

No limitation on the period for prosecution shall be imposed with respect to a case that should have been but is not filed by a People’s Court, People’s Procuratorate or public security organ after the victim brings a charge within the period for prosecution. (Article 88 of the Criminal Law)

The limitation period for prosecution shall be counted from the date the crime is committed; if the criminal act is of a continual or continuous nature, it shall be counted from the date the criminal act is terminated.

If further crime is committed during a limitation period for prosecution, the limitation period for prosecution of the former crime shall be counted from the date the new crime is committed. (Article 89 of the Criminal Law)

Is it possible to make an affirmative defense if the facts of the crime cannot be denied?

In an affirmative defense, the counsel does not deny the elements of the alleged offense but still attempts to prove the innocence of the defendant. Such a defense requires the counsel to present sufficient evidence, including witness testimony or material evidence. Even if the lawyer does not deny that the defendant committed the alleged acts, the defense will try to prove that the acts were

justified or provide another legal defense for negating the defendant's criminal liability.

Can the defense lawyer prove the innocence of the defendant?

This is one type of affirmative defense and aims to prove that the defendant did not commit the crime, i.e. that the defendant **could not possibly have** committed the alleged offense.

The two most common methods of proving the defendant innocent are: proving the defendant's alibi and using the material evidence to prove that the alleged offense could not have happened. In employing the first strategy, the criminal defense lawyer can provide credible evidence, such as the testimony of a witness at the scene to prove an alibi; if adopting the second strategy, the legal aid lawyer can cite credible evidence demonstrating the weaknesses of the material evidence against the defendant, and explain how these limitations or weaknesses exclude the possibility of the alleged offense. For example, suppose the defendant was accused of stabbing the victim with the right hand, and the evidence provided by the prosecutor indeed indicates that the victim was stabbed by an assailant who used his right hand. In such circumstances, if the criminal defense lawyer can provide credible evidence to prove that the defendant's right hand was previously injured and that he could not have used it at the time that the crime was committed; this demonstrates that the defendant could not have committed the alleged offense.

Can the defense lawyer justify the crime committed by the defendant?

Justifying the crime for the defendant is another type of affirmative defense wherein the defendant does not deny the alleged offense, but argues that he should not bear legal responsibility for it. The theory of defense for the defendant will take the form of "I did, but ..." arguing that the defendant committed the alleged offense for justified causes that are socially accepted or that conform to moral principles.

1. Statutory Excuses that Exclude Transgression: Justifiable Defense and Averting Danger in an Emergency

CL Article 20 offers this definition of "justifiable defense": "an act that a person commits to stop an unlawful infringement in order to prevent the interests of the State and the public, or his own or other person's rights of person or property or other rights from being infringed upon by the on-going infringement, thus harming the perpetrator, is justifiable defense,

and he shall not bear criminal responsibility.” As stated, the defendant need not bear criminal responsibility. If, however, a person’s act obviously exceeds the limits of necessity and causes serious damage, he will bear criminal responsibility; however, he shall receive a mitigated punishment or be exempted from punishment. CL Article 20 stipulates: “If a person’s act of justifiable defense obviously exceeds the limits of necessity and causes serious damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment, or be exempted from punishment. If a person acts in defense against an on-going assault, murder, robbery, rape, kidnapping or any other crime of violence that seriously endangers his personal safety, thus causing injury or death to the perpetrator of the unlawful act, it is not undue defense, and he shall not bear criminal responsibility.”

2. Legally Prescribed Excuses for Mitigation:

Mental Disorder:

CL Article 18 stipulates, “If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility [for these consequences].” If the defendant has indeed lost the ability to recognize or control his own conduct, the defense lawyer must provide evidence for this mental disorder. If the prosecutor can prove the defendant is mentally in good order, the defendant shall bear criminal responsibility.

Lighter Responsibility

CL Article 18 also stipulates, “If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.” Even if it is impossible to prove that the defendant could not recognize or control his conduct at the time of the offense, the defense lawyer can still cite evidences to prove the mental disorder of the defendant (for example, the defense lawyer might argue that the defendant was unable to form the intent required to commit the alleged crime), and thus seek a mitigated punishment for the defendant.

Minor Offender

In representing juvenile offenders, the defense lawyer emphasizes that the defendant should not bear criminal responsibility because of his or her

age. CL Article 17 specifies 16 as the lower limit for bearing criminal responsibility. However, if the defendant has exceeded the age of 14 and committed such serious crimes as intentional homicide, rape, robbery, drug-trafficking, arson, explosion, poisoning, or other serious crimes, or intentionally hurts another person and thereby causes serious injury or death of that person, he shall bear criminal responsibility. Therefore, the legal aid lawyer can represent as “children” persons under the age of 14 and persons between 14 and 16 who have committed only minor crimes. If the defendant is 14 or older and has committed serious crimes but has a “mental and intelligent age” that is far below his real age in years, the legal aid lawyer can argue under the defense of infancy. The legal aid lawyer can argue, for example, that the defendant is mentally retarded and is similar to an infant or younger child in his mental development and intelligence.

3. Other Excuses of Defense:

Maltreated Women Syndrome:

Although some courts do not recognize “Maltreated Women Syndrome” as a criminal defense, it can be considered secondary evidence for other defenses such as self-defense, defense from being coerced, etc. Because “Maltreated Women Syndrome” affects a person’s behavior, an expert needs to be retained to testify and explain her act in this context. Some courts allow using expert testimony about “Maltreated Women Syndrome” to prove the defendant did not have the requisite intent for committing the alleged crime.

Being under Coercion or Duress

If the defendant was forced or coerced to participate in a crime, the legal aid lawyer can argue the defense of being forced or coerced. CL Article 28 stipulates, “Anyone who is coerced to participate in a crime shall be given a mitigated punishment or be exempted from punishment in the light of the circumstances of the crime he commits.” When many defendants are involved in a case and any one of them may have been coerced by the other defendants, the defense lawyer often employs this kind of defense.

Criminal Act of Necessity

When the defendant committed some crimes to avoid more serious damage, the defense of necessity can be adopted. CL Article 21 regulates, “If a person is compelled to commit an act in an emergency to avert an

immediate anger to the interests of the State or the public, or his own or another person's rights of the person, property or other rights, thus causing damage, he shall not bear criminal responsibility. If the act committed by a person in an emergency to avert danger exceeds the limits of necessity and causes undue damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment." Similar to the stipulations concerning justifiable defense, if the defendant's act exceeds the limits of necessity and causes undue damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment. This stipulation (CL Article 21), however, does not apply to a person who is charged with special responsibility in his post or profession.

Misunderstanding of Law/Facts:

In this type of defense, the criminal defense lawyer argues that the defendant had no knowledge that his act constituted a crime at all. In the defense of misunderstanding the law, the criminal defense lawyer must prove that first, the defendant can be found guilty of the alleged crime only if he deliberately broke the law, and second, that the defendant did not know the law at the time of the offense. In the defense of misunderstanding facts, the criminal defense lawyer must prove that first, the defendant misunderstood the true circumstances at the time of the offense; second, if he understood them, he would not have committed the crime; third, there were understandable reasons for this misunderstanding.

Being Instigated or Misled by Government

When the government has instigated or misled the defendant to commit a crime, the criminal defense lawyer can consider using two types of defense. In the "instigated by the government" defense, the defense lawyer must prove that government officials instigated the defendant to commit the crime, and that the defendant would not have otherwise committed the crime. In the "misled by the government" defense, the criminal defense lawyer must prove that first, government officials told the defendant that the alleged crime was legal; second, the defendant committed the crime only because he believed this; and third, there were understandable reasons for the defendant's credulousness. The defense lawyer then argues that the defendant should therefore not be held criminally responsible. In this type of defense, the defense lawyer focuses on the government officials' acts rather than on the defendant's thoughts

and on whether the defendant had the motive to commit the crime. Even if the case concerns a crime usually considered under the “strict responsibility principle” (i.e. even if the crime is one of “strict responsibility” under the law), this type of defense can still be employed.

Criminal Act with Sincere Intent

“Sincerity” refers to very sincere ideas or beliefs, or is used to describe somebody lacking in evil or malicious intent. The defense of “crimes with sincere intent” usually applies to crimes of tax or financial fraud for which the defendant’s intent needs to be verified. Deliberate fraud or forgery cannot be considered “sincere.” If, however, the criminal defense lawyer can prove the defendant possessed all sincerity in his act, it can be inferred that the defendant did not have fraudulent intent as alleged by the prosecutor.

Did the defendant complete the crime?

Although being only at a certain stage of the crime (e.g. an intermediate stage) cannot count as evidence that proves the defendant’s innocence, it can lessen the defendant’s punishment in the court’s final sentencing and even result in the defendant being exempted from punishment. Thus, the legal aid lawyer must carefully research the defendant’s acts to determine whether the following circumstances exist so as to request a mitigated punishment or exemption from punishment.

Crime Preparation

CL Article 22 defines “crime preparation” as “the preparation of the instruments or the creation of the conditions for a crime.” If the crime is still in the stages of preparation, the defendant may be given a mitigated punishment or be exempted from punishment.

Attempted Crime

CL Article 23 defines “attempted crime” as “a case where an offender has already started to commit a crime but is prevented from completing it for reasons independent of his will.” An offender who attempts to commit a crime may be given a mitigated punishment or exempted from punishment.

Crime Discontinued

CL Article 24 defines “a crime discontinued” as “a case where, in the course of committing a crime, the offender voluntarily discontinues the crime or voluntarily and effectively prevents the consequences of the crime from occurring.” If the defendant discontinues the crime and does not cause any damage, he can be exempted from punishment; even if the defendant has caused some damage, he can still be given a mitigated punishment.

Is there anyone who should take more responsibility than the client for the alleged offense?

Does the defendant have any other co-defendants? If so, the defense lawyer must investigate the concrete role of every co-defendant to determine the actual role of the client. The lawyer needs to pay particular attention to joint crimes (CL Article 25: “A joint crime refers to an intentional crime committed by two or more persons jointly.”) and criminal groups (CL Article 26: “A criminal group refers to a relatively stable criminal organization formed by three or more persons for the purpose of committing crimes jointly.”):

Was your client the ringleader in the course of the crime? Did your client organize, plot, or direct/lead the criminal group or other co-defendants? Was your client playing an important role in the course of joint crimes? Was your client a ringleader (CL Article 97) or principle actor? CL Article 26 states that the organizer and principal leader of a criminal group shall be punished on the basis of all the crimes that the criminal group has committed. CL Article 26 further states that any principal criminal not included in Paragraph 3 shall be punished on the basis of all the crimes that he participates in or that he organizes or directs.

Did your client instigate others to commit a crime? CL Article 29 regulates, “anyone who instigates another to commit a crime shall be punished according to the role he plays in a joint crime. Anyone who instigates a person under the age of 18 to commit a crime shall be given a heavier punishment. If the instigated person has not committed the instigated crime, the instigator may be given a lighter or mitigated punishment.”

Did your client play a secondary role in the course of the preparation and commission of the crime?

CL Article 27 states: “An accomplice refers to any person who plays a secondary or auxiliary role in a joint crime. An accomplice shall be given a lighter or mitigated punishment or be exempted from punishment.”

CL Article 29 states: "If the instigated person has not committed the instigated crime, the instigator may be given a lighter or mitigated punishment."

Is your client eligible for a lighter or mitigated punishment?

The court can be allowed to give the defendant a mitigated punishment or exempt him from punishment under some circumstances according to law. CL Article 63 regulates, "In cases where the circumstances of a crime call for a mitigated punishment under the provisions of this Law, the criminal shall be sentenced to a punishment less than the prescribed punishment." The following regulations of CL are concerned with a mitigated punishment:

Article 17: If a person who has reached the age of 14 but not the age of 18 commits a crime, he shall be given a lighter or mitigated punishment.

Article 18: If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment.

Article 19: Any deaf-mute or blind person who commits a crime may be given a lighter or mitigated punishment or be exempted from punishment.

Article 20: If a person's act of justifiable defense obviously exceeds the limits of necessity and causes serious damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment.

Article 21: If the act committed by a person in an emergency to avert danger exceeds the limits of necessity and causes undue damage, he shall bear criminal responsibility; however, he shall be given a mitigated punishment or be exempted from punishment.

Article 22: An offender who prepares for a crime, in comparison with one who completes the crime, may be given a lighter or mitigated punishment or be exempted from punishment.

Article 23: An offender who attempts to commit a crime, in comparison with one who completes the crime, may be given a lighter or mitigated punishment.

Article 24: An offender who discontinues a crime shall, if no damage is caused, be exempted from punishment or, if any damage is caused, be given a mitigated punishment.

Article 27: An accomplice shall be given a lighter or mitigated punishment or be exempted from punishment.

Article 28: Anyone who is coerced to participate in a crime shall be given a mitigated punishment or be exempted from punishment in the light of the circumstances of the crime he commits.

Article 29: If the instigated person has not committed the instigated crime, the instigator may be given a lighter or mitigated punishment.

Article 67: Voluntary surrender refers to the act of voluntarily giving oneself up to police and truthfully confessing one's crime after one has committed it. Any criminal who voluntarily surrenders may be given a lighter or mitigated punishment. Offenders whose crimes are relatively minor may be exempted from punishment.

Article 68: Any criminal who performs such meritorious services as exposing an offence committed by another that is verified through investigation, or producing important clues for solving other cases may be given a lighter or mitigated punishment. Any criminal who performs major meritorious services may be given a mitigated punishment or be exempted from punishment. Any criminal who not only voluntarily surrenders after committing the crime but also performs major meritorious services shall be given a mitigated punishment or be exempted from punishment.

Can the lawyer still seek a mitigated punishment for the client if there are no statutory specifications about mitigation?

Yes, CL Article 63 states, "In cases where the circumstances of a crime call for a mitigated punishment under the provisions of this Law, the criminal shall be sentenced to a punishment less than the prescribed punishment. In cases where the circumstances of a crime do not warrant a mitigated punishment under the provisions of this Law, however, in the light of the special circumstances of the case, and upon verification and approval of the Supreme People's Court, the criminal may still be sentenced to a punishment less than the prescribed punishment." Although the regulation does not specify a mitigated punishment, the defense lawyer can still obtain a mitigated punishment for his client by presenting convincing and persuasive evidence.

The following are some points of evidence that may help in obtaining a mitigated punishment:

1. The defendant does not have long-term criminal record.
2. The defendant has expressed sincere remorse and self-examination for having participated in the crime.
3. The defendant has compensated the victim for all his or her losses.
4. The defendant is still a minor and also wants to continue schooling; his school also allows him to continue enrollment.
5. The defendant needs to take care of elderly and young household members.
6. The defendant is mentally retarded and cannot sensibly make judgments, and is thus easily taken advantage of by others.
7. The defendant had a difficult childhood (for example, he was ill-treated at home) that has affected his long-term personal development.
8. The defendant has had to overcome great hardships that have tested his limits and abilities as a person (for instance, domestic violence, drug-addiction).
9. The defendant has good work experience or educational background, or has made significant contributions to society.
10. Any other mitigating circumstances about the defendant. The defense lawyer should think of any means to describe the defendant as pitiable and condonable.

In order to discover these points of evidence for a mitigated punishment, the defense lawyer must win the trust of the client, his family members, and other important persons in his life (such as his teacher or boss). The evidence for a mitigated punishment must form an important part of the theory of defense. When presenting the evidence for mitigated punishment in court, the defense lawyer does not need to conceal his own feelings. The defense lawyer's objective is for the court to see his client's more humane side and thereby to give him the opportunity for reform.

Conclusion

In the course of developing the theory of defense, the lawyer needs to carefully consider whether the prosecutor bears the burden of proof. Furthermore, after the conclusion of the investigation, the defense lawyer can judge whether the client's act constitutes a crime, whether there is any possibility that the client has a reasonable and legitimate defense, whether the client has actually completed the crime, whether the client is only an accessory, and whether there is evidence supporting mitigated punishment. Only after the analysis of the above questions can the defense lawyer present a complete, persuasive theory of defense in court.

EXPERT WITNESSES

Introduction

Chinese law allows the criminal defender to:

- Seek the court's permission to have an expert witness conduct an evaluation (CPL Article 119)
- Be notified by the investigation organ at the conclusion of an expert evaluation (CPL Article 121)
- Ask the court to have a new evaluation, auxiliary evaluation or supplementary evaluation conducted (CPL Articles 120, 121)
- Cross-examine expert witnesses at trial (CPL Article 156)
- Ask the court to have a new expert evaluation conducted during the trial (CPL Article 159)

Although expert witnesses have commonly been used in civil cases in China, they are now being used more frequently in criminal cases. The following information offers suggestions for the criminal defense lawyer on when to retain an expert, what types of cases usually require expert assistance, and how to challenge expert evaluations that are suspect.

When should you consider retaining an expert witness?

The criminal defender should secure the assistance of experts where it is necessary in order to:

1. Prepare a defense;
2. Understand the prosecution's evidence;
3. Rebut the prosecution's evidence;
4. Investigate the client's ability to commit the alleged offense and his/her mental state at the time of the offense.

What kinds of issues require expert assistance?

According to CPL Article 119, "when certain special problems relating to a case need to be solved in order to clarify the circumstances of the case, experts shall be assigned or invited to give their evaluations." Although Article 119 does not

define “certain special problems,” expert assistance usually can explain complex issues that the average person would have trouble understanding.

Possible issues for expert evaluations include, but are not limited to: forensic evaluation, medical evaluation of bodily injuries, medical evaluation of mental illness, monetary evaluation of objects, antique appraisals, evaluation of rare plants and animals and products made from them, evaluation of banned objects and hazardous objects, and evaluation of electrical data. With permission from the People’s Court, judicial evaluation agencies can conduct examinations on evidence materials such as investigation reports, medical records, and accounting records, etc.

Therefore, it is a good idea to seek expert assistance in cases where the cause of the victim’s death or injuries is uncertain or disputed, where the defendant’s mental health is in issue, and also in cases involving questions about the value of items stolen, the authenticity of documents or records, the chemical composition of drugs or other substances, the cause of a suspicious fire, accident or other event, the source of blood, semen, other bodily fluids, hair, fibers or fingerprints, as well as *any* case where an expert witness can help the court to understand the issues presented.

Should you retain a testifying expert witness or a consulting expert witness?

Before making this decision, it is important to understand the difference between these two types of witnesses. Testifying experts are expert witnesses who will actually appear in court and testify for the defense or whose evaluation results the defense plans to present to the court. The criminal defender must seek and obtain the court’s permission to be able to present the witness or any of his findings to the court. The defense lawyer can simultaneously ask the court for permission to retain the witness and for a continuance of the trial to allow the expert sufficient time to conduct his evaluation.

A consulting expert, on the other hand, is an expert witness who assists the criminal defender in understanding the case’s complex issues or details but who does not testify in court. The criminal defender does not need the court’s permission to confer with a consulting expert witness. How then can a consulting expert assist the criminal defender?

1. By helping to develop the defense theory for the case and to create a narrative that integrates the pieces of the story in a persuasive way.
2. By assisting the criminal defender in excluding unnecessary information that may derail the defense theory or result in the presentation of an overly complex case to the court (the expert assists in making the

presentation of expert testimony to the court informative and persuasive but not overly complicated).

3. By helping the criminal defender to develop a streamlined argument and preventing the defense from presenting too many expert witnesses or too much complex expert testimony.
4. By assisting the criminal defender in selecting a competent expert witness or witnesses who will testify well and be able to tell the defendant's story in a manner that is persuasive but not overly complex.
5. By assisting the criminal defender in developing good working relationships with other experts in the same or related fields.
6. By helping the criminal defender critically assess and develop arguments illustrating the weaknesses and logical inconsistencies in the evaluations conducted by the prosecution's expert witnesses.

For legal aid attorneys, the best places to find experts (whether they are testifying or consulting expert witnesses) are academic settings, i.e., from among the faculty of research and training universities.

What factors should you consider when choosing an expert witness?

There are many criteria to consider, but the fundamental principle is that as a scientist, the expert witness should focus on the process and sequence of events in the case, rather than the results. The defense lawyer should consider the following issues when deciding whether someone has the professional qualifications and experience to be retained as an expert witness:

- Does the witness have sufficient education and experience in the specialized area to be considered an expert?
- What is the witness's professional reputation? How well-respected is he by other experts in the same field?
- What kind of expert witnesses does your case need? What are the different fields that need to be addressed?
- Is the witness still receiving education?
- How much time does the witness normally spend on his profession? Besides his work in his area of expertise, does he hold any other job?
- Has the witness previously provided expert testimony for the defendant, victim or others? Is this testimony consistent or inconsistent with the issues in your case?

The defense lawyer is not a scientist and therefore cannot be expected to have the specialized expertise of the expert witness. Nevertheless, the lawyer should adhere to objective standards and to the requirement that the expert witness's conclusions must be scientific, objective, and persuasive.

Do you need the court's permission to retain an expert witness?

As previously mentioned, you need to obtain the court's permission to retain a testifying expert (an expert who you want to testify at trial or whose evaluation results you want to introduce during the trial). If, however, you just want to understand the issues in your case, you can confer with a consulting expert without having to seek and obtain court approval.

Can the court order an evaluation to be conducted?

Yes. CPL Article 119 authorizes the court to order an evaluation "when certain special problems relating to a case need to be solved in order to clarify the circumstances of the case." Additionally, CPL Article 158 allows the court to conduct an expert evaluation "when carrying out investigation to verify evidence;" this article applies in situations when the collegial panel adjourns a court hearing because it has doubts about the evidence.

The newly passed changes of decisions about evaluation:

The 14th Meeting of the standing committee of the 10th National People's Congress passed *Decision of the Standing Committee of the National People's Congress on the Administration of Judicial Authentication* on Feb 28, 2005. It stipulates that "Judicial evaluation is conducted in a lawsuit by the expert witness employing scientific technology or special knowledge to evaluate, judge and provide evaluation conclusions on the special problems relating to the lawsuit."

The *Decision* has further stipulations on administrative organs, personnel conditions (expert qualifications), and procedure for registration management procedure. The lawyer should ensure that the retained expert is qualified according to *Decision*. Note in particular:

- Only three types of items are thus far allowed to be evaluated: medical evaluations, material evidence, and audiovisual materials.
- The investigative organs/departments (whose purpose is to conduct investigation work) are forbidden to be socially entrusted with judicial evaluation work. The People's Court and Judicial Administrative Departments cannot set up judicial evaluation organs.
- The judicial evaluation organs/departments are not subject to each other, nor should they be geographically confined when entrusted with judicial evaluation work. The expert witness should practice within a judicial evaluation organ.

- In a legal proceeding, the items up for evaluation should be given to an expert witness from the list of recognized expert witnesses (i.e. the expert witness register) to evaluate.
- The expert witness should withdraw according to the stipulations of the CPL. If the litigant raises objections to the conclusion of the expert's evaluation, then under notice of the People's Court according to law, the expert witness may be asked to testify in court.

Can you challenge the results of a court-ordered evaluation or an evaluation authorized by the prosecution?

Yes. Several options are available to a criminal defender seeking to challenge the results of a court-ordered or prosecution evaluation:

1. Rejection of evaluation request: The commissioning party should be held responsible for any faulty evaluation conclusions as a result of the presentation of false or incomplete evaluation materials. Additionally, CPL Article 120 provides that "if an expert intentionally makes a false verification, he shall assume legal responsibility."
2. Repeat evaluation: CPL Article 121 allows a repeat evaluation if the following circumstances occur with respect to the first evaluation:
 - The initial evaluator did not have the relevant qualifications for conducting such evaluations, or the judicial evaluation agency or evaluator exceeded its/his scope of business or licensed work to conduct the evaluation.
 - The first evaluation procedure did not comply with the relevant laws.
 - The original evaluation conclusion contradicts other evidence.
 - The materials presented for evaluation were false or untrue.
 - The standards, methods or equipments used in the original evaluation were inappropriate, resulting in unscientific and inaccurate conclusions of the original evaluation conclusion.
 - The original evaluator had a conflict of interest, and there are people raising doubts about his evaluation conclusions.
 - The original evaluator resulted in an incorrect evaluation conclusion.
 - There are different evaluation conclusions for the same case.
 - There is evidence that other elements influenced the accuracy of the evaluation.

Materials presented for repeat evaluation must be the same as those used in the first evaluation. When different materials are evaluated, this should not be regarded as a repeat evaluation. All repeat evaluations can be

conducted by the original evaluation agency, except for evaluations described above in the first category (the agency chosen was inappropriate) in which case it should be conducted by other agencies.

3. Supplementary evaluation: CPL Article 121 authorizes supplementary evaluations. These evaluations should be conducted when new materials for evaluation have been found or when something was improperly excluded from the original evaluated items.

Conclusion

Expert witnesses can provide valuable assistance to criminal defenders by helping them to understand complex scientific, valuation, authenticity and other highly specialized issues and by assisting them in putting this complex information into a format that is both persuasive and easy to understand. Additionally, experts can help criminal defenders critically assess the weaknesses in the prosecution's evidence and create a defense theory that will successfully refute it. Expert witnesses should be regarded as vital members of the defense team in any case where their knowledge, education and experience can be utilized to explain why the prosecution's version of events is incorrect.

QUESTIONING THE WITNESSES

PROSECUTION WITNESS EVALUATION

Legal Background

Chinese law allows the criminal defender to:

1. Conduct an independent investigation to verify the evidence collected by the public security organ and prosecution (CPL Article 37)
2. Cross-examine the prosecution's witnesses (CPL Article 47, 156)
3. Use evidence to impeach the prosecution's witnesses (CPL Article 157, 159, 160)

This form will assist you to evaluate and prepare your defense against the statements of the prosecutor's witnesses.

Name of Witness:

Analysis

List the reasons why this witness helps the prosecutor prove the crime charged.

List the reasons this witness's testimony will hurt the defense of your client.

List the reasons (if any) this witness will help the defense of your client.

List the ways (if any) in which this witness's testimony is inconsistent with their previous statement, statements of other witnesses, the victim, defendant and co-defendants, and the evidence presented.

List the ways (if any) that this witness's testimony may be utilized to advance the defense attorney's theory of the case.

Pages in the case file where this witness appears:

Supporting Evidence

List the evidence to be used when asking this witness questions.

In case the prosecution witness changes their previous statements, the defense lawyer can use the following prompts:

You can ask the witness: "You previously said...", and the witness will in all likelihood say "yes," or argue with his or her previous statement. If the witness says "no," or contradicts his or her previous statement, you can:

- Refer to trial documents or other evidence:
- Call an already prepared defense witness to the stand to refute the prosecution witness' claim:

Sample Questions

Is this witness helping your case? If so, remember to:

1. Repeat the aspects of the witness' testimony that are helpful to your case during your questioning.

Example: "I want to make sure I heard your testimony correctly. Did you say that [helpful statement]?"

2. First ask the witness easy, supportive questions in order to make them comfortable, then you can ask more difficult or aggressive questions.

Examples (of easier, introductory questions):

- How many years have you been doing this? (if the witness is an expert witness, teacher, policeman, etc.)
- How well do you know the person?
- Are you the type of person who notices details?
- How good is your eyesight?
- How good was the lighting?

Is this witness against, or hurting, your case? If so, try to demonstrate inconsistencies and problems in their testimony. Examples:

- Is it true that you are friends with the victim?
- You didn't write down any of your observations at the time of the event?
- You did not speak with the police until many weeks after the alleged crime?

Your concluding question should be your strongest one, and one that:

1. You safely know the answer to, and
2. Whose answer supports your case.

Example: Isn't it true that my client called the police, and waited for them at the scene?

DEFENSE WITNESS EVALUATION

Legal Background

Chinese law allows the criminal defender to:

1. Conduct an independent investigation to verify the evidence collected by the public security organ and prosecution (CPL Article 37)
2. Cross-examine the prosecution's witnesses (CPL Article 47, 156)
3. Use evidence to impeach the prosecution's witnesses (CPL Article 157, 159, 160)

The following form serves as a guide to help you evaluate and prepare for the testimony of witnesses that may help your case.

Defense Witness # _____

Name of Witness:

Address:

Phone number:

Family member(s):

Place of work:

Relationship to defendant (if any): _____

Reputation for honesty or dishonesty:

Capacity/mental health issues (if any): _____

Prior arrests/criminal convictions (including juvenile record):

Pages in the case file where this witness appears:

Prosecutor's evidence we need to discuss or explain:

1. description of crime scene
2. knowledge of complainant/victim
3. knowledge of prosecution witness
4. expert testimony on:
 - a. blood
 - b. tests by prosecution
 - c. reconstruction of the crime scene
 - d. victim's injuries/mental health status

Defense evidence to identify or admit:

1. knowledge of defendant's:
 - a. character
 - b. habits

- c. mental health status/limitations
 - d. physical health status/limitations
 - e. business practice
 - f. family
 2. knowledge of the crime scene
 3. alibi evidence
 4. new evidence, such as:
 - a. scientific testing
 - b. diagrams
 - c. reconstruction of the crime scene
 - d. results of mental health evaluation of defendant
 5. When preparing questions, remember to consider how each witness's testimony can be developed to advance the defense attorney's theory of the case.
-

PREPARING FOR THE PROSECUTION TO QUESTION YOUR CLIENT

1. The theory of most prosecution questions promotes the following false logic:
 - a. Story has changed from the original account or is different from the police's account,
 - b. The defendant is lying, and so therefore,
 - c. He must have committed the crime.
2. Prepare your client for the prosecutor's tone.
3. Your client should answer the prosecutor as he or she answered you, with the same voice inflection, the same eye contact, and a body language that indicates they are telling the truth.
4. Approach expert questions that produce damaging evidence carefully. These questions must be answered directly by the defendant, with no attempt to either evade or explain. The defendant's body language must not convey any effort to evade touchy questions.

Evasion makes the client look untruthful.

Explanations can become opportunities for a prosecutor to start tearing holes in the defendant's account.

Therefore, let the client know that you can return to these issues during re-questioning and clean up some damage. During re-questioning, be sure to ask questions that will advance your theory of the case.

5. If the defendant does not know the answer, he or she should not be afraid to say "I don't know." This may be especially important if a prosecutor tries to make your client admit to a certain number, or quantity:

A prosecutor will try to show that your client incorrect about something, anything at all: A frequent trick is to ask how *long* the red light lasted, how *many* meters it was across the room, or how *many* beers were consumed, etc.

Even if the defendant first says that he or she does not know, the prosecutor may badger them to assent to an *estimate*, or a *range*.

QUESTIONING WITNESSES DURING TRIAL

1. Start with simple background questions to put them at ease. Examples:

What is your....

Name

Place of Birth

Work history

2. Ask a few "foundation" questions about the witness; they can be general but should be *consistent with the main testimony*. Examples:
 - If the main testimony is about a character trait or habit of the someone connected to the case, ask how long they've known the person.
 - If the testimony is mainly about neighborhood layout or traffic, ask how long they've lived there, or how good the lighting is.
 - If the testimony is an expert opinion, ask how many and what types of materials the expert reviewed before coming to a conclusion. How much time did he spend on the review? Who did he interview?
3. Ask the "main" questions clearly and understandably.

GO SLOW. BE CLEAR. Witnesses get nervous up on the witness stand. There is a significant chance that your question will be confusing, even if you have discussed it ahead of time. There is a very real risk of getting an answer you do not want.

4. Phrase the main questions you ask each witness in a way that will advance the defense theory of the case.
 5. If there is evidence that hurts your defendant, bring it out before the prosecutor's questioning. Examples:
 - Tell us why you did not talk with the police before coming here.
 - Tell us why you're saying this today, but said something different earlier.
 - Tell the judge, please, why you didn't go to the police and explain this alibi the day your husband was arrested.
-

DIRECT AND CROSS-EXAMINATION

Introduction

CPL Articles 47 and 156 give criminal defenders the right to conduct direct and cross-examination of witnesses in criminal cases. CPL Articles 156, 157 and 160 give criminal defense attorneys the right to use evidence to impeach the prosecution's witnesses. The following information will assist criminal defenders in developing effective strategies for questioning witnesses.

Questions to Consider

Regardless of whether the criminal defender is preparing for direct or cross-examination, he should prepare his inquiry by answering the following questions:

1. What is the overall theory of the case?
2. How does this witness fit into the overall theory of the case?

3. How can you fit this witness's story into the story that has already been told and the story that will be told after this witness testifies?
4. How will the witness's testimony help you to develop your client's story? To counter the prosecutor's story?
5. What evidence do you need to introduce or rely on during direct examination? During cross-examination?
6. What evidence will the prosecutor rely on during direct examination? During cross-examination? What questions can you ask or what evidence can you use to counter the prosecutor's evidence?

Purpose of Direct and Cross Examination

Although the criminal defender should ask the six questions listed above when preparing for either direct or cross-examination, he should be aware that direct and-cross examination have very different purposes and techniques.

Direct examination requires the witness to tell a story. The goal of direct examination is for the criminal defender to elicit the witness's story in the witness's own words in a manner that will advance the overall theory of the case.

Cross-examination, on the other hand, is a selective, targeted attack on the prosecutor's theory of the case. It is not simply rehashing the testimony that was developed during the direct examination of the witness. The criminal defender seeks to develop points that will show that the witness's testimony is inconsistent with other testimony or evidence; that the witness is biased against the defendant; that the witness has a motive to testify against the defendant; that the witness (if he is a co-defendant) had the opportunity to commit the crime; that the witness lacks knowledge of the facts and the evidence in the case; and that the witness was unable to see, hear, perceive, and observe the major events in the case.

Types of Questions to Ask during Direct and Cross-Examination

Open-ended questions: Since the purpose of direct examination is to have the witness tell a story in narrative form, the criminal defender should ask questions beginning with words that are intended to elicit information from the witness, such as *who, what, where, when, why, how, describe, explain*. Asking these types of questions requires a witness to do more than simply answer yes or no.

Examples:

- When you arrived at the bar, what did you see?
- Can you tell us how the fight began?
- Who did you see at the bar? What were they doing? What happened next?

Closed-ended questions: Closed-ended questions require the witness to answer yes, no or as briefly as possible; therefore, the criminal defender should avoid asking these types of questions on direct examination and should ask closed-ended questions during cross-examination. Examples:

- Was the bar crowded the night that the fight occurred?
- Who threw the first punch—the victim or the defendant?
- Were you still there when the fight ended?

Words Never to Use during Cross-Examination

Criminal defenders should NEVER ask *who, what, where, when, why, how, describe and explain* during cross-examination. These are words requiring explanation that you do not want to elicit during cross-examination. The goal of cross-examination is to target the prosecutor's case and to advance the defendant's theory of the case without giving the witness an opportunity to explain their answers. You want the witness to agree with your version of events, not to develop their own.

What if the judge does not allow you to cross-examine the witness?

If the judge does not allow you to cross-examine the witness, you can refer to the CPL's provisions for cross-examinations. Politely remind the court that Article 58 in *Explanations on some Issues in Administering Criminal Procedure Law of the People's Republic of China* specifically states that only through the defense lawyer's cross-examination can any evidence be considered as a basis for deciding a case, and not otherwise.

How to Prepare Your Client and Other Witnesses

1. Communicate your theory of the case to the client or other witness. Explain how their testimony advances the theory of the case and refutes the prosecutor's version of events.
2. Prepare your client and other witnesses for both direct and cross-examination.

3. Prepare your questions for both direct and cross-examination. Remember to begin with broader, more general questions at first and more specific, detailed questions as the examination proceeds. Be sure to save your strongest/best points for the end of your examination. Do not ask a question for which you do not know the answer.
4. Role-play with your client or other witness. Prepare them for the prosecutor's tone, questions the prosecutor will ask, and evidence the prosecutor will use.
5. Advise your client or other witness to listen carefully to the question that is being asked, regardless of whether you or the prosecutor is doing the questioning. Make sure the client or other witness understands that they need to concentrate on answering the question that is actually asked and that they should not provide information that they have not been asked to give.
6. If the client or other witness truthfully does not know the answer to a question, he should say "I don't know" instead of guessing or speculating.
7. Reassure the client or other witness that they will have the opportunity to clarify any matters that need clarification during direct re-examination.

Conclusion

Developing effective direct and cross-examination skills takes persistence, patience and most of all, practice, practice, practice! By developing a comprehensive theory of the case and structuring your direct and cross-examination questions in a manner that advances your theory, you will be able to persuasively argue your client's case to the court.

DEFENSE OF SPECIAL CASES

SPECIAL CONSIDERATIONS IN JUVENILE CASES

Introduction

Representing children is a specialized area of criminal defense work and juvenile cases often constitute a significant percentage of a legal aid lawyer's caseload. CPL Article 34 states that if the defendant is a minor and no one has been entrusted to defend him "the People's Court shall designate a lawyer that is obligated to provide legal aid to serve as a defender." The purpose of this section is to address some of the unique issues that may arise when representing juvenile defendants.

Who is the Client—Parent or Child?

One of the most common issues that may arise when representing a juvenile client is a conflict of interest between the minor client and the client's parents. For example, the child may not be willing to express remorse for the crime while his parents insist that he must do so. When these types of situations occur, who does the criminal defender represent—the parents or the child?

The answer to this question is that the criminal defender represents the child. The criminal defender should inform all parties (including the parents) that he has been appointed by the court to represent the child. If there is a disagreement between the child and his parent or guardian, the attorney is required to serve exclusively the interests of the child. The lawyer should advise the parents that they should consider hiring an attorney who can represent their interests but emphasize that as the child's attorney, he cannot serve the parents' interests if they conflict with the child's interests. Because the child is the client, the lawyer must respect the child's confidentiality at all times.

Counseling the Child Client

A lawyer engaged in juvenile court representation often has occasion to counsel the client and, in some cases, the client's family with respect to non-legal matters. This responsibility is generally appropriate to the lawyer's role and should be discharged, as any other, to the best of the lawyer's training and ability.

The counsel must arrange for prompt and timely consultation with the client, in person, in an appropriate and private setting. The counsel should assure him/herself that the client is competent to participate in his/her representation, understands the charges, and has some basic comprehension of criminal procedure. The client must be given adequate time to fully apprise the counsel of the evidence and defenses in his/her case. The counsel must also arrange for prompt and thorough consultation with the parent or guardian, and this consultation should be within parameters established by the client.

Interviewing the Child Client

Interviewing child clients can be much more challenging than interviewing adults. The following list contains some suggestions that may make client interviews more effective.

1. Take some time to establish rapport with your child client. Let the client know that you care about what he thinks and what happens to him.
2. Keep your client informed. Children sometimes have a very different perception of time than adults do and what may not seem like a long time to an adult can seem to be a very long time to a child. Depending on the child, you may have to spend considerably more time communicating with him in person than you would with an adult client who is facing the same charges.
3. Use simple phrases—for example, “What happened?”
4. Use proper names and places instead of pronouns—for example, “What did Wang do?” instead of “What did he do?”
5. Use concrete nouns instead of abstract ones—for example “Internet café” instead of “place”.
6. Try to ask about one main idea in each question or to get the client to tell you about one main idea in each answer that he gives you.
7. Avoid using negatives.
8. Avoid using legal words. Be sure to explain legal terms in simple words and phrases that the child can understand.
9. Listen carefully for possible miscommunications. If the child’s answers are inconsistent or do not make sense, you need to determine whether there is a problem with how you phrased the question, whether you assumed that the child has knowledge that he does not have, or whether the child is interpreting the question literally.
10. Make sure that you and the child give the same meanings to words. If you are not sure, ask the child what he means when he uses a word in a way that makes the word’s meaning unclear.

11. Avoid asking the child about abstract concepts and asking the child questions of belief.
12. Let the client tell you his story in his own words. Ask simple follow-up questions to make sure that you understand the child's meaning.
13. Encourage the child to tell the truth, even if it means that he implicates co-defendants. Children can be very loyal to their friends even when their friends do not deserve it and may be reluctant to discuss a co-defendant's role in a crime. Gently advise the child that the co-defendant friend will probably not be as loyal to the child. Also, remind the child that he must tell the truth and that telling the truth may enable him to seek a mitigated punishment such as suspended sentence.
14. Remind the child that he must not discuss the case with anyone except you and the authorities. This includes speaking about the case with his family members, potential witnesses, friends and co-defendants.

Investigating the Case

It is the duty of the lawyer to conduct a prompt investigation into the circumstances surrounding the case, and to explore all avenues that might uncover information about who should bear responsibility for the alleged acts and conditions. The investigation should always involve efforts to secure information in the possession of prosecution, law enforcement, education, and other authorities. The defense lawyer has a duty to investigate regardless of the client's admissions, statements of fact establishing responsibility for the alleged acts, or any stated desire by the client to admit responsibility for those acts.

Conducting a thorough investigation and developing a theory of the case that focuses on both the crime and the resolution of the case is especially critical when representing a child. Children frequently believe that if they maintain their innocence, do not admit responsibility, and evade punishment that they are lying or being dishonest. The criminal defender must explain to the client that the prosecution has the burden of proving that the facts are clear and that the evidence is reliable and sufficient before the People's Court can find him guilty of committing the offense. (CPL Article 162).

Another important thing to remember when investigating a juvenile case is that the Criminal Law states that children who are between the ages of 14 and 17 "shall be given a lighter or mitigated punishment" (CL Article 17). This means that even children who commit serious crimes are entitled to receive a lighter or mitigated punishment (CL Article 17). In developing the theory of the case, the

defense lawyer should thus present a comprehensive portrait of the client to the court so that it can fulfill its legal obligation to give the child a lighter or mitigated punishment.

Capacity

When representing a juvenile client, the criminal defender must always consider whether the child had the capacity to form the intent required to commit the crime with which he is charged. CL Article 17 makes 16 years the presumptive age at which children are old enough to face criminal responsibility for their actions. Article 17 also requires children who are 14 or 15 years old and who commit serious crimes such as intentional homicide, rape, robbery, drug-trafficking, arson, explosion or poisoning, or who intentionally hurt another person and cause serious injury or death to be held criminally responsible.

If the child is 16 or 17 years old or is a 14 or 15 year old juvenile who has committed a serious crime, the criminal defender must determine whether he was able to form the intent required to commit the alleged crime. Determining whether or not the child had sufficient capacity requires the evaluation of a mental health professional. Although the criminal defender can (and should) obtain a great deal of information about the child's mental limitations from interviewing the child's family members, doctors, and school officials, and by obtaining any records they may have, the criminal defender must also seek the court's permission to retain a mental health expert witness who can testify in court that the child lacked the capacity to form the requisite intent to commit the alleged offense.

The criminal defender should raise the capacity issue even if CL Article 17 states that the child is old enough to face criminal responsibility. Even if the child is old enough to be held criminally responsible for his actions, he may function at a much lower age level than other children of the same age because of mental retardation, developmental delays that occurred during early childhood, learning disabilities, or other cognitive impairments.

Drafting a Winning Mitigation Sentence Plan to Resolve Your Child Client's Case

The criminal defender representing a child client must always remember that children between the ages of 14 and 17 "shall be given a lighter or mitigated punishment" (CL Article 17). Children who are 14 and 15 years old and who have not committed serious crimes may even be able to avoid criminal punishment completely. In this situation, the court can order the head of the

child's family or the child's guardian to discipline him. The child may also be taken in by the government for rehabilitation (CL Article 17).

The criminal defender's objective is to make certain that the child receives the least severe possible punishment and that the setting in which the child is placed is the least restrictive alternative. For example, it is far less restrictive to have the child living at home with his family than for the government to take custody of him. Therefore, in designing a mitigation/sentencing plan, the criminal defender must persuade the court that the child will become a productive member of society if he is allowed to remain at home and to continue attending school.

When drafting a mitigation/sentencing plan to propose to the court, the criminal defender must consider the child's unique personal needs, attributes and limitations, the quality and quantity of family support that the child can reasonably expect to receive, whether the child has any sources of support in addition to his family members, the types of controls that would insure community safety without unnecessarily restricting the child, and alternative sanctions that might be effective. A partial list of options to consider includes:

1. **Living Arrangements**—Where and with whom will the child live during the period of court supervision? If remaining in the family home is not possible, are there other adult relatives or adult family friends who are willing and able to assume custody of the child? If the criminal defender proposes placing the child in another adult's home, he should provide some information to the court to prove that the proposed custodian is willing and able to assume responsibility for the child.
2. **Geographic Relocation**—Removing the child from his current environment may be desirable in order to keep him away from a particular group of friends or to prevent him from encountering the victim on a regular basis. Are there adult relatives or friends living elsewhere who would be willing and able to assume custody? Again, the criminal defender must provide the court with information about any proposed adult custodians and assure the court that they are willing and able to properly supervise the child.
3. **Psychological Assessment or Treatment**—If psychological issues or addiction to drugs or alcohol contributed to the child's delinquent behavior, the criminal defender should propose that the child receive either inpatient or outpatient treatment, depending on the nature and severity of the child's problems.

4. **Community Service**—Having the child do meaningful volunteer work in the community can be a form of symbolic restitution, which may be appropriate if the child is not able to pay monetary restitution.
5. **Public Acknowledgement of the Crime**—CL Article 37 provides that if the circumstances of a person’s crime are minor and he is exempt from punishment, he may nevertheless be reprimanded, ordered to make a statement of repentance, or offer an apology. Public acknowledgement of the crime can be done in several different ways, such as placing an ad in the newspaper or posting a sign. Although the fact that juvenile court proceedings are usually not held in public (CPL Article 152) might preclude public acknowledgement, the criminal defender should consider whether it is a viable option.
6. **Contributions to Law Enforcement**—The criminal defender should consider whether the juvenile would benefit from working with members of local law enforcement and whether a local law enforcement agency would be willing to mentor the child client.
7. **Public Information Services**—The child client may be able to educate other teenagers, the general public and media representatives about what he has learned from his experience. For example, possible topics could include such issues as the dangers of substance abuse or being involved in a gang.
8. **Victim Restitution**—CPL Article 77 allows victims who have suffered material losses to file incidental civil actions. CL Article 37 states that individuals whose crimes are minor and who are exempt from punishment may still be ordered to compensate the victim for his losses. If applicable, a mitigation/sentencing plan should include a provision for compensating the victim. If it is not possible for the child client or his family to pay money to the victim, some sort of restitution that has special meaning for the victim should be proposed.
9. **Special Consideration for the Victim**—There is no reason that the child’s sentence should not take the victim’s needs into consideration. For example, in some cases, it may be appropriate to order the child to stay away from the victim. Other possibilities include requiring the child to make a statement of repentance or to apologize to the victim.
10. **Education**—A mitigation/sentencing plan must contain a plan for the child’s continued education. If the child is to be eligible to receive a

suspended sentence, he must continue to remain enrolled in and attending school pending the resolution of his case.

11. **Employment**—If the child is not enrolled in school, he should be employed if possible. The criminal defender should provide the court with information about who will supervise the child, his job duties, rate of compensation and work schedule.
12. **Letters of Support and Recommendation**—A mitigation/sentencing plan needs to provide the court with information about sources of support in the community for the child, including family members, friends, employers, teachers and other individuals. Letters must be consistent with the overall strategy being presented to the court.

Suspended Sentences and Keeping Your Child Client in School Pending the Resolution of His Case

In addition to the items listed above, another important element in a comprehensive mitigation/sentencing plan may be a proposal to suspend the child client's sentence.

A delinquent minor can get a suspension of sentence under certain circumstances, as stipulated by CL Article 72:

1. Legal conditions:
 - The defendant must have received a sentence of criminal detention or of fixed-term imprisonment of not more than three years,
 - The defendant must demonstrate his repentance.
 - Applying a suspended sentence will not result in further harm to society.
2. Conditions pertaining to the defendant:
 - The delinquent minor must be a first-time and causal offender in order to obtain a suspension of his sentence.
 - The delinquent minor has either committed a crime that is not serious in nature and consequence, or has committed a crime that is serious in nature and consequence but was only an accessory or played a secondary or supplemental role in the crime.

The delinquent minor must acknowledge, admit, and repent his crime in an honest and frank manner. Suspensions of sentences will not be granted to those minors who refuse to admit their crimes after committing them.

3. Family conditions:

- The parents of the minor must have the capabilities and provide the conditions to educate and discipline the minor.

4. Social conditions:

- According to CL Article 76, a criminal for whom a sentence suspension has been pronounced is to be observed by the public security organ during his probation period, in coordination with his unit (*danwei*). Thus, besides the three types of conditions mentioned above, another condition for sentence suspension is that a school or unit will accept the delinquent minor as a student/member.

Note in particular:

- The school where the defendant was enrolled at the time of the crime may attempt to persuade the defendant to leave the school on the grounds that his presence is damaging to the school's reputation, or that "it is difficult to manage" the defendant.
- If the student does not agree to leave, he will likely be expelled from the school.
- The school may threaten the student or his legal representatives with entering negative records or reports in their personal files in order to get the student to voluntarily leave the school.
- The schools may use other methods to push the minor students out of the school.

Thus, if a minor student leaves school before being sentenced, he will likely lose his claim for a sentence suspension. Without the school's acceptance of the student's continued enrollment, and because it is unlikely that a convicted minor will find a unit (*danwei*) to accept him on short notice, a judge will most likely think that there is no suitable social institution that might cooperate with the public security organ in supervising the minor. Under these circumstances, it is therefore less likely that a judge will grant sentence suspension.

Hence, the defense lawyer of a delinquent minor should pay particular attention to this issue. The following are some strategies for addressing this problem:

- The defense lawyer can inform the client and his legal guardian of Article 44 of the Law on Prevention of Juvenile Delinquency of the People's Republic of China, which states that a minor who is a defendant in a criminal case cannot have his status as a student revoked before the ruling of the people's court takes effect. The lawyer should emphasize that the defendant has the right to get an education, and that continued education is especially important for a student with a criminal record. Again, student status is a very important condition for the people's court to grant a suspension of sentence. Thus, if the school tries to persuade the student to leave, this should be refused firmly; if the student is expelled, the school should be sued for violation of law.
- A defense lawyer should use this provision to actively coordinate with relevant authorities and to do his utmost to safeguard the minor defendant's legitimate rights and interests under the law. The lawyer should pay special attention to these issues; they are in fact an indispensable part of preparing a defense in a case, besides being a necessary condition for getting a suspension of sentence for the client.

Conclusion

Representing juvenile clients is a specialized area of criminal defense, requiring criminal defenders to utilize unique interviewing, counseling, and investigative skills. Juvenile cases provide criminal defenders with the opportunity to think creatively and to act as role models for children who may not have any other positive relationships with adults in their lives. Although challenging, representing children well can also be extremely rewarding because it provides the criminal defender with the chance to make a difference in the life of a child.

CASES INVOLVING A POSSIBLE DEATH PENALTY

Introduction

There is no denying that it is most difficult and challenging for the legal aid lawyer to defend a client who is likely to be sentenced to death. Death penalty

cases are usually entrusted to the legal aid lawyer. CPL Article 34 regulates, "If there is the possibility that the defendant may be sentenced to death and yet he has not entrusted anyone to be his defender, the People's Court shall designate a lawyer that is obliged to provide legal aid to serve as a defender." In death penalty cases, the legal aid lawyer must not only help the defendant confront the dire situation, but may also himself suffer the hostility of the defendant's family members, other lawyers, government officials, the mass media, or even the society at large. The purpose of this section is to provide legal aid lawyers with some strategies of defense for death penalty cases that will help them persuade the court to grant the client his or her life.

Could the defendant possibly be sentenced to death?

According to CL Article 49, "The death penalty shall not be imposed on persons who have not reached the age of 18 at the time the crime is committed or on women who are pregnant at the time of trial." In addition, the legal aid lawyer should make a careful analysis of the defendant to judge whether the defendant should bear the criminal responsibility, be given a mitigated punishment, or even be exempted from punishment. For example, CL Articles 18 and 19 stipulate, "If a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility," and, "If a mental patient who has not completely lost the ability of recognizing or controlling his own conduct commits a crime, he shall bear criminal responsibility; however, he may be given a lighter or mitigated punishment." Furthermore, "Any deaf-mute or blind person who commits a crime may be given a lighter or mitigated punishment or be exempted from punishment." CL Article 5 stipulates, "The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender." Therefore, the legal aid lawyer should first determine whether the defendant should bear criminal responsibility. The answer to this question will have a significant impact on the investigation, procurement of evidence, and defense in court regarding the alleged crime.

Could the defendant possibly be sentenced to death for the crime committed?

CL Article 48 states, "The death penalty shall only be applied to criminals who have committed extremely serious crimes;" this is the applicable maxim for the death penalty. If the crime committed by the defendant is not extremely serious, he is not supposed to be sentenced to death. The death penalty can only be applied in the following three circumstances:

1. The crime committed is extremely serious, for example, intentional crimes like (intentional) homicide, arson, rape, robbery and kidnapping which seriously endanger society.
2. The crime has resulted in very harmful consequences, for example, the death of many people, severe injury, or great loss of property.
3. The way in which the crime was committed was very brutal, for example, the accused resorted to especially cruel means to complete the crime.

Regardless of these circumstances, even in the case of intentional homicide, the court and the prosecutor should ideally not seek to sentence the accused to death. CL Article 232 provides many possible types of punishments, including fixed-term imprisonment of not less than ten years and life imprisonment. If the circumstances are relatively minor (this is especially possible and should be emphasized in cases involving issues of self-defense or family violence), the defendant might even be sentenced to fixed-term imprisonment of not less than three years but not more than ten years. CL Article 5 regulates that the degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender. In addition, CL Article 63 states, "In cases where the circumstances of a crime do not warrant a mitigated punishment under the provisions of this Law, in the light of the special circumstances of the case, the criminal may still be sentenced to a punishment less than the prescribed punishment." When the case largely involves external elements and considerations, such as family cases, the defender should take this regulation into consideration.

Why is the relationship between the legal aid lawyer and the defendant as well as his family members so important?

In the process of preparing and arguing a case, the legal aid lawyer should always keep close contact with the defendant. It is indispensable to maintain a good relationship with the defendant and his family members in order to conceive of and practice effective counsel. Of course, the confidentiality clause between the lawyer and the defendant is still valid and applicable to the relationship between the lawyer and the family members of the defendant.

The defendant and his family members are the chief sources of information for the legal aid lawyer to find out about the life of the defendant. If possible, the legal aid lawyer should immediately have an exhaustive talk with the defendant and his family members. Suggestions about this initial interview have been included in the chapter "Interview the family members of the defendant" of this handbook. An interview at the earliest possible stage will help the legal aid

lawyer collect the evidences needed for a mitigated punishment. A friendly lawyer-defendant and lawyer-defendant's family member relationship is of great help to the process of the case.

Although *the Criminal Procedure Law* of China does not comment on out-of-court settlements, precedence indicates that such consultation can arise in death penalty cases. Therefore, another reason for establishing a good relationship with the defendant and his family members is to find out any information that might mitigate the defendant's potential punishment in the early stages of the case. For example, suppose the defendant is a woman who suffers her husband's physical and mental abuse for years and who then kills him. According to CL Article 232, the circumstances of this murder are relatively minor and she should not be sentenced to death. The defendant and her family members may inform the legal aid lawyer of this background information, and the lawyer can make use of the information to persuade the procurator and judges outside of court (this is legal practice) not to employ the death penalty. Then, the legal aid lawyer can cooperate with the procurator to find a more appropriate punishment and persuade the court to adopt it.

What defending strategies are relatively effective in death penalty cases?

CPL Article 35 states, "The responsibility of a defender shall be to present, according to the facts and law, materials and opinions proving the innocence of the criminal suspect or defendant, the pettiness of his crime and the need for a mitigated punishment or exemption from criminal responsibility, thus safeguarding the lawful rights and interests of the criminal suspect or the defendant."

In death penalty cases, the legal aid lawyer aims to persuade the court that 1) The defendant is innocent; 2) Even if the defendant committed crimes, he should not bear criminal responsibility; 3) Even if the defendant committed crimes and should bear criminal responsibility, in the light of the true circumstances of the case, he should not be sentenced to death.

Whatever theory of defense the legal aid lawyer adopts, he should realize that it is sometimes a bit contradictory to try to prove the defendant's innocence and simultaneously help the defendant avoid the death penalty. Thus, the legal aid lawyer should attempt to resolve all the potential contradictions in the defense theory, endeavoring to prove the defendant innocent, as well as requesting a mitigated punishment for the defendant even if the court has found the defendant guilty.

The legal aid lawyer should first determine whether he can prove the defendant innocent. Some possible defense theories include, but are not limited to: proving an alibi (when there are reliable witnesses or material evidence); proving no capacity (i.e., the defendant did not have the capacity needed for committing the crime); demonstrating that the prosecutor relies on the unreliable eyewitnesses (e.g. eyewitnesses who could not or did not see the true circumstances of the crime); arguing that government officials, the victim, other defendants, or other people are attempting to frame the defendant.

If the defense lawyer cannot prove the defendant innocent, he should consider whether he can prove that the defendant shall not bear criminal responsibility. For example, according to CL Article 18, if a mental patient causes harmful consequences at a time when he is unable to recognize or control his own conduct, upon verification and confirmation through legal procedure, he shall not bear criminal responsibility. CL Article 14 states that only when the defendant “clearly knows that his act would possibly entail harmful consequences to society but [still] wishes or allows such consequences to occur, thus constituting a crime,” is he deemed to have committed an intentional crime. If there is any doubt about the mental state of the defendant at the time of the offense, the legal aid lawyer should immediately seek the evaluation of an expert. If there is evidence of a mental disorder, the legal aid lawyer should appeal to the court to allow the expert to testify at trial. The legal aid lawyer should also consult an expert on whether the prosecution’s or court’s evaluation of the defendant’s mental state is in accordance with CPL Article 120.

If the legal aid lawyer can neither prove the defendant innocent nor prove that the defendant should not bear criminal responsibility, he should then argue to his utmost ability for a mitigated punishment. (In fact, whatever defense theory he adopts, the legal aid lawyer should prepare a defense that argues for a mitigated punishment in case the court finds the defendant both guilty and bearing criminal responsibility.) CL Article 61 stipulates, “When sentencing a criminal, a punishment shall be meted out on the basis of the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this Law.” However, even if there are no special regulations in CL, in the light of the special circumstances of the case, and “upon verification and approval of the Supreme People’s Court,” the court may still give “a punishment less than the prescribed punishment” (CL Article 63).

A frequently employed defense strategy is to find fault with the victim. Ideally, the legal aid lawyer can prove that if the victim was not at fault, the defendant would not have reacted and committed the crime. For example, suppose that the defendant suffers from the “Maltreated Women Syndrome” because of the victim’s abuse. In this case, the legal aid lawyer needs to provide material

evidence to prove that the victim frequently hit the defendant. In addition, witness testimonies and other materials need to be provided to analyze the victim's character and the relationship between the victim and the defendant. The legal aid lawyer can investigate, for example, whether the defendant ever tried to divorce the victim; whether there are photos, medical reports, or other pieces of evidence concerning the defendant's bodily injuries; whether the victim has a criminal record, and so on. An expert should be retained to testify in court on the psychological effects of family violence and why an abused woman might not be able to leave her husband. The legal aid lawyer can present these facts surrounding the case within the limits of the law, and can find other individuals or organizations that have significant social influence and know the harm of family violence to support the defendant. The verdict of similar cases can be counted as secondary evidence, helping the lawyer to explain why the maltreated woman who revengefully killed her husband should not be sentenced to death. The legal aid lawyer can argue that because the defendant did not cause society serious harm, and because the victim had previously abused and incited the defendant, the defendant should be given a lighter punishment. (CL Articles 5, 61, 63, and 232)

How to Conduct Investigation in Death Penalty Cases

A trial is often a battle between different versions of a story, with the prosecutor's version almost always at odds with the defendant's version. The ideal theory of defense presents the defendant's statements as a coherent and credible account that connects the various facts of the case. The legal aid lawyer's defense theory also provides the basic train of thought for finding and presenting evidence and witnesses. Whatever defense theory the legal aid lawyer adopts, it cannot violate the truth or the law; at the same time, it should demonstrate contradictory pieces of evidence or logical inconsistencies in the prosecutor's opinions, explain and mitigate evidence that is unfavorable to the defendant, and describe the defendant as a person of flesh and blood who should not be sentenced to death for the crime committed.

When investigating death penalty cases, note the following in particular:

1. The legal aid lawyer should independently conduct an investigation and research the circumstances of the case and the possibility for a mitigated punishment. Once the lawyer takes up the case, he should immediately set out to do all above things tirelessly.
2. Regardless of the defendant's or others' admissions or statements that may indicate guilt on the part of the defendant, the lawyer should investigate the true circumstances of the case.

3. Even if at the beginning stage of the case, the defendant himself holds little hope of attaining a mitigated punishment, the lawyer should still investigate the possibility of a mitigated punishment, exhausting all available evidence, attempting to refute any evidence in support of death penalty, and appealing to the court for a mitigated punishment.
4. Sources of available and useful information include, but are not limited to:
 - Documents of indictment: try to obtain all the documents of indictment and analyze them according to the relevant laws. Consider the following:
 - a. The elements of the indictment, especially those which seem to support the death penalty;
 - b. The applicability of the death penalty, the alleged crime, and a feasible defense theory for the defendant;
 - c. any possibility of challenging the documents of indictment.
 - The defendant: After the legal aid lawyer takes the case, he should interview the defendant within 24 hours unless there is sufficient reason to delay. Even if delayed, the interview should be conducted as soon as possible. If possible, the lawyer should complete the following work by the first interview, or in that first interview (and if this is not possible, the work should be done as soon as possible in later interviews and investigations):
 - a. Obtain information about the process of indictment, notice whether the police infringed upon the defendant's rights in the course of investigation or indictment.
 - b. Obtain the following: information concerning the alleged crime, information on the mental state of the defendant, information about the laws and regulations concerning the death penalty and mitigated punishment.
 - c. Get information about the defendant that will need to be used in the sentencing stage of the trial, including but not limited to: medical reports (on mental or physical injury or illness, intoxication or drug-use, congenital deficiencies, etc.); educational background (performance, school reports, mental or learning disabilities); records of military service (type of military service, length, performance, special training); work and technical training (technical skills, performance, any circumstances that might hinder or affect work); family and social experiences (physical or

psychological maltreatment, sexual harassment); criminal record; re-education experiences (the supervision, education, training or treatment received); and any cultural influences.

- d. If the above information is private or confidential, try to exert influence on the relevant departments. Appeal to collect and employ the information.
 - e. Seek the names of other insiders, or find other sources of information to verify, explain, and expand the information you have.
- Looking for witnesses: the legal aid lawyer should meet some potential witnesses, including:
 - a. The eyewitnesses at the scene or other “insiders;”
 - b. Those who are acquainted with the defendant and are familiar with his life story. Their testimonies can help the lawyer determine whether the defendant would, in all probability, commit crimes. The testimonies can also help the lawyer identify potential arguments for a mitigated punishment or exemption from the death penalty.
 - c. The victim’s family members who oppose the death of the defendant (here, the lawyer needs to ask the court’s permission according to CPL Article 37). If the legal aid lawyer conducts such interviews of potential witnesses, he should attempt to do so in the presence of a third person. If necessary, the third person can appear in court as the defense’s witness.
 - The police and the prosecutor: the legal aid lawyer should try to obtain information from the prosecutor or the police.
 - Material evidence: If possible, the legal aid lawyer should collect the material evidence and the expert evaluation concerning conviction and sentencing from the police or investigation organs.
 - Scene: If possible, the legal aid lawyer should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).
 - Obtain expert assistance: The legal aid lawyer should secure the assistance of experts where it is necessary for:
 - a. The preparation of the defense;
 - b. Adequate understanding of the prosecution's case;
 - c. Rebuttal of the prosecution's case;
 - d. Applying for a mitigated punishment.

The expert helping with investigation and evaluation should work independently from the defense lawyer, and the conclusion should be kept confidential under the protection of law. The defense lawyer and his team should attempt to obtain the necessary information to the best of their abilities.

- Cases with similar circumstances and favorable verdicts for the defendant: the legal aid lawyer should find cases with similar circumstances for which the court rejected the death penalty. If necessary, the legal aid lawyer should seek help from other legal aid centers, professors of Criminal Law, or other individuals who know the death penalty well. The lawyer should cite these cases in his or her defense, and refer to CL Article 5 that states, "The degree of punishment shall be commensurate with the crime committed and the criminal responsibility to be borne by the offender."
- Communication with the court: Within the limits of the law, the legal aid lawyer should inform the court of the truth of the case and explain why the defendant should not be sentenced to death.
- Seek the help of other individuals or organizations: Within the limits of the law, the legal aid lawyer can consider seeking the help of the following organizations or their members: Women's Association, Labors' Association; the unit (*danwei*) of the defendant; other individuals or organizations that support of the defendant. If the defendant's experience is especially noteworthy, consider contacting and cooperating with media outlets that would sympathize with the defendant.

What evidence can be presented to persuade the court not to employ the death penalty?

In deciding which witnesses or pieces of evidence to employ in court, the legal aid lawyer should consider the following types of witnesses:

1. Those who are familiar with the defendant's life experiences and sympathize with the defendant, and are capable of exculpating the defendant from the crime or rebutting the prosecutor's evidences.
2. Experts who can provide medical, mental, sociological or other kinds of interpretations of the defendant's act; experts whose evaluations testify to the defendant's capacity for reform; experts who can rebut the expert evaluation provided by the prosecutor.
3. Those who have a basic understanding of how the death penalty is employed; those who are familiar with cases involving similar

circumstances in which the death penalty was not sought.

4. Family members and friends of the victim who object to sentencing the defendant to death.
5. In addition, the lawyer can consider whether the defendant should make a statement showing deep sorrow and pleading for his life to be spared. According to *Interpretation on Some Issues Concerning Implementing Criminal Procedure Law of the People's Republic of China*, Article 128, item 4, the defendant has the right to make a final statement after the end of argumentation in court. The legal aid lawyer, together with the defendant, should evaluate both the potential positive and negative effects of such a statement. If the lawyer and the defendant deem the statement advantageous, the lawyer should carefully prepare the defendant to deliver the statement. Such a statement should be sincere, sorrowful, and express the wish to bear the responsibility for the alleged offense.

The legal aid lawyer should provide the court with all and any evidence that would support a mitigated punishment, unless there are important reasons for not adopting this strategy. Depending on the circumstances of a particular case, the following types of evidences may be employed:

1. Medical report (mental or physical injury or illness, intoxication or drug-use, congenital deficiencies and so on);
2. Educational background (performance, school reports, mental or learning disabilities); opportunities or hardships
3. Record of military service (type of military service, length, performance, special training);
4. Work and technical training (technical skills, performance, any circumstances that might hinder work);
5. Family and social experiences (including the physical, psychological, or sexual abuse); any cultural influences; re-education record (including the supervision, education, training or treatment received);
6. Potentials to be educated and reformed;
7. Criminal record (especially when the defendant has little or no criminal record, or has record of only nonviolent crimes);
8. Expert evaluation concerning any of the above items.

The legal aid lawyer should consider any and all kinds of evidence that might support a mitigated punishment and submit this evidence to the court. The evidence might take the form of witnesses, a warrantor, reports (where possible, pointing out the informational or logical inconsistencies of the prosecutor's case, and the information that favors the defendant), letters, and national files.

The Prospects for Defense in Appeals Trials and for Review of the Death Penalty

As is well known, criminal procedure in death penalty cases in China has gradually improved; especially since the Supreme Court now has the right to review the death penalty in many cases. Recent interpretations of criminal procedure law regarding the appeal of death penalty cases indicate that lawyers, especially the legal aid lawyer, will play an even greater role in these cases.

On Dec. 7, 2005, the Supreme People's Court issued *Notice of the Supreme People's Court on Further Doing a Good Job in Opening Court Sessions to Hear Appeal Cases Involving Death Sentences*, which states that as of Jan. 1, 2006, the court shall open sessions and try cases in which the defendant has submitted important facts or evidence for appeal, making sure that the lawyers, key witnesses, and expert witnesses shall be present in court. In the spirit of the *Notice*, the defense lawyer in death penalty cases should try to file appeals ahead of time. The defense lawyer should present clear facts and evidence in these appeals, and should re-examine the case's evidence in the court session and there attempt to establish opportunities for his client to avoid the death sentence.

Although the defense lawyer in death penalty cases has no right to attend the review of the death penalty under current law, with the current procedural reform of the right for death penalty review, there is every reason to believe that defense lawyers will soon be granted the opportunity to participate in these reviews, either in person or through written argumentation. The defense lawyer, especially the legal aid lawyer, should make every effort to comprehend and familiarize himself with the key points in the counterplea, and as a long-term goal, to accumulate the experience necessary for defending death penalty cases. The defense lawyer should also conduct as much of a defense as is possible under the constraints of the law in death penalty reviews.

Conclusion

Although death penalty cases are the most challenging of all cases, the defense lawyer can still humanize the defendant's experience and present the court with a powerful argument for a mitigated sentence. To effectively defend the client in death penalty cases, the lawyer needs to conduct an investigation as soon as possible and utilize his or her patience, persistence, creativity in establishing a friendly relationship with the defendant and his family members. The lawyer's utmost objective to evoke empathy for the defendant; by presenting the case from the perspective of the defendant, the lawyer can convince the court to understand and even sympathize with the defendant's actions at the time of the offense.

