

# THE PRACTICE RISK OF DEFENCE LAWYERS AND ITS PREVENTION

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## ABSTRACT

*In recent years, China has paid increased attention to the role of defence lawyers in criminal proceedings. Defence lawyers play an irreplaceable role in establishing equal prosecution and safeguarding the rights of suspects and defendants. However, because of the particularities related to the practice of defence lawyers, the practice risk of defence lawyers has always been a major obstacle to the effective realization of defence. This paper discusses and studies the practice risk and prevention of defence lawyers. The main reasons for the practice risk of defence lawyers are the lack of legislation and the misunderstanding and prejudice of the public and public security organs towards defence lawyers. To guard against the present practice risks of defence lawyers, it is most important to perfect current laws, strengthen the protection of defence lawyers' rights and improve the status of defence lawyers.*

**Keywords:** Criminal Responsibility, Risk Cause, Risk Prevention and Control.

## INTRODUCTION

### I. The Practice Risk of Defence Lawyers

Herein, the term "risk" refers to the risk that may occur. More specifically, from the generation process of "risk", the term refers to the uncertainty in various fields in modern society. Generally, risk refers to the potential danger that may exist or will happen in the process of the creation and development of things. The characteristics of risk are universality, objectivity, loss, uncertainty and sociality. Marx pointed out that one of the basic characteristics of modern society is the unlimited openness to the future, rapid change and rapid uncertainty. There are risks in every aspect of modern social life, and there are also risks in the profession of law. A lawyer's practice risk refers to all the legal liabilities or consequences that a lawyer may suffer during his or her practice. The practice risk of defence lawyers refers to all the legal liabilities and consequences that defence lawyers may bear due to their practice behaviour in the process of representing criminal cases, including criminal liability, civil liability, personal safety risk, economic loss, reputational loss and so on. According to the risk of process, defence lawyer career risk can be divided into three types. The first type of risk refers to the practice process by which the lawyer follows the practising rules and legal regulations carefully. If he or she is unable to satisfy the parties, there is the risk of complaints to the Chinese Lawyers Association and the risk to personal safety from retaliation. The second type of risk refers to the chance of internal disciplinary punishment imposed by the Chinese Lawyers Association due to negligence in the course of practising that caused the party's interests to be damaged. The third type of risk refers to the civil liability, administrative liability and even criminal liability that the lawyer would bear in case of intentionally violating the principal-agent contract or taking illegal actions in order to win

the lawsuit.<sup>iii</sup> According to the causes of risks, the practice risks of defence lawyers can be divided into three categories: criminal violation risk, general violation risk and civil interest damage risk. In other words, the risk arising from the violation of criminal law by defence lawyers in their practice, the risk caused by the defence lawyer's violation of civil and administrative laws and regulations in the process of practising, and the risk of personal damage, property damage and reputation damage caused by the dissatisfaction of the litigant or personnel related to the case.

### ***i. The Risk of Violating Criminal Law***

According to the provisions of *Criminal Law of the People's Republic of China* and *The Law of Lawyers of the People's Republic of China*, there are primarily three types of criminal risks for defence lawyers in practice. The first is the risk of the defence lawyer committing perjury. Second, the defence lawyer may be suspected of violating the provisions, because of disclosing any information that shall not be disclosed in a case not tried in public in accordance with the law or divulging any state secret. Third, the defence lawyer may be suspected of the crime of bribery.

The first risk is mainly embodied in the crime of the defender and the law agent destroying evidence, forging evidence, obstructing testimony and helping to destroy and forge evidence, as stipulated in Article 306 of the *Criminal Law of the People's Republic of China*.<sup>iii</sup> There are two main reasons for this risk. On the one hand, evidence is the basis for ascertaining the facts of a case, and it is also an important basis for the judge to pass judgement according to the law. It is difficult to obtain the support of the judge if there is no evidence to prove the claim made by the defence lawyer in the lawsuit. Therefore, in order to achieve the purpose of defence, defence lawyers, regardless of the practice provisions, may help parties destroy or forge evidence or prevent, lure, or threaten witnesses regarding telling lies. As a result, the defence lawyers have violated criminal law. On the other hand, although the laws of our country regulate the evidence collection behaviour of defence lawyers, the provisions of perjury as related to defence lawyers are not specific enough; thus, the issue of how to identify such threatening and inducement behaviour is the key to identifying whether or not someone's behaviour constitutes perjury. However, threats and inducements themselves are abstract to a certain extent, which makes it easy for lawyers' technical inquiries to be regarded as inducements; thus, defence lawyers have to bear too much risk in criminal proceedings. At the same time, in the judicial practice, a criminal suspect or defendant may change their statement after meeting with the lawyer, and witness statements may change after the lawyer's intervention. The judiciary staff often thinks that the defence lawyers have coerced these individuals to change their statements or testimony. Then, the criminal suspect and defendant, in order to avoid being investigated for criminal responsibility and being considered as admitting guilt due to a bad attitude, will leave the responsibility of the retracting confession to the defence lawyer and claim that their actions are directed by the defence lawyer.

The risk of defence lawyers being accused of disclosing important information and evidentiary material and leaking state secrets is mainly reflected in the provision that

[i]. Jin Li (2017). *The Deepen Of The Reform Of The Lawyer System To Guard Against The Practice Risk Of Lawyer*, Journal of ChangChun Normal University. (01):57.

[ii]. Jin Li (2017). *The Deepen Of The Reform Of The Lawyer System To Guard Against The Practice Risk Of Lawyer*, Journal of ChangChun Normal University. (01):57.

[iii]. Criminal Law of the People's Republic of China (2017).306. Section2. Chapter VI.

regulates the crime of the disclosure of case information that should not be disclosed, according to Article 308 of the *Criminal Law of the People's Republic of China*.<sup>iv</sup> To achieve the purpose of defence, lawyers often disclose relevant information of the case to the media and the public. The media will report relevant information about the case on purpose, to arouse the attention of public opinion. Under the pressure of public opinion, the defence lawyers achieve the purpose of influencing the decision of the case. Theoretically speaking, when judicial organs hear cases, they should take facts as the basis and keep the law as the criterion. Public opinion should not and cannot become factors that affect the decision of cases. However, from the perspective of judicial practice, public opinion often affects the decision of a case to a certain extent. Facing the pressure of public opinion from all sides, the court may still be questioned by the public even if it follows the legal provisions, takes the facts as the basis, takes the law as the criterion and makes the judgement according to law. To reduce this pressure, the courts may inevitably go along with public opinion. The most typical case of a defence lawyer accused of leaking state secrets is that of a female lawyer in Henan Province, whose assistant handed the case file to a relative of the defendant; the relative copied it and lured the prosecution witness to change his testimony. The lawyer was prosecuted by the local public prosecution authority for the crime of leaking state secrets. At first, the lawyer was found guilty of leaking state secrets. After joint efforts from several parties, the female lawyer was acquitted. The case has sparked a debate about whether lawyers should give their case information to criminal suspects and defendants in custody when they meet the parties and about how lawyers should discuss the case with the parties and their relatives. Once the parties or their relatives disclose the case, the risk should be borne by the lawyer. The existence of this risk greatly affects the defence lawyer's defence activities.

The risk of defence lawyers being involved in bribery is mainly reflected in the provisions of Article 49 of the *Law of Lawyers of the People's Republic of China*.<sup>v</sup> If defence lawyers offer bribes to judges, prosecutors, arbitrators and other relevant staff members, introduce bribes or instigate or induce the parties to engage in bribery, and if the behaviour constitutes a crime, they shall be investigated for criminal responsibility according to the criminal law. Many lawyers, in order to obtain financial benefits and greater fame, bribe the public security officers or induce the parties or their families to bribe the judicial staff. In addition, some lawyers, in order to expand the source of cases, bribe government agencies, public institutions and other staff.

## **ii. The Risk of Violating the General Law**

The risk of violating the general law is the risk caused by defence lawyers' violation of administrative laws and regulations during their practice. It mainly refers to the administrative illegal acts stipulated in Articles 47, 48 and 49 of the *Law of Lawyers of the People's Republic of China*<sup>vi</sup> and the specific administrative illegal acts stipulated in Article 22 of the *Punishment Method for Illegal Acts of Lawyers and Law Firms*.<sup>vii</sup> There are five main formats in which defence lawyers can bear legal liability for violating administrative regulations: warning, fine, confiscation of illegal income, suspension of practice, and revocation of lawyer's practice certificate. The administrative illegal behaviour of the defence

[iv]. Criminal Law of the People's Republic of China (2017).308. Section2. Chapter VI.

[v]. Law of Lawyer of the People's Republic of China (2017). 49. Chapter VI.

[vi]. Law of Lawyer of the People's Republic of China (2017). 47.48.49. Chapter VI.

[vii]. Punishment Method for Illegal Acts of Lawyers and Law Firms (2010). 22. Chapter V.

lawyer is mainly because the lawyer violates the practice standard or violates the practice ethics. In practice, some defence lawyers will only pursue economic interests. For example, in order to win business, they may suggest that the client bribe the judicial staff or use their own relationship to meet the judicial staff in violation of the provisions. In addition, there are some defence lawyers who, in order to undertake business, use illegitimate means such as misleading, inducement or false promises. Some defence lawyers even deliberately conceal important facts or evidence related to the case for the purpose of litigation. These acts not only violate the practice standards of lawyers but also infringe on the interests of the clients and obstruct the normal operation of the judicial work of the state.

### **iii. The Risk of Damage to Civil Interests**

The risk of damage to civil interests mainly refers to the risk that defence lawyers may suffer civil liability and damage to their reputation due to various uncertain factors in the process of representing litigation cases. First, the signing of the commission contract between the defence lawyer and the client is a civil legal act, and there is naturally a risk of civil liability. The formation of civil liability of defence lawyers is mainly due to the civil liability that lawyers should bear for breaching entrusted contracts, practising illegally and causing losses to the parties due to fault. Defence lawyers must sign a commission contract with the client during the course of their practice. Once the lawyer violates the contract, there will be a risk of liability for breach of contract. In addition, lawyers will also be liable for infringement, which mainly occurs when lawyers fail to complete the entrusted matters in accordance with the agreement or the client's interests are damaged due to intentional or negligence. For example, a defence lawyer may, due to negligence, make an untimely appeal to the statute of limitations, may lose or damage main evidence that cannot be replaced, or may reveal client privacy. If the client or third party suffers a loss as a result, the lawyer must bear civil liability for his fault. Article 54 of the *Law of Lawyers of the People's Republic of China*<sup>viii</sup> stipulates that if a lawyer practises illegally or the client's interests are lost due to fault, then the law firm shall bear the liability for compensation and then recover from the lawyer with intentional or gross negligence. Article 46 of the *Measures for the Penalty of Lawyers and Law Firms for Illegal Act*<sup>ix</sup> makes the same provision. Second, there is the risk of reputational damage to the practice of defence lawyers. At present, in terms of the practice of defence lawyers, the reputational risk of defence lawyers is accompanied by the start of the client's commission to carry out legal services. For example, clients and defence witnesses may provide false evidence to lawyers or conceal facts when presenting facts, which will lead to unsatisfactory court trial results. However, the client often thinks that this is caused by the lawyer's failure to do his best and therefore asks the lawyer to refund the agency fee or reports to the relevant department that the lawyer has behaved illegally in his practice. Of course, there are also some lawyers whose reputation is affected due to their low professional level, poor ability to respond to the law, and lack of experience.

## **II. Reasons For the Practice Risk of Defence Lawyers**

The practice risk of defence lawyers is accompanied by their practice behaviours. This kind of risk is affected not only by the objective laws of the operation of things but also by social factors, institutional factors, and human factors. From the above analysis of the practice risk of defence lawyers, it can be seen that the existence of defence lawyers' practice risk is not only affected by the characteristics of the industry but also by the legislative, social and

[viii]. Law of Lawyer of the People's Republic of China (2017). 54. Chapter VI.

[ix]. Punishment Method for Illegal Acts of Lawyers and Law Firms (2010). 46. Chapter VI.

human aspects. This article mainly discusses the reasons for the practice risk of defence lawyers from the following three aspects.

**i. Legislative Aspect**

Inadequacy at the legislative level is an important reason for lawyer's practice risk, especially the risk of criminal liability. The most prominent type is the crime of perjury, as provided for in Article 306 of the *Criminal Law of the People's Republic of China*,<sup>x</sup> which is called "a sword hanging over the lawyer's head" by academics. The crime of perjury was originally formulated to ensure the normal conduct of criminal proceedings by the national judicial organs; however, in practice, it has become an important tool for the official abuse of the right of prosecution. On the one hand, the subject of the crime is directed to a lawyer. The subject of the crime is only a defence lawyer and a litigation agent, but in fact, the staff of the public prosecutor's office may commit acts of destruction or the falsification of evidence. On the other hand, the crime's constitutional elements are relatively vague, which makes it easy to be abused. Not only does the definition of "threat, inducement" in the crime not have a clear scope, but there is also no reasonable basis for the judgement of "changing testimony against facts".<sup>xi</sup> Generally, one cannot determine the facts of the case but can only pursue objective truth to the greatest extent. Therefore, when objective facts cannot be determined, how can they be contrary to facts? In addition, Article 44 of the *Criminal Procedure Law of the People's Republic of China*<sup>xii</sup> stipulates that the subject of the destruction or falsification of evidence is also limited to defence lawyers, but this should be a requirement that all participants in the lawsuit must follow. These regulations have increased the risk of lawyer practice. Of course, there are certain deficiencies in the laws regarding defence lawyers' practice. For example, the *Law of Lawyers of the People's Republic of China* simply stipulates that the legal rights of defence lawyers must be protected. Personal rights, defence rights, investigation and evidence collection rights of defence lawyers are protected in accordance with law, but these provisions are general and declarative. Regarding how these rights of defence lawyers are protected and how to remedy them if they are violated, there are no further provisions. The lack of legislation for defence lawyers' rights relief has increased the possibility of risk exposure for defence lawyers.

**ii. Social Aspects**

Since the establishment of the lawyer system in China, although people's recognition of lawyers has been greatly improved, the public still has some prejudice against the lawyer industry. In practice, the law consciousness of people is relatively weak; in addition, the low professional quality of some lawyers who always pursue their economic interests and violate professional ethics leads to the incorrect public opinion that "lawyers are to take people's money, for people to eliminate the disaster". In judicial practice, the defence lawyer is often regarded as the opposite of the judicial staff because of the different purposes and positions of the prosecution. In addition, the position of both sides of the prosecution and defence is unequal. As long as the defence lawyer's behaviour is slightly careless, the judicial organs will think the lawyer interferes with the handling of the case, and then the lawyer will be prosecuted. Once the lawyer is prosecuted by the judicial organ, the client will think that the defence lawyer must have partaken in illegal behaviour and damaged his own interests, which

[x]. Criminal Law of the People's Republic of China (2017). 306. Section2. Chapter VI.

[xi]. Ruihua Chen & Wenchang Tian (2016). *Chinese Experience in Criminal Defense*. Peking University Press. 323.

[xii]. Criminal Procedure Law of the People's Republic of China (2018).44. Chapter IV.



causes the public's prejudice against the defence lawyer to deepen. The more prejudice the public has against the defence lawyer, the more difficult it is for the defence lawyer to gain the trust of the client in the practice process. Once the trust is lacking, the defence work will encounter more obstacles, and the risk of the lawyer's practice will increase.

### ***iii. Human Aspect***

Human aspects are mainly discussed from the point of the defence lawyers themselves. There are certain risks in the lawyer profession, and the lawyer profession must be accessible to those who master specific knowledge. Most countries implement an access system for lawyers, which also shows the professionalism and particularity of the lawyer profession. However, if the defence lawyers do not have a high professional level and if they lack practical experience, there will be greater risks for them regarding the handling of litigation cases and conducting of criminal defence activities. Thus, related cases may not achieve due effect because of the lack of ability of these individuals. This ineptitude may even lead to some procedural negligence in the litigation process, due to the lack of professional knowledge and awareness of risk prevention of defence lawyers, which may damage the interests of the client. In addition, in order to achieve the effect of fame and wealth, some defence lawyers will not hesitate to take illegal actions or skirt the edge of the law to achieve their own defence purposes, such that their practice risk is further increased. Once such an incident is discovered, defence lawyers will take administrative responsibility or criminal responsibility.

## **III. Prevention and Control of Practice Risks of Defence Lawyers**

### ***i. Legislation Aspect***

For the prevention and control of the practice risk by defence lawyers, the crime related to defence lawyers in the Criminal Law of the People's Republic of China, especially the provision of Article 306 of that law,<sup>xiii</sup> should receive the most attention in the legislation. As discussed above, Article 306, "the crime of the defender and law agent destroying evidence, forging evidence, obstructing testimony and helping to destroy and forging evidence", is a sharp sword hanging over the head of the defence lawyer. The constitution of this crime is vague, the scope of the subject of the crime is unreasonable, and there is discrimination against defence lawyers. Therefore, this crime must be amended. First, the subject of the crime must include all the judicial personnel and civil subjects related to the criminal proceedings, since the defender and the agent ad litem may destroy or forge evidence, and other participants in the proceedings or the personnel related to the case may also destroy or forge evidence. Second, the constitutive conditions of the crime are uncertain, so it is necessary to further refine the constitutive elements of the crime and make them more specific. Examples include how to identify "enticing the witness to change the testimony against the facts", how to conduct a clear provision on the enticement, and how to set a specific standard for the judgement system against the facts. Otherwise, all the constitution of the crime is determined by the public prosecution, so the crime is likely to become a tool for the judicial staff to retaliate against the defence. In the regulation of the lawyer industry, the law should strengthen the rights protection and the right remedy of lawyers. It is important to pay attention to the lawyers' simultaneous practising rules and legal obligations and to strengthen the protection of defence lawyers' rights, especially the relief extended after the lawyer's rights are violated. Only in this way can one reduce the abnormal risk of a lawyer's practice.

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[xiii]. Criminal Law of the People's Republic of China (2017). 306. Section2. Chapter VI.

## ii. *Lawyers' Perspective*

There will be risks in any profession, and risks exist objectively. However, as practitioners of this industry, we can start with ourselves and strengthen our ability to deal with risks, which is an effective means by which to reduce the risks of practising. First, defence lawyers must enhance their legal awareness and strictly abide by the provisions of the law. There should not be a fluke mentality and lawyers should not be at the edge of legality. The practice of defence lawyers must be carried out in accordance with the law.<sup>xiv</sup> Second, defence lawyers must improve their professional level; only by strengthening their own quality can they improve their ability to control and prevent professional risks. At the same time, as long as the defence lawyers fulfil the requirements of the client, they can establish a good image and change the public's prejudice against defence lawyers. This process requires defence lawyers to understand their own position correctly, to abide by the practice norms strictly, and to improve their own professional quality and moral level. Finally, defence lawyers should handle their relationships with clients, criminal suspects and defendants appropriately. This is necessary not only to obtain the trust of the clients but also to avoid excessive trust of the clients, which is an important way to avoid the risk of practice. Otherwise, in the criminal proceedings, the defence lawyer is likely to be framed by his or her client or by case-related personnel for intentional purpose or negligence, thus causing legal risks.

## iii. *Form the Protection of the Rights of Defence Lawyers*

The duty of the defence lawyer is to safeguard the lawful interests of the criminal suspect and defendant and to assist the judicial organ in making an accurate and timely judgement. In the process of practice, the defence lawyer confronts the powerful public authority of the state. The position of both sides is naturally unequal, and the defence lawyer is always in a weak position. This requires us to pay more attention to the protection of the rights of defence lawyers and to realize the equal confrontation between the prosecution and defence. Therefore, the defence lawyer must be granted certain immunity, as far as possible, to avoid unnecessary practice risk. In this respect, we can learn from Anglo-American law systems. In the United Kingdom, the barrister enjoys absolute, unconditional immunity in criminal cases, whether the theory is relevant to the case or unrelated, malicious or not malicious. In the United States, the rules for the criminal liability of lawyers for falsifying and destroying evidence are very strict, and lawyers enjoy great immunity. Although Article 37 of the *Law of Lawyers of the People's Republic of China*<sup>xv</sup> provides for the immunity of lawyers' speech, the scope of the immunity of lawyers is too small and too general to protect the rights of defence lawyers effectively. First, the practice behaviour of defence lawyers not only involves the court trial stage, from the investigation procedure to the examination of the prosecution procedure and the trial procedure, but defence lawyers are also required to participate in the litigation activities, such as reviewing papers, investigating and collecting evidence, and meeting the parties. Therefore, the defence lawyers' immunity of speech should be consistent throughout the whole process of criminal proceedings. Second, we can learn from the British and American systems and establish immunity for lawyers regarding providing false evidence. Specifically, if the evidence provided or quoted by the defence lawyer is inconsistent with the facts, the criminal responsibility of the defence lawyer cannot be investigated unless there is definite evidence to prove that the defence lawyer has carried out an act of destroying or forging evidence.

## CONCLUSION

[xiv]. Meijie Guan (2001). *Practice Risk and Protection of Lawyers*. Hebei Law. 01:94.

[xv]. *Law of Lawyer of the People's Republic of China* (2017). Chapter IV.

The practice risk of defence lawyers is accompanied by their practice behaviors. This kind of risk is affected not only by the objective laws of the operation of things but also by social factors, institutional factors, and human factors. The main reasons for the practice risk of defence lawyers are the defects in the system, the lack of attention for the protection of defense lawyers' rights and their own professional qualities. Therefore, if we want to avoid the practice risk of defence lawyers effectively, we must have the pertinence consummation legislation, strengthens the defence lawyers right safeguard system, simultaneously strict lawyer practice admittance qualification, enhances the defence lawyers' profession accomplishment.

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