

1-1-2013

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Recommended Citation

Yang, Jie (2013) "The Development of China's Death Penalty Representation Guidelines: A Learning Model Based on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases," *Hofstra Law Review*: Vol. 42: Iss. 2, Article 7.

Available at: <http://scholarlycommons.law.hofstra.edu/hlr/vol42/iss2/7>

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THE DEVELOPMENT OF CHINA'S DEATH PENALTY REPRESENTATION GUIDELINES: A LEARNING MODEL BASED ON THE ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES

*Jie Yang**

I. INTRODUCTION

In 2010, China's legal advocates, including law professors and defense attorneys, worked together to create a code for lawyers representing defendants in death penalty cases. This code was the first of its kind in China, and was largely based on the American Bar Association ("ABA") Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines").¹ This Article discusses the efforts made in China to create its own defense representation guidelines with the assistance of the ABA Death Penalty Representation Project and the ABA Rule of Law Initiative ("ABA ROLI").²

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1. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES], available at <http://www.ambar.org/2003Guidelines>.

2. Since 2004, the ABA ROLI has supported programs in China by working with local partners to increase the capacity to advocate for citizens' rights. *Access to Justice and Human Rights*, AM. B. ASS'N, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/programs.html (last visited Feb. 16, 2014) [hereinafter *Access to Justice*]. One substantive area that has been improved is criminal justice, the support of which has focused on strengthening the defense work through identifying and addressing legislative, organizational, and other barriers. *See id.*

II. BRIEF HISTORY OF THE DEVELOPMENT OF DEATH PENALTY REFORM IN CHINA

The death penalty, once prevalent around the world as the most severe criminal punishment, has been abolished in most countries.³ China is one of the remaining countries that still actively uses capital punishment, and it will probably retain the death penalty for a considerable period of time.⁴

In recent years, however, the Chinese government has taken significant steps to improve the fairness, transparency, and judicial oversight of death penalty proceedings. Although the exact number of executions in China is a state secret and therefore publicly unavailable, there is evidence that the number of annual executions has fallen.⁵ In September 2006, China's Supreme People's Court ("SPC") and China's Supreme People's Procuratorate ("SPP") issued a joint regulation requiring live hearings in the second instance trials of death penalty cases.⁶ Previously, appeals were limited to a paper review.⁷ In second

3. According to the Death Penalty Information Center, fifty-eight countries still use the death penalty. *Studies: Amnesty International Reports Continued Movement Away from Capital Punishment*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/studies-amnesty-international-reports-continued-movement-away-capital-punishment> (last visited Feb. 16, 2014).

4. Judge Ermei Huang of the China Supreme People's Court ("SPC") noted, "China's government is not in the right place to abolish the death penalty for a considerable period of time." *Zuigao Fa: Zhongguo Xiangdang Shiqi nei Bu Jubei Feichu Sixing Tiaojian* (最高法: 中国相当长时期内不具备废除死刑条件) [*Sup. People's Ct.: China Is Not in the Right Place to Abolish the Death Penalty for a Considerable Period of Time*], PEOPLE.COM.CN, <http://society.people.com.cn/GB/42735/6979231.html> (last visited Feb. 16, 2014).

5. Sun Jungong, a spokesperson for the SPC, stated that, "[i]n recent years, among the death penalty cases the SPC reviewed, there have been a number of cases in which the SPC did not approve of the use of the death penalty." *Zuigao Fa: Yiju Zhengce Falu Bu Hezhun de Sixing Anjian Shizhong Zhan Yiding Bili* (最高法: 依据政策法律不核准的死刑案件始终占一定比例) [*Sup. People's Ct.: There Have Been a Number of Cases in Which the SPC Did Not Approve of the Use of the Death Penalty*], XINHUANET.COM, http://news.xinhuanet.com/politics/2013-02/27/c_114826746.htm (last visited Feb. 16, 2014); see also Zhao Lei (赵蕾), *Sixing Jianshao, Faguan Laolu, Zhengfu Weici, Lushi Kong Deng Sixing Fuhe Zhounian Jilu* (死刑减少, 法官劳碌, 政府微词, 律师空等死刑复核周年纪录) [*Death Penalty Cases Dropped, Judges Exhausted, Government Unsatisfied, Lawyers Kept Waiting in Vain, the Anniversary Report on Judicial Review of Death Penalty*], NANFANG ZHOUMO (南方周末), Dec. 19, 2007, <http://www.infzm.com/content/trs/raw/32900>. Due to the SPC's decision in 2007 to review all death penalty cases, the handing down of death penalty decisions has been restricted. Lei, *supra*. In 2007, the number of executions dropped to its lowest point in a decade; the Deputy Chief Judge in charge of the Criminal Division of an intermediate People's Court in western China mentioned at a national court conference on death penalty reform that he heard about sixty death penalty cases each year prior to 2007. *Id.* After 2007, the average was ten cases per year. *Id.*

6. *Zuigao Fa* (最高法), *Zuigao Jian Guanyu Sixing Anjian Ershen Kaiting Shenli Chengxu Ruogan Guiding* (最高检关于死刑案件二审开庭审理程序若干规定) [Regulation on Procedural Issues of Open Hearings in Death Penalty Cases of Second Instance Trials Issued by the SPC and SPP] (promulgated by Sup. People's Ct., Aug. 28, 2006, and Sup. People's Procuratorate, Sept. 11, 2006, effective Sept. 25, 2006) (China), available at <http://www.court.gov.cn/qwfb/sfjs/>

instance hearings, the judiciary is required to reconsider both the legal and factual bases of the case.⁸ At the hearing, the prosecutor or defense attorney may introduce new evidence or facts that are necessary for the court to effectively review the verdict and death sentence. On January 1, 2007, the SPC declared that it would review all death penalty sentences.⁹ Until that date, provincial high courts had conducted the final review of death penalty sentences.¹⁰ With this change, the SPC, as China's highest court, is ensuring a final level of protection. In February 2010, the SPC issued several opinions on the policy of "justice tempered with mercy" (*kuanyan xiangji*), which stressed the need to limit the use of the death penalty.¹¹ These opinions provided guidance on the circumstances in which courts should refrain from applying the death penalty.¹² In July 2010, the SPC, the SPP, the Ministry of Public Security, the Ministry of State Security, and the Ministry of Justice jointly released rules about how to examine and judge evidence in death penalty cases.¹³ These rules set standards for collecting and examining evidence in criminal proceedings, including: standards of proof; burdens of proof; types of evidence; and the admissibility of evidence in death penalty cases. On February 25, 2011, the standing committee of the National People's Congress officially approved the Eighth Amendment of the Criminal

201006/t20100604_5798.htm; Robin M. Maher, *ABA Death Penalty Representation Project and ABA Rule of Law Initiative China Program 2003 – 2008*, CHAMPION, July 2008, at 28, 28 [hereinafter Maher, *ABA Rule of Law*].

7. See ZHENJIE ZHOU, *THE DEATH PENALTY IN CHINA: REFORMS AND ITS FUTURE* 37 tbl.2, available at http://www.waseda.jp/wias/achievement/bulletin/data/z_zhou_2011.pdf (last visited Feb. 16, 2014).

8. See *id.*

9. See *Zuigao Fa Zhengshi Shouhui Sixing Fuhe Quan* (最高法院正式收回死刑复核权) [*Sup. People's Procuratorate Officially Revives Its Death Penalty Review Competence*], JCRB.COM (Mar. 22, 2007), http://news.jcrb.com/xwjj/200807/t20080723_40143.html.

10. See ZHOU, *supra* note 7, at 37 tbl.2.

11. See *China Issues Guidelines to Limit Death Penalty Use*, ENGLISH.NEWS.CN (Feb. 9, 2010, 8:57 AM), http://news.xinhuanet.com/english2010/china/2010-02/09/c_13169980.htm.

12. The guidelines state that the death penalty should be "resolutely" handed down to those who have committed "extremely serious" crimes; they also provide detailed guidance on the circumstances that should elicit leniency. See, e.g., *ZUIGAO RENMIN FAYUAN GUANYU KUANYAN XIANGJI XINGSHI ZHENGCE DE RUOGAN YUIAN* (最高人民法院关于贯彻宽严相济刑事政策的若干意见) [SEVERAL OPINIONS OF THE SPC REGARDING IMPLEMENTING THE POLICY OF JUSTICE TEMPERED WITH MERCY] ¶¶ 14-15, available at http://www.court.gov.cn/qwfb/sfwj/yj/201002/t20100222_1513.htm.

13. See *Guanyu Banli Sixing Anjian Shencha Panduan Zhenju Ruogan Wenti de Guiding* (关于办理死刑案件审查判断证据若干问题的规定) [Rules Concerning Questions About Examining and Judging Evidence in Death Penalty Cases] (promulgated by Sup. People's Ct., Sup. People's Procuratorate, Ministry of Public Security, Ministry of State Security & Ministry of Justice, June 25, 2010, effective July 1, 2010) (China), available at http://www.court.gov.cn/qwfb/sfwj/tz/201007/t20100705_7369.htm.

Law of the People's Republic of China ("CLC").¹⁴ The Amendment further limited the scope of death penalty use.¹⁵ For example, if the defendant standing trial is over seventy-five years old, a court may only give him a death sentence if he committed an especially cruel crime that caused the death of the victim.¹⁶ The new Amendment also reduced the total number of crimes for which the death penalty is a possibility from sixty-eight to fifty-five.¹⁷ Though fifty-five is no small number of crimes that are death penalty eligible, and the number of defendants over seventy-five years old who are charged with the death penalty is few, these new restrictions are important in the context the long-term death penalty reform initiative in China.

These encouraging changes in policy and law offer a significant opportunity to control and limit the number of executions that take place, allowing judges to pay more attention to the evidence when they determine cases, and improving the reliability of judicial decisions in China. Correspondingly, in order to achieve the goal of ensuring fair trials, the legal representation that defense attorneys provide in death penalty cases needs to be strengthened because representation is a vital component of guaranteeing defendants' rights.¹⁸

14. Zhonghua Renmin Gongheguo Xingfa Xiuzhengan (Ba) (中华人民共和国刑法修正案(八)) [Amendment VIII to the Criminal Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 25, 2011, effective May 1, 2011) [hereinafter CLC Amendment VIII], available at http://defensewiki.ibj.org/images/8/80/AmendmentVIII_China_Criminal_Code.pdf.

15. See *China Adheres to Limiting Use of Death Penalty*, PEOPLE'S DAILY ONLINE (Mar. 9, 2012, 8:23 AM), <http://english.peopledaily.com.cn/90785/7752628.html>.

16. "Death penalty shall not apply to a person who has attained the age of 75 at the time of trial, except where the person has caused the death of others by especially cruel means." CLC Amendment VIII, *supra* note 14, ¶ 3.

17. The Eighth Amendment of the CLC removed thirteen crimes that are non-violent in nature, including theft, smuggling, and fraud. See *China Exempts 13 Crimes from Death Penalty*, ENGLISH.NEWS.CN (Feb. 25, 2011, 3:47 PM), http://news.xinhuanet.com/english2010/china/2011-02/25/c_13750127.htm. According to international standards, fraud and other non-violent offenses should instead be punished by imprisonment. See INT'L COMM'N AGAINST THE DEATH PENALTY, THE DEATH PENALTY AND THE "MOST SERIOUS CRIMES": A COUNTRY-BY-COUNTRY OVERVIEW OF THE DEATH PENALTY IN LAW AND PRACTICE IN RETENTIONIST STATES 5, 13 (2013), available at http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf.

18. Yongzhong Gu (顾永忠) & Zuo Ning (左宁), *Sixing Anjian de Bianhu* (死刑案件的辩护) [Defense in Death Penalty Cases], in SIXING ANJIAN DE CHENGXU KONGZHI (死刑案件的程序控制) [DEATH PENALTY PROCEDURAL CONTROL] 428, 428-29 (Yuguan Yang (杨宇冠) ed., 2010); Amanda Whitfort, *The Chinese Criminal Defense System: A Comparative Study of a System in Reform*, 35 HONG KONG L.J. 695, 712 (2005).

III. PROBLEMS OF CRIMINAL DEFENSE AND LEGAL AID FOR DEATH PENALTY CASES IN CHINA

Under China's Criminal Procedure Law, a defendant facing a potential death penalty sentence is entitled to legal representation.¹⁹ If he cannot afford to hire a lawyer, the court must appoint one to him.²⁰ Although courts have been required by law to appoint counsel in death penalty cases since 1996,²¹ many problems remain in the practice.

First, defense attorneys face many obstacles protecting their professional rights under the law. For example, defense attorneys have difficulty accessing their clients at the early stages of a case.²² This challenge is common for defense lawyers in both death penalty cases and other criminal cases.²³ Also, defense attorneys are often unable to access the prosecution's files and are not allowed to conduct independent investigations, greatly limiting their access to the information a defense attorney needs to prepare for trial.²⁴ Additionally, in practice, courts are not willing to give a reason for denying a defense attorney's motion, and rarely permit defense attorneys to call witnesses or expert witnesses to testify at trial.²⁵ Defense attorneys also have very few opportunities to investigate or introduce mitigation evidence about the background of the client.²⁶ Another difficulty is that, in death penalty

19. See Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Mar. 17, 1996, effective Jan. 1, 1997, amend. Mar. 14, 2012), art. 32 [hereinafter China Criminal Procedure Law], available at <http://ds.eywedu.com/law/ssf/200701/20070119172221.htm> (allowing criminal defendants to entrust lawyers to be her defenders).

20. *Id.* art. 34 ("[I]f there is the possibility that the defendant may be sentenced to death and yet has not hired anyone to be his defender, the People's Court shall assign a lawyer who is obligated to provide legal aid and to serve as the defense attorney.").

21. Hongxian Mo (莫洪宪) & Xiaoqin Ye (叶小琴), *Sixing Anjian Faluyuanzhu de Xianzhuang he Qianjing* (死刑案件法律援助的现状和前景), http://www.legalinfo.gov.cn/moj/zgsfzz/2005-02/01/content_184956.htm.

22. See Yanfei Ran, *When Chinese Criminal Defense Lawyers Become the Criminals*, 32 FORDHAM INT'L L.J. 988, 1014-16 (2009).

23. See *id.* at 1013-15.

24. See *id.* at 1015, 1017-18.

25. See Li Enshen, *The Li Zhuang Case: Examining the Challenges Facing Criminal Defense Lawyers in China*, 24 COLUM. J. ASIAN L. 129, 144 (2010).

26. See Ran, *supra* note 22, at 1018-19. In China, the conviction phase is combined with the sentencing phase for all criminal trials, including trials for death penalty cases. Evidence relevant to sentencing is presented and considered simultaneously with evidence related to guilt or innocence. This creates problems for defense attorneys choosing a defense strategy: if the defense argues that a defendant is innocent, the defense attorney may lose the chance to argue leniency at sentencing, should the court hand down a guilty verdict. In practice, most defense attorneys choose the mitigation defense, even when the prosecution's case is weak, because it is less risky. But, denying the defense the opportunity to prove the defendant's innocence is a grave miscarriage of justice, especially in death penalty cases. The process lacks transparency and is difficult to challenge. *Cf.*

review cases, the role of defense lawyers remains unclear; the procedures that can be used to introduce new evidence or written arguments to the court are likewise unclear, particularly at the SPC final review stage.

Second, lawyers representing criminal defendants face tremendous personal risk, especially in death penalty cases.²⁷ Death penalty cases are generally politically sensitive and draw significant public attention, which in turn pressures judges and prosecutors to secure a conviction and death sentence.²⁸ Article 306 of the CLC imposes criminal penalties on lawyers who have falsified evidence or led their clients to make false statements.²⁹ In practice, prosecutors often invoke this provision when a criminal defendant recants or materially changes a prior confession, or when witness statements are changed, arguing that the defense attorney must have persuaded the client or witnesses to submit false statements.³⁰ Therefore, in order to protect themselves, defense attorneys are often reluctant to conduct their own investigations of the case, and sometimes will not even discuss the charges when interviewing clients. Article 306 has often been called the proverbial Sword of Damocles hanging above the head of every criminal defense attorney in China.³¹ China also lacks an ethical rule or guideline explaining how lawyers can protect themselves while still fulfilling their professional responsibilities to their clients.³²

Maier, *ABA Rule of Law*, *supra* note 6, at 28.

27. See Maier, *ABA Rule of Law*, *supra* note 6, at 29; Ran, *supra* note 22, at 1036-37.

28. See ROBIN M. MAHER, THE DEATH PENALTY AND REFORM IN THE UNITED STATES 4 [hereinafter MAHER, DEATH PENALTY], available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/maier_dp_reform_english.authcheckdam.pdf.

29. See Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (1997 Xiuding) (1997 修订) [1997 Revision] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997, amend. Feb. 25, 2011), art. 306, available at <http://www.21lawyer.cn/english/04c/2.html>. Article 306 provides that:

During the course of criminal procedure, any defender, law agent destroys, falsifies evidence, assist parties concerned in destroying, falsifying evidence, threatening, luring witnesses to contravene facts, change their testimony or make false testimony is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the circumstances are severe, to not less than three years and not more than seven years of fixed-term imprisonment.

If witnesses, testimonies, or other evidences provided, shown, used by a defender, law agent are not true but are not falsified purposely, they do not fall into the category of falsifying evidences.

Id.

30. See Ran, *supra* note 22, at 1027.

31. See *id.* at 1012.

32. Cf. Maier, *ABA Rule of Law*, *supra* note 6, at 28-29.

Third, unsatisfied legal aid services and case management remain serious problems.³³ As in the United States, most defendants on death row in China are also indigent.³⁴ China lacks a specialized system like the United States' public defender system, which is a vital legal resource for indigent criminal defendants.³⁵ China does have its own legal aid system, which the government began funding in 1996,³⁶ however, these government-funded legal aid centers are required to handle cases of all types, including civil, criminal, and administrative cases.³⁷ Therefore, the lawyers working in a legal aid office do not devote their practice to one type of case and frequently lack expertise in criminal matters. Legal aid lawyers are also assigned to cases randomly, without consideration of the expertise they may possess or lack.³⁸

Fourth, specialized training and resources in death penalty representation have been rarely provided to legal aid lawyers.³⁹ Defense counsel in death penalty cases do not receive a greater allocation of resources than those defending other, simpler criminal cases, and such resources are insufficient to cover the greater expenses associated with death penalty cases.⁴⁰ Death penalty counsel also lack the benefit of working on a team: lawyers representing death penalty clients operate on their own, without the assistance of experts or investigators.⁴¹ Without coordination and specialized training, legal aid lawyers are unable to effectively use available law and policy considerations.

Finally, in practice, most legal aid lawyers are not assigned to a death penalty case until the trial is scheduled to occur; therefore, defense attorneys commonly have less than a week to prepare for trial.⁴²

33. See *Legal Representation: The Right to Effective Legal Representation*, DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/legal-representation.cfm> (last updated June 28, 2012).

34. Compare Maher, *ABA Rule of Law*, *supra* note 6, at 28, with China, DEATH PENALTY WORLDWIDE, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=China> (last updated Apr. 1, 2011).

35. See Whitfort, *supra* note 18, at 711.

36. See, e.g., *id.*; see also, e.g., *Legal Aid in China*, MINISTRY OF JUSTICE, CHINA, http://www.legalinfo.gov.cn/english/Legal-Aid/content/2010-01/25/content_2035688.htm?node=7619 (last visited Feb. 16, 2014). The Ministry of Justice ("MoJ") first set up pilot legal aid centers in 1994. *Survey on Chinese Legal Aid System*, MINISTRY OF JUSTICE, CHINA, http://www.legalinfo.gov.cn/english/legal-aid/node_7619.htm (last visited Feb. 16, 2014). When the Criminal Procedure Law was issued in 1996, the Legal Aid Center under the MoJ was founded. See *id.*

37. See *Legal Aid in China*, *supra* note 36.

38. See *id.*

39. *Id.*

40. See *id.*

41. See discussion *infra* Part IV.C.

42. See European Initiative for Democracy and Human Rights, *Strengthening the Defense in Death Penalty Cases in the People's Republic of China* (Dec. 2003) (unpublished working paper)

IV. CHINA'S EFFORTS TO DEVELOP DEATH PENALTY REPRESENTATION GUIDELINES AT THE NATIONAL LEVEL

In the past few years, several wrongful convictions in death penalty cases have highlighted the need for reforms. Xianglin She was a defendant from Hubei Province who served eleven years in prison after receiving a death sentence for allegedly murdering his wife, whose body was never found.⁴³ After his wife reappeared eleven years later, his sentence was overturned and he was released from prison.⁴⁴ During the first instance trial, She's defense attorney voiced his concerns regarding the prosecutor's evidence and maintained that his client was not guilty.⁴⁵ However, the court did not accept the attorney's argument and rendered a decision of guilt, sentencing the defendant to death.⁴⁶

Zuohai Zhao, a man from Henan Province, was tortured into confessing to a murder he did not commit.⁴⁷ The legal counsel assigned to him was inexperienced and unable to provide effective representation.⁴⁸ After receiving a death sentence, the defendant served over a decade in prison until he was released when the "victim he killed" returned to his village very much alive.⁴⁹ The media coverage of these wrongful convictions revealed the unreliability of coerced confessions,⁵⁰ and the cases themselves reinforced the need for effective

(manuscript at 15), available at http://www.ecba.org/extdocserv/DP_Baseline.pdf.

43. See Liu Li, *Wrongly Jailed Man Freed After 11 Years*, CHINA DAILY (Apr. 14, 2005, 5:39 PM), http://www.chinadaily.com.cn/english/doc/2005-04/14/content_434020.htm.

44. See *id.*

45. See Shaqi Hanyuan Ruyu Shiyinian An Xu: Beigao Bianhu Lushi Jieshou Caifang (杀妻含冤入狱11年案续: 被告辩护律师接受采访) [Additional Report on the Case of Alleged Wife Murderer Wrongfully Imprisoned for 11 Years: Defense Attorney Being Interviewed], TENGXUN XINWEN (腾讯新闻) [TENGXUN NEWS] (Apr. 6, 2005, 7:48 AM), <http://news.qq.com/a/20050406/000246.htm>.

46. See *id.*

47. See Zhao Zuohai: Ming Jiuxiang Shi Yigen Cao (赵作海: 命就像是一根草) [Zuohai Zhao: Life Is Just Like a Straw], IFZM.COM (May 13, 2010, 10:04 AM), <http://www.ifzm.com/content/44901> [hereinafter *Life Is Just Like a Straw*].

48. See He Weifang (贺卫方), Zhao Zuohai Yuan'an Zhuizong: Dangnian Fayuan Zhiding Bianhu Lushi Shi Shixisheng (赵作海冤案追踪: 当年法院指定辩护律师是实习生) [Tracing the Wrong Case of Zhao Zuohai: The Court-Appointed Defense Attorney Was an Intern], SINA BLOG (May 16, 2010, 12:35 PM), http://www.blog.sina.com.cn/s/blog_488663200100j11y.html.

49. See *Life Is Just Like a Straw*, *supra* note 47.

50. China has not adopted a right to silence or a right against self-incrimination. See Interview by Elizabeth M. Lynch with Margaret K. Lewis, Assoc. Professor of Law, Seton Hall Univ. (Sept. 23, 2012), available at <http://www.chinalawandpolicy.com/tag/self-incrimination>. Confessions have always been sought by investigators as evidence for bringing criminal charges. See *Forced Confessions Banned, Again: China 'Reiterates' a Widely Ignored Ban on Abuses in Its Jails and Prisons*, RADIO FREE ASIA (Dec. 28, 2012), <http://www.rfa.org/english/news/china/banned-12282012133531.html>. In order to address the issue of illegally obtained evidence, and especially to reduce the use of coercion, evidence obtained through illegal means should be excluded. See Wendy

defense representation to ensure the accuracy and fairness of death penalty proceedings.

Cases like She and Zhao's prompted the Criminal Law Committee of the All China Lawyers' Association ("ACLA") to take a leadership role in improving the quality of defense representation in death penalty cases. In 2005, the ACLA Criminal Law Committee began to work on providing guidance to attorneys representing defendants in death penalty cases.⁵¹ The ABA ROLI China Program was invited to provide technical support, resources, and a comparative perspective.⁵² In particular, the ABA's Death Penalty Representation Project, which led to the creation of the ABA Guidelines, partnered with the ABA ROLI and contributed its institutional and professional expertise to aid in the creation of death penalty guidelines for capital case representation in China.⁵³

The ACLA Criminal Law Committee and ABA ROLI co-hosted several workshops in China to discuss the development of representation guidelines for Chinese defense lawyers.⁵⁴ Robin M. Maher, the Director of the ABA Death Penalty Representation Project, spoke about how and why the ABA created the 2003 ABA Guidelines.⁵⁵ Using what it learned from the ABA, the ACLA Criminal Law Committee created draft representation guidelines that indicated the minimum standards required to provide effective legal representation in death penalty cases and other

Zeldin, *China: Amendment of Criminal Procedure Law*, LIBR. OF CONGRESS, GLOBAL LEGAL MONITOR (Apr. 9, 2012), http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205403080_text. This was articulated in the new Amendment of China's Criminal Procedure Law, which recently became effective on January 1, 2013. See Zhonghua Renmin Gongheguo Xingshi Susong Fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People's Republic of China] (promulgated by Nat'l People's Cong., Mar. 14, 2012, effective Jan. 1, 2013), arts. 56, 58, available at <http://gyys.fyfz.cn/b/291495>.

51. See *Access to Justice*, *supra* note 2.

52. See *id.*

53. See Maher, *ABA Rule of Law*, *supra* note 6, at 28. See generally ABA GUIDELINES, *supra* note 1 (providing professional guidelines applicable to death penalty cases). In 1989, the ABA issued a set of guidelines for effective defense representation in death penalty cases. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989), available at <http://www.ambar.org/1989Guidelines>; see Robin M. Maher, 'The Guiding Hand of Counsel' and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L. REV. 1091, 1093 (2003) [hereinafter Maher, *Guiding Hand*]. In 2003, the ABA published revised and updated guidelines to reflect current law and practice. Maher, *Guiding Hand*, *supra*, at 1093; see also AM. BAR ASS'N, DEATH PENALTY REPRESENTATION PROJECT: 2012 YEAR-END REPORT & NEWSLETTER 6 (2012), available at http://www.americanbar.org/content/dam/aba/publications/project_press/DPRP_YearEnd_2012_authcheckdam.pdf (stating that the ABA Guidelines are now widely accepted as the national standard of care in death penalty cases, and "have been cited in more than 250 decisions by state and federal courts, including the U.S. Supreme Court").

54. See *Access to Justice*, *supra* note 2.

55. See Maher, *Guiding Hand*, *supra* note 53, at 1093-95.

aspects of representation, including ethical obligations.⁵⁶ The ACLA Criminal Law Committee, however, was unable to obtain official approval to publish the guidelines because of increased scrutiny of the ACLA by the Chinese government. As a consequence, the ACLA guidelines still have not been published, but the experience of drafting them and learning from the ABA's model has led to the other reform efforts discussed below.⁵⁷

V. CHINA'S FIRST PUBLISHED DEATH PENALTY REPRESENTATION GUIDELINES: A SUCCESSFUL PROVINCIAL LEVEL MODEL

In 2008, the ABA ROLI China Program found an opportunity to continue the work of the ACLA Criminal Law Committee when the lawyers' associations of the Shandong, Guizhou, and Henan Provinces expressed interest in developing provincial-level defense representation guidelines. The ABA ROLI partnered with Professor Ruihua Chen⁵⁸ of Peking University Law School ("PKU") to design a project that would support the efforts of these local lawyers' associations.

As noted earlier in this Article, implementation of a series of law and policy reforms related to the death penalty occurred from 2006 to 2010.⁵⁹ None of the reforms, however, focused on improving the ability of defense attorneys to effectively represent their clients.⁶⁰ There are no standards for the minimum qualifications defense attorneys must possess. There are also no issued guidelines on how to provide effective representation in death penalty cases.

The focus of the project was to help the Chinese partners learn from the ways in which the ABA Guidelines gained mainstream acceptance and to better understand the ways in which the ABA Guidelines have been used to provide improved protection for criminal defendants and their legal advocates.⁶¹ The project particularly aimed to provide detailed and comprehensive guidance for defense attorneys—a model that defense counsel could look to for help when representing death penalty defendants.

In the United States, the ABA Guidelines contain detailed instructions concerning the training of defense lawyers who represent

56. See *Access to Justice*, *supra* note 2.

57. See Maher, *ABA Rule of Law*, *supra* note 6, at 28; *infra* Part IV.

58. Professor Ruihua is a leading criminal law scholar who promotes criminal justice reforms, including those related to strengthening the role of criminal defense. *Chen Ruihua*, INT'L ASS'N EVIDENCE SCI., <http://www.theiaes.com/aboutus-council/chen-ruihua> (last visited Feb. 16, 2014).

59. See *supra* text accompanying notes 4-13.

60. See Maher, *ABA Rule of Law*, *supra* note 6, at 28; see also discussion *supra* Part II.

61. Maher, *ABA Rule of Law*, *supra* note 6, at 28.

clients in capital cases, such that these lawyers can obtain and further develop the knowledge and skill essential to providing effective counsel.⁶² The ABA Guidelines also articulate key issues, such as the expertise that effective defense lawyers must possess; the use of supporting resources; the responsibility of courts; the lawyer's relationship with the client; the duty to develop and present mitigation evidence; and the obligation to facilitate the work of successor counsel.⁶³ All of these critical issues in the ABA Guidelines have been sufficiently discussed in the process of creating guidelines for Chinese lawyers.

In 2010, the three provincial lawyers' associations created their own death penalty defense representation guidelines ("Provincial Guidelines"), modeled after the ABA Guidelines.⁶⁴ Though influenced by the ABA Guidelines, the Provincial Guidelines were tailored to address China-specific issues.⁶⁵ The Provincial Guidelines have ten chapters with ninety-six articles, many of which address issues defense attorneys encounter when representing defendants in death penalty cases—spanning from the moment the case is received, through appeals and the final court review. Some highlights are discussed below.

A. *Qualification of Defense Counsel*

Article 3 of the Provincial Guidelines requires the responsible agency to appoint a lawyer who has experience in criminal trials as defense counsel.⁶⁶ Although this Article does not detail the specific

62. See ABA GUIDELINES, *supra* note 1, Guideline 8.1, at 976-77 (providing parameters for "comprehensive training programs," and suggesting the scope, frequency, and funding of such programs).

63. *E.g.*, *id.* Guideline 4.1, at 952 (regarding defense counsel's use of supporting resources); *id.* Guideline 5.1, at 961-62 (articulating the skills and expertise defense counsel should possess); *id.* Guideline 10.5, at 1005 (concerning defense counsel's relationship with clients); *id.* Guideline 10.7 cmt., at 1021 (explaining defense counsel's duty to present mitigating evidence at the sentencing phase).

64. See *Chinese Delegation Studies Death Penalty Representation During U.S. Visit*, ABA, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/news/news_china_us_study_tour_death_penalty_representation_1010.html (last visited Feb. 16, 2014).

65. See *id.* The Shandong Lawyers' Association issued its death penalty representation guidelines on May 28, 2010; Henan on June 11, 2010; and Guizhou on June 26, 2010. See *Shandong Chutai Shoubu Sixing An Bianhu Zhidao Yijian*, Henan Guizhou Ye Jiang Chutai (山东出台首部死刑案辩护指导意见, 河南贵州也将出台) [*Shandong Province Issues First Guidelines for Death Penalty Representations, Henan Province and Guizhou Province Will Also Issue Guidelines*], XINHUANET (June 3, 2010, 1:42 PM), http://news.xinhuanet.com/legal/2010-06/03/c_12176508.htm.

66. The Death Penalty Representation Guidelines issued by the Shandong Provincial Lawyers' Association, art. 3, states that, "[i]n a capital case, the law firm in charge of representing the client facing the death penalty should appoint a lawyer who has experience in criminal trials as defense counsel." *Shandong Sheng Lushi Xiehui Sixing Anjian Bianhu Zhidao Yijian* (山东省律师

experiences or knowledge that the lawyer should process, it is significant in that it states that the responsible agency should consider the lawyer's experience when appointing counsel in death penalty cases, instead of randomly distributing the cases to defense lawyers who may not even have trial experience.⁶⁷

B. Defense Lawyer's Responsibilities to Offer Mitigating Circumstances

Article 36 of the Provincial Guidelines suggests that defense counsel conduct a thorough and detailed investigation into all matters related to sentencing, draft a sentencing recommendation that is favorable to the accused, and use the recommendation as the basis for petitioning the court for a lenient or reduced sentence.⁶⁸ It also notes the aspects of a case that defense counsel should examine to support requests for lighter sentences, including: the defendant's family situation and background; educational history; any extenuating circumstances that led to the commission of the crime; the availability of compensation for the victim or the victim's family; and any fault on the part of the victim.⁶⁹ Defense counsel should then draft a written recommendation report including relevant evidentiary material and counsel's assessment.⁷⁰

These recommendations reflect practices employed in the United States and insights from the ABA Guidelines, which clearly require defense attorneys to collect documents that humanize the client and tell his life story.⁷¹ In the United States, it is standard for defense attorneys to introduce mitigating factors, such as the good character of the defendant; his positive relationship with his family; his youth; or the absence of any previous criminal record.⁷² They may also introduce evidence of abuse or neglect as a child, mental illness, or mental

协会死刑案件辩护指导意见) [*The Death Penalty Representation Guidelines Issued by the Shandong Provincial Lawyers' Association*] art. 3 (2010) [hereinafter *China Provincial Guidelines*].

67. See *id.* As described above, there is currently no professional legal training available for death penalty defense counsel. See *supra* Part III. China also faces a shortage of defense lawyers in general. HUMAN RIGHTS WATCH, "WALKING ON THIN ICE": CONTROL, INTIMIDATION AND HARASSMENT OF LAWYERS IN CHINA, 56 (2008), available at <http://www.hrw.org/reports/2008/china0408/china0408web.pdf>. For these reasons, it is impractical to require different standards for lawyers assigned to death penalty cases.

68. *China Provincial Guidelines*, *supra* note 66, art. 36.

69. See *id.*

70. See *id.*

71. See ABA GUIDELINES, *supra* note 1, Guideline 10.11, at 1055-56.

72. See *Mitigation in Capital Cases*, CAPITAL PUNISHMENT IN CONTEXT, <http://www.capitalpunishmentincontext.org/issues/mitigation> (last visited Feb. 16, 2014).

disability.⁷³ Additionally, family members, teachers, and friends can testify in support of the defendant.⁷⁴ Until now, few defense attorneys in China had ever considered making efforts to present evidence of the client's humanity; but, as the ABA Guidelines instruct, Chinese lawyers are beginning to understand that it is mitigation evidence that can literally save their clients' lives.

C. *The Defense Team and Supporting Resources*

Articles 4 and 5 of the Provincial Guidelines recommend that defense counsel consult with experts when specialized issues are present in the case.⁷⁵ The responsible agency is also encouraged to organize group discussions with experienced or senior lawyers to develop strategies for addressing significant or complex legal issues.⁷⁶ Because of the limited funding available in China, it is unlikely that a legal aid office could appoint a defense team with two defense attorneys, an investigator, and a mitigation specialist, as prescribed in the ABA Guidelines.⁷⁷ The Provincial Guidelines reflect an understanding of the usefulness of a defense team and address the reality of China's lack of available funding by promoting teamwork and encouraging the addition of more financial resources for death penalty cases. The language in the Provincial Guidelines about assembling a defense team and obtaining additional funding is vague, but it leaves space for defense attorneys and responsible agencies to work toward these ends to the greatest extent possible.

D. *Relationship with the Client*

Articles 37 and 38 of the Provincial Guidelines focus on the client interview and provides comprehensive guidance regarding a defense attorney's responsibilities to his client.⁷⁸ It is similar to the ABA

73. *See id.*

74. MAHER, DEATH PENALTY, *supra* note 28, at 5.

75. *China Provincial Guidelines*, *supra* note 66, arts. 4–5 (permitting defense counsel in capital cases to consult with experts and conduct conferences with experienced attorneys within the firm when “death penalty cases . . . involve significant and complicated legal issues”).

76. *Id.* art. 5.

77. ABA GUIDELINES, *supra* note 1, Guideline 4.1, at 952.

78. *China Provincial Guidelines*, *supra* note 66, art. 37 (requiring defense counsel, during a meeting with client, to obtain client's consent to the retainer agreement, if the attorney was previously retained by the defendant's family); *id.* art. 38 (requiring defense counsel, during a meeting with client, to obtain detailed information from defendant, especially the defendant's age and whether a female defendant is pregnant).

Guidelines in requiring defense attorneys to engage in “interactive dialogue” with clients on all matters that may impact the case.⁷⁹

As noted earlier, due to the personal risks that defense attorneys face in China, defense attorneys often choose not to discuss the case with or present evidence to their clients during the client interview.⁸⁰ This problem drew public attention in February 2010 through the well-publicized case of Zhuang Li.⁸¹ Li was a defense attorney who was sentenced to eighteen months in prison for allegedly encouraging his client to submit false testimony.⁸² This case created a national debate on the role and vulnerability of criminal defense attorneys with regard to the client interview.⁸³ The Li case brought to light the need to develop practice standards that provide guidance to defense lawyers concerning the scope of acceptable behavior when talking to their clients and how to mitigate risk to themselves. The Provincial Guidelines, by clarifying how lawyers should handle the client interview and encouraging lawyers to fulfill their professional responsibilities, are a good start.⁸⁴ For example, in situations in which the client claims he was tortured or had other rights violated during an interrogation, the defense lawyer should file a motion or complaint with the court.⁸⁵ Because these claims sometimes draw accusations from the prosecution that the defense lawyer has encouraged the client to falsify evidence (the fact at issue in the Li case), defense lawyers need to be particularly careful about how they handle these claims. The Provincial Guidelines therefore also include a requirement that the client make any claims of this nature in writing, and that the client sign the documentation of the claim.⁸⁶

79. See *id.* arts. 37–38; ABA GUIDELINES, *supra* note 1, Guideline 10.5, at 1005.

80. See *supra* text accompanying notes 27–32.

81. John Garnaut, *Children of the Revolution*, SYDNEY MORNING HERALD (Feb. 13, 2010), <http://www.smh.com.au/world/children-of-the-revolution-20100212-nxjh.html>.

82. See *The Li Zhuang Case*, CAIXIN ONLINE, <http://topics.english.caixin.com/2010/lizhuang> (last visited Feb. 16, 2014). On June 11, 2011, Li was released after serving a full eighteen months in prison. *Id.* He is still waiting for the SPP’s pending result of the reconsideration of his case. See *Former Lawyer Lodges Complaint with Supreme Procuratorate*, XINHUANET (Nov. 24, 2012, 6:33 PM), http://news.xinhuanet.com/english/china/2012-11/24/c_131996577.htm.

83. See, e.g., *Judicial Process and One Lawyer’s Bold Stand*, CAIXIN ONLINE (Apr. 22, 2011, 7:46 PM), <http://english.caixin.com/2011-04-22/100251590.html>.

84. See, e.g., *China Provincial Guidelines*, *supra* note 66, art. 44 (allowing attorney to plead for the defendant if defendant’s rights have been impinged upon); *id.* art. 45 (requiring attorney to plead to relevant agency for a change of custody if the defendant’s situation is not suited for the current custody).

85. See *id.* art. 44.

86. See *id.* art. 91. Article 91 of the Provincial Guidelines states:

E. The Duty to Seek an Agreed upon Decision with the Client

The steps that a defense attorney should take when he disagrees with the client about whether the client should plead guilty were controversial in China. Articles 66 and 67 of the Provincial Guidelines now provide recommendations for this circumstance.⁸⁷ These provisions encourage the lawyer to ensure that the client fully understands his options and the consequences of his decision.⁸⁸ The lawyer should then attempt to reach an agreement with the client based on the clarified understanding.⁸⁹ If the attorney and the client continue to disagree, the defense attorney has the ability to withdraw from the representation of the client.⁹⁰

During the interview with the client, if the accused claims that the authorities have tortured him/her or engaged in other illegal conduct, defense counsel should ask the defendant to record such complaint in written form and submit the written document to the detention center officials, which will then convey the document to the appropriate government organ. If the accused does not have the ability to write, defense counsel should promptly contact the prison officials, convey the accused's complaint, and request that the prison officials process the complaint according to law.

Id.

87. *Id.* arts. 66–67. Article 66 states:

If the defense counsel and accused have agreed to defend the case on the basis of a not-guilty plea, but the accused has pled guilty in open court, defense counsel should petition the court to adjourn the case.

After the case has been adjourned, defense counsel should confer with the accused and reach an agreement on how to defend the case. If an agreement can not be reached, defense counsel can terminate its retainer agreement with the accused, and petition the court to permit the defense counsel to withdraw from the case.

If the defense counsel has incontrovertible evidence proving the innocence of the accused, he or she should continue to defend the accused, unless the accused proactively decides to terminate defense counsel's representation.

Id. art. 66. Article 67 states that:

If before trial the defense counsel and accused have reached an agreement on sentencing defense, but the accused has pled not guilty in open court, defense counsel should petition the court to adjourn the case.

After the case has been adjourned, defense counsel should confer with the accused and reach an agreement on how to defend the case. If an agreement can not be reached, defense counsel can terminate its retainer agreement with the accused, and petition the court to permit the defense counsel to withdraw from the case.

Id. art. 67.

88. *See id.* arts. 66–67 (requiring defense counsel to confer with defendant if they disagree on the defense strategy).

89. *See id.* (requiring defense counsel to attempt to reach agreement after conferring with defendant).

90. *See id.* (allowing defense counsel to petition the court to withdraw from the case if no agreement can be reached).

F. *The Duty to Facilitate the Work of Successor Counsel*

Article 82 of the Provincial Guidelines states that, during the SPC death penalty review process, successor counsel can acquire case files from the previous lawyer to handle the case.⁹¹ The previous lawyer and his firm or legal aid agency have the obligation to cooperate and provide support to the lawyers handling the appeal.⁹² This provision was based on the ABA Guidelines' requirement that prior counsel cooperate with successor counsel in order to fulfill their duties to safeguard the interests of the client.⁹³

The most critical lesson that the provincial lawyers' associations learned from their examination of the development of the ABA Guidelines was the importance of soliciting input from different stakeholders in the justice system. During the development of the Provincial Guidelines, the lawyers' associations made serious efforts to understand the opinions of police, prosecutors, the judiciary, and members of criminal law committees and local lawyers' associations. This process not only helped the provincial lawyers' associations gather feedback about their burgeoning guidelines, it also helped them educate the judiciary and other stakeholders about important defense representation issues. In turn, this established political autonomy for criminal defense attorneys and their ability to provide competent, vigorous legal representation because it clarified defense lawyers' obligations to establish the legal basis of a case and make use of relevant laws regarding death penalty and criminal defense. Notably, the provincial lawyers' associations took pains to incorporate China's Criminal Procedure Law, the Law on Lawyers, and official judicial interpretations into the Provincial Guidelines.⁹⁴

VI. STUDY TOUR: LEARNING HOW TO IMPLEMENT THE PROVINCIAL GUIDELINES

Implementing the Provincial Guidelines in practice is another significant challenge facing the leaders of this reform movement. They must therefore examine how the American legal community has implemented similar practice guidelines and identify the mechanisms employed by individual states to facilitate implementation.

91. *Id.* art. 82.

92. *Id.*

93. ABA GUIDELINES, *supra* note 1, Guideline 10.13, at 1074.

94. See *Chinese Delegation Studies Death Penalty Representation During U.S. Visit*, *supra* note 64.

In order to learn more about these issues, ABA ROLI, with the essential help of the ABA Death Penalty Representation Project, organized a study tour of the United States in summer 2009.⁹⁵ The Chinese delegation consisted of representatives from the three provincial lawyers' associations of PKU—which had been dedicated to developing China's first provincial-level death penalty representation guidelines—and members of the ACLA.⁹⁶ The delegation traveled to Philadelphia, Pennsylvania⁹⁷ and Phoenix, Arizona⁹⁸—areas that use the death penalty, but also accept and use the ABA Guidelines.⁹⁹ Ms. Maher accompanied the delegation to explain the process of implementing the ABA Guidelines in these specific jurisdictions.¹⁰⁰

During the visit, the delegation met with defense attorneys, prosecutors, and judges.¹⁰¹ Their discussions highlighted the ways in which various members of the criminal justice system have encouraged the implementation of the ABA Guidelines;¹⁰² how such stakeholders were introduced to the ABA Guidelines and what training programs exist; and how each of these groups supported the use of the ABA Guidelines. The critical need of specialized training for attorneys handling death penalty cases was impressed upon the delegation at almost every meeting during the study tour.¹⁰³ The delegation also discussed the roles that the ABA and state bar associations play in monitoring the performance of defense attorneys in capital cases; how

95. *See id.*

96. *See id.*; Maher, *ABA Rule of Law*, *supra* note 6, at 28. Wenchang Tian, Director of the ACLA Criminal Law Committee, has been practicing as a criminal defense lawyer since 1995. *Tian Wenchang*, KING & CAPITAL, http://www.king-capital.com/templates/en_hhr/index.aspx?nodeid=125&page=LsPage&contentid=1319 (last visited Feb. 16, 2014). He is one of the leading criminal defense attorneys in China, and has represented defendants in many important and well-known death penalty cases. *See id.* He has also been a strong advocate of criminal justice reforms. *See id.*

97. The Philadelphia, Pennsylvania public defender's office is a national model for how the ABA Guidelines can be incorporated into criminal defense training and daily practice. *See, e.g., Rule 801 Resolution*, PHILA. B. ASS'N, <http://www.philadelphiabar.org/page/BoardResolution1738374282005?appNum=1> (last visited Feb. 16, 2014).

98. The Arizona Supreme Court amended the Arizona Rules of Criminal Procedure to require all capital defense attorneys to "be familiar with and guided by" the ABA Guidelines. ABA DEATH PENALTY REPRESENTATION PROJECT, IMPLEMENTATION OF THE 2003 ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 3 (2012), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet_01_2012.authcheckdam.pdf.

99. *See Chinese Delegation Studies Death Penalty Representation During U.S. Visit*, *supra* note 66.

100. *See id.*

101. *See id.*

102. *See id.*

103. *See Chinese Delegation Studies Death Penalty Representation During U.S. Visit*, *supra* note 64 (discussing the need to develop training programs).

bar associations deal with complaints of ineffective assistance of counsel in death penalty cases; what kinds of training regimes states and other institutions provide to defense attorneys to facilitate quality representation in capital cases; ethical issues in capital cases; the importance of lawyer independence; mechanisms for monitoring and disciplining lawyers; and the interaction of the ABA Guidelines with states' professional ethics rules.¹⁰⁴

The delegation was particularly interested in the role of mitigation specialists, which evolved as part of the growing recognition of the importance of gathering and presenting persuasive evidence to mitigate a potential death sentence.¹⁰⁵ Aside from such meetings, the delegation was also given opportunities to observe court proceedings in death penalty cases and discuss those cases with the practicing defense attorneys.¹⁰⁶ It was particularly useful for the delegation to hear from the defense attorneys about their strategies for motion practice.¹⁰⁷

The study tour provided valuable experience to the delegation, individuals who will go forward as pioneers to promote the Provincial Guidelines and supply recommendations for achieving effective criminal defense in China.

VII. CONCLUSION

Prominent law professors and defense attorneys in China have made significant efforts to create and implement the first provincial-level death penalty defense representation guidelines. The creation of the Provincial Guidelines is a great step in establishing a professional standard of care for defense counsel in death penalty cases, and will help to increase the quality of defense representation in China.

It should be noted that the U.S. legal system is very different from the Chinese legal system. The Pattern of Authority Doctrine (职权主义模式) has been deeply affecting Chinese criminal procedures and the Chinese judicial system. The role of lawyers has not been well recognized or respected. For example, in the death penalty review, the

104. *See id.*

105. *See* ABA GUIDELINES, *supra* note 1, Guideline 10.7, at 1020-21 (discussing defense counsel's obligations concerning mitigation at the sentencing phase).

106. *See Chinese Delegation Studies Death Penalty Representation During U.S. Visit, supra* note 64; Maher, *ABA Rule of Law, supra* note 6, at 28-29.

107. China's Provincial Guidelines encourage defense attorneys to be more proactive in filing motions with the court to support the effectiveness of defense; for example, a motion asking the court to subpoena witnesses for the defense. *See China Provincial Guidelines, supra* note 66, arts. 63, 65. The observation of actual trials during the study tour allowed the delegation to learn about motion practice in death penalty cases first hand.

newly amended Criminal Procedure Law requires the judge to meet and question the defendant. If the defense attorney so requests, the judge must also listen to counsel's opinions.¹⁰⁸ However, in practice, there are many obstacles for defense lawyers to communicate with judges in the death penalty review process, while judges prefer to do their own investigation by talking to the defendants. Determining whether the defendant is guilty or whether he should be sentenced to death is generally left to the judge, who forms opinions by reviewing both facts and evidence—sometimes gleaned from his own interview with the defendant. Such processes may impede the development of criminal defense attorneys, and lead to a negative assessment of the value of lawyers.

Furthermore, judges and prosecutors have inherently more authority and power than defense attorneys, who therefore are perpetually at a disadvantage despite the existence of lawyers' associations entirely composed of defense attorney members of the bar. In the United States, the ABA Guidelines are widely recognized—by defense attorneys and other stakeholders in the criminal justice system—as a national standard of care for counsel's effective representation of clients in death penalty cases. In China, individual lawyers in capital cases are increasingly using the Provincial Guidelines; however, the Provincial Guidelines are not mandatory rules.¹⁰⁹ The leading lawyers and professors who are currently working to evolve these guidelines will surely encounter more difficulties implementing and promoting them as the Provincial Guidelines continue to grow.

It is pertinent to note that courts and other important stakeholders in China's criminal justice system have not yet officially recognized the Provincial Guidelines. This is an important next step in China.

As the ABA Guidelines do in the United States, the Provincial Guidelines can, in China, help judges understand what information they need to decide cases accurately. A stronger and more effective defense effort will in turn help prevent abuses and mistakes by the prosecution and police. Furthermore, skilled and experienced defense lawyers can help prosecutors understand all aspects of the case before the prosecution must decide whether it is necessary to seek the death penalty. More importantly, the Provincial Guidelines provide clear and detailed guidance for defense attorneys to consult when they represent defendants in death penalty cases. The Provincial Guidelines direct

108. See China Criminal Procedure Law, *supra* note 19, art. 32.

109. See discussion *supra* Part V.

where the justice system should be moving towards to allow defense attorneys to fulfill their obligations and do better jobs.

China has recently made progress by listening to the voices of defense attorneys. The SPC has declared that it will consider defense attorneys' opinions and suggestions on how to prevent wrongful convictions; the SPC has also expressed the importance of, and committed to, protecting the professional rights of defense lawyers.¹¹⁰ China is aware that its attitude and practices towards death penalty cases must be changed, and that such changes will not happen overnight; but recognition of the important role of defense counsel, and the fortification of a professional legal community, is a promising place to begin.¹¹¹ We expect that Chinese lawyers, academics, judges, and other stakeholders will continue to promote acceptance of the Provincial Guidelines at the national level. Future efforts will focus on getting each of the various stakeholders to buy into the Provincial Guidelines, and will seek to provide systematic training programs akin to those promoted by the ABA Guidelines. The ultimate goal is for every defendant facing the possibility of a death sentence to be adequately represented by a competent lawyer at every stage of the criminal proceedings, and to provide each defendant with a fair trial.

110. Judge Shen Deyong of the SPC stated that China "[s]hould highly pay attention and utilize the role of defense attorney in preventing wrongful conviction cases." *Zuigao Fa: Chongfen Fahui Lushi zai Fangfan Yuanjia Cuo'an shangde Zhongyao Zuoyong* (最高法:充分发挥律师在防范冤假错案上的重要作用), JCRB.COM (Apr. 25, 2013, 5:54 PM), http://news.jcrb.com/jxsw/201304/t20130425_1098416.html.

111. Judge Shen, regarding the imperative position of defense counsel, urged China to "realize [that] defense attorneys are one of the most important players in the professional legal community." *Id.*