



## CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA

### DEFENSE LAWYERS TURNED DEFENDANTS: ZHANG JIANZHONG AND THE CRIMINAL PROSECUTION OF DEFENSE LAWYERS IN CHINA

*“We should improve judicial proceedings and safeguard the legitimate rights and interests of citizens and legal persons.”*

- Jiang Zemin, November 8, 2002

*“In a modern democratic society ruled by law, criminal defense is vitally important to safeguarding human rights, protecting the dignity of law, and ensuring judicial justice. . . . The dropping ratio of lawyers defending criminal cases is having a long-term, harmful effect on both China’s image as a country ruled by law and on China’s drive to establish the rule of law.”*

- *Legal Daily*, January 13, 2003

#### **Executive Summary**

The intimidation of defense attorneys poses a major challenge to China’s criminal justice system and the Chinese leadership’s stated goals of building the rule of law and protecting the rights of PRC citizens. In recent years, China’s leaders have taken some positive steps toward these goals by amending the PRC Criminal Procedure Law to enhance the rights of criminal defendants and making public commitments to restrain law enforcement abuses. However, these steps forward are being undermined by the intimidation of China’s defense attorneys. Such harassment, which has been highlighted by the recent prosecution of Zhang Jianzhong, one of China’s most prominent defense lawyers, has contributed to low morale in the Chinese defense bar and a lack of aggressiveness in criminal defense. It has also contributed to a steady decline in the percentage of Chinese criminal defendants represented by legal counsel, despite a continuing increase in the number of lawyers in China. These trends have sparked a vibrant debate in China on appropriate protections for criminal defense lawyers.

Chinese authorities can take several steps to address these problems by: (1) recognizing the important implications of the Zhang Jianzhong case for rule of law in China and demonstrating that Zhang has been treated fairly under the law; (2) repealing Article 306 of the PRC Criminal Law, an unnecessary provision on evidence fabrication that is often used to harass defense attorneys; (3) raising evidentiary requirements in evidence fabrication cases and clarifying related statutory language; and (4) giving an All China Lawyers Association disciplinary committee primary responsibility for adjudicating cases of evidence fabrication and similar misconduct involving defense attorneys.

## 1. Introduction

On February 25, 2003, Zhang Jianzhong, one of China's most prominent and outspoken defense attorneys, was tried in Beijing on charges of assisting in the fabrication of evidence in a major corruption case. Zhang's case has sent shockwaves through China's legal profession and highlighted longstanding concerns that some Chinese prosecutors are using criminal provisions on evidence fabrication to unfairly harass defense attorneys. As such tactics have become more common in recent years, Chinese attorneys have come to view criminal defense work as a "high risk" activity. Many Chinese lawyers and legal scholars cite this concern as a principal reason for low morale in China's criminal defense bar, a lack of aggressiveness in criminal defense, and a steady decline in the percentage of Chinese criminal defendants represented by legal counsel. In a legal system where criminal defendants and defense attorneys already face numerous obstacles and disadvantages, such trends are a step in the wrong direction.

This paper examines the Zhang Jianzhong case and, more broadly, concerns about the treatment of criminal defense lawyers that his case highlights. Specifically, it recommends that China consider the following steps to address concerns about the Zhang case and the problem of defense attorney intimidation:

- Chinese authorities should recognize the implications of the Zhang Jianzhong case for rule of law development in China and respond to public concern about his prosecution by demonstrating that Zhang has been treated fairly under the law. Specifically, in its judgment in the case, the court should address the legal arguments in Zhang's favor raised by a panel of Chinese legal experts. A reasonable and transparent treatment of Zhang's case will show China's commitment to building a strong, yet accountable, criminal defense bar.
- The National People's Congress should repeal Article 306 of the PRC Criminal Law, a legal provision on evidence fabrication that specifically targets defense attorneys. Article 307 of the PRC Criminal Law prohibits evidence fabrication. Article 306 is unnecessary and contributes to the perception among Chinese lawyers that criminal defense is a high-risk activity.
- The National People's Congress or Supreme People's Court should raise the evidentiary requirements for convicting an attorney of evidence fabrication and define evidence fabrication more precisely under the law. At present, there are no legal interpretations to guide the application of evidence fabrication provisions in the Criminal Law, making such provisions a convenient mechanism for attorney harassment.
- The All China Lawyer's Association, the Ministry of Justice, and relevant law enforcement organs should agree to allow the All China Lawyers Association to establish a disciplinary committee, with oversight by the procuratorate<sup>1</sup> or the Ministry of Justice, to handle cases of evidence fabrication and similar misconduct involving defense attorneys. Such an ACLA committee would provide a check on the procuratorate, which has a conflict of interest in bringing these cases and few institutional checks to ensure that such charges are fair.

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<sup>1</sup> The procuratorate is China's prosecutorial organ. It is also the formal supervisor of China's legal system (*see* Section 3.2).

## 2. The Prosecution of Zhang Jianzhong for Evidence Fabrication

### 2.1 Background on Zhang Jianzhong

Zhang Jianzhong is one of China's most prominent attorneys. A partner in the Beijing Gonghe Law Firm, Zhang built a successful practice as a business lawyer and litigator.<sup>2</sup> In recent years, Zhang has also gained notoriety by serving as defense counsel in the corruption cases of two high-ranking government officials, Li Jizhou and Cheng Kejie.<sup>3</sup> Billed as two of the largest corruption cases in PRC history, both attracted significant media attention in China and abroad. In the case of Cheng Kejie, Zhang reportedly put on a spirited defense and angered authorities by granting interviews about the case.<sup>4</sup>

In addition to his legal work, Zhang has been an active member of the Chinese bar and a vocal advocate for lawyer rights. Prior to his arrest, Zhang served as chairman of the Beijing Lawyers Association Committee to Protect Lawyer Rights and spoke publicly about the problems faced by defense attorneys in China.<sup>5</sup> As a result of his professional accomplishments, Zhang has been honored as one of Beijing's ten outstanding lawyers.<sup>6</sup>

### 2.2 Detention, Formal Arrest, and Indictment

On May 3, 2002, the Beijing Public Security Bureau detained Zhang Jianzhong.<sup>7</sup> Despite requests from the Beijing Lawyers Association and his law firm, Zhang was not permitted to see a lawyer for over a month, a violation of the PRC Criminal Procedure Law.<sup>8</sup> In June 2002, Zhang's family was notified that pursuant to the approval of the Beijing No. 1 People's Procuratorate, Zhang had been formally arrested on suspicion of assisting in the fabrication of evidence.<sup>9</sup> Zhang's lawyer was permitted to meet with him the following week.<sup>10</sup> Zhang was not formally indicted until January 6, 2003, more than seven months after his detention.

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<sup>2</sup> Zhang Jingping, "Interviewing Zhang Jianzhong, Defense Counsel of Cheng Kejie and Li Jizhou," *Xinwen Zhoukan (News Weekly)*, November 19, 2001.

<sup>3</sup> "Detention of Noted PRC Defense Lawyer Zhang Jianzhong," *Hong Kong Ming Pao*, June 8, 2002.

<sup>4</sup> "Lawyer Does Wonderful Job in Defense, Cheng Kejie Is Likely to Escape Death Penalty," *Hong Kong Ming Pao*, July 15, 2000; "Cheng Kejie's Defense Counsel Zhang Jianzhong Formally Arrested by Authorities," Hong Kong Information Center for Democracy and Human Rights, June 14, 2002.

<sup>5</sup> Zhang Jingping, *supra* note 2.

<sup>6</sup> Li Hongbing, "An Investigation of the Case of Zhang Jianzhong, 'Defense Lawyer for Cheng Kejie and Li Jizhou,'" *21<sup>st</sup> Century Business Herald*, March 13, 2003.

<sup>7</sup> "Detention of Noted PRC Defense Lawyer," *supra* note 3.

<sup>8</sup> Erik Eckholm, "China Detains Leading Lawyer and Keeps Him Incommunicado," *New York Times*, June 7, 2002. Under Article 96 of the PRC Criminal Procedure Law, "After the criminal suspect is interrogated by an investigation organ for the first time or from the day coercive measures are taken against him, he may appoint a lawyer to provide him with legal advice. . . . The appointed lawyer shall have the right to . . . meet with the criminal suspect in custody to inquire about this case. . . ."

<sup>9</sup> "Zhang Jianzhong Suspected of the Crime of Evidence Fabrication? Cheng Kejie's Lead Lawyer Is Arrested," *China Commercial Daily*, July 17, 2002. Note that under PRC criminal procedure, there is a difference between "detention" and formal "arrest." Individuals under investigation are initially "detained" by public security. After sufficient evidence of a crime has been gathered, the public security organ will request formal approval from the procuratorate to make an arrest. PRC Criminal Procedure Law, Chapter VI.

<sup>10</sup> Vivien Pik-Kwan Chan, "Rights Lawyer Held Incommunicado Formally Arrested," *South China Morning Post*, June 15, 2002.

Notably, while the written recommendation for prosecution filed by the public security bureau originally charged Zhang with violating Article 306 of the Criminal Law, the procuratorate's indictment charged Zhang with a violation of Article 307. As discussed below in Section 3, Article 306 is a controversial provision of the Criminal Law that specifically targets defense attorneys for evidence fabrication. Article 307 is a general prohibition on the fabrication of evidence.<sup>11</sup> This shift is notable because it raises the possibility that prosecutors were concerned about public fallout from the case and decided to apply the less-controversial provisions of Article 307 in charging Zhang.<sup>12</sup>

### 2.3 *The Charges Against Zhang*<sup>13</sup>

The prosecution of Zhang stems from his work as an attorney for Huo Haiyin, the former head of a branch of the Beijing Urban Cooperative Bank (the "Bank"). In March of 1998, Huo was detained on suspicion of corruption and later charged with and convicted of making illegal loans and a series of other crimes. Prior to his detention, Huo had retained Zhang to help him sell an interest in two Dalian real estate projects. Huo, who served as chairman of board of the company that owned the real estate assets, was alleged to have arranged for a series of illegal loans from the Bank to fund the projects. It is unclear whether Zhang was aware of the illegal loans and the details of the original Dalian real estate transactions. Zhang agreed to represent Huo in the transfer and requested a power of attorney to handle the transaction. After Huo was detained in March 1998, Zhang received the power of attorney, and was also authorized by Huo's family to serve as Huo's defense counsel. Subsequently, the Dalian assets were transferred to a Hong Kong company, which reportedly agreed as a term of the asset purchase to repay the loans owed to the Bank, with interest. According to PRC reports, the debt was never fully repaid, and the Bank lost 780 million RMB (about 95 million USD).

The specific charge that Zhang assisted in the fabrication of evidence relates to the power of attorney executed by Huo. According to the charges, Zhang colluded with Huo and Ceng Yan, a public security officer investigating Huo's case, to backdate the power of attorney to a date prior to Huo's detention. According to the indictment filed by the procuratorate, the backdated power of attorney was then used to transfer the Dalian assets for the purpose of lightening Huo's criminal responsibility for the illegal loans (presumably because the Bank would have been repaid). Ceng Yan was eventually convicted of crimes of corruption in September 2001, a trial at which Zhang appeared as a witness. At Ceng's trial, the court found that Huo had executed the power of attorney after he was detained and during his interrogation by Ceng.

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<sup>11</sup> Both Article 306 and Article 307 carry penalties of three to seven years of imprisonment or criminal detention.

<sup>12</sup> It is also possible that public security made an error in recommending that Zhang be prosecuted under Article 306. Although Zhang initially was entrusted by Huo's family to serve as his defense attorney, Huo later hired different counsel. Article 306 only applies to individuals acting as defense lawyers or defense agents, while Article 307 has general application.

<sup>13</sup> The narrative in this subsection is based on two reports on the case and trial published in the PRC press. See Li Hongbing, *supra* note 6, and Zhang Wen, "The Inside Story of the Arrest of Zhang Jianzhong," *China Lawyer Net*, August 31, 2002 (reprinting an article that originally appeared in *Xinwen Zhoukan*).

## 2.4 Trial and Defense

Zhang's trial took place on February 25, 2003 in the Beijing No. 1 Intermediate People's Court.<sup>14</sup> According to reports, only Zhang's relatives, one colleague from Zhang's law firm, five representatives of the Beijing Lawyer's Association, and two media representatives were allowed to attend the one-day hearing, and the atmosphere in the courtroom was tense.<sup>15</sup> As of the date of publication of this paper, no verdict had been reached in the trial. The length of time that it has taken for the court to reach a verdict in this case is one indication of the political sensitivities involved, and is also a violation of the Criminal Procedure Law.<sup>16</sup>

At trial, Zhang's attorneys argued that he was innocent of the charges, relying heavily on an advisory opinion solicited by the defense from a panel of legal experts at Renmin University's Expert Research and Consultation Committee on Difficult Criminal Law Questions.<sup>17</sup> The opinion, in which the experts concluded that Zhang's acts did not constitute a crime under Article 307 and urged the court to "seek truth from facts," is reportedly based on three arguments. First, the power of attorney was not relevant evidence in Huo's case because it could not have been used to prove the crimes with which Huo was charged. Second, the power of attorney would have been a legal document even if it had been executed during Huo's detention, the implication being that the date on the document was irrelevant. Finally, the experts argued that Zhang merely accepted the power of attorney, and did so through Ceng Yan, the public security officer in Huo's case. Thus, at the time Zhang had reason to believe that the acts of Ceng Yan were sanctioned by law enforcement, and his act of accepting the power of attorney cannot be evidence of a criminal intent to assist in the fabrication of evidence.<sup>18</sup>

## 2.5 Reactions to Zhang's Prosecution

Zhang's case raises a number of questions and concerns. The evidence related to Zhang's involvement in dating the power of attorney is ambiguous, and the prosecution appears to have a weak legal case under Article 307 based primarily on the testimony of Ceng Yan, the public security officer who was convicted of corruption. Moreover, even assuming that the prosecution's evidence and legal arguments are correct, Chinese authorities have violated at least two provisions of the Criminal Procedure Law in Zhang's case and have held him in detention, without a verdict, for over one year for altering the date on a power of attorney, the relevance of which to Huo Haiyin's criminal case was questionable at best. This response and the length of

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<sup>14</sup> "Beijing Publicly Tries the Lawyer Zhang Jianzhong for Assisting in Evidence Fabrication," *People's Daily Online*, February 25, 2003.

<sup>15</sup> Li Hongbing, *supra* note 6. It is unclear why access to the trial was restricted, as Article 152 of the PRC Criminal Procedure Law requires trials to be held in public, except in cases where "state secrets" or the "private affairs of individuals" are involved.

<sup>16</sup> Under Article 168 of the PRC Criminal Procedure Law, the court has a maximum of 2.5 months to reach a verdict. "A People's Court shall pronounce judgment on a case of public prosecution within one month, or one and a half months at the latest, after accepting it. Under one of the situations provided in Article 126 of this Law, the period may be extended by one more month. . . ."

<sup>17</sup> This description of the defense is based on the *21<sup>st</sup> Century Business Herald* account. Li Hongbing, *supra* note 6.

<sup>18</sup> In China, an element of intent or negligence is necessary in order to prove a crime. PRC Criminal Law, Articles 14-16.

time it has taken to reach a verdict seem disproportionate to the alleged crime, and lend support to speculation that Zhang was targeted for other reasons.

Zhang's case has attracted a great deal of attention both in China and abroad. Observers have speculated that Zhang may have been targeted for prosecution because of his defense work for Li Jizhou and Cheng Kejie.<sup>19</sup> In addition, at least one Chinese source suggests that authorities may have targeted Zhang because he obtained information about scandals implicating senior leaders and their families while defending Cheng Kejie.<sup>20</sup>

Since July 2002, the domestic Chinese press has reported widely on Zhang's case. Articles in China's major dailies have provided basic news about case developments and have described the shock in China's legal community at Zhang's prosecution. Other sources have provided more substantive descriptions of the facts and issues. Detailed investigations of the case published in *News Weekly (Xinwen Zhoukan)* and the *21<sup>st</sup> Century Business Herald* conclude that the Bank and high-level authorities knew about and approved the transfer of the Dalian assets.<sup>21</sup> In fact, the *News Weekly* account cites sources asserting that if the Bank had been fully repaid as part of the asset transfer, the charges against Zhang would have been dropped.<sup>22</sup> When read together, the accounts suggest another theory of the case – that Zhang was unfairly made the scapegoat for a deal approved by law enforcement that soured when the Bank's illegal loans were not repaid.

Zhang's prosecution has sent shivers through China's defense bar.<sup>23</sup> The All China Lawyers Association and the Beijing Lawyers Association have tracked the case closely, and the Beijing Lawyers Association has established a small group that has met regularly to discuss the case. Many Chinese lawyers have been unwilling to comment on the case, even to domestic reporters.<sup>24</sup> Those who have commented have expressed concern about the implications of Zhang's prosecution. "There is no doubt, regardless of how Zhang Jianzhong's case is finally decided, that it will have a profound and far-reaching impact on the legal world and on legal reform," stated one Chinese lawyer.<sup>25</sup> Others have expressed shock at Zhang's prosecution and fear for their own safety. As one Chinese attorney lamented, "If they dare arrest a lawyer as famous as Zhang, there are no lawyers who feel safe."<sup>26</sup> In short, Zhang's case and the manner in which it has been handled has crystallized longstanding concerns in the Chinese bar that criminal defense work is dangerous and has generated further controversy over the criminal prosecution of defense attorneys. As discussed in Section 3, such concerns are having a major impact on criminal defense in China.

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<sup>19</sup> See, e.g., "Detention of Noted PRC Defense Lawyer" supra note 3; John Pomfret, "Prominent Chinese Lawyer Detained by Police Since Early January," *Washington Post*, June 7, 2002.

<sup>20</sup> "Cheng Kejie's Defense Counsel Zhang Jianzhong Formally Arrested by Authorities," supra note 4.

<sup>21</sup> Li Hongbing, supra note 6; Zhang Wen, supra note 13.

<sup>22</sup> Zhang Wen, supra note 13.

<sup>23</sup> See, e.g., Vivien Pik-Kwan Chan, "Leading Lawyer to Face Trial After Being Formally Charged with Perjury," *South China Morning Post*, January 8, 2003; Li Hongbing, supra note 6.

<sup>24</sup> "Zhang Jianzhong Suspected of the Crime of Evidence Fabrication?," supra note 9.

<sup>25</sup> Li Hongbing, supra note 6.

<sup>26</sup> *Xinwen Zhoukan*, August 5, 2001, as quoted in "PRC: Arrests of Lawyers Show Slow Progress in Judicial Reform," *Foreign Broadcast Information Service*, November 1, 2002.

### 3. The Crisis in China's Defense Bar

#### 3.1 Prosecution and Harassment of Criminal Defense Lawyers

Although Zhang Jianzhong is the most prominent Chinese defense lawyer to be prosecuted for actions related to client representation, he is not alone. Statistics on such cases vary, but most sources confirm that an increasing number of lawyers have been subject to harassment and wrongful criminal prosecution in recent years, particularly in comparison to the mid-1990s.<sup>27</sup> While lawyer harassment takes many forms in China, from prosecution for corruption to threats and physical violence, a large proportion of such cases involve charges of evidence fabrication.<sup>28</sup> Many evidence fabrication cases are brought under Article 306 of the Criminal Law, which makes it a crime for defense attorneys or other defense agents to “destroy or forge evidence, help any parties destroy or forge evidence, or coerce or entice witnesses into changing their testimony in defiance of the facts or giving false testimony.”<sup>29</sup> As demonstrated in Zhang Jianzhong’s case, evidence fabrication charges can also be brought under Article 307 of the Criminal Law, which makes it a crime for any person “by violence, threat, bribery or other means, to obstruct a witness from giving testimony, or entice another person to give false testimony” or to “assist any parties in destroying or forging evidence.” According to reports, at least 100 defense lawyers have been prosecuted under Article 306 since the provision was added to the Criminal Law in 1996.<sup>30</sup> In many other cases, lawyers have been harassed with investigations for evidence fabrication, but not prosecuted.<sup>31</sup>

Although the language of Articles 306 and 307 does not appear objectionable on its face, reports on evidence fabrication cases illustrate how such provisions can be manipulated in practice to intimidate defense lawyers. Defense attorneys have been charged with assisting in evidence fabrication after defendants or witnesses lied to them or fabricated evidence without their knowledge.<sup>32</sup> In other cases, prosecutors have brought charges against defense lawyers because a witness or client changed an earlier statement made to investigators.<sup>33</sup> Some defense attorneys

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<sup>27</sup> See, e.g. “Luo Gan Urges Lawyers to Tackle Issues of Public Concern,” *Xinhua*, April 26, 1999 (citing Ren Jisheng, then president of the All China Lawyers Association); Liu Zhonghai, “The Environment in which My Country’s Lawyers Practice Law Still Requires Continued Improvement,” *Xinhua*, May 21, 2000; Work Report of the All China Lawyers Association on Protecting Lawyers Rights, *China Lawyer Net*, May 14, 2002.

<sup>28</sup> Wang Jin, “Are Defense Lawyers Able to Enjoy ‘Special Rights,’” *Beijing Youth Daily*, May 22, 2001; *Xinwen Zhoukan*, supra note 26; ACLA Work Report, supra note 27.

<sup>29</sup> Clause 2 of Article 306 incorporates an explicit intent requirement. “Where a witnesses’ testimony or other evidence provided, shown or quoted by a defender or agent ad litem is inconsistent with the facts but is not forged intentionally, it shall not be regarded as forgery of evidence.”

<sup>30</sup> See, e.g., Cha Qingjiu, “Lawyers Turn Pale at the Mention of Defending Criminal Suspects – Worries Arising from the Decreasing Percentages of Criminal Cases with Defense Lawyers,” *Legal Daily*, January 13, 2003; Pomfert, supra note 19.

<sup>31</sup> A prominent Chinese defense attorney estimates that almost 500 lawyers have been arrested for perjury in recent years, but notes that most have not been prosecuted. Chan, supra note 23.

<sup>32</sup> “Famous Lawyer Zhang Jianzhong Arrested in Beijing on Suspicion of Perjury,” *China News Agency (Zhongguo Xinwen She)*, July 18, 2002; Qian Lieyang and Zhao Yan, “A Legal Analysis of the Evidence Fabrication Case of Li Kuisheng,” Chinalawinfo.com (no date available).

<sup>33</sup> See, e.g., the case of Liu Jian, described in Yu Ping, “Glittery Promise vs. Dismal Reality: The Role of a Criminal Lawyer in the People’s Republic of China after the 1996 Revision of the Criminal Procedure Law,” 35 *Vanderbilt Journal of Transnational Law* 827, 855 (May, 2002); Wang Jin, supra note 28. Other commentators have reported

appear to have been targeted simply because they had strong cases. In three different cases in Anhui Province, for example, prosecutors requested a postponement of a trial after unfavorable evidence was introduced by the defense, allegedly intimidated defense witnesses into changing their statements, then charged the defense attorneys involved with evidence fabrication.<sup>34</sup> In practice, any discrepancy between evidence collected by law enforcement officials and evidence presented by the defense creates the potential for a defense attorney to be accused of inciting evidence fabrication, even if law enforcement officials obtain their evidence through coercion.<sup>35</sup>

It is telling that most defense lawyers investigated or charged with evidence fabrication are not convicted of such crimes.<sup>36</sup> While this fact suggests a certain degree of protection for defense attorneys, Chinese lawyers and legal scholars interpret it as further proof that evidence fabrication provisions are being used for the purpose of professional retaliation – either charges are dropped once the defense attorney is intimidated, or the cases are trumped up by public security or the procuratorate and do not hold up in court.<sup>37</sup> In either case, law enforcement organs do not necessarily need to secure a conviction to achieve the purpose of sidelining or cowing an aggressive defense lawyer.

Concern over such cases has generated a vigorous and emotional debate in China over Article 306 and prompted the All China Lawyers Association and some legislators to work actively for the repeal of this provision of the Criminal Law.<sup>38</sup> The legal community has focused its efforts primarily on Article 306 for several reasons. First, lawyers and legal scholars contend that Article 306 is discriminatory and unfairly targets defense lawyers, creating an uneven playing field with prosecutors.<sup>39</sup> They note that Article 307 addresses crimes of evidence fabrication sufficiently and question the need for a separate legal provision that singles out defense attorneys.<sup>40</sup> Critics of Article 306 make the further point that if anyone should be singled out for such behavior, it should be prosecutors and public security officials, who frequently resort to illegal tactics to gather evidence.<sup>41</sup> Second, they argue that because there are no clear legal interpretations to guide the application of Article 306, prosecutors have wide latitude to bring

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similar incidents and note that witnesses often blame lawyers for discrepancies in testimony to escape trouble with law enforcement.

<sup>34</sup> Tian Hengsheng, “Thoughts on Article 306 of the Criminal Law,” *China Lawyer Net*, December 20, 2002. For a similar case, see “Judgment in the First Fujian Province Case of Lawyer Fabrication Announced a Few Days Ago: Lawyer Not Guilty,” *Fujian Legal Daily*, October 29, 2001. See also, “A Zhi,” “Words on the Joys and Sorrows of Criminal Defense,” *Legal Daily*, January 16, 2003.

<sup>35</sup> Wang Jin, *supra* note 28.

<sup>36</sup> See Wang Jin, *supra* note 28, and commentary in “Judgment in the First Fujian Province Case,” *supra* note 34.

<sup>37</sup> “Prominent PRC Defense Lawyer Zhang Jianzhong Formally Arrested, Charged,” *Hong Kong AFP*, June 14, 2002; Wang Jin, *supra* note 28.

<sup>38</sup> According to CECC sources, the All China Lawyers Association has taken the lead in this effort, making annual appeals to the National People’s Congress for removal of the provision. Such efforts have also received support within the NPC. Zhang Yan, an NPC delegate, has offered repeal resolutions for several years, and in 2000 thirty NPC delegates signed a petition in support of repeal. Wu Yi, “Delegate Zhang Yan Again Raises a Resolution to ‘Abolish Article 306 of the Criminal Law,’” *China Lawyer Net*, May 10, 2002.

<sup>39</sup> See, e.g., De Hengbei, “An Analysis of Basic Concepts in the Controversy over Seeking the Criminal Liability of Lawyers,” *Legal Daily*, February 13, 2003; Wu Yi, *supra* note 38.

<sup>40</sup> *Id.*

<sup>41</sup> Tian Hengsheng, *supra* note 34.

evidence fabrication charges, making it a convenient mechanism for lawyer harassment.<sup>42</sup> Finally, commentators in this group blame Article 306 for the growing problems of the defense bar, noting that cases of lawyer prosecution have become more frequent since Article 306 was added to the Criminal Law.<sup>43</sup> One Chinese attorney suggests that the provision was intended to keep defense attorneys in check. Article 306, he says, was added to the Criminal Law as a concession to law enforcement agencies opposed to the 1996 amendments to the Criminal Procedure Law, which expanded the rights of defendants and the role of defense lawyers.<sup>44</sup>

Others in the legal community oppose such repeal efforts. Law enforcement officials and some legal scholars see little problem with Article 306.<sup>45</sup> They argue that ethics are a major problem in China's legal profession, that Article 306 and the criminal prosecution of attorney misconduct is necessary to combat illegal behavior by defense attorneys and uphold the administration of justice, and that the language of Article 306 mirrors statutory language in other jurisdictions. A third group of commentators agrees that there is nothing wrong with Article 306 in substance, but acknowledges that there have been problems with the application of the provision.<sup>46</sup> In the view of this group, repeal of Article 306 will not solve the underlying problem of intimidation of defense attorneys, as prosecutors will simply find another provision of the Criminal Law under which to charge lawyers. The problem, in their view, is that it is simply too easy for defense attorneys to be "trapped" by Article 306, and too easy for prosecutors to prove a case under the provision. Consequently, these observers do not support repeal of Article 306, but instead advocate a statutory amendment or judicial interpretation that would raise evidentiary standards in evidence fabrication cases involving defense attorneys and define the crime of evidence fabrication more clearly.

Some lawyers and legal scholars have gone even further than repeal of Article 306 and advocated limited criminal immunity for defense attorneys. Although immunity proposals take slightly different forms, most would apply immunity to statements made by defense attorneys and other advocacy undertaken in the course of their representation of criminal clients.<sup>47</sup> As support for their position, advocates of criminal immunity point out that other countries extend limited immunity to defense lawyers.<sup>48</sup> Some advocates of immunity stress that lawyers must still be subject to sanctions if they engage in willful misconduct and acknowledge that there are some disadvantages to immunity, but conclude that given the current problems with lawyer harassment, the benefits of such a protection outweigh the costs.<sup>49</sup>

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<sup>42</sup> Wang Jin, *supra* note 28. For example, it is unclear when a lawyer is "enticing" a witness to change testimony. In the absence of a judicial interpretation of this term, even a leading question could be interpreted as enticement. Yu Ping, *supra* note 33, at 855-6.

<sup>43</sup> *See, e.g.*, Wang Jin, *supra* note 28; Wu Yi, *supra* note 38.

<sup>44</sup> CECC Interview.

<sup>45</sup> CECC Interviews. For examples of these arguments, *see also* Deng Kezhu, "Article 306 of the Criminal Code and Lawyers Rights," *China Lawyer Net*, February 28, 2003, and material presented in De Hengbei, *supra* note 39.

<sup>46</sup> CECC Interviews.

<sup>47</sup> Li Yujie and Dong Juan, "Human Rights of Lawyers," *Hebei Legal Science*, July 2001, at 94-5; Wang Jin, *supra* note 28.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

### 3.2 Sources of Conflict Between Law Enforcement Personnel and Defense Attorneys

Chinese and foreign legal scholars provide several reasons for the frequent conflicts between defense attorneys and law enforcement personnel. Many Chinese police and prosecutors do not fully recognize either the procedural rights of criminal defendants or the role of defense attorneys in preserving these rights.<sup>50</sup> Such attitudes reflect dominant public attitudes towards the legal profession and the criminal process in China. The public has a poor perception of lawyers generally, a perception based in part on growing ethics problems in the Chinese bar.<sup>51</sup> In addition, there is broad public support for the government's efforts to fight crime, and little sympathy for or understanding of the need for strong procedural protections for criminal defendants.<sup>52</sup> As a result, police, prosecutors, and the public at large often view defense lawyers simply as troublemakers and obstacles to the work of law enforcement.<sup>53</sup>

Several legislative and political developments since the mid-1990s have intensified this conflict. Amendments to the Criminal Procedure Law in 1996 introduced a more adversarial process by expanding the right to counsel, enhancing defendant access to evidence, and strengthening the role of defense attorneys in the pre-trial and trial process.<sup>54</sup> These changes enable Chinese defense attorneys to mount a more aggressive defense and have brought them into sharper conflict with law enforcement officials.<sup>55</sup> At the same time, police and prosecutors have been under greater pressure than ever to secure convictions. In response to a growing crime problem in recent years, the Chinese government has embarked on two broad "strike hard" anti-crime campaigns, during which law enforcement organs and courts are encouraged to show substantive results by generating convictions.<sup>56</sup> Finally, under China's 1995 State Compensation Law, law enforcement officials can be liable for compensation if a criminal defendant is found innocent. The threat of liability under the State Compensation Law puts further pressure on police and prosecutors to ensure that defendants are convicted.<sup>57</sup>

While there are numerous incentives for China's law enforcers to harass defense attorneys, there are few checks on such abuses. China lacks an independent media, which could expose abuses by law enforcers. More important, procuratorates have a dual role as both prosecutors and as watchdogs of China's bureaucracy and the criminal process. In addition to prosecuting criminal cases, procuratorates themselves are charged with investigating cases of official graft,

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<sup>50</sup> Li and Dong, *supra* note 47, at 95; Yin Hongwei, "Who Will Defend Criminal Suspects in China?," *Phoenix Weekly* (2002).

<sup>51</sup> *Xinwen Zhoukan*, *supra* note 26; Wu Xinzong, "As Complaints Against Lawyers Mount, the Public Calls for Lawyers' Wash-up," *Heilongjiang Daily*, April 13, 2002; De Hengbei, *supra* note 39. According to De, Chinese legislators have expressed strong concern about the deterioration of lawyer ethics.

<sup>52</sup> Randall Peerenboom, *China's Long March Toward Rule of Law* (Cambridge University Press, 2002), 375-76.

<sup>53</sup> One local public security bureau even went so far as to issue a written circular formally listing a defense attorney as an "enemy." Wang Jin, *supra* note 28.

<sup>54</sup> Lawyers Committee for Human Rights, *Opening to Reform? An Analysis of China's Revised Criminal Procedure Law*, October 1996.

<sup>55</sup> As some observers have documented, however, these improvements are often not implemented in practice. See *Challenges for Criminal Justice in China, Staff Roundtable of the Congressional-Executive Commission on China*, July 26, 2002, Written Statement of Jerome A. Cohen.

<sup>56</sup> Susan Trevaskes, "Courts on the Campaign Path in China: Criminal Court Work in the 'Yanda 2001' Campaign," 42 *Asian Survey* 673, 675-78 (September/October 2002).

<sup>57</sup> De Hengbei, *supra* note 39.

supervising law enforcement and the trial process, and addressing citizen complaints about legal personnel.<sup>58</sup> Although in theory China's courts and people's congresses could provide some oversight of procuratorate actions, both institutions are relatively weak in relation to law enforcement, and to date neither has been an effective check on law enforcement abuses.<sup>59</sup> As a result, Chinese lawyers complain, prosecutors are both "players and referees" in the criminal process, and it is easy for them to use illegal means to deal with "obstructions" in the name of legal supervision.<sup>60</sup>

### 3.3 *Defendants Without Lawyers*

The increasing number of lawyer prosecutions in China has corresponded with a sharp and continuous decline in the percentage of Chinese criminal defendants represented by legal counsel since 1997. The Chinese media has reported widely on this decline. The *Legal Daily*, a newspaper published by the Ministry of Justice, reported in January 2003 that the percentage of criminal defendants represented by counsel dropped from 40% in 1996 to 30% in 2001.<sup>61</sup> A professor at the National Judicial College confirms that in many courts, fewer than 30% of criminal defendants are represented by counsel.<sup>62</sup> In some areas, the number is as low as 10%.<sup>63</sup> Surprisingly, the percentage of criminal defendants represented by counsel has continued to drop between 1996 and 2002, even as the number of attorneys in China has increased by over 20%.<sup>64</sup>

Chinese lawyers give several reasons for the declining percentage of criminal defendants represented by counsel. First, it is generally recognized that fees for criminal cases are low, and many attorneys prefer more lucrative areas of practice.<sup>65</sup> Second, as described below, it is often difficult or impossible for defense attorneys to mount a meaningful criminal defense for their clients. Finally, and most importantly in the view of many commentators, lawyers in China view criminal defense as a "high risk" activity. According to such commentators, lawyers fear prosecution under Article 306 and other forms of harassment by law enforcement organs, and as a result they are unwilling to engage in criminal defense work.<sup>66</sup>

For attorneys who do remain in the defense bar, morale and job performance are low. Attorneys face a wall of obstacles in preparing even a basic defense for their clients. Among other difficulties, they often have difficulty meeting with clients, have limited access, if any, to

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<sup>58</sup> PRC Organic Law of the People's Procuratorates, Chapters II and III; PRC Procurators Law, Chapter II.

<sup>59</sup> See Keith Hand, "Watching the Watchdog: China's State Compensation Law as a Remedy for Procuratorial Misconduct," 9 *Pacific Rim Law & Policy Journal* 95, 98-103 (February 2000); Wang Jin, *supra* note 28.

<sup>60</sup> Yin Hongwei, *supra* note 50.

<sup>61</sup> Cha Qingjiu, *supra* note 30. Other Chinese sources indicate similar trends. See, e.g., Li Shuming, "The Dangerous Implications of Lawyers 'Turning Pale when Discussing Criminal [Law]," *China Youth Daily*, March 29, 2002; Wang Jin, *supra* note 28; Yu Ping, *supra* note 33, at 833; Yin Hongwei, *supra* note 50.

<sup>62</sup> Wang Jin, *supra* note 28.

<sup>63</sup> *Id.*

<sup>64</sup> *China Law Yearbook*, 1996 and 2002 (Legal Publishing House, 1996, 2002), 1074, 1253. According to CECC sources, the percentage of Chinese lawyers practicing criminal law has dropped from 3% to 1% in recent years.

<sup>65</sup> Cha Qingjiu, *supra* note 30; Yin Hongwei, *supra* note 50. At least one Chinese commentator concludes that the obstacles defense attorneys face are at least in part responsible for low fees. How can a defense lawyer charge high fees, he asks, if the system prevents the lawyer from mounting an effective defense? Wu Yi, *supra* note 38.

<sup>66</sup> See, e.g., Cha Qingjiu, *supra* note 30; "Words on the Joys and Sorrows of Criminal Defense," *supra* note 36; Wu Yi, *supra* note 38; Li Shuming, *supra* note 61.

prosecution evidence prior to trial, and frequently have no opportunity to cross-examine witnesses.<sup>67</sup> As one Qinghua University law professor concludes, defense lawyers are forced simply to go through the motions of serving as a trial prop – as a result, he says, they have no enthusiasm and lack the diligence to protect the lawful rights and interests of their clients.<sup>68</sup> Other lawyers and legal scholars echo such comments.<sup>69</sup>

Legal observers have reacted to these trends in criminal defense with alarm. “The dropping ratio of lawyers defending criminal cases is having a long-term, harmful effect on both China’s image as a country ruled by law and on China’s drive to establish the rule of law,” states a commentator in the *Legal Daily*.<sup>70</sup> Chinese scholars note that the falling rates of defense representation are a particular problem in China because many law enforcement and judicial organs have a backwards attitude and do not recognize that defendants have rights in the criminal process.<sup>71</sup> Thus, in an environment in which it is critical to have good lawyers doing defense work, concluded one Beijing University law professor, China is moving in the opposite direction of developed countries.<sup>72</sup> As these Chinese observers point out, the problems faced by defense attorneys pose a major obstacle to China’s stated efforts to build its legal system, address law enforcement abuses, and protect the rights of its citizens. In particular, such trends undermine the right to counsel provided to criminal defendants under the Criminal Procedure Law.<sup>73</sup>

#### 4. Recommendations

As Chinese experts have pointed out, in a system where the state traditionally has enormous power, law enforcement organs dominate the judicial process, and criminal defendants face many disadvantages, defense lawyers are clearly the weaker party in the Chinese criminal process.<sup>74</sup> In the long-term, full resolution of the problems faced by defense lawyers in China will require education and a change in prevailing attitudes toward criminal defense. However, the Chinese government can take some limited steps now to alleviate the crisis in China’s defense bar and signal its concern about these issues to law enforcement and the public.

- *Recognize the rule of law implications of the Zhang Jianzhong case and respond to public concern about his prosecution by demonstrating that Zhang has been treated fairly under the law.*

Violations of the Criminal Procedure Law during the detention of Zhang Jianzhong, lack of transparency in the detention and trial process, and the weakness of the prosecution’s evidence

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<sup>67</sup> These and other difficulties faced by defense attorneys in China are described in Yu Ping, *supra* note 33, “Words on the Joys and Sorrows of Criminal Defense,” *supra* note 36, and Cohen, *supra* note 54.

<sup>68</sup> Yin Hongwei, *supra* note 50.

<sup>69</sup> *See, e.g.*, the comments of Zhang Yanshang, the director of the Beijing Lawyers Association Criminal Law Committee, in Wang Jin, *supra* note 28. *See also* Li and Dong, *supra* note 47.

<sup>70</sup> Cha Qingjiu, *supra* note 30. Similar views are expressed in “Words on the Joys and Sorrows of Criminal Defense,” *supra* note 36.

<sup>71</sup> Li and Dong, *supra* note 47.

<sup>72</sup> Yin Hongwei, *supra* note 50.

<sup>73</sup> PRC Criminal Procedure Law, Articles 33, 96.

<sup>74</sup> De Hengbei, *supra* note 39.

and legal case have fueled concerns that defense lawyers in China are not safe from unfair retribution by law enforcement. In addition, the Beijing No. 1 Intermediate People's Court has yet to render a verdict, even though Zhang's case was tried on February 25, 2003. As one of China's most prominent attorneys, a lawyer rights advocate, and a defense lawyer in several nationally publicized corruption cases, Zhang is a figure of symbolic importance to China's legal community. His arrest and trial have contributed to the climate of fear that is undermining criminal defense in China and fueled controversy over the prosecution of defense lawyers. As such, his case has broad implications for China's rule of law development.

Given such a context, authorities should have exercised particular caution in handling Zhang's case, including complying carefully with China's own Criminal Procedure Law, providing as much public information about the case as possible, and ensuring that its legal case for evidence fabrication against Zhang is strong. Unfortunately, law enforcement failed on all three counts. Public security and the procuratorate should consider the negative effect that their handling of the case has had on confidence in China's legal community. In addition, the Beijing No. 1 Intermediate People's Court should consider the legal arguments raised by a panel of experts in this case and address these arguments clearly in its judgment. A reasonable and transparent treatment of Zhang's case will show China's commitment to building a strong, yet accountable, criminal defense bar.

- *Repeal Article 306 of the PRC Criminal Law.*

The National People's Congress should repeal Article 306 because it is unnecessary and contributes to the perception that criminal defense is a high-risk activity. It is not unreasonable to make evidence fabrication a criminal offense. The United States, for example, has federal criminal statutes with language similar to that of Articles 306 and 307 (although such statutes do not specifically target defense attorneys).<sup>75</sup> However, Article 306 appears to have few if any benefits beyond those provided by Article 307, which prohibits the fabrication of evidence generally. At the same time, practicing Chinese attorneys have argued frequently and emotionally that Article 306 facilitates lawyer harassment and unfairly discriminates against defense lawyers. Whether fully justified or not, there is a strong *perception* in China's legal community that Article 306 raises the risk of engaging in criminal defense work, and it is precisely this perception of high risk that has contributed to the deterioration of China's defense bar. Defense lawyers already face a host of disadvantages and frustrations in the criminal process – absent negative consequences, any step that can be taken to improve morale in China's defense bar is a positive one. Moreover, as a signal that the Chinese leadership has recognized the problem of defense lawyer intimidation, repeal could help to improve the status of the defense bar and encourage local authorities to exercise greater care in dealing with defense attorneys.

Critics of repeal efforts are correct to point out, however, that China's defense bar should not rely solely on repeal of Article 306 to resolve the issue of defense attorney harassment. Article 306 was added to the Criminal Law in 1996, at about the same time that the Criminal Procedure Law was amended to expand the rights of criminal defendants and the role of defense attorneys.

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<sup>75</sup> For example, under U.S. federal law, whoever "procures another to commit any perjury" is guilty of a crime. 18 U.S.C. 1622.

Although many Chinese lawyers blame Article 306 for the increasing number of improper lawyer prosecutions since 1996, a more plausible explanation for the increase is that the expansion of defendant rights under the amended Criminal Procedure Law has resulted in more frequent conflicts between law enforcement officials and defense attorneys. As the cases of Zhang Jianzhong and other lawyers demonstrate, if Article 306 were repealed, prosecutors could simply charge defense lawyers with evidence fabrication under Article 307 (the general criminal provision on evidence fabrication).<sup>76</sup> Thus, while repeal would be a moral victory, it should be considered in the context of a set of broader reforms to address the procedural and institutional problems at the root of these cases.

- *Raise the evidentiary requirements for convicting an attorney of evidence fabrication and define evidence fabrication more precisely under the law.*

In the short-term, the suggestion of raising evidentiary standards in evidence fabrication cases involving defense attorneys could provide some limited benefits. Part of the problem with Articles 306 and 307 is that it is simply too easy for prosecutors to build a case of evidence fabrication, and there are few if any legal standards to guide the application of these statutory provisions. As cases demonstrate, the prosecution needs only a discrepancy in evidence or the testimony of one witness to make the charge. Suggestions related to evidentiary requirements include: (1) requiring a higher level of corroborating evidence beyond the fact that testimony or evidence is inconsistent<sup>77</sup> (for example, requiring more than one witness to demonstrate that an attorney knowingly engaged or assisted in the fabrication of evidence); (2) establishing a *de minimis* requirement under which small discrepancies in evidence would not subject defense attorneys to prosecution;<sup>78</sup> and (3) clarifying the definition of statutory terms such as “entice” or “assist” to make it clear to attorneys what behavior violates the law and make it more difficult for prosecutors to manipulate the provisions. The heightened evidentiary requirements and expanded definitions could be established through a judicial interpretation by the Supreme People’s Court or a statutory amendment by the National People’s Congress.<sup>79</sup>

- *Establish a disciplinary committee of the All China Lawyers Association, with oversight by China’s procuratorate or the Ministry of Justice, to handle most such cases.*

In addition to the steps outlined above, China should consider shifting primary responsibility for handling evidence fabrication and similar cases involving defense attorneys to China’s lawyers associations. One model would be for a lawyers association disciplinary committee to adjudicate cases of evidence fabrication or other ethics violations committed by defense attorneys in the

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<sup>76</sup> Recall that in Zhang’s case, the public security bureau’s written recommendation for prosecution indicated that Zhang should be charged under Article 306, but the procuratorate charged him under Article 307. For an example of another case brought under Article 307, see “Judgment in the First Fujian Province Case,” supra note 34.

<sup>77</sup> CECC Interview; Randall Peerenboom, Posting to China Law Net, April 15, 2003.

<sup>78</sup> Randall Peerenboom, Posting to China Law Net, April 15, 2003.

<sup>79</sup> While desirable, heightened evidentiary requirements and legislative clarifications have limitations as well. Although such changes would make it more difficult for prosecutors to secure convictions in evidence fabrication cases, prosecutors could presumably find ways to manufacture additional evidence. Moreover, as discussed above, evidence fabrication charges have had a chill on the defense bar even though only a small percentage of attorneys investigated for evidence fabrication are convicted. New evidentiary standards would do little to address this effect.

course of representing their clients.<sup>80</sup> Upon the recommendation of the relevant procuratorate or public security organ, the lawyers association disciplinary committee would investigate cases of evidence fabrication, evaluate evidence, and recommend disciplinary sanctions, if warranted, to the local justice bureau with jurisdiction over the lawyer in question. Such sanctions could range from a warning to the suspension or revocation of the lawyer's license.<sup>81</sup> In serious cases and on the recommendation of the lawyers disciplinary committee, attorneys could be referred back to the relevant procuratorate for criminal prosecution. Under this system, lawyers would be more effectively protected from trumped up charges of evidence fabrication, since the lawyers associations would determine whether misconduct occurred.<sup>82</sup>

Undoubtedly, law enforcement would have concerns about relinquishing the power to formally prosecute defense lawyers in such cases. As many sources document, professional ethics in the Chinese bar are a legitimate concern. Under the proposed model, however, lawyers associations would have an interest in investigating cases aggressively, both as a means of enhancing the image of the legal profession and to prevent law enforcement agencies from backing out of the arrangement and once again applying criminal provisions in such cases. In addition, to address the anticipated concerns of law enforcement, the arrangement could require the All China Lawyers Association (ACLA) to investigate all cases referred by the procuratorate and incorporate an oversight role for the procuratorate and the Ministry of Justice. One option would be to establish an appellate or review body at the Ministry of Justice level to review the decision of the lawyers committee at the request of the procuratorate.

At the same time, additional oversight should be implemented for any cases referred back to the formal criminal process. To avoid local conflicts of interest between prosecutors and defense lawyers, such cases should be monitored closely by the Supreme People's Procuratorate and the Ministry of Justice. In particular, these authorities should ensure that existing provisions of the Criminal Procedure Law are rigorously enforced in such cases and that prosecution witnesses are subject to cross-examination by the defense.

A concern with this model is whether lawyers associations have the capacity to handle such disciplinary investigations. When the PRC Lawyers Law was being drafted in the mid-1990s,

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<sup>80</sup> At least one Chinese commentator has proposed a similar mechanism. *See* De Hengbei, *supra* note 39. In the United States, lawyers can be prosecuted for suborning perjury and similar offenses, but such misconduct is usually handled by bar association ethics committees. U.S. prosecutors are reluctant to bring such cases, both because they appreciate the effect that such cases can have on the criminal justice system and because they are afraid of professional reproach and accusations of retaliation if their cases are not airtight. In the U.S. federal system, if attorneys are prosecuted for acts related to the representation of a criminal client, the prosecuting attorney must notify the Department of Justice. U.S. Attorneys' Manual, Title 9, Section 2.032.

<sup>81</sup> Under Part 7 of the 1996 PRC Lawyers Law, local judicial bureaus have the power to issue warnings or suspend or revoke a lawyer's practice certificate.

<sup>82</sup> Such a mechanism would likely require an amendment to Article 45 of the 1997 Lawyers Law and Articles 38 and 45 of the Criminal Procedure Law, all of which require prosecutors to seek criminal liability in cases of evidence fabrication and related offenses. In addition, the Ministry of Justice, law enforcement organs, and ACLA would need to agree to handle defense lawyer discipline cases in this manner. There is some precedent for such experimental agreements on a smaller scale. For example, one district procuratorate in Beijing has entered into a written cooperative agreement with the Beijing Lawyers Association on issues related to the exchange of evidence in criminal cases. CECC Interviews.

the drafters considered giving ACLA responsibility for lawyer discipline.<sup>83</sup> There was significant opposition to this move, however, in part due to concerns that lawyers associations were too weak to handle this responsibility and that lawyers could not properly police their own profession.<sup>84</sup> Although many local lawyers associations still lack the capacity and expertise to fulfill this function now, ACLA is better organized, and is already tracking cases of lawyer harassment. Given what appears to be a small number of cases, centralizing this role with ACLA would not be impractical, and might help to alleviate problems with corruption that could arise if local lawyers associations were given responsibility for investigating cases.

In addition to alleviating concerns about the harassment of defense lawyers, allowing ACLA to handle such cases could stimulate other beneficial dynamics in terms of institutional cooperation and development. Such a model would help to enhance the capacity of lawyers associations to engage in self-discipline, create incentives for lawyers associations to improve professionalism and ethics, and strengthen the autonomy of the bar, all stated goals of China's Ministry of Justice.<sup>85</sup> Giving lawyer associations responsibility for handling such cases would also reflect a general trend in China to enhance the governance role of social organizations.<sup>86</sup> Finally, the process of developing a mutually agreeable structure for the ACLA disciplinary committee and giving the procuratorate some consultation or oversight role in the process could facilitate positive cooperation between lawyers and procurators and enhance understanding between the two institutions. Given the conflicts described in this paper, such interaction would be a positive development.

## Conclusion

The Chinese government has an opportunity to take some limited but important steps now to improve criminal defense in the PRC. By addressing the intimidation of defense lawyers, China will improve the implementation of its amended Criminal Procedure Law, give meaning to its promises to address law enforcement abuses, and demonstrate to its citizens and the outside world that it is taking steps to genuinely protect the legitimate rights and interests of its citizens and build the rule of law.

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<sup>83</sup> Peerenboom, *supra* note 52, at 354.

<sup>84</sup> *Id.*

<sup>85</sup> Zhang Fusen (PRC Justice Minister), "Vigorous Efforts to Be Made to Bring About a Greater Development of the Profession of Chinese Lawyers in the New Century," *Legal Daily*, June 1, 2002; "China to Allow Lawyers More Autonomy," *People's Daily* (Overseas Edition), December 27, 2002.

<sup>86</sup> See, e.g., "Nurture Civic Consciousness, Promote a Transformation of Governance," *21<sup>st</sup> Century Business Herald*, May 15, 2003; *To Serve the People: NGOs and the Development of Civil Society in China*, Staff Roundtable of the Congressional-Executive Commission on China, March 24, 2003, Written Statement of Ma Qiusha.