

# The Promulgation of the "Legal Aid Law" Guides the Implementation of the Duty Lawyer System

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## Abstract

The promulgation of the "Legal Aid Law" has further clarified the implementation of the duty lawyer system. The duty lawyer system was created to cooperate with the implementation of the leniency system for confessing guilt and punishing, and aims to provide basic legal assistance to the prosecutor in the criminal procedure. However, during the operation of this system, there are problems such as unsmooth exercise of power, unclear positioning of legal aid, and easy "substitutes" for defenders. The promulgation of the "Legal Aid Law" takes legal assistance of duty lawyers as a form of legal aid, clarifies the duty lawyers' help objects and legal assistance responsibilities, stipulates the identity of duty lawyers, and the duty lawyers and the delegated defenders and designated defenders in cases The problem of convergence.

## Keywords

Plead Guilty and Punished; Lawyer on Duty; Legal Aid Law; Defender.

## 1. Introduction

In September 2006, the project of "Exploring the Establishment of a Legal Aid Duty Lawyer System" jointly promoted by the United Nations Development Program, the Ministry of Commerce and the Ministry of Justice began a pilot project in Xiuwu County, Henan Province. The project aims to promote the integration of China's legal aid system with international standards, and to accumulate experience for the establishment of a legal aid duty lawyer system throughout the country in the future. [1] In 2008, the system of on-duty lawyers began to be implemented in Henan province. In 2010, the Ministry of Justice explored the establishment of a system of on-duty lawyers nationwide. In 2014, the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice jointly promulgated the "Measures for the Pilot Program of Criminal Cases in Certain Regions". Since then, the establishment of the on-duty lawyer system has taken a new start. In 2016, the "Measures on the Pilot Work of the Criminal Cases Plea and Punishment Leniency System in Certain Regions" jointly issued by the "Two High Schools and Three Ministries" will further give full play to the role of on-duty lawyers, aiming to effectively protect crime under the leniency system the rights of suspects and defendants. In 2017, in order to give full play to the role of legal aid duty lawyers in the trial-centered reform of the criminal procedure system and the reform of the guilty and punishing leniency system. The "Two High Schools and Three Departments" jointly issued the "Opinions on Carrying out the Work of Legal Aid Duty Lawyers". The duty lawyer system was incorporated in the 2018 Criminal Procedure Law. In 2019, the "Guiding Opinions on the Application of the Leniency System for Plea and Punishment" (hereinafter referred to as the "Guiding Opinions on Plea and Punishment") jointly issued by the "Two High and Three Ministries" clarified the work methods and responsibilities of duty lawyers in plea and punishment cases. The problem provides clear guidance for the application of the duty lawyer system. In August 2020, the "two high schools and three ministries" once

again jointly promulgated the "Legal Aid Duty Lawyer Work Measures" (hereinafter referred to as the "Duty Lawyer Work Measures") to further refine the work of duty lawyers in providing general legal assistance and in pleading guilty and punishing cases. The content of the duties that should be performed for legal assistance. The Legal Aid Law of the Thirteenth National People's Congress Standing Committee promulgated in 2021 and implemented in 2022 adopted the legal aid of on-duty lawyers as one of the forms of legal aid services, and the conditions for termination of legal aid are stipulated. The above documents provide a mechanism guarantee for the application of the duty lawyer system.

## 2. Major Changes in the Duty Lawyer System

When the duty lawyer system was first implemented, it was to guarantee the voluntariness of criminal suspects and defendants in applying the leniency system for confessing guilt and punishing, clarify the law for the prosecutor, provide suggestions on procedural choices, provide opinions on the handling of the case, and be able to meet with them. The prosecutor also consulted the case file, making the job design of the duty lawyer and the defensive function of the appointed defender in legal aid somewhat unclear. Due to the fact that the duty lawyer is not a defender but performs some defensive legal assistance acts, coupled with the quick and simple handling of confessions and punishment cases, the role design of duty lawyers has not received sufficient attention in judicial practice, leading to the development of duty lawyers' work difficulty. In confession and punishment cases, when suspects and defendants who have entrusted their own defenders sign the confession of guilt and punishment, the judiciary may find a lawyer on duty as a witness for convenience. The promulgation of the "Legal Aid Law" explained the above controversial issues more clearly, determined the nature of legal assistance for duty lawyers, tried to alleviate the difficulties in the work of duty lawyers, and made it clear that there is no longer a functional conflict between the duty lawyers and the entrusted defenders.

### 2.1. Use Legal Assistance for Duty Lawyers as a form of Legal Aid

The provisions on the duty lawyer system are in the Criminal Procedure Law, the "Guiding Opinions on Pleading Guilty and Punishment" and the Regulations on the Duty Lawyer's Work Law also focus on their legal assistance responsibilities and protecting the rights of on-duty lawyers. There is no clear definition of the position of the duty lawyer system in the legal aid system and its relationship with the defense lawyer appointed in legal aid. Article 22 of the "Legal Aid Law" regards the legal assistance of on-duty lawyers as one of the forms of legal assistance services provided by legal aid personnel in accordance with the law. Parallel to it are criminal defense and agency. Clarifying that the legal assistance of on-duty lawyers, as a type of legal aid service, plays an important role in ensuring the better application of the system of plead guilty and punishing leniency and the implementation of the concept of full coverage of criminal defense.

### 2.2. Difficulties in the Work of Duty Lawyers Get Attention

In 2020, the cases that applied the leniency system in the review and prosecution cases handled by China accounted for 86.8% of the number of cases concluded in the review and prosecution cases in the same period.[2] Based on this, it can be understood that the focus of the work of on-duty lawyers is mostly concentrated on criminal suspects and defendants who have no defenders in confession and punishment cases. The balance of prosecution and defense under negotiated justice required in cases of confession and punishment is the symmetry of information.[3] But in practice, this may become the biggest trouble for duty lawyers in handling guilty plea cases.[4] Because the case-handling agency does not fully understand the duty lawyer system, it believes that the duty lawyer system is mainly reflected in the value of

efficiency.[5] The on-duty lawyer meeting with criminal suspects and consulting case files may be hindered by the case-handling agency. Under such ideologically-led conditions, some case-handling agencies do not want the duty lawyers to request rights such as file review and interviews, and they rarely respond to the opinions put forward by the duty lawyers, but they require the duty lawyers to be present to witness, the prosecutors and criminal suspects. After completing the sentencing negotiation, the on-duty lawyer was notified to be there to witness, and there was also a tendency to "witness-like" functional performance. [6] Even at the beginning of the application of the duty lawyer system, it is difficult to obtain basic office conditions. For example, in order to solve this problem, Guangdong Province issued Article 4 of the "Implementation Opinions on Carrying out Legal Aid Duty Lawyers" Provide a workplace for duty lawyers to carry out their work, equipped with necessary office facilities such as desks, chairs, telephones, and computers." At this stage, it has repeatedly emphasized the protection of the right to meet with on-duty lawyers and review the files. Article 37 of the Legal Aid Law stipulates that "the people's court, the people's procuratorate, and the public security organs shall ensure that duty lawyers provide legal assistance in accordance with the law, and inform criminal suspects and defendants who do not have a defender that they have the right to meet with duty lawyers and act as duty lawyers in accordance with the law. Facilitate understanding of the situation of the case, review of files, interviews, etc." If you want to change the job status of the on-duty lawyer, you should change the awareness of the case-handling personnel as the center.

### **2.3. The Attorney on Duty Will Witness the Signing of the Confession and Punishing Recognizance Letter on Behalf of the Defender Will be Improved**

Article 31 of the Guiding Opinions of Guilty and Punishment stipulates that "the statement of recognizance shall include the criminal suspect's truthful confession of the crime, consent to sentencing recommendations, application of procedures, etc., and shall be signed by the criminal suspect, defender or attorney on duty." The "or" here means "or". The inconsistency of judicial application has led to the appearance of the lawyer on duty to sign a confession on behalf of the defender. In practice, some criminal suspects have entrusted a defender, but when signing the confession letter of confession, the defender may not be able to be present at any time, and the judicial authority asked the lawyer on duty to witness it. In order to solve this problem, on December 1, 2021, the Supreme People's Procuratorate issued Article 7 of the Opinions on the Implementation of Article 28 on the Deliberation Opinions of the Standing Committee of the Thirteenth National People's Congress on the People's Procuratorate's Application of the Plea and Punishment Leniency System It is stipulated that "when the criminal suspect has a defender when signing a confirmation letter in a confession and punishment case, the defender shall be present to witness the confirmation. It is strictly forbidden to bypass the defender and arrange for a lawyer on duty to witness the confirmation." The "28 Implementation Opinions" has clearly stipulated that it is strictly forbidden to bypass the defender. The lawyer on duty will do the work for the defender, but this provision still fails to improve the problem. And if the defender therefore proposes that the confession of guilt and confession is invalid, some defendants will insist that they have pleaded guilty and punished in order to obtain the leniency of the confession and punishment. At this time, it is meaningless for the defender to continue to assert that the confession and confession is invalid; it may be changed if it is valid by default. With some defense strategies, if the defendant lacks the willingness to "repent" when signing the confession letter, he may face more severe charges than when he pleaded not guilty or punished.

Article 48 of the "Legal Aid Law" on the above issues clearly stipulates that if the recipient appoints a lawyer or other agent on his own, the legal aid agency shall make a decision to terminate the legal aid; and the legal aid personnel discover that the aid is received If a person

has seven conditions other than the above, he should report to the legal aid agency in a timely manner. That is to say, in confession and punishment cases, criminal suspects who have entrusted a defender are not eligible for legal aid. Since then, there will probably no longer be cases where the on-duty lawyer will witness on behalf of the defender when signing the confession of guilt and punishment.

### **3. Clarification of the Main Content of the Duty Lawyer System**

According to legal documents such as the Legal Aid Law, Guiding Opinions on Pleading Guilty and Punishment, and Working Methods of Duty Lawyers, the functions of duty lawyers have gradually become clear, and some of the problems that have plagued the practice and academic circles in the past have also been answered. According to the "Legal Aid Law", the target lawyers on duty are criminal suspects and defendants who have no defenders. The duty lawyer system is an integral part of the public legal service system. The "Legal Aid Law" clarifies that duty lawyers do not provide defense services. It is the duty of duty lawyers to provide legal advice, procedural selection suggestions, application for change of compulsory measures, and opinions on case handling for the prosecutor. The relationship between the duty lawyer, the legal aid lawyer and the defender.

#### **3.1. Clarify the Target Lawyer's Help and Legal Help Responsibilities**

According to Article 30 of the "Legal Aid Law", the target lawyers on duty are criminal suspects and defenders who have no defenders in criminal cases. Although other legal documents have successively clearly stated that the recipient should be the subject without a defender, in practice, from the fact that the attorney on duty witnesses the signing of the recognizance, the staff of the judiciary may confuse the duty lawyer in legal aid. Work limits and the requirements for the application of the leniency system of confession and punishment. The duty lawyer is a system designed to protect the voluntariness of the prosecuted person without a defender in pleading guilty and punishing cases and to reduce the inaccuracies that may be brought about by the simplified procedures of pleading guilty and punishing cases, and to protect the rights and justice of the prosecuted party. The defendant who has a defender is not the subject of assistance from the Legal Aid Law and other legal documents related to on-duty lawyers.

Analyzing the contents of the work of duty lawyers in the "Legal Aid Law", "Working Methods of Duty Lawyers", and "Guiding Opinions on Plea and Punishment", it can be divided into general legal assistance and legal assistance for confession and punishment. One is that, according to Article 6 of the "Working Measures for Lawyers on Duty", the content of general legal assistance includes "The lawyer on duty provides the following legal assistance in accordance with the law: (1) Provide legal advice; (2) Provide procedure selection suggestions; (3) Help criminal suspects The defendant applies for changes to compulsory measures; (4) Provides opinions on the handling of the case; (5) Helps criminal suspects, defendants and their close relatives to apply for legal aid; (6) Other matters stipulated by laws and regulations." Second, related The legal assistance for confessing guilt and punishing is detailed in Article 12 of the Guiding Opinions on Pleading Guilt and Punishment, "The duty lawyer shall provide the following legal assistance to criminal suspects and defendants who plead guilty and punished: (1) Provide legal advice, including informing suspected or charged crimes , Relevant legal provisions, the nature and legal consequences of confessing guilt and punishment; (2) Proposing the application of procedures; (3) Helping to apply for changes in compulsory measures; (4) Providing opinions on the people's procuratorate's determination of crimes and sentencing recommendations; (5) Regarding For case handling, provide opinions to the people's court, people's procuratorate, and public security organs; (6) guide and help criminal suspects, defendants and their close relatives to apply for legal aid; (7) other matters stipulated by laws and regulations." The duty lawyer can also Meeting with the prosecutor, and from the

day when the People's Procuratorate examines and prosecutes the case, the on-duty lawyer can consult the case file and understand the facts of the case. Combining the duty lawyer's legal assistance duties with the "Legal Aid Law" reveals that the duty lawyer's job responsibilities in criminal cases have a wide range of help objects, comprehensive assistance content, pertinence in confession and punishment cases, and content containing interviews and scoring. Defensive. Putting the system of on-duty lawyers on the problem of solving criminal cases where there is no defender will not only help improve the quality of case handling by judicial organs, but also improve the fairness and voluntariness of guilty pleas and punishment cases.

### **3.2. Make it Clear that the on-Duty Lawyer is not a Defender**

In the research on the duty lawyer system, more scholars tend to think that the role of duty lawyer is biased towards the "defender". For example, from the "Guiding Opinions" stipulated in the duty lawyer's right to meet and read the files, these two rights confirm the status of the duty lawyer as a prospective defender.[7] However, if the on-duty lawyer is regarded as a "defender", when the criminal suspect has a defender, it is easy to cause overlap in the functions and scope of work of the on-duty lawyer and the defender, triggering conflicts in the exercise of power between the two.

In the research on the duty lawyer system, more scholars tend to think that the role of duty lawyer is biased towards the "defender". From the perspective of the right to meet and read the file, these two rights confirm duty The status of a lawyer's quasi-defender. It is true that the duty lawyer's rights to read and meet in pleading guilty and punishing cases have the appearance of the rights of some defenders, but there is no entrusted relationship between the duty lawyer and the criminal suspect or defendant, so the first thing that can be determined is that the duty lawyer's professional identity is A lawyer but not a defender. The "quasi-defender" is also a trend that is not reflected in the current laws and regulations. According to the second paragraph of Article 39 of the Legal Aid Law, "criminal suspects and defendants provide legal assistance such as representation and criminal defense through a lawyer on duty. If an application is filed, the on-duty lawyer shall forward the application to the legal aid agency within 24 hours." This means that when the on-duty lawyer is used as a collective job term, it will not be transformed into a defense lawyer in the subsequent litigation procedures, but as an individual the duty lawyer may be transformed into a defender. This provision also corresponds to the specific content "(5) Helping criminal suspects, defendants and their close relatives to apply for legal aid" stipulated in Article 6 Paragraph 1 of Duty Lawyers' Work Regulations.

In practice, there are examples of on-duty lawyers turning into defenders, and some scholars have proposed to change the names of on-duty lawyers directly to on-duty defenders.[8] This should not be regarded as a direct conversion on the individual level. It can be understood as helping the criminal suspect to submit a criminal defense legal application when the lawyer is on duty as a duty lawyer, and it happens to be when the legal aid agency appoints a defender. This "duty lawyer" defended him.

### **3.3. Clarify the Connection between Duty Lawyers, Legal Aid Lawyers and Entrusted Lawyers**

The promulgation of the "Legal Aid Law" indirectly clarified the connection between duty lawyers, legal aid lawyers and entrusted lawyers. According to the relevant provisions of the "Legal Aid Law", the lawyer on duty shall forward the application for legal aid, and the legal aid agency shall make a decision on whether to grant legal aid within seven days from the date of receipt of the application. This completes the transition from the legal assistance of the on-duty lawyer to the legal assistance of the designated defender. For criminal suspects and defendants who have previously obtained defense attorneys on duty or legal aid, when they appoint a

defender on their own, legal aid agencies shall make a decision to terminate legal aid in accordance with Article 48 of the Legal Aid Law. The overlap between the on-duty lawyer and the defender is a frequent phenomenon in affairs. It should be noted that both the "Legal Aid Law" and the "Working Methods of On-duty Lawyer" repeatedly emphasize that the aided person is a "criminal suspect or defendant without a defender." In this regard, the "Legal Aid Law" defines the termination of legal aid as an obligation of legal aid agencies, and specifically stipulates that legal aid personnel shall promptly provide legal aid when they discover that the recipient is in the circumstances of the first paragraph of Article 48 of the law. Agency report. So, if the defendant has been entrusted by the prosecutor and he wants to seek legal advice from the on-duty lawyer, he should also be refused. The on-duty lawyer only provides legal assistance to criminal suspects and defendants who have no defenders.

#### 4. Conclusion

From the pilot application of duty lawyers to plead guilty and punished cases, to the specific provisions of the duty lawyer system in the "Leniency System for Plea and Punishment" and "Working Methods for Duty Lawyers", the duty lawyer system in China has been gradually established and improved. The promulgation of the "Legal Aid Law" takes legal assistance of duty lawyers as a form of legal aid, clarifies the relationship between the duty lawyer system and designated defense lawyers, and stipulates that the aided person is a criminal suspect or defendant without a defender, who should be entrusted by himself the defender's legal aid institution shall terminate the legal aid. This article resolves the conflict between the on-duty lawyer and the lawyer entrusted by the prosecutor when signing a confession of guilt and punishment in a confession and punishment case. As an important role in the pre-trial stage of realizing the full coverage of criminal defense, duty lawyers can provide the prosecutor with a variety of defense-related legal assistance. The prosecutor who does not meet the legal aid conditions in the expedited and summary procedures still has no defender. It does not violate the direction of judicial reform with full coverage of criminal defense.

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