

Guarantee of Effective Defense in the Context of Online Criminal Litigation

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Abstract: The application of online criminal litigation in the epidemic period has become a new judicial method, offering a fresh space for discussion on effective defense. With the empowerment of technology, online criminal litigation enhances judicial efficiency, but it also raises questions about whether the litigation rights of the accused are equally respected. In other words, are the rights of the accused to an effective defense ensured in online litigation? Observations show that there are still many issues in the application of technology, the demonstration of procedure and the display of substantive outcomes, suggesting a need to adhere to the value orientation of procedural justice. To this end, it's necessary to ensure the effectiveness of lawyer defense in online criminal litigation by granting defense lawyers data defense rights and strengthening their technical training, thereby maximally protecting the legal rights of the accused.

1. The Presentation of Effective Defense in Online Criminal Litigation

The development of intelligent justice with the empowerment of technology not only brings efficiency bonus to litigation, but also meets the demands for litigation reform in the internet era. Compared to the traditional "face-to-face" physical court trial, the "screen-to-screen" cloud trial is almost a new judicial method^[1] matched to this era because of its significant tool value such as its speed and convenience.^[2] Since 2010, when the Supreme People's Court proposed "promoting remote video interrogation and court proceedings" in its 2010 annual work priorities, a quiet transformation in the method of trial in the criminal litigation field has been underway; in 2016, the "Opinions on Further Promoting the Separation of Complicated and Simple Cases" affirmed the legitimate status of online criminal trial for the first time in a normative document, and online criminal litigation has thereafter gradually begun to be piloted in various provinces and cities. In the post-pandemic era, online criminal litigation has been widely applied due to its advantages of "contactless trial". The 2021 "Online Litigation Rules" provide guidance for the cautious application of online litigation to ensure procedural justice in criminal cases, stating that "cases under the criminal summary procedure, commutation, parole cases, and other criminal cases that are not suitable for offline trial due to special reasons, can be tried online."^[3] It is worth noting that when discussing the positive impact of online criminal litigation on improving judicial efficiency, its value in protecting judicial justice, especially procedural justice, must also be considered. Some scholars point out that the design and application of pragmatism in the current online criminal trial provide convenience and efficiency for law enforcement by the public security and judicial authorities, but to a certain extent, ignore the protection of the accused's rights.^[4]

The right to defense, as the most core right of the accused, is based on the fundamental principle of criminal procedural law that the accused has the right to a defense. The lawyer's right to defend, being a secondary right derived from the accused's right to defense^[5], is more influential and even decisive in the context of effective defense compared to the right of self-defense held by the accused themselves. Whether the accused can obtain effective defense is not only a common topic in the field of traditional criminal litigation, but also an important consideration in the application of technology to justice in new trial modalities, with the aim of ensuring litigation rights. How to realize "visible effective defense" in online criminal litigation, we should first clarify the meaning of effective defense.

In discussing the essence of effective defense, scholars often regard whether a lawyer provides diligent and responsible defense as the standard to measure effective defense^[6]. However, some scholars question this by arguing that this is a misunderstanding of effective defense, and attaching

importance to due diligence defense does not mean neglecting the effectiveness of the defense ^[7]. From the above viewpoints, two ways of understanding with different focuses are provided. The first is to emphasize the full exercise of the right to defense; that is, in terms of the procedural concept, defense lawyers should fully protect the litigation rights of the accused, i.e., highlighting the lawyers' defense action under the protection of rights; the second is to attach importance to the effectiveness of defense; that is, in terms of substantive handling, defense lawyers should achieve the litigation results favorable to the accused, i.e., paying more attention to the defense lawyers' realization of the accused's claims. The conduct of online criminal litigation also relies on defense lawyers safeguarding the litigation rights and interests of the accused through equal confrontation and appropriate defense, which, in terms of safeguarding litigation rights procedurally and uncovering the truth substantively, aligns with the value of effective defense in offline litigation. In addition to a proper understanding of the essence of effective defense, we should also consider the following two questions: first, what obstacles and problems are currently and practically encountered in online criminal litigation that might contradict the principles of effective defense; second, how to ensure the effective exercise and realization of defense rights by transitioning from “technology-empowered online litigation” to “technology-empowered defense”.

2. Three Dilemmas Faced by Effective Defense in Online Criminal Litigation

2.1 Obstacles of Technology: Severely Limited Evidence Collection and Proof Abilities

Whether the defense lawyer can provide sufficient evidence in court is an important manifestation of offering favorable defense opinions for the accused and achieving the best defense outcomes, and the basic premise of sufficient evidence is the full exercise of defense rights such as investigation, evidence collection and case file review. In other words, the realization of effective defense heavily depends on safeguarding lawyers' rights to investigate, collect evidence and review case files. ^[8]However, in the context of online criminal litigation, lawyers' abilities to collect and present evidence are “hollowed out”.

(1) There are technical disadvantages in investigation and evidence collection. The Criminal Procedure Law grants defense lawyers two ways to investigate and collect evidence, one is to investigate and collect evidence by themselves, the other is to apply to investigate and collect evidence on their behalf.^[9] However, both ways are technically limited to different degrees in the context of online litigation. Due to the phenomenon of evidence bias in online litigation^[10], the prosecution has an obvious advantage in the quality and quantity of evidence obtained using AI technology, especially the "Skynet Monitoring System" and the Intelligent Face Comparison provide effective assistance for the extraction and analysis of evidence, which not only avoids the potential distortion of evidence when the "human" is the object of investigation and evidence collection, but also forms the core component of the prosecution's evidence in a guilty state. In contrast, defense lawyers lack the ways and technologies to collect relevant big data evidence. Even if they manage to obtain sporadic big data evidence favorable to the accused, they struggle to unlock the true value of such evidence without the technical enhancement of algorithms, creating a significant barrier in investigation and evidence collection.

(2) There is technical concealment in the scope of case file review. Although the Criminal Procedure Law grants defense lawyer the right to view, excerpt, and copy the case-related materials from the date of indictment, there are concerns whether the case-related materials may be "obscured," in other words, some forms unknown to the defense are applied to AI calculation programs, or the "algorithmic black box" directly delivered to the judges through an interconnected platform may bypass the case files [11]. These factors have become technical obstacles for the defense lawyer to fully review the case-related materials. It can be said that the prosecution's technical reservations in the stage of incriminating evidence will not only widen the gap in evidence presentation between the prosecution and the defense, resulting in less effective defense. These hidden data may also be relied on by the judge and affect the judge's ruling, thereby damaging the litigation rights of the accused.

2.2 The Challenge of Procedure: The Diminishing Reality of Online Court Cross-Examination

The theatrical court field not only enables the accused to present their case to the judge on the spot, but also to carry out effective cross-examination of evidence directly. This involves questioning the three aspects of physical evidence and cross-examining verbal evidence to demonstrate the effectiveness of the defense and the substantial nature of the trial. However, the shift from theatrical to online trial formats has hastened the change in the method of cross-examination; technology has become a weight for public power monopoly, seemingly placing the accused and their defense lawyers at risk of having their cross-examination efforts diminished.

(1) It is difficult to distinguish the flaws and authenticity of the electronic form of evidence displayed on the screen. The "Online Litigation Rules" require that "both the prosecution and the defense shall electronically process and upload offline litigation documents or evidence materials to the litigation platform by scanning, duplicating, transcribing or otherwise"^[12]. Although the evidence to be cross-examined is electronically processed, due to the absence of rules for cross-examination of online litigation, evidence cross-examination of online litigation still follows traditional litigation mode of cross-examination, which emphasizes to observe the original tangible nature of evidence materials to identify whether the evidence is admissible. However, merely relying on visual observation to determine the authenticity of evidence, besides being influenced by network environment, video angle, screen distortions, etc., there are risks in discerning whether the evidence is destroyed, tampered with or even maliciously forged in the process of electronic transformation, becomes a challenge for the accused and their lawyers to cross-examine effectively. Existing studies show that about 88.78% of online criminal proceedings last less than an hour, and about 43.59% of the hearings last less than half an hour.^[13] The limited court trial time not only further weaken the defense's cross-examination ability, but also cause the online cross-examination procedure to degenerate into a mere perfunctory reading of the evidence catalogue when the prosecution conducts "data dumping," due to the defense's technical deficiencies and lack of capacity.

(2) It is difficult for the witness testimony behind the screen to effectively unfold. The basic operation of the defense's right to cross-examine is based on the simultaneity of being in the same physical space and the continuity of questioning and answering.^[14] The traditional physical field of the criminal witness's absence from court has hindered the effective cross-examination of the witness's testimony by the accused and their defense lawyers. Does the use of online litigation effectively resolve this issue? The answer does not seem optimistic. Although online litigation provides convenience for the criminal witness to "testify in court", the elimination of the sense of ceremony and solemnity of the court makes the criminal witness more likely to make false statements or even commit perjury. Traditionally, witnesses in our country have been reluctant to testify in court. Even if online testimony is available, the witnesses give priority to providing written testimony due to various concerns. If the online witness gives oral testimony, due to technical reasons such as blurred picture quality, network delay, equipment malfunctions, it is difficult for the defense to capture the expression and language hesitancy of the witness during synchronous testimony to form an effective confrontation, and the unfavorable situation of the defense's cross-examination, such as partial listening and missing listening seems unable to be reversed.

2.3 Substantial Dilemma: Minimal Effectiveness of Defense under Imbalance of Prosecution and Defense

Whether it is presenting evidence or cross-examining evidence, the use of online litigation has further widened the gap between the prosecution and the defense, which may lead to the inability of the accused to obtain the most favorable judgments through equal confrontation, despite having the diligent assistance of defense lawyers. Whether adopting a "partial online" trial method or a "fully online" trial method, the "four-party structure" of online litigation seems to spatially separate the accused and the defense lawyers from the traditional "three-party structure" of physical courtroom settings. When new evidence unfavorable to the accused or objections to the evidence are raised in the online litigation, the accused and the defense lawyers adjusting their defense strategies through remote dialogue and forming a joint defense effort is the expected manifestation of effective defense.

However, an intercommunication platform for the defense has not been established to facilitate the defense in consultation as to the methods of communication and how to guarantee the timeliness and confidentiality of the communication. In judicial practice, most accused participate in online litigation under the custody condition. The oppressive and helpless environment of being on trial may also make the accused afraid or unwilling to communicate extensively with their lawyers, suppressing the effectiveness of the defense, and preventing substantial functioning of effective defense.

3. Specific Guarantees of Effective Defense under the Technology Empowered Defense

3.1 Adhering to Online Litigation Approach Guided by Procedural Justice

Although online criminal litigation breaks the limitations of physical space in traditional court trial, bringing convenience to optimizing judicial efficiency and effectiveness, we should also realize that the inclination and instinct to pursue judicial efficiency shall not override judicial justice. The iron law of criminal procedure "justice first while efficiency is taken into account" remains the value goal that online litigation shall adhere to. As mentioned above, in the case of the existing imbalance between the prosecution and the defense in the traditional litigation, the procedural defects such as inability of the accused to provide evidence and diminishing cross-examination are further amplified in online litigation. Cases in which defendants appeal due to insufficiently protected rights to an effective defense in the first trial prompt a procedural reflection on online criminal litigation. Transitioning from "technology-empowered online litigation" to "technology-empowered defense", adhering to the protection of online litigation for procedural justice, especially focusing on the protection of the accused's litigation rights, is the fundamental path choice for deepening online criminal litigation.

3.2 Granting Defense Lawyers the Right of Data Defense

Due to the natural distance between technology and law, it is difficult for defense lawyers to collect, process and analyze big data. The traditional defense rights theory faces a bottleneck in protecting the legitimate rights and interests of the accused in the field of data. Compared with the vigorous collection and processing of massive data by criminal investigation and control authorities with the aid of AI technology, the use of data by defense lawyers for defense, whether direct or indirect data information, is significantly behind. In particular, case information obtained from traditional interviews, investigation, evidence collection, and review of case files cannot effectively cover all kinds of data information generated by digital office software.^[15]Therefore, it is necessary to grant defense lawyers the right to data defense based on the concept of equal confrontation between the prosecution and the defense, so as to protect the lawyer's right to know from the source, emphasizing the coordination and cooperation obligations of public authorities through in every stage of "collection—processing—transformation". It involves allowing criminal investigation and control authorities to open some data space and data access, gradually establishing data review portals for defense lawyers to ensure that key data is cross-examined in the process of criminal online trial focusing on the controversial issues of the case, and procedurally ensuring the full realization of the right of defense of the accused and their defense lawyers.

3.3 Strengthen the Cultivation of Online Cross-Examination Capacity and Technical Support for Defense Lawyers

Online criminal litigation brings higher technical demands to court proceedings. Under the national initiative of speeding up the development of smart courts and promoting the construction of the internet judicial model, allowing the defense to obtain corresponding technology enhancements also becomes a strong support to ensure equal confrontation between the prosecution and the defense in online criminal litigation. First, it is recommended to compensate for the defense lawyers' insufficiency of online litigation capacities within the industry, this can be achieved through industry training programs and other measures to improve their strategies for cross-examining evidence under the virtual field. Strategies should be developed to in aspects such as image, color, structure,

information and sound, so as to enable the accused to intuitively perceive the effectiveness of defense. Second, it is important to ensure that defense lawyers have smooth operation of both hardware and software devices in the courtroom, and law firms may, according to their own conditions, establish a special online criminal litigation defense room at their office. These rooms should meet the basic technical requirements of high-clarity, timeliness, fluency, stability in respect of audio and video transmission, so as to provide the fundamental technical support for defense lawyers to conduct effective defense in the cloud.

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