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## Inside the Soviet Bar: A View from the Outside

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## Inside the Soviet Bar: A View from the Outside\*\*

Not long ago a well-informed scholar of Soviet law observed: "It is somewhat startling how little we know of the Soviet advocate, that species of Soviet jurist who seems most proximate in function to the western private practitioner. . . . [P]aradoxically we are not even sure how many advocates there are in the Soviet Union."<sup>1</sup> Although the profession of a Soviet advocate is no longer the enigma that it used to be, some fundamental issues as well as intricate details of the Soviet advocate's practice remain obscure and deserve more extensive treatment. In fact, even the precise number of advocates in the USSR is still unknown.<sup>2</sup>

The primary purpose of this article is to describe the way in which the Soviet Bar Association is organized and functions and to define the position that it occupies vis-à-vis other Soviet institutions. Although an

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1. Butler, *Some Reflections on the Soviet Advokatura: Its Structure and Prospects*, in *SOVIET LAW AFTER STALIN* 239 (Law in Eastern Europe series, vol. 20, 1979).

2. Recent Soviet sources quote the number of advocates in the country from as low as 18,000, *see, e.g.,* THE CRIMINAL JUSTICE SYSTEM OF THE USSR 39 (1979), to as high as 23,000, *see, e.g.,* *Povysheniye Roli Advokatury v Okazanii Pomoshchi Grazhdanam*, 2, SOVETSKOYE GOSUDARSTVO I PRAVO [SOV. GOS. & PRAVO] 93 (1985), (comments by Sukharev, Counsel to the Advokatura Department at the Ministry of Justice of the USSR). Interim figures are also often cited.

adequate exposition of this subject requires some recounting of information already available,<sup>3</sup> an attempt has been made to fill in the gaps in existing scholarship and to clarify some of the remaining ambiguities which are inevitable in a study of any Soviet institution. The article does not deal directly with either the procedural aspects of the Soviet advocate's work or with the political constraints imposed on their substantive performance. Both of these topics are discussed insofar as they help to highlight the role of advocates in Soviet society.<sup>4</sup>

## I. The Strange Case of Advocates in the USSR

Even at first glance, the continuing existence of advocates in the Soviet Union is perplexing. Just recently a respected Soviet legal periodical carried an article by a history professor who quoted from the famous words of Lenin: "One must rule the advocate with an iron hand and keep him in a state of siege, for this intellectual scum often plays dirty."<sup>5</sup> The author observed that in reality Russian advocates "played dirty" more often in the twentieth century, when the proletariat advanced to the position of vanguard of the revolution and thus threatened the well being of the bourgeoisie.<sup>6</sup> Such comments in a Soviet journal hardly offend many readers and apparently easily pass the censorship of the editors because the status of an advocate in the USSR generates mistrust and suspicion of both the government and its subjects.

An advocate in the Soviet Union is endowed with certain prerogatives and duties which must inevitably create almost universal animosity toward the bar in the Soviet society. The officialdom must see the advocate as potentially the most dangerous opponent, because he possesses a legal right to oppose the system in a courtroom. Moreover, the system has provided him with the unique privilege of speaking to an audience without prior scrutiny. This freedom of expression itself may be seen as a sub-

3. See, e.g., Huskey, *The Limits to Institutional Autonomy in the Soviet Union: The Case of the Advokatura*, 34 SOVIET STUDIES 200 (1982) [hereinafter *Advokatura*]; D. KAMINSKAYA, *FINAL JUDGMENT, MY LIFE AS A SOVIET DEFENSE ATTORNEY* (1982).

4. For background reading on the profession of an advocate in the USSR see, e.g., Barry & Berman, *The Soviet Legal Profession*, 82 HARV. L. REV. 1 (1968); Zile, *Soviet Advokatura Twenty Five Years After Stalin*, in SOVIET LAW AFTER STALIN, *supra* note 1, at 207.

5. See Troitski, *Korifei Russkoi Advokatury Pervogo Prizyva*, 2 SOV. GOS. & PRAVO 120 (1985) (quoting V. Lenin, *Pismo E. D. Stasovoi i Tovarishcham v Moskovskoi Tyurme*, 9 POLNOYE SOBRANIYE SOCHINENII 171). The author omitted the closing lines of Lenin's statement: "Announce to him ahead of time: if you, son of a bitch, allow yourself even the slightest indiscretion or political opportunism, then I, the accused, will at once separate myself from you publicly, label you a scoundrel, and state that I reject such a defense." *Id.* Lenin, himself a lawyer, is also known to have adverted to advocates' talent for fabricating false arguments and throwing sand into the people's eyes.

6. Troitski, *supra* note 5, at 120.

versive anachronism in a regime that has monopolized the supply of information, education, and ideology. The right to address the public is coupled with the legally protected privilege/duty of confidentiality of communications with clients. In the absence of clergy and private psychiatrists, an advocate in the Soviet Union is the only individual with whom (ideally) a citizen may consult without fear that his secrets will be exposed to the authorities. Neither of these fundamental rights of an advocate fits neatly into the standard image of Soviet society.

The advocate's position as a champion of individual rights has not earned him the respect and support of his fellow countrymen. The public generally envies advocates for their considerably higher than average wages and opportunities to receive side income. The apparent separation of the bar from the state apparatus also alienates advocates from the masses, who view them as a foreign element in a country of pervasive government controls. Finally, until recently the predominantly Jewish looks and names of advocates<sup>7</sup> further raised the barrier between the profession and its potential clients.

It should be of no surprise, then, that as a Soviet lawyer recently admitted: "It is hard to remember an instance when an advocate was portrayed in a newspaper article or on the television screen not as a blowhard and a sharpie fencing off a criminal, but as a wise specialist of strong patriotism."<sup>8</sup> In this unfriendly environment an advocate today finds himself squeezed between the state's need to restrict his independence and the populace's desire to minimize his privileges.

## II. The Status of the Soviet Bar

In 1977 the Soviet bar was raised to the level of a constitutional agency whose fundamentals are provided for in Article 161 of the Soviet Constitution: "Colleges of advocates are available to give legal assistance to citizens and organizations. In cases provided for by legislation citizens shall be given legal assistance free of charge. The organization and procedure of the Bar are determined by the legislatures of the USSR and

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7. Huskey observed that "a disproportionally high percentage of the membership [in the bar] is Jewish. The Jewish component of the Moscow City College of Advocates is estimated at well over 50%." See *Advokatura*, *supra* note 3, at 202. Huskey concluded that "the *advokatura* continues to function as a refuge for Jewish lawyers unable to enter freely state legal institutions because of officially imposed restrictions." *Id.* The latter assertion seems to be inaccurate, since from the mid 1970s the very same restrictions apply to admission of new members to the bar.

8. See *Povysheniye Roli Advokatury v Okazanii Pomoshchi Grazhdanam*, *supra* note 2, at 86 (comments by Savitsky, member of the Institute of State and Law of the Academy of Science of the USSR).

Union republics.”<sup>9</sup> As stated in the Constitution, the bar is subject to the statutory commands of an all-union law and respective republican regulations (*polozheniya*). In November 1979, the Supreme Soviet of the USSR passed the first Law on the Bar of the USSR.<sup>10</sup> The 1979 law provided general outlines for the institutional organization of the advocate profession.

The Soviet bar is composed of associations of advocates—“colleges”—which are independent from each other and are structured on the principle of territoriality. Republican colleges of advocates are formed in Union Republics without regional division and in Autonomous Republics; territorial and regional colleges in corresponding administrative units of the country; and city colleges in some of the largest cities.<sup>11</sup> Thus, several colleges of advocates, without any formal links to each other, may be set up on the territory of one Union Republic. For example, on the territory of RSFSR (Russian Soviet Federative Socialist Republic) one will find city colleges, regional colleges, and colleges of advocates of Autonomous Republics. There is no subordination of one college to another, nor is there a single ruling body supervising the work of all advocates in the Republic. The every day work of a college is conducted by its member-advocates through so-called offices of legal consultation formed by each college.<sup>12</sup>

The Law of the Bar defines colleges of advocates as “voluntary associations of persons practicing as advocates.”<sup>13</sup> Despite this terse definition, both in the Soviet Union and abroad the bar has come to be known by its more sententious description as a social, self-governing,<sup>14</sup> and voluntary organization.<sup>15</sup> A close look at the status of the Soviet bar reveals that none of these epithets is accurate.<sup>16</sup>

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9. KONST. SSSR art. 161.

10. See LAW OF THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE BAR OF THE USSR, reprinted in LEGISLATIVE ACTS OF THE USSR 330 (1981), (hereinafter THE LAW). Before the passage of this fundamental law, there was no uniform legislation regulating the profession of an advocate as a whole; each union republic adopted its own statute regulating activities of advocates within its respective jurisdiction.

11. *Id.* art. 3.

12. *Id.* art. 8.

13. *Id.* art. 3.

14. The Russian word “*obshchestvennaya*” is sometimes translated as “public;” in this context “social” seems to be a more accurate English equivalent. Similarly, the word “*samoupravlyayushchayasya*” means “self-governing,” but sometimes is translated as “self-administering.” The choice of terms is not crucial for the understanding of the concepts involved.

15. See, e.g., SUD I SUDOPROIZVODSTVO V SSSR (1984). This recent Soviet textbook for law students gives the following definition of the Soviet Bar: “*Advokatura*—is a social, self-governing organization, which is called upon to render to the population and organizations juridical assistance on legal issues, draft all sorts of documents and business papers,

### A. IS THE BAR VOLUNTARY?

The voluntary nature of the Soviet bar is its only property expressly mentioned in the law.<sup>17</sup> It is usually associated with the process of creating new colleges of advocates.<sup>18</sup> According to the all-union and republican legislation, "colleges of advocates shall be set up on application by a group of constituents consisting of persons with a higher law education."<sup>19</sup> The statutes, however, provide for an alternative method of establishing a college of advocates—"initiative of the executive and administrative organ of a corresponding Soviet of People's Deputies."<sup>20</sup> No statistical data exist on how many colleges were started by volunteers in recent decades, but in all probability the number is minuscule, or zero. In any event, even if a group of jurists decides to organize themselves into a college, they must forward their application to the Republican Ministry of Justice, which in turn, if it consents, will send it to the Council of Ministers or a corresponding territorial executive committee of the People's Soviet for approval.<sup>21</sup> It is evident that the right to "voluntarily" organize a college of advocates depends totally on the bureaucracy of the state apparatus and probably is never exercised anyway. Thus the definition of colleges of advocates as "voluntary associations" is deceptive and meaningless since in practice it does not distinguish the bar from any other Soviet institution. In fact, even in the Soviet Union this term has become a legal fiction, whose substance is not usually discussed in the literature.

### B. IS THE BAR A SOCIAL ORGANIZATION?

The description of the Soviet bar as a social organization has become a custom observed in almost every piece of writing on this subject.<sup>22</sup> Yet, despite this almost universal definition of the bar as a Soviet social or-

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conduct court defense in criminal cases, and representation in civil cases." *Id.* at 259 (emphasis added).

16. In this respect it is hard to resist a comparison of the definition of the Soviet bar with the popular description of the Holy Roman Empire.

17. See *supra* note 13 and accompanying text.

18. See, e.g., *SUD I SUDOPROIZVODSTVO V SSSR* 240 (1981).

19. See *THE LAW*, *supra* note 10 at art. 3; RSFSR REGULATION ON THE BAR art. 3, reprinted in *VEDOMOSTI VERKHOVNOGO SOVETA RSFSR* 1105 (1980) [hereinafter the RSFSR REGULATION ON THE BAR].

20. *Id.*

21. *Id.*

22. See, e.g., Apraksin & Polyak, *Razvitiye Sovetskoi Advokatury*, 5 *Sov. Gos. & Pravo* 99 (1979); *The Criminal Justice System of the Soviet Union*, *supra* note 2, at 39; *Advokatura*, *supra* note 3, at 200.

ganization,<sup>23</sup> legally it does not carry this status.<sup>24</sup> Some western scholars, even those who continue to call the bar a social organization have noted, on the advice of their Soviet colleagues, that colleges of advocates, unlike other Soviet social organizations, are not subject to the state income tax.<sup>25</sup> The exemption from taxation, however, does not explain why the Soviet government is reluctant to formally extend the status of social organization to the bar.<sup>26</sup>

The critical fact is that the status of social organization accords the republican organs of such a body a privilege of legislative initiative<sup>27</sup> which is denied to the bar. There are two primary reasons for the government's unwillingness to grant this right to advocates. First, only the republican organs of a social organization have the right of legislative initiative. Consequently, since colleges of advocates on the level of a Union Republic exist in less than half of the Soviet Union Republics, the extension of the status of social organization to all colleges will discriminate against those that have no governing bodies at the level of a Union Republic.<sup>28</sup>

Second, had the government really wanted to give the bar full rights of social organization, the situation could have been easily remedied, for example, by creating an all-union organ to represent the common interests of all advocates. Such a body would also have enjoyed the prerogative to initiate legislation.<sup>29</sup> A denial of the status of social organization and, therefore, of the right to initiate legislation enables the government to maintain a disheartening situation in which "the impact of the profession on the law-making process is marginal at best. In the case of the 1979 Law on the Advokatura, the advocates had no direct influence on the initiation or drafting of the legislation."<sup>30</sup> In order to continue this practice of excluding advocates from the law making process, which apparently

23. Admittedly some Soviet authors writing about social organizations in the Soviet Union in general do not mention the bar as one of them. See, e.g., Ts. Yampolskaya, *SOCIAL ORGANIZATIONS IN THE USSR* (1972).

24. In common usage the word "social" is appropriate to indicate that advocates are not state employees and do not receive their salaries from the state.

25. See *Advokatura*, *supra* note 3: "Although the *advokatura* satisfies all requirements of a social organization, a Ministry of Justice official explained that it was not so described in legislation because it would have subjected the profession to an unnecessary tax liability." *Id.*; see also W. BUTLER, *SOVIET LAW* 78 (1983 ed.).

26. There is nothing complicated in granting an exemption from taxation to an agency which otherwise is recognized in law as a social organization.

27. See, e.g., KONST. RSFSR art. 108.

28. For the official Soviet view on this issue see Natruskin, *Novyi Zakon ob Advokature v SSSR*, 10 SOV. GOS. & PRAVO 20 (1980) (Natruskin is the head of the *Advokatura* Department of the Ministry of Justice of the USSR.).

29. KONST. USSR art. 113.

30. *Advokatura*, *supra* note 3, at 206.

satisfies the interests of the ruling elite, the government will avoid by all means a legal recognition of the bar as a social organization.<sup>31</sup>

### C. DO ADVOCATES GOVERN THEMSELVES?

No Soviet law mentions the words "self-governing" when talking about the bar. Yet this term, like "social," has acquired a permanent presence in the Soviet bar lexicon.<sup>32</sup> Soviet advocates, perhaps like their western counterparts, justifiably consider that "the self-governance of the bar is a necessary condition of its normal work."<sup>33</sup> Soviet juridical literature usually explains that the essence of the "principle of self-governance is the advocate's right to decide independently questions relating to the organization and activities of the college."<sup>34</sup> Western commentators adopt a similar position: "Unique in the Soviet Union as a self-administering profession, the *advokatura* places ultimate responsibility for administering the affairs of the profession within the colleges of advocates on the general meeting, or conference of the college."<sup>35</sup> The validity of these evaluations is questionable, if only because of the minimal role that advocates played in writing the law governing their own organization.<sup>36</sup> To assess accurately the degree to which the bar governs itself, it is useful first to take a look at the commands of the law, and then to observe how the law is implemented in practice.

The highest organ of a college of advocates is a general meeting (conference),<sup>37</sup> its executive body is a presidium, and an auditing commission

31. For comparison it should be noted that the ruling bodies of the Procuracy do have the right to initiate legislation. See LAW OF THE USSR ON THE PROCURATOR'S OFFICE OF THE USSR art. 9, reprinted in LEGISLATIVE ACTS OF THE USSR, *supra* note 10, at 303.

32. See, e.g., *Advokatura*, *supra* note 3, at 200; THE CRIMINAL JUSTICE SYSTEM OF THE USSR, *supra* note 2, at 39.

33. Stetsovsky, *Distsiplinarnaya Otvetstvennost Advokatov*, 5 Sov. Gos. & PRAVO 105 (1979).

34. SUD I SUDOPROIZVODSTVO V SSSR, *supra* note 18, at 241.

35. W. BUTLER, *supra* note 25, at 79.

36. See *supra* note 30 and accompanying text. Huskey also correctly points out that the regulation of the bar by laws promulgated by the state legislature sets it apart from social organizations which are governed by rules adopted at the congresses of these organizations and are not subject to confirmation by state authorities. See *Advokatura*, *supra* note 3, at 222 n.39.

37. THE LAW, *supra* note 10, art. 4. If a college of advocates comprises more than three hundred members, a conference may be convened instead of a general meeting. The delegates to the conference are elected at each legal consultation office according to the ratio set by the college presidium. See, e.g., RSFSR REGULATION ON THE BAR, *supra* note 19, art. 5. The intervention by the state or party organs into the process of electing delegates to the conference is usually limited to the assurance that all officers and party members at each legal consultation office are chosen as delegates. Since the same rules apply to general meetings and conferences, all future references are made only to general meetings.

is its control and auditing organ. The general meeting or conference of the college is convened at least once a year on the initiative of either the college presidium, one third of the member-advocates, or the authorized state organs.<sup>38</sup>

The agenda of the annual general meetings usually includes reports by the presidium members about the activities of the college, exchange of information and experience with the visiting advocates from other colleges, and often speeches by the invited representatives of state and party organizations about their supervision of and cooperation with advocates. In addition, discussions are frequently conducted on the various topics of interest to the lawyers present. In agreement with republican regulations on the bar, the general meeting is authorized to decide by a majority vote all questions affecting the governance of the college.<sup>39</sup>

This seemingly democratic assembly of the general meeting and liberal delegation of powers over the management of the college to its members camouflages the impotence of the general meeting to make any independent decisions. In practice, long in advance of the general meeting its agenda is discussed in detail and drawn up at the meetings between the chairman of the college presidium and local state and party organs.<sup>40</sup> In addition, more important questions decided at the general meeting—those affecting the size, the personnel, and the future income and expenses of the college—are not finalized until the approval by the corresponding executive committee of the local Soviet of People's Deputies.<sup>41</sup> Finally, in the event that the general meeting deviates from the prescribed posture resulting in "disparity between effective legislation and a decision of the general meeting (conference), the Ministry of Justice may stay its operation."<sup>42</sup>

38. RSFSR REGULATION ON THE BAR, *supra* note 19, art. 5 provides that the general meeting (conference) can be called at the initiative of the presidium of the college, the suggestion of the Ministry of Justice, juridical section of the executive committee of the local Soviet of People's Deputies, or at the request of one third of the members of the college.

39. *See, e.g.*, RSFSR REGULATION ON THE BAR, *supra* note 19, art. 6.

40. These preliminary consultations may often be very strained. For example, one of the topics often discussed at the general meeting of a college is the nature of the relationship between an advocate and his client. Since the party and the profession often hold competing views on this subject—e.g., could an advocate pursue the defense of his client if he is aware of the latter's guilt—consensus is often hard to reach.

41. RSFSR REGULATION ON THE BAR, *supra* note 19, art. 6. For example, the size of the Moscow City College of Advocates has not grown for the last thirty years despite numerous requests to increase its membership by thirty advocates. The denial has resulted in limitations on business trips and on the number of out-of-city clients that an advocate may receive. It is curious to note that in many instances the decision to change the size of a college of advocates is held up not by the local Soviet, under whose jurisdiction it belongs, but rather by the Ministry of Justice. *See* Sukharev, *supra* note 2, at 93.

42. *See* THE LAW, *supra* note 10, art. 16; RSFSR REGULATION ON THE BAR, *supra* note 19, art. 35.

Once in three years a general meeting convenes to exercise its most important function—to select the presidium and the auditing commission of the college. The election of the ruling bodies of the college by its rank and file members casting secret ballots<sup>43</sup> is usually presented as the cornerstone in the foundation of the bar's self-governance. This ostensibly democratic, even by western standards, method of selecting the elite of the college is, in practice, just a screen concealing a process by which the roster of the presidium and auditing commission<sup>44</sup> members is ultimately determined by the Communist Party apparatus.

The initial list of advocates to be suggested for the membership in the presidium is a product of negotiations between the current chairman of the college presidium and the appropriate official of the local party organization.<sup>45</sup> This list of potential candidates is presented for discussion and approval to the party caucus of the college on the day of the general meeting before the actual elections begin. This meeting of the party group is usually chaired by the party representative,<sup>46</sup> who instructs members of the party on their voting behavior and recommends advocates who should be nominated for the presidium. The party list is finalized by an open vote which usually coincides with the original party proposal. At the end of the gathering, one of the advocates is authorized to nominate the agreed-upon candidates at the general meeting; the representative of the party group always is given the first right of nomination. Following the dispersion of the party group, the discussion of the candidates with nonparty members may take place in different formats.

In Moscow, for example, an informal meeting between the party group and the rest of the college occurs before the voting process starts. In the course of this discussion the two groups may come to a new consensus—excluding few of the candidates on the party list and adding new nominees—in which case an updated list is proposed at the general meeting. Obviously most of the candidates on this final slate should be elected to the presidium, because they have the prior support of a majority of the college members.<sup>47</sup>

43. THE LAW, *supra* note 10, art. 7. Before 1979 these elections were held in secret only in Estonia and RSFSR. See APRAXIN & POLYAK, *supra* note 22, at 100 n.6.

44. There is no need to separately describe the election of the auditing commission members because it is essentially the same as the election of the members of the presidium.

45. As a general rule this party official is a member of The Department of Administrative Organs. This party organ consists of the head of the department, his deputy, and a number of instructors. The Department of Administrative Organs is a division in the secretariat of the local party organization which oversees and supervises the work of the KGB, MVD, Procuracy, Ministry of Justice, and the bar at the corresponding territorial level.

46. In Moscow the meeting is apparently chaired by the "head of the Administrative Division." See D. KAMINSKAYA, *supra* note 3, at 26.

47. This account is based on the description by D. Kaminskaya and E. Haskey, who

Other colleges may follow a slightly different order. In Estonia, for example, no informal discussion takes place before the general meeting reconvenes. At the general meeting the party group representative nominates the candidates selected by the party and a general formal discussion follows. Since the nomination of candidates is open to everyone, two or three advocates may be proposed spontaneously by the audience. An advocate may cast his vote for any candidate, although party members are constrained by party discipline to vote for their original list. This process seems to be more democratic, since it involves a genuine discussion of candidates at the general meeting rather than a give-and-take bargaining resulting in the nomination of predetermined candidates at the general meeting.<sup>48</sup> Nevertheless, both procedures of choosing the governing bodies of the college are tainted by external interference and can hardly be regarded as a free expression of the advocates' will. Yet while the culmination of the elections in a secret ballot may at least create the appearance of independence, the actual governance of the college—the work of the presidium itself—is devoid of any pretense of autonomy.

The presidium of the college of advocates is vested with broad powers enabling it to shape the character of the college and to manage its day-to-day activities. The numerical composition of the presidium is determined by the general meeting, but as a rule ranges from nine to twelve advocates. The presidium is headed by a chairman and usually one vice-chairman, though sometimes two. These officers are elected by an open vote to ensure the selection of the members designated by the party. The elected bureaucrats receive a salary from the funds of the college<sup>49</sup> and spend most of their time administering its affairs.<sup>50</sup>

The law provides that the official responsibilities of the chairman and vice-chairman of the presidium include such mundane duties as conducting the work of the presidium, reviewing complaints and recommendations submitted to the presidium, and maintaining control over the fulfillment of the general meeting decisions.<sup>51</sup> One of the main functions

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interviewed her on this issue. See D. KAMINSKAYA, *supra* note 3, at 26; *Advokatura*, *supra* note 3, at 208.

48. In addition to the Law on the Bar, the election of the governing bodies of colleges of advocates is controlled by the regulations adopted by the Ministry of Justice of the USSR. See Natruskin, *Zakon ob Advokature v Deistvii*, 7 SOTSIALISTICHESKAYA ZAKONNOST' [SOTS. ZAKI] 22 (1981).

49. RSFSR REGULATION ON THE BAR, *supra* note 19, art. 21.

50. Neither the chairman nor the vice-chairman of the presidium is prohibited from engaging in the practice of law, see, e.g., RSFSR REGULATION ON THE BAR, *supra* note 19, art. 21, but usually both of them are too overwhelmed with administrative duties to see clients. Other members of the presidium do not receive any remuneration from the college for their services and their salary, like that of any rank and file member of the college, depends solely on the amount of legal work they do.

51. See, e.g., RSFSR REGULATION ON THE BAR, *supra* note 19, art. 8.

of the presidium officers, which is not specified in the law, is to serve as liaisons between the college and the party and state organs. This role is of primary importance to both sides. Advocates of the college hope that their elected representatives will use their position to safeguard the interests of the profession. The authorities, counting on their patronage extended in the nomination process, rely on the cooperation of these officers in exercising control over the college.

Because of the dual loyalties of the members of the college presidium and its leadership, the state apparatus subjects their work to additional scrutiny. A representative of the Advocatura Department of the Ministry of Justice or of a juridical section of the executive committee of the local Soviet of People's Deputies attends every meeting of the presidium. This watchdog does not take part in the work of the presidium, nor does he vote. Yet he expresses his, and therefore the state's, opinion on every issue discussed and his participation is reflected in the minutes of the meetings. Through this routine and immediate supervision over the work of the presidium, the government ensures the implementation of its policies by the colleges and exercises control over the advocates.

Despite the preliminary screening of presidium members and regular supervision over their work, most presidium decisions are subject to confirmation by the party or state bodies. For example, the appointment of a head of a legal consultation office, who has purely nominal responsibilities, requires approval by the Ministry of Justice or a juridical section of the executive committee of the local Soviet.<sup>52</sup> In addition, appointment of a head of a consultation office must be approved by the organs of the local party organization. A rejection by the presidium to admit a new member may be appealed by this individual to the Council of Ministers or to the executive committee of the Soviet of People's Deputies which can stay the decision and require its review by the presidium.<sup>53</sup> Such intervention by the state authorities on behalf of an unsuccessful applicant usually guarantees revision of an earlier decision by the presidium. A good illustration of the presidium's helplessness to withstand pressure from the government is a case recently reported in the Soviet press.<sup>54</sup> In that case, a judge was forced to resign after he was proved to have grossly violated his duties by convicting a person whom he had known to be not guilty. After his resignation this judge applied for a membership in the local college of advocates, but was rejected. The presidium managed to successfully oppose the admission of the judge for half a year, until it

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52. See, e.g., *id.*

53. See, e.g., *id.* art. 12.

54. See Tselnis, *Chastnoye Opredeleniye, Kotorogo Ne Bylo*, *Literaturnaya Gazeta*, Jan. 15, 1986, at 14.

finally had to give up and accepted him.<sup>55</sup> In all fairness it should be recognized that the presidium's ability to reject unwanted members depends on the extent of support given to such individuals by the government. Occasionally, especially in controversial cases, the government may let the presidium have its way.<sup>56</sup>

A western observer may be surprised to find out that in the opinion of the government the three-tier screening mechanism (control over the election of the presidium, on-site inspection of the work of the presidium, and approval of the presidium's major decisions) does not adequately protect its interests vis-à-vis those of a "self-governing" college. Thus the Law on the Bar of the USSR, as well as all republican regulations on the bar, reserve to the Ministry of Justice of the USSR, Republican Ministries of Justice, and executive committees of the local Soviets of People's Deputies a right to stay any decision of the presidium "in the event of [its] disparity [with] the effective legislation."<sup>57</sup> One cannot escape the conclusion that the "self-governance" of the bar is a fiction with no practical meaning.

### III. Professional Ethics

In addition to an all-embracing control over the governance of colleges of advocates, political interests of the party and state require constant supervision over the advocate's professional activities. Two areas of such intervention, resulting in the violation by advocates of their professional responsibilities, illustrate the extent of the bar's subordination to the commands of the elite.

The first area, the so-called "access" (*dopusk*) system, requiring that an advocate obtain a permit to participate in "special cases" has been unveiled to the West in the past.<sup>58</sup> Commentators have not yet discussed, however, the legal effects of the "access" system on the advocate's professional conduct. A brief description of this aspect of the Soviet advocate's practice is necessary in order to clarify some of the information contained in the older sources.

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55. Only after this incident was publicized in the press, the Republican Ministry of Justice was compelled to ask for the expulsion of the former judge from the bar. See *Literaturnaya Gazeta*, Apr. 23, 1986, at 11.

56. In some cases when former procurators apply for membership in the Bar, they are ultimately rejected despite support from the local party and state bodies. This may be due to the mutual realization that past conflicts with the *Advokatura* may cause friction when procurators join it.

57. See, e.g., THE LAW, *supra* note 10, art 16; RSFSR REGULATION ON THE BAR, *supra* note 19, art. 35.

58. For a background account on the "access" system and the role of advocates in political trials, see Luryi, *The Role of Defense Counsel in Political Trials in the USSR*, 7 MAN. L.J. 307 (1977); see also D. KAMINSKAYA, *supra* note 3, at 31.

The requirement that an advocate obtain a special permit granting him the right to participate in a particular trial is not a legal norm and cannot be found in any official Soviet publication. Yet it is well-known within the Soviet legal community, and by now abroad, that an advocate needs a permission to take part in a case where the investigation was carried out by the organs of the KGB<sup>59</sup> pursuant to its jurisdictional authority to investigate particular cases enumerated by law.<sup>60</sup>

If an advocate wishes to have "access" to these "special cases" investigated by the KGB, he applies for a permit with the presidium of his college of advocates.<sup>61</sup> On receipt of an application, the presidium prepares letters of recommendation for the advocate and forwards them to the appropriate office of the KGB. The final decision whether to grant the "access" is made on an individual basis by a group of officials usually including, in addition to a KGB member, a procurator or deputy procurator for the corresponding territorial unit, the chairman or deputy chairman of the highest court of such territorial unit, and a member of the Department of Administrative Organs.<sup>62</sup> The number of advocates in the entire Soviet Union who have "access" is difficult to ascertain, but it probably does not exceed twenty percent of the profession.<sup>63</sup> Lists of advocates with "access" are on file in every legal consultation office and can be obtained from its head by a client who needs an advocate in a case requiring "access." This system of segregation, excluding about 80 percent of the profession from participation in an entire category of cases,<sup>64</sup> often leads to violations of Soviet legislation.

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59. Probably because of this KGB connection laymen usually call these cases "political." Indeed most of them deal with anti-Soviet activities, contacts with foreigners, or hard currency transactions.

60. See, e.g., UPK RSFSR art. 126. In some instances a case may be forwarded for an investigation by the KGB on the orders of the prosecutor's office.

61. It seems that opportunities to secure a permit ad hoc have been restricted since Luryi mentioned this possibility in 1977. See Luryi, *supra* note 58, at 308.

62. Kaminskaya notes that "access is always given to members of a college presidium, to all office heads, and to all secretaries of party bureaus or offices. In addition it is granted to three or four rank and file advocates in each office." See D. KAMINSKAYA, *supra* note 3, at 31. This account is not completely accurate, since instances occur in which some of the listed officers are denied access. This may often happen when compromising facts about an officer become known during his tenure in office.

63. Kaminskaya and Luryi provide conflicting information on this issue. Thus, Kaminskaya believes that 100 to 120 advocates in Moscow have "access," *id.*, while Luryi thinks that only 17 to 20 have it in Leningrad. See Luryi, *supra* note 58, at 307. This disparity cannot be explained simply by the difference in the numbers of advocates in two cities. If Kaminskaya's formula is accurate, see *supra* note 62, then more advocates must have been granted "access" in Leningrad. At the same time, roughly 20% of advocates are given "access" in Estonia. The most plausible conclusion is that there is no uniform pattern observed across the country.

64. The impact of the "access" requirement on the advocate's earning potential should not be overestimated, since it affects a tiny minority of all criminal cases in the USSR.

The Soviet Constitution provides that "a defendant in a criminal action is guaranteed the right to legal assistance."<sup>65</sup> Republican Criminal Codes explain and supplement this constitutional provision: "The advocate has no right to abandon the defense of an accused once he has accepted it."<sup>66</sup> This mandate of criminal procedure rules assures the accused that his defender will not drop the defense in the middle of the case, which requires an explanation to the court, and thus will not cast suspicion on the position of the defendant. It has also been interpreted by Soviet lawyers to mean that "admission by an advocate of the defendant's guilt when the latter does not confess should be considered to be a violation of professional responsibility, an obscured form of abandoning the defense, and consequently a gross violation of the right to defense."<sup>67</sup> The trial of Anatoly Shcharansky, familiar to the western observer, exemplifies how violations of all of these precepts occur in "a special case."

Professor Fletcher provided a detailed account of the developments in this notorious case.<sup>68</sup> On the relevant issue he reports that Shcharansky's relatives "consulted with 20 or 30 Moscow lawyers, none of whom were willing to take the case if Anatoly maintained his innocence."<sup>69</sup> Fletcher continues:

The system of security clearances in politically sensitive cases . . . does function, and this is why the 20 or 30 lawyers consulted by the Shcharansky family would take the case only if Anatoly pleaded guilty.<sup>70</sup> A lawyer without "a *dopusk*" could not appear. A lawyer with "a *dopusk*" would lose it if he or she entered a vigorous defense.<sup>71</sup>

This statement, however, misses the point. An advocate without "a *dopusk*" could not have assumed the defense whether Shcharansky pleaded guilty or not guilty. For an advocate with "access," the issue was not whether to "enter a vigorous defense," but rather how to comply with the legal norm requiring that he insist on the acquittal of the client, because the latter did not admit his guilt. Any other action on the part of the advocate would amount to the violation of his professional responsibility,

65. KONST. SSSR art. 158.

66. See, e.g., UPK RSFSR art. 51. This requirement also used to be included in some old Republican Regulations on the Bar. See, e.g., 1962 REGULATION ON THE BAR OF RSFSR. The new 1980 regulation does not contain this provision, which could have been excluded because of the controversy over its implementation.

67. See G. GINSBURG, A. POLYAK & V. SAMSONOV, SOVETSKII ADVOKAT 6 (1968).

68. See Fletcher, *Justice Thwarted*, SOV. JEWRY L. REV. 3 (1980).

69. *Id.* at 6.

70. From the standpoint of criminal law, the reference to a guilty plea is not entirely accurate. Whereas in the United States a guilty plea, without more, results in conviction, in the Soviet Union an admission of guilt by the defendant is more akin to a confession which does not obviate the necessity for a full trial.

71. Fletcher, *supra* note 68, at 6.

criminal law, and Shcharansky's right to "legal assistance." Naturally, very few advocates are anxious to preserve professional integrity at the cost of their careers. Were they to ask for acquittal they could be disbarred, if a confrontation with the government ensued, and their "*do-pusk*" would almost certainly be withheld. Consequently most advocates prefer not to participate in such trials at all.

Conflicts between professional ethics and the demands of the political branches of the government usually occur only in "special cases." An example of a regular criminal case demonstrates that disagreements between an advocate and his client on the issue of guilt ordinarily result in vacating the judgment.<sup>72</sup> Thus, in the case of Zirakishvily and Gugushvily, the Supreme Court of the USSR reversed the conviction by the Supreme Court of Georgia on the ground, *inter alia*, that the defendant's right to defense was violated when the advocate conceded the guilt of the accused who did not confess his guilt.<sup>73</sup>

Another area, not linked to political cases, where the government's interference in advocates' work results in the compromise of their professional responsibilities concerns the right to confidentiality. The law requires that "an advocate shall not have the right to divulge information communicated to him by the principal in connection with the rendering of legal advice."<sup>74</sup> Ordinarily, when an advocate is discreet in his activities, the confidentiality principle is observed. Nonetheless, the exclusivity of professional communications cannot be guaranteed in everyday consulting practice which is conducted through the legal consultation offices. Every advocate consulting a client must fill out a so-called registration card. Among other information, an advocate is required to specify the nature of the problem discussed and the advice given to the client. These registration cards are submitted for review to the head of the legal consulting office. The cards are held in a special file reserved for each advocate. Every advocate in the office has access to all files and may indiscriminately inspect them. Understanding that this practice conflicts with the requirements of the law, the Moscow City College of Advocates decided to simplify the content of registration cards making it more difficult to ascertain the nature of the advocate-client communications from the face of the cards. The *Advokatura* Department of the Ministry of Justice of RSFSR, however, found this innovation inappropriate "because

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72. A disagreement between an advocate and his client on the issue of guilt may pose a problem only when the defendant does not confess. An advocate can always assert his client's innocence, even if the latter admits his guilt.

73. See 4 BIULETEN VERKHOVNOGO SUDA SSSR [BULL. VERKH. SUDA. SSSR] 25 (1983).

74. See, e.g., THE LAW, *supra* note 10, art. 7; RSFSR REGULATION ON THE BAR, *supra* note 19, art. 16.

it undermined its control over the work of advocates."<sup>75</sup> Once again the integrity of the profession was undermined for the sake of the state's ulterior motives.

#### IV. Compensation of Advocates

Although the system of advocates' remuneration has been previously described,<sup>76</sup> recent Soviet legislation not yet discussed in legal literature calls for a fresh look at this subject. The advocate profession is distinguished by a method of compensation that is unusual by Soviet standards. Unlike the majority of the Soviet working people, advocates do not receive their salary from the state, and its size is determined solely by the amount of work they do.<sup>77</sup>

An advocate's monthly salary is the sum of the payments made by his clients to the legal consultation office for the assistance rendered by this advocate. The amount of each payment corresponds to the fee schedule issued by the Ministry of Justice of the USSR and is obligatory for all colleges of advocates.<sup>78</sup> Since the government wants to ensure that every Soviet citizen can afford legal aid, and does not want to overpay the advocates, the cost of advocates' services is maintained at a very modest level. For example, a regular oral consultation with an advocate costs one ruble (\$1.30) and a draft of a complicated legal document which requires preliminary research by the advocate cannot cost more than six rubles (\$8.00). To an advocate participating in the preliminary investigation, his client will pay twenty rubles for the initial two days, and eight rubles a day thereafter. A day of a criminal trial that lasts less than three days also costs twenty rubles; each subsequent day will earn an advocate twelve rubles.<sup>79</sup>

Often advocates face considerable obstacles collecting even the fees specified by the instruction. As a rule, Soviet advocates may be retained in two ways: by agreement (*po soglasheniyu*) and by assignment (*po naznacheniyu*). More experienced members of the bar with established clientele handle the majority of their cases after they reach an agreement with a client. Such agreements are finalized by a registration card<sup>80</sup> which carries signatures of the advocate, his client, and the head of the legal

75. See *Povysheniye Roli Advokatury v Okazanii Pomoshchi Grazhdanam*, *supra* note 2, at 97 (comments by A. Polyak, member of the Moscow City College of Advocates).

76. See *Advokatura*, *supra* note 3, at 214-15; D. KAMINSKAYA, *supra* note 3, at 28-29.

77. See *THE LAW*, *supra* note 10, art. 10.

78. See *Instruktsiya Ob Oplate Yuridicheskoi Pomoshchi Okazyvayemoi Advokatami Grazhdanam, Predpriyatiyam, Uchrezhdeniyam i Organizatsiyam*, reprinted in 3 SOTS. ZAK. 81 (1978) [hereinafter *Instruktsiya*].

79. *Id.*

80. See *supra* note 75 and accompanying text.

consultation office as well as the description of the service to be rendered and a corresponding legal fee. After the registration card is filled out the client makes his payment to the legal consultation office.<sup>81</sup> On the completion of the advocate's legal duties the legal consultation office credits the fee to the advocate's account.

Younger lawyers, and sometimes their more experienced colleagues, are often assigned to a particular case. These appointments are made by the head of the legal consultation office, who receives requests from courts for advocates who are not otherwise engaged on a specified date. When an advocate participates in a court proceeding by assignment he signs no agreement with a client, although a registration card is filled out, and receives no compensation after the trial ends. Instead, at the completion of the trial, when the judgment is pronounced, the court exacts from the defendant a fee in favor of the legal consultation office that provided the advocate.<sup>82</sup> The consultation office will now receive monthly installment payments, deducted from the defendant's earnings, which are credited to the advocate's account. Naturally, Soviet advocates often complain that this mode of payment results in inadequate compensation and consequently a lower quality of work.<sup>83</sup>

The Soviet justice system prides itself on the broad range of services which are provided by advocates free of charge.<sup>84</sup> As a rule, every Soviet advocate is obligated by his college to carry a load of pro bono work. Accordingly, it is reported that out of the seven million oral consultations given by advocates in 1981, six million were rendered free of charge.<sup>85</sup> Although these numbers should be taken with a grain of salt, they reveal the amount of time and effort that advocates are pressured to expend without pay.

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81. The signing of the registration card by the advocate finalizes his agreement with the client whether the latter pays the fee or not. In fact, an advocate may be disciplined for neglecting his duties after he signed the registration card, even if the payment was not made.

82. See, e.g., UPK RSFSR art. 322.

83. See, e.g., *Povysheniye Roli Advokatury v Okazanii Pomoshchi Grazhdanam*, *supra* note 2, at 97:

[T]he number of cases an advocate has to accept by assignment goes up. At the same time the quality of work decreases, because after an advocate completes his work, he is not paid according to the tariff. The payment occurs much later in installments, and sometimes is not received at all.

(Comments by Stetsovsky.)

84. See, e.g., KONST. SSSR art. 161; The Law, *supra* note 10, art. 11.

85. See *Sovershenstvovaniye Yuridicheskogo Obsluzhivaniya Naseleniya*, 4 Sov. Gos. & PRAVO 74 (1983) (comments by Natruskin, Head of the *Advokatura* Department of the Ministry of Justice of the USSR).

Despite strict government restrictions on advocates' salaries,<sup>86</sup> they usually earn between two and three hundred rubles a month.<sup>87</sup> After the obligatory deductions of about 30 percent—usually 25 percent for office maintenance and 2 to 3 percent for the vacation fund—advocates still take home a salary significantly higher than the country's average. On the other hand, advocates, perhaps justifiably, feel that their salaries are not commensurate with the amount of time and effort they have to dedicate to their work. This situation has resulted in an informal understanding between advocates and their clients that unrecorded, additional payments will have to be made in order to stimulate advocates' commitment.

Direct compensation of advocates beyond the rate specified in the Instruction has become to be known as "*mikst*," a Russian acronym for maximum use of the client over the tariff (*maksimalnoye ispolzovaniye klienta sverkh tarifa*). *Mikst* is usually given to an advocate before the case is tried and thus does not represent a payment for a favorable outcome. Nonetheless, *mikst* is widely believed to correlate directly with the advocate's effort and has become a common method of retaining a desired advocate.

Although the practice of side payments to Soviet advocates has long been known in the West, it often was inaccurately characterized as "a breach of law."<sup>88</sup> Even if a western reader might not appreciate the custom of extralegal payments, it is important to understand that in the context of total political subordination of the advocate, financial flexibility may be an important factor of a successful defense. In fact, until 1981, the most distinctive feature of the advocate's profession was not the opportunity to receive additional compensation, which is available to and practiced by all layers of the Soviet society,<sup>89</sup> but the relative impunity with which *mikst* were accepted. Under Soviet criminal law the honorarium paid to advocates cannot technically be labeled as a bribe, and therefore until 1981 was not criminally punishable.<sup>90</sup> The maximum penalty facing an advocate receiving *mikst* used to be disbarment.<sup>91</sup>

86. It must be acknowledged that Soviet advocates are eligible for state social security and retirement benefits. See, e.g., RSFSR REGULATION ON THE BAR, *supra* note 19, art. 20.

87. An advocate's salary is subject to a formal ceiling of 350 rubles a month. See *Advokatura*, *supra* note 3, at 214. If an advocate earns more, the difference is contributed to the funds of his college.

88. See, e.g., Barry & Berman, *supra* note 4, at 16.

89. See, e.g., K. SIMIS, *THE CORRUPT SOCIETY* (1983).

90. See, e.g., UPK RSFSR art. 173, which states that "bribes" are included into the category of so-called "official crimes," which may be committed only by "an official"—person in authority—"Dolzhnostnoye litso." UPK RSFSR art. 170 defines "an official" as, *inter alia* "a person who permanently or temporarily carries out functions of a state rep-

In 1981 all Soviet republics eliminated this loophole by amending their respective criminal codes with articles subjecting to criminal liability individuals working in service industries for "accepting payments from citizens for the performance of services included in their office responsibilities."<sup>92</sup> To enforce the implementation of the new statutes, the Plenum of the Supreme Court of the USSR passed a decree obligatory for all lower courts.<sup>93</sup> In its decree the Supreme Court specifically emphasized that the new legislation applied to "all individuals employed in any organization providing any form of services to the public."<sup>94</sup> Thus, the government cracked down on the last vestige of independent professional livelihood. In addition to the prosecution of some advocates, the new law contributes to a complete political and economic domination of the state over advocates.

## V. Conclusion

The independence of the Soviet bar from the state organs of power is an illusion that quickly fades once one takes a closer look at the work of advocates. Yet advocates remain the only profession in the USSR which is not employed by the state and is not a part of its hierarchy. Within the confines imposed on its work, advocates perform, if often only perfunctorily, the important mission of a guardian to otherwise defenseless people. Despite common misgivings, in times of need and want, people still turn to advocates for support and advice. They still discern in the *advokatura* its traditional yearning for pluralism and institutional democracy. While it exists, even in its circumscribed form, the Soviet *advokatura* should be recognized as freedom's refuge in the USSR.

## Postscriptum

After the completion of this article, the authors were informed that as part of a general liberalization of Soviet economic practices undertaken by M. Gorbachev, several legislative proposals are now under review that may transform the profession of advocate in the USSR.

The new law on private labor activities, which became effective on May 1, 1987, could introduce the most important of the contemplated changes

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representative." Since the bar is not a part of the state apparatus, advocates do not fall under the jurisdiction of article 173.

91. Other members of the legal profession, judges and procurators, are subject to criminal penalties up to the capital punishment. *Id.* art. 170.

92. See, e.g., UPK RSFSR art. 156(2). Maximum penalty for the violation of this article is set at three years.

93. See 1 BULL. VERKH. SUDA. SSSR 23 (1984).

94. *Id.*

by permitting advocates to practice in their individual capacity, rather than through colleges of advocates, as is done today. New regulations are being considered that will remove the current ceiling on advocates' salaries and will revise the fee schedule to allow advocates to charge more for their services as they become more experienced or skillful. The aims of the reforms are to provide additional incentives to advocates and to enable the government to monitor advocates' compensation. If implemented, these innovations would certainly revitalize the *advokatura* and make it a more potent factor in Soviet legal and social development.