

THE EMERGENCE AND DEVELOPMENT OF THE RUSSIAN
ADVOKATURA: 1864-1905

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ABSTRACT

This dissertation examines the emergence and development of the Russian advokatura (legal profession) between 1864 and 1905. Unlike past historical works, which have concentrated on the activities of a few prominent defence attorneys in the major political trials, this dissertation focuses on the advokatura's development as an independent, self-governing, profession. Such an approach reveals that contrary to received wisdom, the advokatura's professional evolution was a long, arduous, complicated process, by no means complete at the time of its premature demise.

The Russian advokatura traces its origins back to the Judicial Reforms of 1864; prior to that time, Russia's legal practitioners existed as an amorphous mass, where virtually every citizen had the right to act as an attorney. The Judicial Reforms created a new, western-style advocate - the sworn attorney and his assistant, the attorney-in-training - as well as a new, autonomous institution - the regional Bar Council - which was to supervise the professional activities of a given region's sworn attorneys. Yet as this dissertation shows, the Judicial Reforms did more than simply introduce a modern advokatura to Russia; these reforms also represented a critical experiment with Russia's existing social structure, an unprecedented, largely unpremeditated attempt by the autocracy to take the western image of a 'liberal' profession and somehow adapt it to Russia's existing hierarchical soslovie (estate) system. For political and social reasons, however, the advokatura quickly proved incongruous with Russia's traditional soslovie order; as a result, the autocracy introduced a series of counter-reforms in 1874 which sharply restricted the professional development of the sworn attorneys and attempted to transform the existing advokatura into a more conventional soslovie. At approximately the same time, the autocracy created yet another branch of the Russian legal profession - the private attorneys. Therefore, during the course of its lifetime, the Russian advokatura consisted of multiple sections - sworn attorneys, private attorneys, attorneys-in-training - plus the descendants of the pre-reform legal practitioners, commonly known after 1864 as underground advocates. Each of the above subdivisions will be examined in this dissertation in order to gain a greater appreciation of the advokatura's overall professional development as well as the numerous obstacles that were placed in its path. At the same time, this dissertation will also examine the advokatura's impact on Russia's emerging legal culture as well as its attempts to gain more political influence. Such an analysis reveals that despite some significant gains, Russia's entire legal system - not just the advokatura - was seriously undermined and devalued by its incompatibility with the political and social order, constructed by the autocracy.

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INTRODUCTION: PROFESSIONS AND THE RUSSIAN STATE

November 20, 1864 has always served as a natural point of departure for any study of the Russian legal profession (the advokatura). Cut off from the Western legal tradition and without the benefit of the West's legal evolution, Alexander II created a modern legal profession seemingly out of nothing. V. D. Spasovich, in one of his famous after-dinner speeches, described the immaculate conception of the advokatura. "Zoologists search in vain for a (case of) spontaneous generation of an organism and believe in such a phenomenon. We gave such an example of spontaneous generation. Nothing similar ever existed in Russia. We are not hatched ex ovo. We are without kith or kin."¹ Yet miraculous births are usually best reserved to the realm of mythology, not history. In reality, despite Spasovich's above claim, the advokatura did not defy the laws of evolution. For example, the advokatura could quite easily trace their pre-reform historical ancestors. There was also no spontaneous generation; on the contrary, the advokatura's development, especially on a professional level, was a long, arduous process, by no means complete at the time of its premature demise.

Nevertheless, Spasovich's characterization remains largely unchallenged. On a few occasions, historians have analyzed the specific statutes that created the Russian advokatura, but what is lacking, especially in Western historiography, is an examination of how these statutes were put into practice.² There was, for example, no national Bar in Russia - only regional Bars, thereby making the professional development of the

¹Spasovich, Zastol'nye rechi(Leipzig, 1903), p. 85. As quoted by Kucherov, Courts, Lawyers, and Trials under the Last Three Tsars(New York, 1953), p. 119.

²See Kucherov, Courts, Lawyers, pp. 120-160.; Eugene Huskey, Russian Lawyers and the Soviet State(Princeton, 1986), pp. 12-33.

advokatura highly dependent on local conditions. Yet rather than analyze the uneven development of the advokatura, historians have instead chosen to concentrate on the activities of a few prominent defence attorneys in the major political trials. Without underestimating the significance of these trials - nor the personal courage required to participate in them - one must emphasize the deceptive picture it creates of the advokatura's professional development. Political trials were rare in Russia, and after the acquittal of Vera Zasulich in 1878, they disappeared entirely from the public realm for some twenty five years. More importantly, big political trials allow the lawyer to appear in his most glamorous role, whereas the daily activities of the average lawyer revolve around much more practical matters. Therefore, a more impersonal investigation into the advokatura is required, one that focuses on its development as a profession, not on the individual actions of its leading members.

Research on the professions, of course, has undergone a rapid expansion over the last 30 years, yet despite copious literature, the enigma, surrounding the professional phenomenon - continues to persist.³ Many

³A partial bibliography on this subject includes the following: A.M. Carr-Saunders and P. Wilson, The Professions(Oxford, 1933), pp. 289-318.; R. Lewis and A. Maude, Professional People(London, 1952), pp. 53-71.; M. Cogan, "Towards a Definition of Profession," Harvard Educational Review, no. 23(1953), pp. 34-42.; D. Barry and H. Berman, "The Soviet Legal Profession," Harvard Law Review(November , 1968), pp. 1-41.; E. Freidson, Profession of Medicine: A Study of the Sociology of Applied Knowledge(New York, 1970), pp. 71-73.; J.A. Jackson, "Professions and Professionalization - Editorial Introduction," in J. Jackson, ed., Professions and Professionalization(Cambridge, 1970), pp. 3-15.; M.S. Larson, The Rise of Professionalism: A Sociological Analysis(London, 1977), pp. X-XVIII.; G. Holmes, Augustan England(London, 1982), pp. 3-18.; E. Freidson, "The Theory of Professions: State of the Art," and D. Rueschemeyer, "Professional Autonomy and the Social Control of Expertise," in R. Dingwall and P. Lewis, ed., The Sociology of the Professions(London, 1983), pp. 19-58.; D. Duman, The English and Colonial Bars in the Nineteenth Century(London, 1983), pp. 197-202.; W. Prest, "Introduction: The Professions and Society in Early Modern England," in W. Prest, ed., The Professions in Early Modern England(London, 1987), pp. 1-25.; R. Abel, The Legal Profession in England and Wales(Oxford, 1988), pp. 3-31. Harold Perkin, The Rise of Professional Society(London, 1989), pp. 1-26.

studies naturally tend to begin with the broadly recognized ideal attributes of a 'liberal' profession. Professions, for example, have traditionally been portrayed as autonomous associations, self-governing and free from outside interference. Admission is strictly controlled from within and is possible only after the applicant has acquired a highly specialized body of knowledge. Once accepted, members are uniformly subjected to a detailed code of ethics, regulating their professional behaviour. Finally, professions are separated from other purely commercial occupations by their commitment to public service, their expressed determination to use their acquired knowledge for the social good.

These combined ideal character traits - autonomy, selected admissions, specialized knowledge, a code of ethics, public service - can serve as an abstract bench-mark in any assessment of a profession, yet in practice, one must hasten to add, the idiosyncrasies of a profession are much more difficult to define. Recognized professions may possess some but not all of the above attributes, or, what is far more likely, they may not possess the above attributes to the degree that was originally presumed. Research has also shown that in reality, the *raison d'être* of a profession is much more complex. Yes, there may be an element of disinterestedness, altruism and public service in certain professions, but professions are also concerned about economic power - monopoly rights over whatever service they provide - as well as political influence - to ensure that their professional status is maintained. As a result, the demands of the marketplace must be included in any study of a profession.

Historians and sociologists, therefore, have gradually begun to move away from abstract general models and instead have chosen to examine professions on an individual basis, looking at them not through some sort of ideal prism but as they really are. This approach -

which will be emphasized in this dissertation - was best summarized by Eliot Freidson. A profession, Freidson writes, should be "treated as an empirical entity about which there is little ground for generalising as an homogeneous class or logically exclusive conceptual category. The task of a theory of professions is to document the untidiness and inconsistency of the empirical phenomenon and to explain its character in those countries where it exists."⁴ Particular attention must be given to the label itself; research on any profession, Freidson stresses, must be concerned "with the role of the title in the aspirations and fortunes of those occupations claiming it, and not with some quality or trait that all occupations claiming the title may share."⁵

But how does one apply this western notion of a profession - complete with many Anglo-American biases - to nineteenth century Russia, just liberated from the era of serfdom? Did one's status in pre-revolutionary Russia, after all, depend on one's occupation? In reality, a terminological minefield must first be transversed before one can discuss the Russian legal profession. To begin with, in the specific case of the advokatura, there was not one but four words - professiia(profession), korporatsiia(corporation), institut(institute), and soslovie(estate) - which were used interchangeably in order to approximate the western concept of a profession. In terms of etymological history, quantitative structure, social recognition and overall prestige, these terms possessed different connotations - a professiia, for example, can be translated as 'trade' or 'occupation' - but in terms of nineteenth century contemporary usage, these titles became hopelessly intertwined. The problem of placing the western notion of a profession in its proper Russian context is

⁴E. Freidson, "The Theory of Professions," p. 33.

⁵Ibid., p. 34.

compounded by the fact that during the nineteenth century, there was, in fact, no single entity known as the Russian legal profession. Unlike the United States or England, there were two distinct categories of legal practitioners in pre-revolutionary Russia - those in state service, and those in private practice. According to the continental system, only those in the latter category had any claim to the title advocate - legal representative of individuals and organizations. Therefore, a large group of legal practitioners - procurators, judges, professors - are excluded from the Russian advokatura and represent a second (and possibly third) legal profession.

That Russia somehow lacked a precise, developed social vocabulary to describe the phenomenon of 'a profession' should come as little surprise. Leopold Haimson and Gregory Freeze have been in the forefront in arguing that during the latter half of the nineteenth century, Russia's institutional framework failed to keep pace with her rapid economic development, and that as a result, there was a perceptible confusion in social identity. Haimson himself has pointed out several groups and occupations - workers, merchants, pharmacists - which possessed multiple social identities.⁶ Undoubtedly, the turmoil surrounding Russia's social categories was directly related to the complexity, ambiguity, and in the final analysis, inadequacy of Russia's system of sosloviia. According to the 1847 Academy of Sciences dictionary, a soslovie was a "category of people with a specific occupation, distinguished from others by their special rights and obligations," but as Freeze has shown, there were other connotations attached to this notion of soslovie as well, such as: constituted body, state

⁶L. Haimson, "The Problem of Social Identities in Early Twentieth Russia," Slavic Review, vol. 47, no. 1(Spring, 1988), pp. 1-6.

institution, social group, and caste.⁷ Freeze has also swept away the traditional image of Russia's estate system - that there were four distinct sosloviia (nobility, clergy, townspeople, and peasantry) and that by the latter half of the nineteenth century, this system was gradually being dismantled. Instead, Freeze has shown that there were four juridical sostoianii (legal status groups) which incorporated numerous sosloviia, and that far from dissolving, "the soslovie structure proved adaptable to the exigencies of social and economic development; a multivariate structure permitted specialization and occupational professionalization, yet within a formal system of hereditary estates."⁸

Therefore, amongst all the previously mentioned titles conferred on the Russian advokatura - professii, korporatsiia, institut, soslovie - clearly the most important one was that of soslovie. In reality, the Judicial Reforms of 1864 were not simply a bid to transform Russia's legal system; they also represented a critical experiment with Russia's existing social structure, a unprecedented, almost unpremeditated attempt by the autocracy to take the western image of a 'liberal' profession and somehow adapt it to Russia's existing, hierarchical soslovie system. This proved to be an almost impossible task. Prior to 1864, Russia's legal practitioners, commonly known as striapchie, existed as an amorphous mass - "an absolutely free professii," as E. Vas'kovskii later called it where every citizen, not specifically forbidden by law, had the right to serve as a legal representative in court.⁹ Russia was not unique in having such an undefined legal profession; a similar situation existed in medieval England. Yet unlike the early days of the English legal profession, there

⁷As quoted by G. Freeze, "The Soslovie(Estate) Paradigm and Russian Social History," American Historical Review(February, 1986), pp. 18-19.

⁸Ibid., p. 24.

⁹E. Vas'kovskii, Organizatsiia advokatury, pt. 2(St. Petersburg, 1893), p. 29.

were no Inns of Court to somehow link this disparate group of legal practitioners; they came from all occupations and backgrounds. The autocracy's attitude towards the striapchie was one of unmitigated hostility, yet there was remarkably little that could be done to limit their activities. The only attempt to break the striapchie influence occurred in 1832 when the institute of prisiazhnye striapchie - a licensed advocate, attached to the commercial courts - was created. Otherwise, with the noted exception of the various annexed territories, the striapchie tradition continued unabated up until 1864.

The Judicial Reforms of 1864, of course, transformed Russia's system of legal representation. A modern advokatura was introduced, consisting of sworn attorneys (prisiazhnye poverennye) and their assistants, the attorneys-in-training (pomoshchniki). Sworn attorneys were required to have a university degree in law as well as have had completed a five year apprenticeship either in government service or as an attorney-in-training. None of the previously mentioned four professional titles (professiia, korporatsiia, institut, soslovie), however, were affixed to these sworn attorneys within the Judicial Reforms themselves; it is only when one analyzes the bureaucratic evolution of the Judicial Reforms that one discovers that what its founders had actually created was a soslovie of prisiazhnye poverennye - a soslovie which, with the exception of the nobility, had more rights and privileges than any other soslovie in Imperial Russia. In any city, where their numbers exceeded 20, sworn attorneys could form their own Bar, to consist of a general assembly (obshchee sobranie) and a Bar Council (sovet prisiazhnykh poverennykh). The general assembly reserved the right to elect the Bar Council, while the latter, in turn, ruled over the estate. The Bar Council's powers included the right to independently review applications to the soslovie, resolve disputes over remuneration, appoint

advocates to indigent clients, articulate a code of ethics, and finally, to personally supervise the professional conduct of its members and punish all transgressions. There were some glaring gaps within the Judicial Reforms - most notably over how the attorneys-in-training should be organized - but without question, the sworn advokatura represented a radical departure from the traditional image of a Russian soslovie. No single occupation had ever existed as an autonomous, self-governing soslovie before.

In the end, it took the autocracy just ten years to change its mind. The autocracy had never respected the limited corporate privileges it had granted to other sosloviia, and the prisiazhnye poverennye turned out to be no exception. In December 1874, after the creation of just three Bar Councils (Moscow, St. Petersburg, Kharkov), the government temporarily suspended the creation of new councils, a suspension which ultimately lasted until 1904. The reasons behind this decision were never revealed, but the most logical explanation for this reversal - one that would be reinforced in the years to come - was that by 1874, the autocracy already knew that the Russian advokatura - the soslovie of prisiazhnye poverennye - would not fit into Russia's traditional, hierarchical soslovie system. Thus, thanks to the above moratorium, control of sworn attorneys and attorneys-in-training outside Moscow, St. Petersburg, and Kharkov was transferred to the local district court and thereby, to the state. There was no general assembly, no Bar Council; the courts controlled admissions, internal management, and discipline. In other words, the corporate identity was removed from the prisiazhnye poverennye and what was left was not the soslovie, described in the Judicial Reforms, but a more conventional soslovie, one which the state could control.

The December, 1874 temporary legislation, however, does not represent the first subdivision which occurred within the Russian

advokatura. Some six months earlier - in May, 1874 - another temporary piece of legislation had been introduced, this time creating a whole new category of advocate: the private attorney (chastnyi poverennyi). Contrary to popular belief, the private attorney was introduced not as a direct challenge to the sworn attorney but rather as a practical measure to somehow limit the influence of the pre-reform striapchie, who had continued to practice into the reform era. The creation of the chastnye poverennye, however, did represent a major retreat from the Judicial Reforms of 1864. There were no educational requirements to join the chastnye poverennye; anyone who was approved by the court and paid his license fee could become a private attorney. Private attorneys also had no identity as an independent korporatsiia. Instead, they were under the direct supervision of the court which granted them a license. The courts controlled admissions and discipline, while the Minister of Justice reserved the extra right to unilaterally remove any private attorney from a case whenever he so desired. But despite the fact that the professional orientations of the prisiazhnye poverennye and the chastnye poverennye were radically different, Russia's social vocabulary still had difficulty distinguishing between these two types of advocates. In the end, the only title that private attorneys failed to acquire was that of korporatsiia; otherwise, the chastnye poverennye were known as an institut (its most common designation), a professiia, and most importantly, as a soslovie.

The above discussion clearly sets out the parameters of this dissertation. Just as there was no one Russian legal profession in the nineteenth century, there was no one Russian advokatura. Instead, the advokatura was made up of several subdivisions - the sworn attorneys in Moscow, St. Petersburg, and Kharkov, the sworn attorneys in the rest of Imperial Russia, the private attorneys - each of which will be examined within this dissertation. But even this list is incomplete; the attorneys-in-

training - the supposed subordinates of the sworn profession - also sought public recognition both as a separate korporatsiia and as an independent soslovie, and therefore, they too, deserve special attention. Finally, circling around the advokatura's different branches were the direct descendants of the pre-reform striapchie, collectively known after 1864 as the underground(podpol'naia) advokatura. Although these underground advocates were not licensed by the state, they were not, strictly speaking, illegal. This was because the Judicial Reforms had not established a monopoly; it had not deprived private citizens of the right to represent people in court, and in the vast majority of Russia's towns and villages, these underground advocates remained the only legal representatives available.

Therefore, this dissertation will attempt to give a more realistic picture of what it meant - in terms of internal structure, social prestige, public influence, etc. - to be a member of the pre-revolutionary Russian legal profession(the advokatura). On a general level, such a study will clearly reveal the complicated relationship which developed between the professions and the Russian state between 1864 and 1905 and why such institutions in Russia never achieved the same respected status as their counterparts in the west. But before one can begin an investigation into the advokatura's 'professional' development, it is necessary to turn to the roots of the advokatura - the striapchie - and the genesis of the Judicial Reforms of 1864.

CHAPTER ONE: THE BIRTH OF THE RUSSIAN ADVOKATURA

I. THE STRIAPCHIE TRADITION

The deficiencies of the pre-reform Russian legal system are already well-known to any student of eighteenth century Russian history: secretive, inquisitorial, corrupt, violent, underfinanced, inadequately staffed and paradoxically, anti-legalist in its very nature. Cynical aphorisms abounded on the subject of Russian justice. "Justice is strong, money is stronger." "Do not fear the courts, fear the judges." "Where there is a court there is injustice."¹ Undeniably, the backwardness of the Russian legal system was directly proportional to the open hostility displayed by the autocracy to legal institutions and legal values. As the ultimate protector of justice, successive autocrats simultaneously promoted and obstructed the rule of law, believing that the people's general welfare demanded legal guidelines but fearing that such guidelines - freely interpreted by judges - would infringe upon their personal power. Nicholas I best embodied this contradiction. His enmity to western liberal thought and western legal values are well known, but it was during his realm that a small, influential cadre of young lawyers - men with higher legal education - were trained and the codification of Russian laws was finally completed.

The potential influence of the pre-reform legal profession was limited, however, by the autocratic tradition. In reality, Nicholas I required narrow technicians, not enlightened practitioners. Thus, in the University Statute of 1835, Nicholas I abolished courses on natural law and demanded that students instead acquaint themselves with the esoteric

¹Richard Wortman, The Development of a Russian Legal Consciousness(Chicago, 1976), p. 241-2.

detail of the law.² Two vastly different institutions supervised the legal training of Russia's first generation of lawyers: the School of Jurisprudence, an elite secondary school for nobles, and the universities.³ Ultimately, graduates from both of these institutions became imbued with a sense of mission, a desire to change Russia's backward system of justice, and in 1864, they would play a pivotal role in the drafting of the Judicial Reforms.⁴

But the emergence of university-trained Russian lawyers did not coincide with the appearance of advocates in the broadest sense of the word. Legal representation could be traced all the way back to fifteenth century Pskov and Novgorod.⁵ Peter the Great's conception of absolutist legality, however, left little room for advocates and their obscurantist ways and from that time forwards, the autocracy displayed a deep rooted suspicion of the profession. Peter referred to advocates as yabedniki(slanderers), an epithet which lasted for more than a century.⁶ Catherine the Great particularly loathed French advocates. "These lawyers support now truth, now lies, now justice, and now injustice according to what they are paid for, and where; I would chase these people away . . ."⁷ Not surprisingly, Nicholas I shared these prejudices. Who ruined France "if not advocates. Who was Mirabeau, Marat, Robespierre, and others?! Russia does not need advocates; we will live without them.

²Ibid., pp. 44-5.

³Ibid., pp. 49-50. For a description of life at these two academic institutions, see Wortman, pp. 206-34.

⁴Ibid., pp. 244-67.

⁵ The Novgorod Sudebnaia Gramota gave everyone the right to legal representation, whereas the Pskov Sudebnaia Gramota granted this right only to women, children, nuns, senile men, and deaf persons. See Samuel Kucherov, Courts, Lawyers, and Trials under the Last Three Tsars(New York, 1953), p. 107.

⁶ PSZ, v.3, No.1572.

⁷Kucherov, Courts, Lawyers, p. 114.

Do what the law requires of you; I do not want anything else."⁸ Laws, dating back to as early as 1649 and Tsar Alexis were introduced to punish people engaged as legal representatives.⁹ In 1716, Peter the Great attempted to bar advocates from all criminal trials.¹⁰ Other edicts threatened yabedniki with loss of honour and property, while chinovniki, both acting and retired, were specifically forbidden to act as legal representatives.¹¹

But despite these legal measures, a form of legal representation did begin to develop. "No one in Russia," wrote D. O. Obolenskii on the eve of the Judicial Reform, "beginning with peasants and up to members of the State Council, appear in court personally but always through an attorney (poverennye)."¹² These khodatai po delam(legal practitioners), poverennye, or striapchie(scriveners), as they were most commonly known, were ironically the direct product of the legal system Peter had created. "Anything which legislation undertook against them," wrote A.V. Lokhvitskii in 1860, "beginning with the time of Peter the Great was in vain, because they are the natural result of the secret and written judicial procedure, administration of justice according to the letter(and not the spirit) of the law, complete absence of publicity in court procedure and absence of a well-organized legal profession."¹³ The legislative attempts to ban the striapchie were futile. "Yabedniki tricks," continued Lokhvitskii, "are repeatedly prohibited, but nevertheless they continue because it is impossible to define in law that such and such is a yabedniki

⁸Ibid., p.115.

⁹E. Vas'kovskii, Organizatsiia advokatury(St. Petersburg, 1893), pt. 1, p. 311-12.

¹⁰PSZ, v.5, No. 3006.

¹¹PSZ, v.4, No. 2330; PSZ, v.13, No. 9989; PSZ,v.16, No.11624; PSZ, v.20, No. 14567. See also A.G. Puparev, "Advokat v tsarstvovanie imperatora Pavla," Russkaia Starina (October, 1871), pp. 411-4.

¹²J. Gessen, Istoriia russkoi advokatury, 3 vols.(Moscow, 1914-1916), 1: p. 39.

¹³A.V. Lokhvitskii, "O nashikh khodataiakh po delam," Russkoe Slovo(February, 1860), p.44. As quoted by Kucherov, Lawyers, Courts, p.110.

trick, and it is very difficult for a judge to express his opinion when there is no basis in the articles of the lawcode."¹⁴

But the striapchie were not simply the product of legal loopholes - they were also the result of simple ignorance. People had no understanding of their rights, no conception of the importance of the rule of law. In such an environment, wrote S. Zagibenin, the judicial system was not much more than a lottery. Even if a person knew that his case had no merit, he nevertheless turned to the courts, "not counting on the justice of the case" but on chance, on the "resourcefulness and dexterity of a sophist."¹⁵ Russian society was not looking for a conscientious, professional advocate; it was looking for someone to help them win this legal lottery, and the striapchie, concluded Zagibenin, were simply fulfilling society's needs.

It is within the striapchie, therefore, that one finds the roots of private legal representation in Russian and thereby the roots of the advokatura. Generalizations do not easily apply to this amorphous group of legal practitioners. In one of the few reminiscences on the subject, P.A. Potekhin divides the striapchie into three categories. The first group were judicial chinovniki - secretaries, chief clerks, registrars and other civil servants attached to the courts. According to Potekhin, these were honest men, convinced of the rightness of a particular case. The fact that these chinovniki also accepted cases which came under the jurisdiction of their own departments did not mean, at least in Potekhin's eyes, that they were selling justice. They were simply directing cases to a just decision. Judges, well-aware of the chinovniki's transgressions, refused to impose any restrictions. They knew that a chinovnik had argued similar cases before -

¹⁴*Ibid.*, p. 44.

¹⁵S. Zagibenin, "Poverennye po delam," Iuridicheskii Zhurnal (December, 1860), p. 110.

sometimes all the way up to the Senate - and that a chinovnik often had more knowledge of the relevant laws than the judges themselves.¹⁶

The second group of striapchie were the 'professional' advocates, in the sense that they did nothing other than take judicial cases. These 'professional' striapchie were former chinovniki who had retired, usually under some cloud of suspicion. They often specialized in a branch of law - civil, criminal - corresponding to their previous work as a civil servant. Although Potekhin again found honourable men among this group, their reputation was much more dubious. Potekhin describes one striapchii who specialized in divorce cases yet seemed uninterested in the specific details of any case. In his mind, there were only two kinds of divorce cases - "one with our witnesses, and one with yours..."¹⁷

The final group of striapchie remains the most difficult to characterize. They consisted of noblemen, ruined landowners and merchants, retired military men, expelled chinovniki, and bartenders; collectively, they formed the yabedniki which Peter so despised. Unlike their namesakes, however, these striapchie did not take cases, they wrote petitions, applications, complaints - anything that would pay.¹⁸ As Lokhvitskii states, they were never squeamish about the methods they employed: "They take 20 kopecks and a shtof of vodka for preparing a petition, 5 or 10 rubles for a forged passport. They have a fixed price for a forged certificate or signature, etc."¹⁹

Thus, despite numerous legislative restrictions, the striapchie continued to practice both in the city and in the countryside, and

¹⁶P. A. Potekhin, "Otryvki iz vospominanii advokata," Pravo(No. 47, 1900), p. 2214-5.

¹⁷Ibid., p. 2215-6

¹⁸Ibid., p. 2216-7.

¹⁹Lokhvitskii, "O nashikh khodataiakh po delam," p. 44. As quoted by Kucherov, Courts, Lawyers, p. 110. See also A.D. "Zamechenie na nekotorye punkty osnovnykh preobrazovanie sudebnoi chasti v Rossii," Iuridicheskii Vestnik, no. 32(1863), p. 39-40.

ultimately, by the beginning of the nineteenth century, they even began to receive a certain degree of official acceptance. Instruction manuals, specifically designed for striapchie or poverennye, began to be published. These were primarily compilations of relevant laws and edicts, but they also provide some insight into the few regulations which governed the striapchie.²⁰

Prior to the Judicial Reforms of 1864, Russia's judicial system was based on the soslovie principle; there were separate courts for nobles, merchants, members of the clergy, and peasants.²¹ Oral proceedings, however, were almost completely absent from Russia's courts; instead, Russian civil and criminal proceedings were confined almost exclusively to the examination of written briefs behind closed doors. Therefore, without any responsibility for interrogating witnesses or making speeches, the striapchie's main function consisted of collecting evidence, writing documents, and presenting them to the court.²² Not surprisingly, the striapchie's general instructions demanded assiduous preparation and examination of documents; a striapchii must write clearly, avoid mistakes, and rigorously observe the relevant laws.²³ The Ukaz o forme suda (November 5, 1723) defined the procedural requirements that a striapchii had to fulfil. If a striapchii agreed with a decision, then he had to sign it, but if he disagreed, then he had to record his disapproval and, on the basis of Ukaz June 30, 1762, submit an appeal.²⁴

²⁰I. A. Markov, Vseobshchii striapchii ili poverennyi (St. Petersburg, 1821), p. V-XIV.; I. Naumov, Svedenie dlia poverennykh pri vnutrennem razmezhevanii zemel (Moscow, 1809), pp. 2-36.

²¹J. LeDonne, "The Judicial Reform of 1775 in Central Russia," in Jahrbucher fur Geschichte Osteuropas, vol. 21, no. 1 (1973), pp. 32-3. According to the 1857 Svod zakonov, 'deputies' from the defendant's soslovie or department (vedomststvo) were allowed to be present at any investigation in order to protect the interests of the defendant. See Vas'kovskii, Organizatsiia advokatury, pt. 1: pp. 310-11.

²²Vas'kovskii, Organizatsiia advokatury, pt. 1: pp. 310-11.

²³Markov, Vseobshchii striapchii, p. XII.

²⁴Ibid., p. VI.

But there is no evidence to suggest that these regulations were vigorously enforced. In the end, only one instruction - the one which defined a striapchii's relationship to his client - seems to have had any relevance. According to Markov's Vseobshchii striapchii ili poverennyi, "The duty of any striapchii was the absolute protection of his client's (veritel) welfare. Therefore, he was obligated to utilize all appropriate means," granted to him by law.²⁵ But without any meaningful form of supervision, and without any code of ethics, the absolute defence of the client's welfare soon became intertwined with the absolute defence of the striapchii's welfare, and it was this combination - total subordination and absolute self-interest - which best characterized the striapchie tradition. N. Depp wrote in 1860 that extreme competition, blind ambition, and the possibility of financial reward drove the striapchie to "indifferently take on all cases, not debating whether they are legal or illegal. . . because they do not answer before the law for the conduct of illegal cases."²⁶ This indiscriminate collecting of cases - where any and all means were acceptable in order to achieve final victory - naturally led to the conclusion that the striapchie were simply defenders of "mistruths , lies, deceptions, and false interpretation of the laws . . ."²⁷ It was very rare, concluded Depp, that an honest person would become a striapchii because the temptation to take an unjust case was too great. Thus the majority of striapchie were " uneducated, knowing neither the laws nor the order of legal proceedings. Meanwhile, litigants resort to their defence because they need defenders."²⁸

²⁵ibid., p.VII.

²⁶N. Depp, "O znachenie advokатов v grazhdanskom protsesse," Zhurnal Ministerstva Iustitsii, no.12(1861), p.425.

²⁷ibid., p. 426

²⁸ibid., p. 426.

The striapchie's corrupt practices are confirmed by other local commentators and by foreign observers.²⁹ Bribes were common, although a striapchii was just as likely to keep the money himself as he was to actually bribe the appropriate official. When he lost a case, a striapchii would claim that the other side had paid the judge more.³⁰ It was not unknown for a striapchii to switch sides during a case, nor was it uncommon for a striapchii to purposefully lose a case in the lower courts in the hope that he would subsequently win it in a higher court and thereby obtain a higher honorarium. The indiscriminate accumulation of cases naturally clogged up the court system and led to long delays, although temporarily postponing a case was often part of the striapchie's strategy. Hearing that he was about to lose a case, a striapchii would "write a new petition, even if it did not have any significance, make an objection, even if it did not have any basis. . . It was necessary to provide an explanation against these complaints, and the resolution of the case was delayed further. . ." ³¹ Yet the most important asset that the striapchie possessed was who he knew. "The weapon of the striapchie was not in the knowledge of the law, nor in the art of classifying them, but simply in his knowledge of bureaucratic offices and the opportunity to penetrate so called 'bureaucratic secrets.'" ³²

That the striapchie were not beloved by judges, bureaucrats, and Russian society, as a whole, should come as little surprise. A few striapchie acquired prestige and fortune; these were the aristocratic striapchie, men with higher education who could demand several

²⁹W.E.Butler, "Foreign Impressions of Russian Law to 1800: Some Reflections," in W.E. Butler, ed., Russian Law: Historical and Political Perspectives(Leyden, 1977), pp.73-6.

³⁰Sanktpererburgskie Vedomosti, no 12(1865), p.1.

³¹"O slovesnom deloproizvodstve v Rossii," Russkii Vestnik(September, 1857), p.172.

³²Ibid., p.171-2.

hundred rubles for preparing a specific document.³³ But for most striapchie, their work brought little honour. Their low social standing was confirmed by the fact that in Moscow and St. Petersburg, a striapchie was theoretically required to obtain an adresnyi bilet, a certificate, issued by the local police, used primarily to register unskilled, household servants: tutors, nannies, wet nurses, butlers, seamstresses, etc.³⁴ That the striapchie should find themselves in the same company as personal servants was especially humiliating. It meant that striapchie, whatever their sostoianie, belonged to that large class of people who are hired "to perform various responsibilities in particular homes."³⁵

This subordinate position was reinforced by the fact that the adresnyi bilet doubled as the striapchie's certificate of approval. All employers were at least hypothetically responsible for completing an evaluation of their employees - in this case the striapchii - on the adresnyi bilet. Although this does not appear to have been strictly enforced, an unfavourable opinion could theoretically follow a striapchii around from employer to employer.³⁶ Since a striapchii's whole livelihood possibly depended on a positive review, he naturally surrendered his own personal judgement to his client's wishes. Therefore, the adresnyi bilet represented a potential check on the striapchie, and even in the first year of the Bar's existence, police mistakenly asked prisiazhnye poverennye for their adresnyi bilet.³⁷

³³A.V. Lokhvitskii, "O nashikh khodataiakh po delam," p.44.

³⁴A chinovnik was obviously not required to obtain an adresnyi bilet since by law, he was forbidden to act as a striapchie. The adresnyi bilet only applied to retired chinovniki, practicing as a striapchie, as well as to the general striapchie. See PSZ, v.33, no.26422; PSZ, v.36, no.27882.

³⁵G. Repinskii, "Poverennye po delam," Iuridicheskii Vestnik, no.6(1860-61), p.6.

³⁶S. Zagibenin, "Poverennye po delam," Iuridicheskii Zhurnal(December, 1860), p.109-110.

³⁷Gessen, Istoriia russkoi advokatury, 1: p.99. The adresnyi bilet was abolished completely in 1888.

The striapchie, therefore, were a product of Russia's organic legal tradition. For better, and in most cases, for worse, this was the group of legal practitioners which had evolved alongside Russia's legal institutions. Yet throughout the eighteenth and nineteenth centuries, as Russia annexed the Baltic States, Lithuania, and Poland, Russia also managed to acquire advocates, true advocates, who were the product of the western legal tradition.³⁸ These advocates could neither be assimilated nor destroyed; instead, they gradually had to be adapted to suit Russian conditions. This inevitably meant new restrictions had to be placed on them, but in the process, Russia, for the first time, recognized advocates and articulated rules and regulations to govern them. In Lithuania, an advocate's responsibilities towards his client, his opponent, and the court were clearly enunciated. In any given suit, for example, a Lithuanian advocate was first required to seek mediation, and if this failed, he had to quickly and fairly seek the resolution of the case by other means, preserving, at all times, his client's welfare.³⁹ But along with greater recognition came increased control; the courts acquired control over the admission and discipline of Lithuanian advocates. More importantly, the Ukaz of December 14, 1797 removed the monopoly right which Lithuanian advocates had previously enjoyed, thus granting everyone the right to act as a attorney.⁴⁰ This legislation basically destroyed the Lithuanian advokatura.

The tradition of private legal representation proved far more resilient in other regions, despite limitations imposed by the autocracy.

³⁸Poland had, in fact, been under both the Prussian legal system and the Napoleonic Code. See V. Spasovich and E. Piltz, Ocherednye voprosy v tsarstve Polskom(St. Petersburg, 1902), p.49-50.

³⁹K. Yanevich-Yanevskii, "Ob advokatakh i advokature v Rossii," Otechestvennyia Zapiski, v. 119(1858), p.154-5.

⁴⁰ibid., p.157.

The Polish advokatura was re-organized in 1808. It was divided into three branches; patrons, attached to the court of first instance; advocates, attached to the appeals courts; and defenders, attached to the cassation courts. Eventually, these distinctions were overlooked, so that a patron could practice in the appeals court, but only if he had permission from the director of the government's Commission of Justice and with the participation of an advocate. An advocate could appear in a cassation court as well, but only if he too acquired permission and appeared with a defender. Admission to the estate depended on the highest judicial/administrative authority in Poland. There was no soslovie organization, and disciplinary power belonged to the court.⁴¹

Detailed regulations to govern the Baltic advocates were also introduced. The Svod mestnykh zakoneni gubernii ostzeiskikh, published in 1845, stated that an applicant must have either a Master's or a Doctorate in law from a Russian university - and pass a practical exam - before he could receive the title advocate from the court. In Kurland, chinovniki were denied permission to join the advokatura but in Livland and Estland, advocates could remain chinovniki as long as they did not participate in litigation which came under their own department's jurisdiction.⁴² The duties and responsibilities of Baltic advocates were also clearly defined; advocates took either private cases or cases appointed by the court. He could not refuse any case unless he had either a conscientious or legal objection, and the court ruled on whether such a refusal was reasonable. The court also possessed disciplinary authority over all advocates.⁴³ Any corporate organization of advocates did not

⁴¹Vas'kovskii, Organizatsiia advokatury, pt.1:p. 319.

⁴²Yanevich-Yanevskii, "Ob advokatakh," p. 159-160.

⁴³Ibid., p. 160-61.

exist, although in 1859 , nineteen advocates did attempt to form a special society in Riga.⁴⁴

The significance of these foreign advocates cannot be overlooked. Some of Russia's greatest advocates - Spasovich, for instance - were clearly influenced by these foreign legal traditions. The 1845 Svod continued to govern Baltic advocates up until 1890, when they were reluctantly incorporated into the St. Petersburg advokatura. Finally, these foreign advocates appeared, at least to some, as the path to the future. Here, wrote Yanevich-Yanevskii, was both an experienced cadre of advocates and a prepared body of work for the "gradual application of the advokatura to other parts of Russia. . ." ⁴⁵ It was probably not coincidental, in fact, that while Russia was applying new regulations to foreign advocates, it was also contemplating new ways of organizing the striapchie.

II. ATTEMPTS TO REFORM THE STRIAPCHIE

The first known blue-print for creating a professional Russian advocate is particularly revealing because although it was never implemented, it officially confirms the previous characterization of the striapchie. In 1820, the Kommissiia sostavleniia zakonov (Commission for the Composition of Laws) was asked to resolve, once and for all, the issue of whether or not chinovniki had the right to participate in private litigation. Basing its decision on the Ruling Senate's Ukaz January 23, 1808 and Ukaz July 31, 1808, the Kommissiia confirmed that chinovniki could not acquire power of attorney, emphasizing that such a privilege would interfere with a chinovnik's designated responsibilities. In its

⁴⁴Zhurnal Ministerstva Iustitsii, v. 10(1861), p. 176-183.

⁴⁵Yanevich-Yanevskii, "Ob advokatakh," p. 161.

above decisions, however, the Ruling Senate had also noted a few exceptions to this prohibition which the Kommissiia, in turn, chose to endorse as well. Thus, the Kommissiia upheld that a chinovnik could, with the permission of his superior, defend a member of his immediate family as long as the case did not conflict with his official responsibilities, and that a chinovnik could be granted power of attorney in cases which did not require further litigation, such as mortgages or deeds of purchase.⁴⁶ After citing other precedents on this subject - dating back to the Ukaz December 24, 1714 - the Kommissiia next turned its attention to the rest of the striapchie. Once again, the standard litany of complaints was expressed; striapchie purposely dragged out cases, confused issues, switched sides, etc.. There was, the Kommissiia concluded, a "just prejudice" against the striapchie and it was not by chance that people turned to chinovniki who, in all regards, "deserved more faith" than the striapchie.⁴⁷

Therefore, in order to remove the chinovniki from independent legal practice, the Kommissiia demanded the total enforcement of the Ruling Senate's 1808 decisions. The Kommissiia did recognize, however, the need for an organized legal profession, and as a result, it proposed the creation of a soslovie of striapchie. This represents the first recorded attempt to organize a Russian advokatura. According to the proposal of the Kommissiia, a few striapchie were to be selected by the Minister of Justice from amongst all the practicing striapchie in order to form this soslovie. The number would correspond to the total number of litigants. The responsibilities of this new striapchii were clearly defined; he was to resolve cases based on his conscience and his ability. He had to follow the

⁴⁶"Pervyi proekt organizatsii advokatury," Pravo, no.47(1914), p.3228-9.

⁴⁷Ibid., p. 3232.

instructions of his client and provide clear explanations of what he was doing. He was to observe all the rules of jurisprudence, and was required to explain the case in court as clearly as possible, without resorting to any tricks or chicanery. The corporate organization of this soslovie, however, remained limited. A special council (sovet) was to be elected by the striapchie under the immediate supervision of the Ministry of Justice. The council's primary responsibility was to record all cases taken by striapchie so that in case a dispute arose, the council would already have all the preliminary information at its disposal. Although the council's disciplinary power was not clearly defined, it nevertheless was responsible for the actions of its members. Anyone requiring a striapchii could appeal to the council which, in turn, would recommend two members. Finally, the council was required to appoint a striapchii to indigent widows and orphans regardless of their ability to pay.⁴⁸

The immediate impact of the above report appears to have been negligible. No soslovie was ever introduced, the chinovniki and striapchie continued to practice as before. It is interesting to note, however, that some of the terminology (soslovie, sovet) and ideas (the appointment of advocates to indigent clients) of the Kommissiia eventually found their way into the Judicial Reforms of 1864. It was also only twelve years later that the first official Russian advocate - the prisiazhnye striapchie - was explicitly recognized and defined, although the actual Kommissiia report seems to have had little influence. The institute of prisiazhnye striapchie was created as part of the May 14, 1832 reform of the commercial courts.⁴⁹ There were no educational requirements to become a prisiazhnye striapchie; the court simply

⁴⁸Ibid., p. 3234-6.

⁴⁹For a description of the commercial court reforms, see N.A. Pobedonostsev and T.M. Godzevich, Moskovskii Kommercheskii Sud (St. Petersburg, 1909), p.4-6.

announced whether an applicant had been accepted or rejected, and no reason had to be provided if an applicant was refused.⁵⁰ The court's absolute power was reinforced by the fact that it could also remove a prisiazhnye striapchie at any time without having to supply an explanation. Such a rejection did have to be recorded, however, in the court's protocol.⁵¹ The one privilege granted to the prisiazhnye striapchie was the right of monopoly; all cases before the commercial courts had to be brought through a prisiazhnye striapchie, although in a few exceptions, merchants and accountants could appear as well.⁵²

To some, the creation of the prisiazhnye striapchie represented an important first step in Russia's transition to an independent legal profession. According to one commentator, the prisiazhnye striapchie existed halfway between a true western advocate and the unrestricted striapchie.⁵³ Their special status was confirmed by the fact that the prisiazhnye striapchie were not required to obtain the adresnyi bilet.⁵⁴ But as Gessen later argued, the tight controls placed over the prisiazhnye striapchie were, in reality very similar to the repressive measures taken against foreign advocates throughout the eighteenth and nineteenth centuries.⁵⁵ Therefore, the creation of the prisiazhnye striapchie can also be interpreted as yet another attempt by the autocracy to limit the potential influence of advocates.

Whatever the government's intentions, the prisiazhnye striapchie do not seem to have distinguished themselves from their striapchie brethren. According to Potekhin, there were two separate classes of

⁵⁰PSZ, 5360, 14 May 1832, art. 24.

⁵¹PSZ, 5360, 14 May, 1832, art. 25.

⁵²PSZ, 5360, 14 May, 1832, art. 28.

⁵³Yanevich-Yanevskii, "Ob advokatakh," p. 149.

⁵⁴Gessen, Istoriia russkoi advokatury, 1: p. 98.

⁵⁵Ibid., p. 24.

prisiazhnye striapchie: those with higher legal education, and those from various backgrounds - baliffs, former employees of the court, etc.. Acceptance depended on either a personal acquaintance with the Chairman of the Commercial Court or a certified statement from two merchants which stated that the applicant would be appointed to conduct their litigation.⁵⁶ It was the absolute power of the chairman which seems to have been most dominant. Repinskii noted that with rare exceptions, the prisiazhnye striapchie were not the people whom "society had determined were dignified to carry this title, "but only those whom the members of the courts - and particularly the chairman - had deemed suitable.⁵⁷ As a result, prisiazhnye striapchie were reluctant to take cases which directly clashed with the chairman's interests. Potekhin describes the prisiazhnye striapchie as the personification of the old boys club. "They were neither a soslovie or a korporatsiia; their interests were uncoordinated; several were linked together by friendship, private acquaintance, their place of education or upbringing, but a general soslovie interest was absent. Supervision for the prisiazhnye striapchie was non-existent. . ."58

Therefore, the prisiazhnye striapchie should not be seen as a half-way point in the creation of a true Russian advokatura. Stripped of any soslovie or corporate organization, the prisiazhnye striapchie are probably best understood in light of the counter-reforms taken against foreign advocates. The history of the prisiazhnye striapchie, however, does not end in 1864; the title, in fact, continued to exist throughout the entire post-reform period, although after 1864, the members of the prisiazhnye striapchie came primarily from the sworn advokatura. In St. Petersburg, a

⁵⁶Potekhin, "Otryvki iz vospominany advokata," p. 2219.

⁵⁷Repinskii, "Poverennye po delam," p. 10.

⁵⁸Potekhin, "Otryvki iz vospominany advokata," p. 2219.

sworn attorney could become a prisiazhnyi striapchii - and hence practice in the commercial courts - simply by obtaining a certificate from the Council of the Bar, stating that he was a member of the profession. After 1873, St Petersburg attorneys-in-training were also admitted into the St. Petersburg prisiazhnye striapchie, although their admission was not a formality. It still remained possible for people without any legal education to be admitted into the prisiazhnye striapchie, as long as they showed some familiarity with commercial law, but by 1908, the total number of St. Petersburg prisiazhnye striapchie without legal education was five.⁵⁹ To a large degree, therefore, the prisiazhnye striapchie were incorporated into the established advokatura, but this did not mean that the title became superfluous. Jewish advocates, who after 1889 were denied entry into the prisiazhnye poverennye and refused licenses to practice in most local courts, found their last refuge in the prisiazhnye striapchie. In 1914, after years of discrimination, one quarter of all prisiazhnye striapchie were still Jewish.⁶⁰ Therefore, this anachronism from the pre-reform era became the means by which Jewish advocates continued to practice law.

There was still one last piece of legislation which had an impact on the pre-reform striapchie. The Svod zakonov Rossiiskoi Imperii(1857) actually granted the striapchie their greatest official recognition by guaranteeing all citizens the right to legal representation. The Svod only designated those who could not act as striapchie: "1) underage persons; 2) peasants belonging to the udely (properties of the imperial family) when litigation concerned peasants of those udely; in other cases, they were allowed to be representatives in court with the permission of their superiors; 3) members of the clergy; 4) monks and nuns; 5) officials

⁵⁹Ocherk istorii S.-Peterburgskago Kommercheskago Suda(St. Petersburg, 1909), p. 14-15.

⁶⁰"Evrei v russkoi advokature," Vestnik Prava, no.6(1916), p.163.

(chinovniki); 6) persons of all classes (soslovie) who, having been indicted for crimes punishable by deprivation of rights, conscription, or exile to Siberia and forced labour, were freed from those punishments pursuant to an imperial manifesto or remained unacquitted because their cases were dropped pursuant to a manifesto; 7) persons declared infamous by decision of a court, although not deprived of all rights; 8) persons who were subjected to corporal punishment for criminal offences pursuant to a court decision, although they were not excluded from urban or rural communities; 9) former officials(chinovniki) and employees of chancelleries dismissed for criminal offences or bad behaviour; 10) those under police supervision and those to whom representation is prohibited as a consequence of illegal acts committed by them."⁶¹

The impact of this legislation, however, was minimal, for just as the striapchie achieved official recognition from the state, discussions began within the Second Section which would ultimately lead to the Judicial Reforms of 1864 and the creation of the Russian advokatura. But as the above discussion has clearly shown, Russia did not approach this process with a blank slate. On the contrary, Russia had both an organic tradition of semi-official, semi-underground legal representation as well as a foreign, imported tradition based on western principles. Russia had never reconciled these two separate traditions, but gradually, through various reforms and counter-reforms, the gap between them had narrowed - the difference between the prisiazhnye striapchie and the reformed Lithuanian or Polish advokatura was not that great. The Russian bureaucracy, therefore, was not lacking in precedents in how to approach the problem of creating a Russian advokatura. But if, on the eve

⁶¹Svod zakonov, Izd. 1857g., vol. X, Part 2, Art. 184. As quoted by Kucherov, Courts, Lawyers, p. 108.

of the Judicial Reform, the Russian bureaucracy did not have a clean slate, than neither did Russian society. For more than 150 years, Russia's attitude towards private legal representation had been prejudiced by the corrupt practices of the striapchie. Therefore, in order for a respected advokatura to emerge, Russia's inherent, and in most cases, understandable suspicion of legal representation had to be overcome as well.

III. THE EVOLUTION OF THE JUDICIAL REFORMS

An elaborate bureaucratic maze surrounds the final genesis of the Judicial Reforms of 1864. Between 1857 and 1861, for example, the State Council examined no less than 14 different proposals on legal reform; 2 on jurisprudence, 4 on criminal procedure, and 8 on civil procedure.⁶² As all these projects circulated within the bureaucracy, they were constantly subjected to modifications, amendments, and revisions. For any analysis of the judicial reforms, however, the true dividing line is 1861; prior to that time Alexander II strongly resisted any major changes in Russia's legal system. The principle reform proposals of this period - composed by the Second Section under the leadership of Count Bludov - reflected the Tsar's steadfast opposition. Bludov's ambition was to modernize Russia's system of civil procedure - raising it to early nineteenth century European standards - without altering the fundamental characteristics of Russian justice: the inquisitorial system, central control, the emphasis on written proofs, etc.⁶³ Whatever its longterm feasibility, Bludov's model did set the whole reform process in motion, and his proposals were discussed

⁶²I.V. Gessen, Sudebnaia reforma(St. Petersburg, 1905), p.51.

⁶³Wortman, The Development of a Russian Legal Consciousness, pp. 160-64.

both within the State Council and the Ministry of Justice. But after 1861, the Tsar's attitude towards legal reform dramatically reversed. With the liberation of the serfs, economic considerations, most notably, the need to protect private property, compelled the Tsar to introduce comprehensive legal reform. The responsibility for composing such reform was transferred from the Second Section to the State Chancellery which in 1862 drafted The Basic Principles for the Reform of the Courts. A thorough overhaul of the Russian judicial system was now envisioned; an independent judiciary, a jury system, publicized court proceedings, justices of the peace were all to be introduced for the first time in Imperial Russia. The Basic Principles were still subject to an exhaustive review within the bureaucracy, but eventually, they were transformed into the Judicial Reforms of 1864.

The advokatura occupies a unique position in this whole process. When Bludov contemplated introducing advocates into his new civil system, he stressed continuity. Bludov did not want the advokatura to spring from a new source, and especially not from a foreign source, such as France. Therefore, he took Russia's most established form of legal representation - the prisiazhnye striapchie - and radically transformed their responsibilities in order to make them compatible with his new system of civil procedure. The most important difference between Bludov's prisiazhnye striapchie and the old prisiazhnye striapchie attached to the commercial courts was that the latter's monopoly right was removed. Litigants, not wishing to personally conduct a suit could either turn to Bludov's prisiazhnye striapchie or select their own attorney from the population at large. New demands were also placed on Bludov's prisiazhnye striapchie. Education requirements were added, and prisiazhnye striapchie were required to defend indigent clients free of charge, if those clients presented a certificate of poverty. There was no

illusion as to what role Bludov's prisiazhnye striapchie would play; they were to ensure that all the technical details of a case were observed. Bludov rejected any suggestion that the new prisiazhnye striapchie should be granted soslovie rights. Instead, Bludov chose to emulate advocates that existed in parts of Germany, Holland, and Piedmont where the respective government selected advocates and where they were supervised by the local courts.⁶⁴

But Bludov's proposal is not simply relevant for what it chose to include, it is also conspicuous for what it chose to ignore. The narrow legal function the prisiazhnye striapchie were going to perform, the strict state control, the absence of any soslovie organization all meant that Bludov did not have to concern himself with problems of professional ethics or the complex relationship between an advocate and the state. Such complications were not conceivable under Bludov's narrow conception of the advokatura. The implications of Bludov's omission shall become readily apparent.

Yet for all its oversights, Bludov's proposal provided the initial momentum that ultimately culminated in the Judicial Reform of 1864. It was next examined by the joint meeting of the State Council's Department of Laws and Department of Civil Affairs. They also shared Bludov's opposition to the introduction of western-style advocates. "Our attorneys must not be an independent soslovie but an institution under the supervision of the highest judicial power in the Empire."⁶⁵ Yet even while upholding Bludov's original premise, the joint meeting began to add significant new features to the structure of Bludov's prisiazhnye striapchie. Since a new type of advocate was being introduced, he should

⁶⁴Gessen, *Istoriia russkoi advokatury*, 1: p. 43-46.

⁶⁵*ibid.*, p. 47.

not bear such a ignoble title; thus, the prisiazhnye striapchie irrevocably became the prisiazhnye poverennye. The joint meeting also introduced a limited system of corporate self-management; a special executive council(sovet) was to be elected by its members which would initially review applications to the prisiazhnye poverennye(final approval belonged to the court) and appoint advocates in right of poverty cases. Absolute control, however, still rested with the government and the council remained under the supervision of the local procurator.⁶⁶ Finally, in a radical departure from Bludov's original proposal, the joint meeting restored the monopoly privilege to the prisiazhnye poverennye.⁶⁷

More changes were still to come. The State Council's joint meeting proposal on the advokatura, along with the new civil code, was next sent to individual members of the State Council and Ministry of Justice for their observations and suggestions. Major structural alterations were once again proposed. Within the comments of the various bureaucrats, one finds the first reference to the advokatura as a soslovie, although no attempt is made to define this ambiguous title. The old striapchie, it was argued, were absolutely discredited; therefore, in order to gain both the trust of society and guarantee the morality and knowledge of its members, "it was necessary that this new soslovie be, in reality, a new soslovie."⁶⁸ Self-government was also demanded for the prisiazhnye poverennye; not only did the procurator lack the time to properly supervise the advokatura, but independent self-management would also encourage the very best people to enter the soslovie.

But besides insisting on soslovie recognition for the advokatura, these general remarks also began to address issues which, until then, had

⁶⁶Ibid., p. 47.

⁶⁷Ibid., p. 50.

⁶⁸Ibid., p. 54.

been either overlooked or ignored. The responsibilities of the pomoshchniki were, for the first time, discussed. Professional ethics were also examined. For example, could an advocate refuse to defend an appointed case? If he refused, was the council required to appoint another prisiazhnye poverennye? Although this preliminary discussion of professional ethics proved to be, in the end, inconclusive, it nevertheless represented the first attempt to fill in some of the glaring gaps of Bludov's original proposal. But for all its forward thinking, these general remarks did take one giant step backwards. They demanded that the monopoly right, previously granted to the prisiazhnye poverennye, once again be revoked. Only after the new soslovie had gained the total respect of society should the monopoly right be enforced⁶⁹.

On May 5 and June 6, 1861, these general remarks were reviewed by another joint meeting of the State Council's Department of Laws and Department of Civil Affairs, where yet another reform proposal was composed. The joint meeting accepted some of the suggestions outright; the proposition that only a soslovie could guarantee the morality, honesty, and knowledge of the future prisiazhnye poverennye was copied word for word from the general remarks. The suggestion that the soslovie should have the right to punish, and even exclude, a member of the profession was also introduced. At the same time, however, many of the recommendations were simply ignored. The soslovie remained under the direct supervision of the procuracy. Ethical questions remained unresolved. Finally, an ambiguous compromise was reached on the question of monopoly. Although this right was recognized, the local legislative authorities first had to certify that a sufficient number of prisiazhnye poverennye were living in a given area before it could be

⁶⁹ Ibid., p. 56-8.

implemented. No information was provided as to how to determine what was a sufficient number of prisiazhnye poverennye.⁷⁰

Bludov's proposal had quite clearly undergone a radical transformation. Instead of a revised prisiazhnye striapchie, now there was a new soslovie of prisiazhnye poverennye. The State Council's general meeting was about to examine this new prototype when legal reform turned 180 degrees. Bludov's limited reorganization of civil procedure was discarded in order to make way for a revolutionary change in Russia's administration of justice. The State Chancellery replaced the Second Section as the department responsible for drafting these historic changes, and the fruits of their work - independent judges, juries, open court proceedings etc. - are well known. With the introduction of these major innovations, it would appear obvious that the role of legal representation also had to be reassessed, but it is precisely at this moment that the advokatura's fate, to a certain degree, was determined. When the State Chancellery began to draft the Basic Principles, it either started from scratch or relied on foreign models. In the specific case of the advokatura, however, the Chancellery chose to simply incorporate most of the State Council's recommendations of June, 1861.⁷¹ There was no question as to the roots of the 1861 reform proposals - they went back to Bludov's original prisiazhnye striapchie.

The links between the pre-June 1861 period and the post-June 1861 period, therefore, are quite emphatic. The first draft of Basic Principles utilized the same terminology - prisiazhnye poverennye, pomoshchniki, sovet - as its predecessor, and shared some of the same weaknesses. It failed, for example, to adequately define both the competency of the Bar

⁷⁰ *Ibid.*, p. 60-1.

⁷¹ *Ibid.*, p. 64.

and the responsibilities of the pomoshchniki.⁷² Most importantly, the first draft of the Basic Principles continued to place the Bar under the direct supervision of the procuracy, meaning that there was still no independent advokatura.⁷³ Yet despite these similarities, there were some important additions to the pre-1861 reform proposals as well. The advokatura's public platform was expanded to include both civil and criminal law. The new draft proposal also recommended that the advokatura's monopoly right be enforced in any city, which contained more than 10 sworn attorneys. Finally, the Vice Chairman of each regional Bar was delegated the right to substitute for the procurator in the case of the latter's absence.⁷⁴

Like all the pre-1861 reform proposals, the Basic Principles would also be subject to numerous amendments and suggestions as it worked its way through the bureaucracy. Much of the practical detail was hammered out between 1862 and 1863 by a special commission within the State Chancellery, which ultimately composed the final version of the Basic Principles.⁷⁵ Several important modifications were introduced along the way. In 1862, the advokatura's absolute monopoly right was withdrawn yet again. Instead, the same equivocal compromise, which had existed prior to 1861, was arrived at; the monopoly right would only be implemented when a sufficient number of advocates had been recognized, and once again, no effort was made to numerically define what constituted a sufficient number of advocates.⁷⁶ In 1863, the above mentioned special commission further restricted the advokatura's monopoly right.⁷⁷

⁷²Ibid., pp. 65-6.

⁷³Ibid., p.64.

⁷⁴Ibid., pp. 64-5.

⁷⁵Ibid., pp. 86-99.

⁷⁶Ibid., pp. 67-8.

⁷⁷Ibid., pp. 92-3.

The most salient adjustment that occurred during the passage of the Basic Principles through the bureaucracy, however, remains the most obscure. In May and June, 1862, the Basic Principles were examined by the State Council's joint meeting of the Department of Laws and Department of Civil Affairs, and it was at this time that the decision was made to remove the procurator as the chief supervisor of all prisiazhnye poverennye and instead, place the elected Chairman of the Bar Council in that position. Unfortunately, the reasons behind this decision are unknown, but its implications were profound; for the first time in Russian history, an occupation had been granted the legal status of a self-governing corporation and recognized as an independent soslovie.⁷⁸

The discussion of legal reform, however, was not restricted to the bureaucracy. The press also actively debated the future construction of the advokatura, and their commentary serves as an important additional source on the whole reform process. It is within the press, for example, that one finds the most detailed examination on whether or not Russia should follow the French and English models and introduce a divided profession. Most commentators objected, it appears, on practical grounds. Depp argued that a divided profession was a superfluous distinction which simply burdened the client with additional expenses.⁷⁹ The shortage of people possessing higher legal education - a requirement for admission into the prisiazhnye poverennye - was also raised as a consideration. There were only an estimated 8000 law graduates at the time of the Judicial Reforms, and the 25 year old minimum age for

⁷⁸ *Ibid.*, p. 66.

⁷⁹ Depp, "O znachenie advokatov," p. 440-41.

admission reduced the total eligible number to 6000, an insufficient amount in which to impose a divided profession.⁸⁰

The dispute over professional monopoly, which split the bureaucracy, also proved to be divisive for the press. Supporters argued that this right was required simply to convince people to join the advokatura, for without the monopoly guarantee, there would be no incentive to assume the burdens of the profession. But the opponents of absolute monopoly countered with numerous objections. To begin with, wrote P. Markov, "litigants can not be deprived of the right to appoint to their case those in whom they have more faith."⁸¹ Secondly, there would inevitably be some areas without a single prisiazhnye poverennye; what, asked Markov, were people supposed to do in these localities. Finally, Markov argued that the advokatura's corporate organization did not by itself "present a guarantee that this institution could satisfy all the demands of society."⁸² Therefore, just in case the advokatura failed to live up to expectations, some form of direct competition had to be maintained. Obviously, added Markov, this would not be a problem if the advokatura acquired society's trust.

But above all else, the press represents the clearest expression of hopes and aspirations of Russian society for the advokatura on the eve of its founding. Not everyone was supportive. One anonymous article in Russkii Vestnik in 1859 strongly objected to the introduction of advocates in civil processes, stating that a losing advocate in any civil case was, by the very fact that he had lost, a defender of an unjust cause. Thus, the article continued, the concepts of law and justice will not become more

⁸⁰ S. Belikov, "Advokatura v Rossii," Zhurnal Ministerstva Iustitsii(February, 1865), p. 282-83.

⁸¹ P. Markov, "O monopolii vedeniia sudebnykh del," Zhurnal Ministerstva Iustitsii(February, 1863), p. 363.

⁸² Ibid., p. 363.

understandable through the assistance of an attorney but on the contrary, will become "entangled with their cunning and with the sophistry of their dialectics."⁸³ But this view was clearly in the minority. Russkii Vestnik - the publisher of the above article - so objected to its contents that it published a rebuttal directly alongside the original article. Most commentators supported the call for a new system of legal representation, although they disagreed over whether or not this new institution should be self-governing or controlled by the state. Even Pobedonostev agreed that "without an advokatura, there is no justice."⁸⁴

But this growing acceptance of the advokatura as a social institution was not accompanied by a heightened appreciation of what role an individual advocate plays in society. Expectations were unreasonably high. According to B. Bervi, an advocate had to be honest, could only participate in just cases, and was required to be the natural defender of the poor at, it must be added, no charge.⁸⁵ Depp also naively perceived the advocate's role in society. An advocate, in Depp's eyes, had two primary responsibilities: mediator between the state and the narod and popularizer of the new legal system. Confrontation between the state and the advokatura was never envisioned. "The actual advantage for the state of this soslovie can only be in those cases when advocates understand their sublime responsibilities to preserve peace and tranquillity between citizens and the state, prevent all superfluous suits,[and act as] defenders of positive rights, not petty, temporary personal interests. . ."⁸⁶ With such lofty ideals, it is not surprising that future critics of the advokatura

⁸³ N.C-v, "Ob advokature v grazhdanskom protsesse," Russkii Vestnik(March, 1859), p. 145.

⁸⁴ N.Cherkasova, Formirovanie i razvitie advokatury v Rossii(Moscow, 1987), p. 18.

⁸⁵ V. Bervi, "Neskol'ko slov o khodataiakh po delam," Iuridicheskii Vestnik, no. 6(1860), p. 2.

⁸⁶ Depp, "O znachenie advokatov," p. 444.

ultimately argued that the soslovie had failed to live up to its original expectations.

IV. THE JUDICIAL REFORMS OF 1864

Having analyzed the internal discussions which occurred both within the bureaucracy and the press, it is now possible to turn to the final product - The Judicial Reform of 1864 - and see what was actually created. As previously mentioned the Bar in Russia was a regional, not national institution. According to the reforms each regional Bar was divided into two branches; the general assembly(obshchee sobranie), which incorporated all prisiazhnye poverennye, and the Council of the Bar(the sovet), which served as the profession's governing body. If any district contained more than 20 prisiazhnye poverennye, it could make a request to the local sudebnaia palata(palace of justice) for permission to assemble with the direct purpose of electing a council.⁸⁷ Once solicited, the sudebnaia palata had no right to refuse such a request; instead, all prisiazhnye poverennye of the district would be invited on an assigned day to come to the sudebnaia palata and if one-half of the district's prisiazhnye poverennye were present, then the general assembly was opened and a council was elected.⁸⁸ In order to be elected to the council, all that was required was a simple majority, although in the case of a tie, the winner was the candidate with the most seniority.⁸⁹ The council's officers consisted of a chairman, a vice-chairman, and anywhere between five and fifteen members(the number was predetermined before the

⁸⁷ Sudebnye Ustavy 20 Noiabria 1864, Part III: Uchrezhdeniia sudebnykh ustanovlenii, Art. 358.

⁸⁸ Ibid., Art. 359.

⁸⁹ Ibid., Art. 360.

voting took place).⁹⁰ Once the initial election was completed, the names of the council's members were transferred to the procurator and published for the general public.⁹¹

With the formation of a regional Bar, the Judicial Reform of 1864 assigned certain responsibilities to each of the respective branches. The major prerogative reserved to the general assembly was the right to elect a new council every year. Article 364 stipulated that a yearly gathering of the general assembly had to take place. At this meeting, the annual report of the council was to be read, followed by the election of a new council. If, however, one-half of the district prisiazhnye poverennye failed to attend the general assembly, then the chairman of the council had to dissolve the meeting with the proviso that if quorum was not met at the next meeting, then the entire council would simply be reappointed for another term and the general assembly would not meet again until the following year.⁹²

Far greater authority was placed in the hands of the council. According to the Judicial Reform of 1864, every applicant had to first be examined by the council which verified that all prerequisites had been satisfied.⁹³ If, in a civil case, the fee had not been agreed to in advance by the lawyer and the client, then it was the council that resolved all questions of compensation.⁹⁴ A special tariff was to be published every three years by the Ministry of Justice which was to apply to all cases where the fee had not been decided.⁹⁵ The council was also responsible for appointing prisiazhnye poverennye to indigent clients who, utilizing the right of poverty (pravo bednosti), were entitled to free legal

⁹⁰ Ibid., Art. 363.

⁹¹ Ibid., Art. 363.

⁹² Ibid., Art. 365.

⁹³ Ibid., Art. 367, pt. 1.

⁹⁴ Ibid., Art. 367, pt. 6.

⁹⁵ Ibid., Art. 396.

representation.⁹⁶ A sworn attorney could reject an appointed case, but only if he could provide an appropriate reason.⁹⁷

Finally, if any grievance or complaint was filed against a sworn attorney, then it was the council's responsibility to investigate the charge and, if guilty, pronounce a sentence.⁹⁸ The Judicial Reform designated five different forms of punishment that the council could impose: 1)Warning; 2)Rebuke; 3)Temporary suspension for up to one year; 4)Exclusion from the profession; and 5)Transfer of the case to the criminal courts.⁹⁹ If a prisiazhnye poverennye had been temporarily suspended twice and was then found guilty of a third offence, he had to be disbarred.¹⁰⁰ All decisions required the presence of at least one-half of the council, unless a more severe sentence was involved(anything above a rebuke) which required a two-thirds quorum. In case of a tie, the chairman possessed the deciding vote.¹⁰¹ In all disciplinary cases, an explanation from the accused was sought, and any decision by the council could be appealed to the sudebnaia palata as long as the appeal was filed within a two week period after the initial ruling.¹⁰² The procurator also had the right to appeal all disciplinary decisions within a two week period.¹⁰³

If a district was unable to form a regional Bar, then there were two other alternative forms of governance delineated in the Judicial Reforms of 1864. If more than ten prisiazhnye poverennye lived in a city where the regional sudebnaia palata was not located, then these advocates could,

⁹⁶ Ibid., Art. 367, pt. 4.

⁹⁷ Ibid., Art. 394.

⁹⁸ Ibid., Art. 367, pt. 2.

⁹⁹ Ibid., Art. 368.

¹⁰⁰ Ibid., Art. 369.

¹⁰¹ Ibid., Art. 375.

¹⁰² Ibid., Art.376.

¹⁰³ Ibid. Art. 376.

with the approval of the regional council, form a branch of the council of the Bar attached to the district court(okruzhnoi sud). The powers that were to be granted to the branch, however, were decided by the regional council.¹⁰⁴ As for the final option, the Judicial Reform specified that until a regional Bar was formed, all of the council's responsibilities were to be handled by the district court.¹⁰⁵

The Judicial Reform designated three different routes by which one could apply to become a sworn attorney. 1) A law graduate from university could decide to become an attorney-in-training and join the pomoshchniki. After five years under the supervision of a personal patron, a pomoshchnik was then eligible to apply for admission to the Bar. 2) A member of the judicial department of any Ministry could apply to be a prisiazhnye poverennye if he had spent five years at that Ministry, during which time he had acquired the practical knowledge necessary for conducting court cases. 3) A candidate for judicial appointment could apply to join the Bar if he had spent five years in this position and had also acquired the practical knowledge necessary for conducting court cases.¹⁰⁶ Besides these qualifications, there were eight general admission requirements which had to be met. Applicants were denied admission if they were any one of the following: 1) under 25; 2) a non-Russian citizen; 3) insolvent debtors; 4) employed in government service(with the exception of all honorary positions); 5) condemned to deprivation or restriction of rights; 6) under preliminary investigation for crimes involving deprivation or restriction of rights; 7) dismissed from state service by a court sentence or from ecclesiastic service for vices; and 8)

¹⁰⁴ Ibid., Art. 366.

¹⁰⁵ Ibid., Art. 378.

¹⁰⁶ Ibid., Art 359.

prohibited, by a court decision, from soliciting for other persons.¹⁰⁷ The council reviewed all these qualifications - as well as the personal integrity of each candidate - before deciding whether or not to admit them to the Bar.¹⁰⁸ If rejected, then an applicant had the right to appeal this decision to the sudebnaia palata.

The power of attorney could be granted either by the individual client or, in civil cases, by appointment of the council of the Bar and, in criminal cases, by the local court.¹⁰⁹ The monopoly right of prisiazhnye poverennye was recognized, although it was specified that a sufficient number of sworn attorneys had to live in a given district before this right could be implemented.¹¹⁰ A special table was to be composed by the Ministry of Justice which would define what was a satisfactory number of advocates for a given district.¹¹¹ Article 389, however, did grant near relatives and co-litigants the right to act as legal representatives as well.

Finally, the Judicial Reforms did impose a few ethical restrictions on the advokatura. As stated above, a sworn attorney could not refrain from fulfilling his duties in appointed cases without sufficient reason.¹¹² He could not acquire the rights of his client, act as an advocate against a near relative, or switch sides in the middle of a case.¹¹³ A prisiazhnyi poverennyi was responsible for all acts of negligence, and in such cases, a client could sue him for damages.¹¹⁴ For premeditated acts against a client, a sworn attorney was not only subject to civil action, but also criminal prosecution.

¹⁰⁷ Ibid., Art. 355.

¹⁰⁸ Ibid., Art.380.

¹⁰⁹ Ibid., Arts. 353,391,393.

¹¹⁰ Ibid., Art. 387.

¹¹¹ Ibid., Art. 388.

¹¹² Ibid., Art. 394.

¹¹³ Ibid., Arts. 400,401,402.

¹¹⁴ Ibid., Art. 404.

The publication of the Judicial Reforms of 1864 represents the culmination of Alexander II's sweeping transformation of Russia. The hated striapchie had at last been replaced by the western equivalent of a professional advocate. Indeed at the time of its publication, commentators traced the western and particularly French influence on the Russian advokatura. The internal organization of the council of the Bar and its relationship to the procuracy was similar to the French system. Absolute control of admission and discipline also had French precedents, as did the appointment of lawyers free of charge.¹¹⁵ But Russia was not only influenced by the west, it was, to a certain degree, ahead of the west, in the vanguard of legal reform. During the late 1850's and early 1860's, there were demands both in Austria and parts of Germany to replace their respective bureaucratic advocates with free advocates. Austria, however, did not reform its legal profession until 1868, and newly united Germany did not reform its legal profession until 1878.¹¹⁶ On the surface, both appeared to have been influenced by the reforms in Russia. A case can be made that in terms of professional standards, Russia had even moved in front of the United States. The rise of Jacksonian democracy had greatly weakened the established legal profession in America between 1836 and 1870. People viewed the profession both as a privileged class and as a private money-making occupation. During this period, therefore, the American legal profession went through a period of de-professionalization, where the prerequisites to practice law were gradually

¹¹⁵ Belikov, "Advokatura v Rossii," p. 274.

¹¹⁶ E. Vas'kovskii, "Advokatura," in Sudevnye ustavy 20-go noiabria 1864g. za 50 let (Petrograd, 1914), pt. 2, p.257.

whittled away.¹¹⁷ The American Bar Association itself was only founded in 1878, some fourteen years after Alexander II's Judicial Reforms.¹¹⁸

Russia's achievement, therefore, cannot be dismissed. At the same time, despite certain similarities with the west, one must emphasize the unique origins of the Russian advokatura. As we have seen, the prisiazhnye poverennye did not find its roots in a western advocate but in Bludov's prisiazhnye striapchie, and despite countless modifications and amendments, Bludov's original prejudices still manifest themselves in the final product. The very name - prisiazhnye poverennye - reflected a certain degree of ambivalence. Why did Russia fear a true legal profession so much, wrote one judicial secretary in Voronezh, that the Basic Principles still chose to call "advocates prisiazhnye poverennye and reduced the advokatura to [the status of] a trade."¹¹⁹

But it is not simply a psychological phobia of the word 'advocate' and all its implications which reveals itself in the Judicial Reforms of 1864. When one traces the advokatura's evolution from Bludov's original proposal to the final product, it becomes apparent that upon its completion, the prisiazhnye poverennye possessed the body of a western advocate but the spirit of Bludov's prisiazhnye striapchie. How could this be? Despite the radical re-examination of the advokatura's structure between 1857 and 1864, the Judicial Reforms had, in the end, only resolved the external construction of the prisiazhnye poverennye, and even at that, certain basic questions remained unanswered, most notably the question of the pomoshchniki. Nevertheless, by concentrating on the advokatura's external organization, the Judicial Reforms lost sight of the

¹¹⁷ Roscoe Pound, The Lawyer from Antiquity to Modern Times (St. Paul, 1953), p. 231-3.

¹¹⁸ *Ibid.*, p. 14.

¹¹⁹ Gessen, Istoriia russkoi advokatury, 1: p. 79.

intrinsic qualities that also go into creating a true legal profession. Where, for example, was the detailed code of ethics to govern the advokatura? What was to be the relationship between the state and the advokatura? When would the monopoly right, so enigmatically expressed in the Judicial Reforms, be implemented? Until these basic questions were resolved, the prisiazhnye poverennye's nearest relative was not the western advocate but once again Bludov's prisiazhnye striapchie. The advokatura's future success depended on the quick resolution of all these problems; otherwise, degeneration back into the striapchie remained a real possibility.

Therefore, as was suggested in the introduction, the birth of the advokatura does not represent an example of the spontaneous generation of a profession. On the contrary, like similar professions in the west, the sworn advokatura still had to both articulate its own sense of identity and simultaneously fight for greater recognition from the state before its status as a profession, and as a soslovie, could be confirmed.



CHAPTER TWO: THE ORGANIZATION OF THE RUSSIAN BAR

I. THE FIRST TEN YEARS OF THE BAR(1866-1876)

The Judicial Reforms of 1864 represented the first legal limitation on the absolute power of the autocracy. They did not, however, as is sometimes suggested, symbolize the instant transformation of the entire Russian legal system. In reality, these reforms took more than thirty years to implement - Omsk and Tashkent did not come under their jurisdiction until 1898 - and even in the districts where the reforms were introduced, remnants of the pre-1864 legal system both survived and prospered. The ecclesiastical, military, commercial, and, perhaps most significantly, peasant(volost) courts remained untouched by the reforms. Many lower, non-Russian courts also continued to function as before, such as the Baltic Peasant Courts and the special courts for the Kalmyks(the ulusny zargo). Excluding Finland, there were no less than 12 different types of lower courts in Imperial Russia in 1913, many of which were still "unknown to the Russians themselves."¹

It was within this confused atmosphere - where the old stood directly next to the new - that the advokatura first emerged. Even prior to the formation of the first Councils of the Bar in Moscow and St. Petersburg in 1866, the autocracy began to tamper with the original reforms. In order to stimulate the initial growth of the soslovie, a temporary set of rules were introduced on October 19, 1865, which superseded some of the previously described admission requirements. Based on Article 44 of the above regulations, a prospective candidate,

¹Boris Maklakov, "Local Justice in Russia," The Russian Review(November, 1913), p. 128.

possessing a degree in law, could apply to the Bar if he had either four years experience in a judicial department or five years experience conducting cases as a poverennyi (i.e. as a pre-reform striapchii). Article 44 also opened up the advokatura to non-university graduates. Any chinovnik, regardless of his academic background, was eligible for admission if he had spent five years in a judicial department and had either served no less than one year as a Senate secretary or, alternatively, had achieved another appointment of no less than 7th class which had exposed him to the practical knowledge required to be a sworn attorney.²

The above modifications naturally resulted in a steady flow of former chinovniki into the advokatura. Of the original 26 prisiazhnye poverennye accepted into the St. Petersburg Bar in 1866, 24 were former chinovniki.³ These chinovniki came from various departments within the Holy Synod, the State Chancellery, the Ministry of Finance, the Ministry of Internal Affairs, the Ministry of War, etc..⁴ The October 19, 1865 legislation was finally rescinded in 1871, but during its five years in operation, roughly one half of all St. Petersburg prisiazhnye poverennye (62/123) were admitted under article 44, usually in order to reduce the required preliminary service of a pomoshchnik or chinovnik from five to four years.⁵ The St. Petersburg Bar Council, however, was

²I. Gessen, Istoriia russkoi advokatury, 1: pp. 127-8.

³Ibid., pp. 142-3. Of the two non-chinovniki prisiazhnye poverennye, one was Spasovich, who was a Doctor of Juridical Science, and the other was a prisiazhnii striapchii. After 1864, however, the St. Petersburg Bar Council denied prisiazhnie striapchie admission into the prisiazhnye poverennye. Practice in the commercial courts was seen as too narrow a speciality and did not have enough in common with the practice of law in the reformed courts. See P.V. Makalinskii, S-Peterburgskaia prisiazhnaia advokatura (St. Petersburg, 1889), p. 11.

⁴Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 7.

⁵P. Tager, "Administrativnaia deiatel'nost sovetov," in Istoriia russkoi advokatury, ed. M. Gernet, 3 vols. (Moscow, 1914-16), 2: pp. 186-7. See also K.K. Arsen'ev, Zametki o russkoi advokature (St. Petersburg, 1875), pt. 1, p. 15.: and Arsen'ev, Zametki, pt. 2, p. 3.

well-aware of how important this initial selection process was. There was no guarantee, wrote Arsen'ev, that an applicant could live up to all the duties and responsibilities of an advocate "even if he satisfied all the external demands of the law."⁶ As a result, the infant St. Petersburg Council was not hesitant to employ article 380 and reject even experienced chinovniki for past indiscretions. Secondary school graduates, as well as people who had been educated at home, were also denied admission into the soslovie.

Yet despite the Council's careful review, a large percentage of undistinguished chinovniki did manage to join the St. Petersburg Bar. The admittance of one Znobishin on July 21, 1866 serves as a good example. A former State Counsellor, Znobishin was already 67 years old at the time of his admission to the Bar, having graduated from university in 1818 with a degree in philosophy. According to his application, he had worked in the departments of education, state property, internal affairs, and finance at a now defunct ministry. There was nothing in his service record which suggested that Znobishin's previous work had prepared him for a legal career, and within one year of his admission, a disciplinary complaint was filed against Znobishin which ultimately resulted in an official warning by the St. Petersburg Bar Council.⁷ With such a large, grey mass of advocates, the pre-eminence of the St. Petersburg Bar, in reality, depended solely on a small cadre of men - Spasovich, Arsen'ev, Stasov, Turchaninov, Unkovskii - who were accepted into the soslovie in 1866 and eventually governed it for the next forty years. Writing in 1916, Vinaver extolled the virtues of this elite group who defended this

⁶As quoted by M.M. Vinaver, "Grazhdanskaia khronika(K advokatskomu iubileiu)," Vestnik Grazhdanskago Prava(April, 1916), p. 83.

⁷Ibid., pp. 89-90.

"young institution from external enemies and inspired its surrounding, rather motley and colourless collection of former chinovniki with new ideas, raising their moral level and forging, from this moral authority, the armour against all major enemies."⁸

The Moscow advokatura appears to have suffered from an even less auspicious beginning. The October 19, 1865 special regulations were broadly applied; anyone who had acted as an attorney for four or five years - irrespective of their academic background - could seek admission to the Bar. The liberal use of Article 44 is manifested in the dramatic decrease in the number of people entering the Moscow Bar after 1871. Between 1866-71, the average yearly increase of prisiazhnye poverennye was 15, while after 1871, that number dropped to 6.⁹ Unlike St. Petersburg, Moscow appears to have two sources of advocates. "On the one hand," wrote M. F. Gromnitskii, there were the "capable chinovniki, almost to the man people without means, even openly poor men. On the other hand - [already] experienced in sophistry and legal tricks of the lowest kind - were the prisiazhnye striapchie."¹⁰ Gromnitskii accuses the prisiazhnye striapchie of corrupting the developing ideals of the chinovniki, but what the Moscow Bar clearly lacked was an intellectual centre, a small distinguished group of advocates - such as existed in St. Petersburg - which could lead by example.

The lack of qualified, competent candidates to fill the ranks of this new soslovie was just one of many problems which confronted the advokatura. Vinaver described the early days of the St. Petersburg Bar as "naive" and "comical." One meeting of the St. Petersburg Bar Council

⁸ibid., p. 84.

⁹Istoriia russkoi advokatury, 2: pp. 186-7.

¹⁰M.F. Gromnitskii, "Advokat ob advokatakh," Nedel'ia, no. 52(1875), p. 1763.

could not take place because all of its members were at the same trial.¹¹ Equally distressing, however, were the muddled attempts of several related legal institutions to interpret the Judicial Reforms. The police mistakenly asked prisiazhnye poverennye for their adresnyi bilet, while the courts directly interfered with the St. Petersburg Bar Councils' admission practices, demanding to know why a certain chinovnik had been rejected. The St. Petersburg Sudebnaia Palata was under the impression that the Council paid advocates a salary and in one specific case, even asked the Council to withhold part of that salary. Other judges thought advocates were state employees. Finally, one procurator erroneously demanded that the St. Petersburg Council appoint a sworn attorney in a criminal case even though 1) no right of poverty certificate had been obtained; and 2) it was the courts, not the Council, which was responsible for appointing advocates in criminal cases in the first place.¹²

But the most impracticable problem facing the advokatura was what to do with the pre-reform striapchie. Not only did the Bar lack capable applicants, there was no incentive for a truly qualified striapchii to join the advokatura. Becoming a sworn attorney meant taking appointed cases without compensation, paying a 10% tax on earnings, and being under the strict disciplinary supervision of the council, all burdens which could easily be avoided as long as a striapchii refused to join the Bar. Moreover, unless the monopoly right was enforced, there was nothing to stop a striapchii from continuing to practice as he had prior to the Judicial Reforms. Despite repeated requests by the St. Petersburg Bar Council in 1866, 1868, 1869, and 1873, the Ministry of Justice not only refused to recognize the advokatura's monopoly right, it never even announced

¹¹Vinaver, "Grazhdanskaia khronika," p. 76.

¹²Ibid., pp. 77-8; 84-8.

how many advocates were required for a given region in order for it to be declared sufficient.¹³

The failure to immediately authorize the advokatura's monopoly right had permanent implications for the soslovie. From a financial standpoint, competition with the old striapchie sharply limited the potential earnings of the prisiazhnye poverennye - some had to wait an entire year before they got their first case.¹⁴ The persistence and staying power of the pre-reform striapchie also contributed to the debasement of both the korporatsiia and the very title 'advocate.' "By the word advocate," wrote Sanktpeterburgskie Vedomosti in 1872, "we mean all legal practitioners(khodatai po delam)," including, the article went on to enunciate, former chinovniki, retired military officers, bankrupt merchants, and illiterate and semi-illiterate people.¹⁵ All of the above people, Sanktpeterburgskie Vedomosti argued, "by some kind of magic have been turned into advocates."¹⁶ From the time of Bludov's first proposal in 1857, it had always been recognized that the ultimate success of the advokatura depended on breaking the striapchie tradition, but as the above evidence suggests, the advokatura had, in fact, been swallowed up by it. Russian society could not distinguish between the new advocates and the old charlatans, so therefore, it naturally transferred its opinion of the pre-reform striapchie to the advokatura.¹⁷

¹³There were at least two other appeals to the Ministry of Justice - in 1883 and 1886 - which also requested that the advokatura's monopoly right be recognized, but both were rejected. For a description of all the appeals, see Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 42-8.

¹⁴Zhurnal Grazhdanskago i Ugolovnago Prava, no. 3(1873), pp. 210-11.

¹⁵Sanktpeterburgskie Vedomosti, no 102(April 13, 1872), p. 1.

¹⁶Ibid., p. 1.

¹⁷M. Grebenshchikov, "Zadacha advokatury," Zhurnal Grazhdanskago i Ugolovnago Prava, no. 5(1886), p. 1.

Recriminations quickly reverberated throughout the press. In the eyes of Sanktpeterburgskie Vedomosti, the advokatura had become the subject of "reproach and mockery," although most of the paper's criticism, in fact, centered on the pre-reform striapchie.¹⁸ Other accusations were aimed directly at the prisiazhnye poverennye, charges of excessive fees, elitism, and inadequate disciplinary supervision. All papers - liberal and conservative - joined in on the attacks. The response to the annual St. Petersburg Bar Report, wrote Sudebnyi Vestnik, was "touchingly harmonious. All difference in orientation disappeared, all deep-rooted hostility, inevitably existing between journalists of different camps, died away and the united voice of yesterday and tomorrow's vehement enemies joined in unison in order to denounce, rout, and defeat one general enemy - the advokatura."¹⁹ No decent human attribute was ascribed to advocates - they were debauched, lepers, degenerates, and outcasts of human society.

The strongest words of opprobrium leveled against the advokatura were made by E. Markov. Writing in the supposedly liberal newspaper Golos in 1874, Markov asserted that an advocate's very nature alienated him from any soslovie. By necessity, an advocate was "a sceptic, a cynic, and because he stands for everything, he stands for nothing, believes in nothing, and therefore is prepared to believe in whatever you like. He utilizes science, religion, morality like an actor uses props, solely for the public. When necessary, he speaks with the words of the gospels, when necessary, he speaks with the mockery of Voltaire."²⁰ The very essence of an advocate's duty, continued Markov, was to "help the rich oppress the

¹⁸Sanktpeterburgskie Vedomosti, no. 102(April 13, 1873), p. 1.

¹⁹Sudebnyi Vestnik, no. 128(June 15, 1876), p. 1.

²⁰E. Markov, "Sofisty XIX veka," published in Sobranie sochinenii Evgeniia Markova, vol. 1(St. Petersburg, 1877), p. 72.

poor."²¹ While not proposing to outright abolish the profession, Markov nevertheless saw the relationship between society and the advokatura as entirely parasitical. There exists an entire soslovie of people who "produce nothing [who follow] only their personal aims while drawing to themselves significant monetary resources..."²²

There were other diatribes in the press as well, the most famous being Dostoevsky's celebrated reproach of Spasovich and Spasovich's defence of a man, accused of child abuse.²³ But an even more distressing source of criticism was the advokatura itself. M. F. Gromnitskii, a former assistant procurator and recent admission to the Moscow prisiazhnye poverennye, painted a scathing portrait of both the Moscow Bar and the Moscow advokatura. In an article published in 1875 entitled "Advokat ob advokatakh (An Advocate on Advocates), Gromnitskii emphasized the mercenary element which seemed to pervade the Moscow advokatura: advocates were like shopkeepers in a bazaar, interested only in profits. "Greed, the thirst for money, the craving to grow rich as soon as possible. . ." - these were the prominent features which, according to Gromnitskii, characterized the contemporary advokatura.²⁴ Gromnitskii went on to assert that professional relations between advocates had been reduced to mutual envy, extortion, slander, and the spreading of false rumours. Questions of morality were best left "untouched. This was a very strict canon."²⁵ As a result of all these accumulated problems, the esteem of the

²¹Ibid., p. 79.

²²Ibid., pp. 89-90. Ironically, some 20 years later, Markov found himself in court as a defendant. Not only did Markov hire a noted 'sophist' - S.A. Andreevskii - as his attorney, but he also began to kiss Andreevskii in court after Andreevskii's speech. See Vestnik Prava, no. 22(May 31, 1915), p. 671.

²³Fyodor Dostoevsky, The Diary of a Writer, trans. Boris Brasol(Santa Barbara, 1979), pp. 210-238.

²⁴Gromnitskii, "Advokat ob advokatakh,"p. 1758.

²⁵Ibid., p. 1760.

Russian advokatura, in just nine short years, had already deteriorated significantly. Everywhere, one heard "complaints, censure, and merciless condemnations. The word advocate has become an insulting name. Its synonyms were 'rascal,' 'rogue,' and even more bluntly, 'swindler,' and 'robber.'"²⁶ Gromnitskii was still optimistic enough to believe that the advokatura could be saved, but only if the pomoshchniki were better supervised and if the Moscow Council of the Bar imposed harsher penalties for professional transgressions.

Attacks on the legal profession, of course, abound in western literature and therefore cannot be taken as a sign of imminent collapse, but at the same time, it must be stressed that mid-nineteenth century Russia lacked the legal traditions, the political maturity, and the cultural sophistication simply to absorb these philippics. As a result, these charges undoubtedly had an impact on Russian society. The Zhurnal Grazhdanskago i Ugolovnago Prava noted that this onslaught had created a "hostility against the entire advokatura soslovie," and added that the consequences of these attacks would eventually lead to the "impoverishment of the [advokatura's] intellectual and moral strength."²⁷ The advokatura, itself, was disconcerted both by the vehemence of these diatribes and by their source. The press, it had been assumed, was the advokatura's natural ally, but instead of bolstering the soslovie, the press was actively "tearing away the soslovie of prisiazhnye poverennye from the intelligentsia(soiuz inteligentnykh liudei)."²⁸ This misunderstanding, argued Sudebnyi Vestnik, could still be resolved, but in the short-term, it represented a grievous miscalculation, especially since Russia did not

²⁶Ibid., p. 1758.

²⁷Zhurnal Grazhdanskago i Ugolovnago Prava, no. 1(1876), p. 241.

²⁸Sudebnyi Vestnik, no. 128(June 15, 1876), p. 3.

possess very many educated estates. Spasovich, in his 1874 after-dinner speech, was much more pessimistic. Reacting to the taunts of Katkov, Spasovich concluded that "another ten years in this atmosphere and one must suffocate."²⁹

The advokatura did attempt go on the offensive against its detractors. It challenged its critics to find another profession which had such strict entry requirements and which so carefully screened its future members. At the same time, in order to uphold the integrity of the soslovie, the St. Petersburg Bar Council refused to excuse advocates from taking appointed cases even though the monopoly right - originally promised in the Judicial Reforms - had not been implemented. The conduct of such cases, the Council stipulated, was the only way to distinguish between the pre-reform striapchie and the new prisiazhnye poverennye.³⁰

But the most spirited counter-attack - led almost exclusively by the St. Petersburg Council of the Bar - focused on the creation of a true corporate spirit amongst the prisiazhnye poverennye. This, declared Spasovich in one of his early after-dinner speeches(1873), was the cornerstone of the advokatura's long-term success. Their future depended on its "corporate organization, on the condition of all for one and one for all on each vital question."³¹ The growing respect accorded the prisiazhnye poverennye by the Judiciary was, in Spasovich's opinion, the first dividend of the advokatura's emerging corporate identity. The Judiciary knew that behind each advocate "stood a korporatsiia which has repeatedly proved that its members know not only how to utilize words,

²⁹Spasovich, Zastol'nye rechi, p. 9.

³⁰Gessen, Istoriia russkoi advokatury, 1: p. 170.

³¹Spasovich, Zastol'nye rechi, p. 5.

but also know [how] not to abuse them."³² Concomitant with Spasovich's appeals was the appearance in 1875 of K.K. Arsen'ev's Zametki o russkoi advokature, which summarized the advokatura's development between 1866 and 1874. This was the first, and for many years, the only attempt to systematize the various decisions of the St. Petersburg Bar Council and evaluate an advocate's corporate and soslovie responsibilities. Arsen'ev analyzed the composition of the soslovie, the organization of the Council of the Bar and its disciplinary authority, the rights and duties of prisiazhnye poverennye, and the relationship between the advokatura and the courts.

But the combined admonitions of Spasovich and Arsen'ev were not enough to stop the growing sentiment in Russian society against the advokatura. It was social opinion which had supported the government's decision to deny the advokatura its monopoly right, and it was social opinion which proved unwilling to wait for the advokatura to mature.³³ Thus, to a large degree, the groundwork had already been prepared for the autocracy when, in 1874, it chose to place new limitations on the advokatura. The first counter-reform - on May 25, 1874 - 'temporarily' created a new form of legal representation: the chastnye poverennye (private attorney). The private attorney will be examined in-depth in Chapter 5, but for the present time, it is sufficient to know that the introduction of the private attorney signified the official return of the non-professional advocate to Russia. Whereas the prisiazhnye poverennye represented something innovative, the private attorney could trace his lineage directly to the pre-reform striapchie. No corporate

³²Ibid., p. 5.

³³Gessen, Istoriia russkoi advokatury, 1: p. 232. ; G. Sliozberg, "Advokatura za 25 let," Zhurnal Grazhdanskago i Ugolovnago Prava, no. 9(1889), p.30.

or soslovie rights were granted to the chastnye poverennye, nor were there even any educational requirements to join. A potential attorney merely filled out an application at the local court and as long as he met the general requirements and purchased a license, he could begin to practice law. The private attorney was outside the control of the council. They were not under any moral or ethical obligations, and only the court in the regions where they practiced could discipline them.

Some historians have suggested that Alexander II's primary motivation for creating the private attorney was political. Although this remains theoretically possible, it seems far more likely that the autocracy was responding both to the shortage of prisiazhnye poverennye and the need to somehow limit the activities of the pre-reform striapchie. Even Arsen'ev had to admit that the creation of the private attorney was "absolutely necessary."³⁴ What the established advokatura objected to was the fact that the May 25, 1874 regulations also applied to the pomoshchniki and that this 'temporary' legislation ultimately became permanent.

Approximately six months later, on December 5, 1874, a second piece of temporary legislation was introduced. Since the formation of the Moscow and St. Petersburg Bar Councils in 1866, only one other council had been formed - Kharkov on May 6, 1874. The December 5th decree temporarily suspended the formation of new councils, a stoppage that ultimately lasted until 1904. Under the provision of article 378 of the Judicial Reforms, control of the advokatura, outside the above three cities, now passed over to the district court. The implications of this legislation shall be examined at the end of this chapter, but as Professor I. Foinitskii

³⁴Arsen'ev, Zametki, pt. 1: p. 9.

later commented, this law "fundamentally violated the independence of the advokatura and delayed its logical, natural development."³⁵

Reasons as to why the autocracy chose to enact this legislation remain much more speculative. No official explanation was given at the time of its proclamation, although later reports attribute this decision to the autocracy's growing dissatisfaction with the advokatura and its desire to place the soslovie under the control of judicial authorities.³⁶ Twenty years later, the Murav'ev Commission stated that the original minimum number of prisiazhnye poverennye required to form a council - 20 - had proven to be insufficient and that this was the primary reason why the above legislation had been introduced.³⁷ Spasovich argued, however, that there were covert political motives behind the December 4, 1874 law, the fear that in certain areas, such as Poland and the Baltic, non-Russian advocates would outnumber the Russian advocates and thereby control the local soslovie.³⁸ In fact, so deep was the autocracy's fear of the potential supremacy of non-Russian advocates that special legislation was passed on February 19, 1875, which permanently forbade the formation of a Council of the Bar in Poland.³⁹

³⁵I Foinitskii, Kurs ugolovnogo sudoproizvodstva(St. Petersburg, 1902), vol. 1: p. 446. As quoted by N. Cherkasova, Formirovanie i razvitie advokatury v Rossii(Moscow, 1987), p. 93.

³⁶Gessen, Istoriia russkoi advokatury, 1: pp. 229-30, 242-3. ; Moskovskiiia Vedomosti, no. 304(1897), p. 1.; Ministerstvo Iustitsii za sto let, 1802-1902(St. Petersburg, 1902), pp. 133-4.

³⁷Vysochaishe uchrezhdennaia pri Ministerstve Iustitsii Kommissiia(St. Petersburg, 1897), p. 123.

³⁸V. D. Spasovich, "Ob organizatsii advokatury," Zhurnal Ministerstva Iustitsii, no. 3(1897), p. 5. The formation of new branches of the council of the Bar appear to have been suspended for similar reasons in 1889. The government was concerned that the Baltic states, which had just been placed under the jurisdiction of the St. Petersburg Sudebnaia Palata, would begin to form new branches which inevitably would be controlled by non-Russians. At the time of its suspension in 1889, only one branch, in Novocherkassk, had been formed.

³⁹V.D. Spasovich and E. Piltz, Ocherednye voprosy, p. 83.

Ironically, 25 years later, the early years of the Bar would nostalgically be remembered amongst prisiazhnye poverennye as the 'Golden Age' of the Russian advokatura.⁴⁰ This romantic look backwards was predicated on the illusion that most prisiazhnye poverennye, it was thought, enjoyed great financial success during the 1870's. But as we have seen, there was nothing golden about this period. Censure in the press, competition from the pre-reform striapchie and growing antipathy within Russian society all contributed to the 1874 counter-reforms. Commentators were divided as to what had gone wrong. On one hand, Vestnik Evropy argued that Russia's expectations had been much too high, that nowhere in Europe had people "placed such idealistic hopes in their respective legal professions."⁴¹ On the other hand, one critic noted that Russia had acquired the advokatura it deserved. The reasons for the advokatura's infirmities could be found "in the low moral level of society itself - [society] itself still had not reached any firm, unchangeable rules of private and social life; [society] itself still oscillates, not knowing what to give preference to: lies or truth, freedom or slavery, equality or serfdom. We[the advokatura] are only the barometers of [society's] moral condition. . . Advocates, with more basis than any other group of people, can say to society; 'We are the bones of your bones and the flesh of your flesh.'"⁴²

How could the advokatura, therefore, overcome its inglorious start? Obviously, much still depended on the autocracy. In order to succeed, advocates required independent judges, juries, and the spirit of glasnost, but for the next thirty years - indeed, up until 1917 - the autocracy consistently undermined the principles and the spirit of the

⁴⁰Stolichnaia advokatura; nabroski S. (Moscow, 1895), p. 77-8.

⁴¹Vestnik Evropy, no. 6(1876), p. 825.

⁴²Sudebnyi Vestnik, no. 100(May 11, 1876), p. 2.

Judicial Reforms. In 1881, for example, the Tsar was granted the right to declare a state of emergency in any province in Russia, thereby avoiding all legal constraints. Jury eligibility laws were changed. The power of the Ministry of Justice to transfer unreliable judges was increased. Cases with political implications were transferred to special courts. Finally, advocates themselves were arrested while in the process of defending a client and some were sentenced to periods in exile for their excessively vigorous defences.⁴³

In such an unfavourable environment, the advokatura had only one source of protection: the soslovie. Only a united soslovie could withstand this onslaught and protect the integrity of each individual advocate, thereby enabling the advokatura to begin to acquire the acceptance and respect which had eluded it during the its first ten years of existence. In light of the obstacles already in place by 1874, this was a Herculean task. By December 1874, only prisiazhnye poverennye in Moscow, St. Petersburg, and Kharkov, possessed the institutions - a council of the Bar and a general assembly - which made continued professional development possible. Outside these cities, prisiazhnye poverennye were at the mercy of the district court as to how far, how fast, and under what conditions their corporate development would occur. Therefore, it is now necessary to investigate those institutions - in those cities - which helped forge the advokatura's professional identity.

⁴³For the most complete discussion of the counter-reforms, imposed by the autocracy, see William Wagner, "Tsarist Legal Policies at the End of the Nineteenth Century," in Slavonic and East European Review, no. 3(July, 1976), pp. 371-94.

II. THE GENERAL ASSEMBLY

According to the Judicial Reforms, the general assembly was the one corporate forum which included all prisiazhnye poverennye. Inherently, it should have been an accurate reflection of corporate opinion, but its jurisdiction, in reality, was limited. Only two powers were reserved to the general assembly: the right to examine the council's yearly report, and the right to elect the council. The first privilege was largely superfluous, since the consequences of failing to ratify the contents of the report were not defined by law. It was only in 1876 that the first Bar report appeared in written form. This was in St. Petersburg, and its example was quickly followed by Moscow(1877) and Kharkov(1880); prior to these dates, all reports were delivered orally. However, despite its appearance in written form, these Bar reports were far from totally revealing. The individual actions of each member of the council were not included, and only extracts from the disciplinary cases appeared, minus any dissenting opinions. In Moscow, the veil of secrecy surrounding the report was ultimately lifted so that in 1901, the actual names of the Council members, participating in a decision, were included. The most thorough examination of the report, however, took place in St. Petersburg; in 1871, a special meeting was ordered to take place two weeks before the election of the Bar Council in order to facilitate a more complete discussion of the report. This meeting proved to be an important compass for the St. Petersburg Bar Council, revealing both the concerns and aspirations of the prisiazhnye poverennye.⁴⁴

⁴⁴P. Tager, "Obshchiia sobraniia prisiazhnykh poverennykh, kak organ soslovnago samoupravleniia," in Istoriia russkoi advokatury, ed M. Gernet, 3 vols.(Moscow, 1914-1916), 2: pp. 72-76.

The other major power granted to the general assembly - the right to elect the council - should have, theoretically, been far more substantial if it was not for the fact that the general assembly consistently elected the same men to office. According to the Judicial Reforms of 1864, elections to the council consisted of two stages: nominations, and the actual voting, all of which was to take place on the same day. Since initially the general assembly was so small - and everyone knew each other - it is not surprising that the same people repeatedly were elected to the council. Once the general assembly began to expand, however, this system proved to be too cumbersome and time consuming. As a result, the Moscow Bar converted to a two stage voting process; nominations were obtained by mail while the actual voting was reserved for the annual general meeting, with only a simple majority of those prisiazhnye poverennye actually participating in the election being required for victory.⁴⁵ Moscow's example was eventually adopted by St. Petersburg, although not without a struggle. Twice rejected in the 1870's it was only in the 1890's over the objections of such established figures as A.N. Turchaninov and V. N. Gerard that St. Petersburg followed Moscow's example and introduced a two stage electoral system.⁴⁶ But even after these innovations, lack of turnover remained a common feature. In St. Petersburg, the average tenure for a council member was 7 years, in Moscow - 8 years, and in Kharkov - 9 years. Between 1876 -1913, the average yearly turnover of the St. Petersburg Council was just 14.2%, and

⁴⁵P. Tager, "Organizatsiia advokatury," in Istoriia russkoi advokatury, ed. M. Gernet, 3 vols.(Moscow, 1914-1916), 2: pp. 121-123.

⁴⁶Ibid., pp. 123-125.

between 1884-95, that figure dropped even further, to an annual turnover rate of just 8.9%.⁴⁷

Some attributed this lack of turnover to the general assembly's indolence, others to its strong support of the councils' policies. Whatever the reason, real power within the Bar was concentrated within a small, close knit circle of men who ruled the council. Therefore, the general assembly's significance, outside the fulfilment of its designated responsibilities, depended on how much recognition it received from the council. No constitution defined this relationship; it varied from city to city. In Moscow, for example, the general assembly was only called at election time. Otherwise, the Bar Council ruled without consulting the general assembly and even, at times, ignored petitions from its own members. Efforts were made to change this relationship and increase the power of the Moscow general assembly. The most serious reform was the creation of the extraordinary meeting - a supplementary gathering of the entire Moscow prisiazhnye poverennye, called either by the Bar Council or the members themselves in order to discuss current problems within the soslovie. Originally introduced in 1870 and then amended in 1885, the extraordinary meeting theoretically transferred substantial legislative power to the general assembly, but ultimately, its prohibitively high quorum led to its almost total irrelevance. Petitions calling for an

⁴⁷Ibid., p. 130. There were isolated cases of dramatic shifts in the council's composition; in 1875, for example, a completely new Moscow Council of the Bar was elected. The most direct attempt at dealing with this problem, however, occurred in St. Petersburg. On April 22, 1879, a resolution was passed by the general assembly which stipulated that at least four new members had to be elected to the Council every year. Although this measure was greeted with approval by the St. Petersburg Council, the general assembly chose in 1882 to rescind this regulation and return to a simple majority-rules system. In 1899, a new statute was introduced which called for the yearly renovation of three council positions, and this statute remained in effect for the rest of the Bar's existence. See Istoriia russkoi advokatury, 2: pp. 133-135.; Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 128-129.

extraordinary meeting required the signatures of only one-tenth of all Moscow sworn attorneys, but for the actual meeting to take place, one-half of all Moscow prisiazhnye poverennye had to be present. This proved virtually impossible to obtain. As a result, over a thirty year period (1885-1915), only two extraordinary meetings were able to take place.⁴⁸ This clearly restricted the links amongst advocates, and as early as 1875, Gromnitskii commented that there was no "intellectual centre where members of the estate could meet each other in person ."⁴⁹

The Moscow general assembly, therefore, proved to be a redundant check on the Council's authority, and as a result, the Moscow Council was able to retain its absolute power even though it grew increasingly alienated from a significant percentage of its own members. This growing isolation reached its culmination in the early 1890's. On March 3, 1890, without any consultation with the corporation at large, the Moscow Council published a new set of rules which radically changed the organization and responsibilities of the pomoshchniki.⁵⁰ Because these changes were so controversial, 54 prisiazhnye poverennye petitioned the Moscow Council to call an extraordinary meeting, yet in clear violation of its own internal by-laws, the Council refused, stating that only unresolved question could be discussed at an extraordinary meeting, and the March 3 regulations had already been implemented.⁵¹ The disdain that the council held for its own members was evident for all to see. "If the corporate organization of the sworn advokatura is not a hollow word," wrote Sudebnaia Gazeta, then the strength of the Moscow Council

⁴⁸Istoriia russkoi advokatury, 2: pp. 92- 97.

⁴⁹M.F. Gromnitskii, "Advokat ob advokatakh," p. 1759.

⁵⁰See Chapter 4, pp. 207-211 for a complete discussion of this debate.

⁵¹Otchet Soveta prisiazhnykh poverennykh pri okrugakh Moskovskoi Sudebnoi Palaty za 1889-1890, p. 32.

rested only in the fact that it was restrained neither "by custom, by rules, or by law."⁵²

Two years later, another extraordinary meeting was requested, this time by 43 prisiazhnye poverennye, in order to discuss professional ethics and corruption within the profession. The unwilling instigator of this meeting had been A.E. Saltykov, himself a member of the Moscow Council, who had managed to swindle 150,000 roubles from his clients and then, after tearfully promising to commit suicide, chose to flee the country instead.⁵³ The open indignation of these 43 advocates towards the Council was accurately reflected in their petition for the extraordinary meeting. Obstacles had been placed in their way, calls for extra meetings had been ignored, the "voice of free criticism of the minority was suppressed at general meetings, and investigations of the Council's actions were not permitted."⁵⁴ But if only to confirm this characterization, the Moscow Council rejected this request, stating that the subject to be discussed at the extraordinary meeting had not been clearly formulated.

Even the Moscow general assembly's designated powers - the right to elect the council - proved to be an insufficient check on the Council's absolute authority. The electoral system was quite malleable; in the late 1890's, for example, elections began to be held every two years. The Moscow Council often sent out the list of nominated candidates just a few days before the actual general assembly, thus limiting the preliminary discussion that could take place amongst the members of the Bar. Moscow's electoral rules also played into the hands of a small, active,

⁵²Sudebnaia Gazeta, no. 12(March 25, 1890), p. 10.

⁵³Sudebnaia Gazeta, no. 5(February 2, 1892), p. 12.; Sudebnaia Gazeta, no 52(December 25, 1892), p. 2.

⁵⁴Sudebnaia Gazeta, no. 13(March 29, 1892), p.7.

minority; the general assembly first elected the entire Moscow Council, and then, elected the chairman and vice-chairman. As the following example shows, only a small plurality was needed in order to be elected. In 1897, there were 408 prisiazhnye poverennye in Moscow. 226 attended the annual meeting of the general assembly, of which only 165 stayed around long enough to actually participate in the election of the chairman and vice-chairman of the Bar. The victorious candidates received 88 and 79 votes respectively; in other words, only about 20% of the membership had voted for the officers of the Bar.⁵⁵

The general impotence of the general assembly was finally overcome in 1899, when the reform wing of the Moscow Bar won 5 places on the Council. This victory marked the gradual reconciliation between the two branches of the Moscow Bar, although most of the major changes did not occur until after 1905. Nevertheless, in 1901, the Moscow Council - while reserving legislative power for itself - recognized the right of the general assembly to participate in certain decisions.⁵⁶ This increased harmony was also reflected in the 1901 Bar report which, according to Gessen, contained far more information about soslovie affairs than it did in the past.⁵⁷ Yet the lack of communication between the Moscow Council and the general assembly was never easily overcome. D.I. Neviadomskii could still write in 1900 that "no one can be in any doubt that the [Moscow] Council has the right to publish all rules and circulars," a sentiment which as we shall now see, did not exist in St. Petersburg.⁵⁸

In sharp contrast to its Moscow counterpart, the St. Petersburg general assembly, quite quickly, established itself as the legislative branch

⁵⁵Istoriia russkoi advokatury, 2: p. 128.

⁵⁶Ibid., pp. 103-4.

⁵⁷Pravo, no. 2(January 7, 1901), pp. 92-3.

⁵⁸Istoriia russkoi advokatury, 2: p. 105.

of the St. Petersburg Bar. As early as 1871, it became the standard practice of the St. Petersburg Council to summon the general assembly at least three times per year, in addition to the obligatory electoral meeting. The initiative for calling an extra session rested entirely with the St. Petersburg Council until 1896, when it became mandatory for the general assembly to meet if the Council received a petition signed by no less than 25 sworn attorneys. Quorum was first established at one-third of all prisiazhnye poverennye, but when this turned out to be too unrealistic, it was further lowered to one-sixth of the membership.⁵⁹ The jurisdiction of the St. Petersburg general assembly was very broad. With the exception of disciplinary cases, which remained permanently outside its review, virtually all other administrative and organizational decisions of the St. Petersburg Council had to be first ratified by the general assembly before they could be implemented. Once a proposal had been accepted by the assembly, it became binding for the entire St. Petersburg soslovie. Thus, while the St. Petersburg Bar Council assumed executive responsibilities, the general assembly acquired true legislative power.

The demarcation, in St. Petersburg, between the general assembly and the Council of the Bar - each with clearly defined legislative and executive responsibilities - became the model which other Bars, after 1904, would choose to emulate. That does not mean that the St. Petersburg general assembly was immune from some of the problems that afflicted Moscow. Its electoral rules, especially its low quorum, meant that an active minority - the majority of one-sixth of all sworn attorneys - could make decisions for the entire profession. According to Arsen'ev, the dark cloud of indifference also hung over the St. Petersburg prisiazhnye

⁵⁹Ibid., pp. 79-80.

poverennye. Corporate life had not developed to such a degree, wrote Arsen'ev in 1875, that it was of "lively interest to each member of the estate. There are prisiazhnye poverennye who systematically stand aside from the general business of the soslovie - some on account of indifference to everything that does not concern their personal profit, others due to laziness, and still others on account of excessive caution."⁶⁰ Twelve years later, Spasovich confirmed at one of his after-dinner speeches that the the situation had not improved, that there were still Philistines within the advokatura who "irreproachably fulfil their professional duties but scorn their corporate responsibilities. They are not interested in the korporatsiia and on the contrary, avoid all toil and won't even lift a finger. . ." ⁶¹

But even more ominous for the St. Petersburg Bar was the growing alienation between the Bar Council and the general assembly. This division was never as explicit as the split within the Moscow Bar, but nevertheless, the St. Petersburg Bar Council did, in the late 1880's limit the number of extra meetings of the general assembly to just one per year.⁶² The crucial difference between Moscow and St. Petersburg, however, was that the the St. Petersburg general assembly still retained legislative power. Thus, in the most significant dispute between the two branches - again centering on how best to regulate the pomoshchniki - it was at the insistence of the St. Petersburg general assembly, over the objections of the Council, that Jewish advocates were able to remain as pomoshchniki and thereby continue to practice law despite the legislative ban on people on non-Christian faiths from entering the profession.

⁶⁰Arsen'ev, Zametki, pt. 1: pp. 80-81.

⁶¹Spasovich, Zastol'nye rechi, p. 44.

⁶²Istoriia russkoi advokatury, 2: p. 89.

Unlike its counterparts in Moscow and St. Petersburg, the problems facing the Kharkov general assembly revolved primarily around the question of whether or not it was going to meet at all. In the beginning of the 1880's no less than 65% of all prisiazhnye poverennye attached to the Kharkov Bar lived outside Kharkov (as opposed to only 5% of St. Petersburg advocates) and many sworn attorneys were unwilling to make the journey to Kharkov in order to attend the annual meeting.⁶³ Obtaining quorum, therefore, proved to be extremely difficult, and this caused the cancellation of several meetings. In order to combat this problem, the Kharkov general assembly decided to meet once every two years, even though this was a clear violation of the Judicial Reforms, which required an annual meeting.⁶⁴

Therefore, the role that the general assembly played within each regional Bar cannot be easily summarized; in Moscow, it was ignored, in St. Petersburg, it had to be consulted, and in Kharkov, it was hardly ever called. As an institution, then, the general assembly came to represent not the vigour but the inertia of the profession. It did not serve as a catalyst for greater corporate identity, and if the combined attitudes of the general assemblies can be taken as an accurate reflection of the soslovie at large, then its common characteristics - indifference, alienation, inactivity - testify to how elusive corporate solidarity truly was. Much will be made throughout this dissertation of the external forces working against the advokatura, but undoubtedly, the isolation of the three Bar Councils from their respective general assemblies represented a tremendous internal handicap for the advokatura and its professional development. The diminished capacity of the general assembly to influence the soslovie

⁶³Ibid., p. 62.

⁶⁴Ibid. p. 130.

must be kept under consideration as we now turn to a discussion of the internal, corporate powers of the Council of the Bar.

III. THE COUNCIL OF THE BAR

A. General Responsibilities

As previously mentioned, the Judicial Reforms limited the council's professional competency to five general areas, each of which shall be examined in this section: admission, remuneration, special appointments, professional ethics, and discipline. Each council developed their own guidelines for their specific region. The absence of any uniform standards, however, ultimately led to the gradual expansion of each council's administrative authority. Some of their new duties were strictly ceremonial; for instance, it was standard practice for the St. Petersburg Bar Council to send some sort of congratulatory message to an attorney on the 25th anniversary of his admission to the prisiazhnye poverennye. In the process of expanding its jurisdiction, however, the council also assumed various financial obligations. The St. Petersburg Council of the Bar raised money to build and maintain a library, gave financial assistance to prisiazhnye poverennye in need, and even gave support to widows of sworn attorneys. The Council's fund raising activities were not only restricted to professional concerns. During the Russian/Japanese War, the St. Petersburg Bar Council raised over 5000 rubles for those injured during the war, and over 6000 rubles were raised for the victims of Bloody Sunday.⁶⁵

⁶⁵Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1904-5, p.35.

In order to meet the growing demands of the soslovie, the council's administrative bureaucracy also had to adapt. Most noticeable was the expansion of the chairman's role in council affairs. The Judicial Reform mentioned the chairman only once, stating that in case of a tie, his vote was considered the tiebreaker. The chairman's powers eventually became far more substantial; he had to oversee the council's administrative bureaucracy, prepare the yearly report, and represent the council in all contacts with the government. In disciplinary cases it often became the responsibility of the chairman, alone, to decide whether formal charges should be brought. In order to assist the chairman, other positions, not designated in the original Judicial Reform were created, such as treasurer, while special commissions were also formed in order to further delegate the responsibilities of the council.⁶⁶ Undeniably, a certain amount of tedium crept into the council's activities. Spasovich, while expressing his deep admiration for the St. Petersburg Bar Council, complained of the long hours spent listening to vacuous disciplinary cases.⁶⁷ Controversy, however, was best left untouched. We hear cries from the left and cries from the right, Spasovich commented in his 1876 after-dinner speech, but the Bar Council always "takes a straight line."⁶⁸

Yet it must be emphasized that of the three regions, the St. Petersburg Council quickly established itself as the leading Bar in Imperial Russia. This distinction is most clearly manifested in any comparison of the respective Bar reports. The Moscow and Kharkov reports were dry and formal, whereas the St. Petersburg report openly dealt with many of the fundamental problems facing the advokatura. The two main works

⁶⁶*Istoriia russkoi advokatury*, 2: pp. 139-141.; p. 156.

⁶⁷ Spasovich, *Zastol'nye rechi*, p. 71.

⁶⁸*Ibid.*, p. 15.

on the advokatura's professional responsibilities - Arsen'ev's Zametki o russkoi advokature and P.V. Makalinskii's S.-Peterburgskaia prisiazhnaia advokatura - were based almost exclusively on decisions made by the St. Petersburg Council of the Bar. As Arsen'ev concluded, St. Petersburg deserved the credit for initiating "many measures of importance for the soslovie of prisiazhnye poverennye: for example, the organization of the pomoshchniki, the library, the consultation bureau, and the mutual aid fund."⁶⁹ The Moscow Council, on the other hand, refused to go beyond its judicial/administrative responsibilities. Gromnitskii talked of the "nominal existence of the council of sworn attorneys, which, besides fulfilling its formal duties, does not care about anything."⁷⁰ Only after 1900 did the Moscow Council begin to assume more responsibilities. For the first 35 years, however, St. Petersburg stood alone. The advokatura was hanging by a thread, wrote Spasovich in 1898, "because of the three existing Councils, only one - ours - has firmly established itself and made something. It is impossible to say, that it has done everything that it could, but the other councils have not done anything worthwhile."⁷¹

B. Admissions

With the expiration of the October 19, 1865 temporary regulations in 1871, the original requirements, as articulated in articles 354 and 355 of the Judicial Reforms, came into effect. The council's main responsibility was to review each applicant's credentials in order to insure that they met the necessary intellectual - and moral - demands of the prisiazhnye

⁶⁹Arsen'ev, Zametki, pp. 5-6.

⁷⁰Gromnitskii, "Advokat ob advokatakh," p. 1759.

⁷¹Spasovich, Zastol'nye rechi, p. 72.

poverennye. A significant percentage of advocates continued to come from the chinovniki. Approximately one-quarter of all sworn attorneys in St. Petersburg came from government service.⁷² In Kharkov, between 1874-81, 38.8% of all sworn attorneys came from the government; by 1896, that number had decreased to 24.5%⁷³. By applying to the Bar, these government lawyers managed to avoid the pomoshchniki stage - and all its theoretically supervised professional training. As a result, each council felt obliged to review these applications from government lawyers much more meticulously, often rejecting candidates who, in their eyes, had not had the necessary practical exposure to law in order to be a sworn attorney. In St. Petersburg, land captains were rejected because from the Council's standpoint, their experience was administrative, not judicial.⁷⁴ There are also numerous examples of the St. Petersburg Council rejecting applicants from the Statistics Department of the Ministry of Justice.⁷⁵ The council's power was not absolute, however, since most rejections could be appealed to the sudebnaia palata, and although no complete statistical breakdown exists, there are several individual examples of government lawyers appealing their rejection and subsequently being admitted by order of the sudebnaia palata.⁷⁶ If, however, a government lawyer was rejected based on article 380 (i.e. if there was any moral objection) then he could not appeal his rejection to the sudebnaia palata, nor was the council required to reveal the reasons why it chose to apply article 380.

⁷²Y. Berman, "Statistika advokatury," in Istoriia russkoi advokatury, ed. M. Gernet, 3 vols. (Moscow, 1914-1916), 2: p. 16.

⁷³Ibid., p. 24,

⁷⁴Istoriia russkoi advokatury, 2: p. 223.

⁷⁵Otchet Soveta prisiashnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1881-2, p. 4.

⁷⁶Otchet Soveta prisiashnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1882-3, p. 4.; Otchet Soveta prisiashnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1905-6, pp. 2-3.

The other major source for the advokatura was, of course, the pomoshchniki. The evolution of the requirements that an attorney-in-training had to fulfil in order to apply to the Bar is a long and tortuous one and will be discussed in Chapter 4. On a general level, however, it can be shown that the St. Petersburg Council was far more stringent than its Moscow counterpart. In St. Petersburg, a pomoshchnik had to complete five years of service, attend two years of special conferences, give three reports at these conferences, and participate in at least ten criminal cases.⁷⁷ In Moscow, all that was required, in addition to the five years of service, were two reports to be given at a group meeting.⁷⁸ The patron, who had theoretically been supervising the pomoshchnik, played virtually no role in the entire admissions process.⁷⁹ Reasons for rejection focused primarily on the failure to fulfil these requirements, but applicants could be refused admission if their moral integrity was called into question (article 380). In St. Petersburg, the Komissia pomoshchnikov made a preliminary investigation of each pomoshchnik and informed the Bar Council of its conclusions. Final approval, however, rested with the St. Petersburg Council.⁸⁰

Yet despite this careful review of candidates, the advokatura's admission policy came under close inspection, primarily because of the ever increasing number of Jews being accepted into the soslovie. The first Jewish applicant was accepted into the prisiazhnye poverennye in 1870, and from that time onwards, Jews entered the advokatura in ever increasing numbers. By 1890, 22% of all St. Petersburg prisiazhnye

⁷⁷Istoriia russkoi advokatury, 2: p. 201.

⁷⁸Ibid., p. 194.

⁷⁹Ibid., p. 235.

⁸⁰Ibid., p. 233. This did not become an official part of the application process until 1898.

poverennye and 42.5% of their pomoshchniki were Jewish. At the same time, in Warsaw, 20% of the prisiashnye poverennye and 50% of the pomoshchniki were Jewish, while in Odessa, 30.5% of the prisiashnye poverennye and an astounding 68.4% of the pomoshchniki were Jewish. The influx of Jews in other cities was not as dramatic; by 1890, only 4.6% of all Moscow prisiashnye poverennye were Jewish; in Kharkov - 5.3%; in Kazan - 6.5%; in Saratov - 1.6%. But despite the limited number of advocates in these cities, the longterm trends looked even more irreversible. Of the 359 people who applied to the pomoshchniki between 1885 and 1890, 321(89.4%) were Jewish.⁸¹

The reasons for this deluge are self-evident. Since further academic training and government service were forbidden to Jews unless they converted to Orthodoxy, the only avenue open for a Jewish graduate in higher legal education was the advokatura. Therefore, in order to stem this influx, a new admission requirement was imposed on November 8, 1889. All non-Christian applicants to the prisiashnye poverennye and to the chastnye poverennye had to first be approved by the Ministry of Justice before they could be accepted into their respective institutions.⁸² For the next 7 years, not a single Jewish applicant was accepted into the prisiashnye poverennye. A few exceptions were made between 1897-1903(15 Jews were accepted) and then the regulations were relaxed. Once again, Jews flooded into the soslovie; in 1904, 45 were accepted; in 1905 -

⁸¹Vysochaishe ucherezhdennaia . . ., pp. 113-114, The breakdown of the entire St. Petersburg prisiashnye poverennye by religion in 1889 was as follows: Orthodox - 54%; Jewish - 21%; Catholic - 13%; and Lutheran - 12%. In the pomoshchniki, the percentages were: Orthodox - 41%; Jewish - 39%; Catholic - 13%; and Lutheran - 7%. Since there were several converts from Judaism amongst the Catholics and Lutherans, the Zhurnal Grazhdanskago i Ugolovnago Prava estimated that one-half of the sworn advokatura was either Jewish or of Jewish origins. See Zhurnal Grazhdanskago i Ugolovnago Prava, no 6(1889), p. 146.

⁸²This provision was appended to the original Judicial Reforms as Note to article 380.

189; in 1906 - 109. Restrictions were once again imposed on Jewish applicants to the Bar in 1907, and although this stemmed the flow, Jews were still able to enter the profession. In 1907, 62 Jews were accepted into the prisiazhnye poverennye; in 1908 - 55; in 1909 - 45. New limitations were imposed in 1910, however, which effectively removed the possibility of Jews being accepted into the prisiazhnye poverennye.⁸³

Yet just like the 1874 counter-reforms fifteen years before, the groundwork for this counteraction had been prepared for the government. The rise in the number of Jewish advocates had been accompanied by numerous anti-Semitic tracts in the press. Novoe Vremia, for example, wrote that the vast majority of Jewish prisiazhnye poverennye "had not turned into advocates but speculators."⁸⁴ Others spoke of the unique racial characteristics of Jewish advocates, their "one sided tendencies" which the more philanthropic Russian advocates could not compete with.⁸⁵ Even the supposedly moderate Zhurnal Grazhdanskago i Ugolovnago Prava shared these anti-Semitic views. "Free competition between [Jews] and Christians is dangerous and quite simply impossible. This impossibility lies in racial peculiarities which must be considered."⁸⁶ Yet even more threatening, in the eyes of the Zhurnal, was the rise in the number of Jewish advocates in St. Petersburg; it was abnormal to have an "alien advokatura" in the capital of the Russian Empire.⁸⁷

⁸³"Evrei v russkoi advokature," Vestnik Prava, no. 6(1916), p. 163. The total number of Jews accepted into the prisiazhnye poverennye between 1889 and 1915 was 524. By 1915, however, Jews made up only 8.4% of the prisiazhnye poverennye. *Ibid.*, p. 162.

⁸⁴Novoe Vremia, no. 5006(February 4, 1890), p. 1.

⁸⁵N.I. Gratsianskii, "Bezuriaditsa v advokature," Iuridicheskaiia Letopis(August, 1890), pp. 99-100.

⁸⁶Zhurnal Grazhdanskago i Ugolovnago Prava, no. 6(1889), p. 148.

⁸⁷*Ibid.*, p. 147.

Anti-Semitism was not, however, restricted to the press. The advokatura itself began to voice objections at the ever increasing number of Jews entering the soslovie. In 1888, the Moscow Committee of pomoshchniki requested that the Moscow Council impose some sort of restrictions, stating that the "advokatura must be a purely Russian institution."⁸⁸ Beyond these nationalistic reasons, the Moscow pomoshchniki also attacked the integrity of Jewish advocates; not only did Jewish pomoshchniki accept cases which Russian advocates refused, but they also undercut Russian advocates by offering lower prices. This unsubstantiated indictment prompted Ruskaia Mysl', one of the defenders of unrestricted admissions of Jews into the advokatura, to cynically note that the the Moscow pomoshchniki wanted limitations simply to avoid competition.⁸⁹ But anti-Semitism also penetrated the highest levels of the prisiazhnye poverennye; Moscow sworn attorneys, for example, went around saying, "The Moscow advokatura is for the Russians."⁹⁰ In 1890, the anti-Semitic faction joined forces with those who wanted to reform the pomoshchniki and produced the previously mentioned March 3, 1890 pomoshchniki regulations.⁹¹

Yet the most interesting call for retrenchment was made in St. Petersburg by Spasovich. As a Pole, Spasovich rejected the rabid nationalism of Katkov and in his 1880 after-dinner speech, he asserted that Jews should not be denied admission into a profession which, on the

⁸⁸Ruskaia Mysl', no. 3(1888), p. 197.; Vestnik Evropy, no. 3(March, 1890), p. 390. There had been a significant jump in the number of Jewish pomoshchniki in Moscow. In 1885 only 3% of the pomoshchniki in Moscow were Jewish. In 1886 that percentage had increased to 11%, and by 1887, 17% of all Moscow pomoshchniki were Jewish, See Gessen, Istoriia russkoi advokatury, 1: p. 280.

⁸⁹Ruskaia Mysl', no. 3(1888), pp. 198-9.

⁹⁰Ibid., p. 49.

⁹¹See Chapter 4, pp. 207-11 for a complete discussion of the March 3, 1890 regulations.

basis of merit, they deserved. Within the same speech, however, Spasovich's ambivalent attitude becomes plainly visible. Starting from a point of equality, Spasovich stated, one must nevertheless "take into account the special characteristics of this race [so that] you can restrain it in such a way, that it does not exploit peasants and so that it does not monopolize trade."⁹²

By the end of the 1880's, however, the Jewish question had become much more complicated. In 1888, without any prompting from the government, the St. Petersburg Bar Council - under Spasovich's leadership - released the religious breakdown of the St. Petersburg prisiazhnye poverennye, highlighting, of course, the growing predominance of the Jews.⁹³ Spasovich later explained the reasons behind his provocative actions in his 1889 after-dinner speech. We have "a colossal problem," Spasovich informed the St. Petersburg Bar, one which cannot be "resolved by the rules of cliché liberalism."⁹⁴

Spasovich's pessimism was genuine; in a period of reaction, he argued, the situation could not be improved, but what must be avoided at all costs was further deterioration. To save the Bar, therefore, the advokatura itself had to impose restrictions from within before the government intervened and imposed external restrictions on the soslovie. Spasovich explained his reasoning. If the St. Petersburg Bar is converted "from Russian to Jewish, then I am obliged to worry that it does not change in this sense. I must try not from a personal perspective but from a higher, social point of view. I would defend this opposition to the sudden influx of Jews for the benefit of the Jews themselves. This was a

⁹²Spasovich, Zastol'nye rechi, p. 26.

⁹³Sliozberg, Dela minuvshikh dnei(Paris, 1933), 1: p. 208.

⁹⁴Ibid., p. 53.

good korporatsiia, it was the *magnum asylum* for us as well. You overflowed it (the advokatura) so quickly that the state cannot tolerate this and will change not the korporatsiia but the Bar. For this very reason the Bar was not opened in Odessa."⁹⁵ In recognition of the strict division in St. Petersburg of the two branches, Spasovich noted that it was not the St. Petersburg Council which could impose restrictions but only the general assembly. Spasovich concluded by lamenting how divisive this whole debate had been for the soslovie. The advokatura was to have been the refuge of all races and nationalities, but now , "this unity was lost, completely split."⁹⁶

Yet despite the incriminating nature of the above remarks, one is reluctant to ascribe Spasovich's motivation to latent anti-Semitism. As we will see in Chapter 6, Spasovich's liberal credentials were incontrovertible, and G. Sliozberg, a prominent Jewish sworn attorney who, in his memoirs, described the events leading up to the above speech, refused to accuse Spasovich of anti-Semitism. On the contrary, Sliozberg wrote that in 1888, when Manasein, the Minister of Justice, asked Spasovich what should be done about the excessive number of Jews in the advokatura, Spasovich responded by saying that the government should allow Jews to enter state service, thereby reducing the flow into the prisiazhnye poverennye. Sliozberg ultimately interpreted Spasovich's

⁹⁵Ibid., p. 54.

⁹⁶Ibid., p. 52. Spasovich was not alone amongst the leaders of the Bar in calling for restrictions to be placed on Jews. The Murav'ev Commission Report, which was published in 1897 and contained numerous anti-Semitic references, demanded that a limitation of 10 % be placed on the number of Jews permitted to join the prisiazhnye poverennye. This report was reviewed by 6 leading sworn attorneys who were also members of the Commission. Only V.O. Liustikh voted against these restrictions. Four members (Spasovich, Korsakov, Kriukov, and Makalinskii) supported them, while F.N. Plevako wrote a dissenting opinion where he stated that Jews, by the nature of their religion, could not understand Russian laws and demanded that a 15-20% limitation be placed on non-baptized Jewish prisiazhnye poverennye (i.e. Jewish converts to Christianity). See Kucherov, Courts, Lawyers, pp. 277-279.

comments as a smokescreen to divert the government's attention from the fact that a great number of Poles were also joining the sworn advokatura.⁹⁷ Spasovich later confirmed his reputation as a liberal - and as a defender of Jewish causes - in 1900 when he agreed to defend, in his native Poland, the Jewish physicians' assistant Blondes in the first ritual murder trial.⁹⁸

The November 8, 1889 legislation, therefore, represented the most direct interference on the part of the government into the internal affairs of the established Bar. The legislation was partially mitigated in St. Petersburg, however, by the continued acceptance of Jews into the pomoshchniki. Thus, prominent advocates, such as Gruzenberg and Vinaver, were able to get around this ban by remaining in the pomoshchniki for 16 and 15 years respectively. There was also a pronounced change in policy within the St. Petersburg Council of the Bar. In 1902, 7 Jewish candidates were officially accepted into the prisiazhnye poverennye and, as stipulated in the November 8, 1889 legislation, their names were sent to the Ministry of Justice for confirmation. No reply was received, however, from the Ministry.⁹⁹

But what this controversy most clearly reveals was the palpable tension which existed between the advokatura's existence as a true korporatsiia (i.e. as a 'liberal' profession) and as a Russian soslovie. As a korporatsiia, the advokatura had to accept any applicant who was properly qualified, but as a Russian soslovie, it could not tolerate the growing dominance of the Jews. This paradoxical situation was most clearly

⁹⁷Sliozberg, Dela minuvshikh dnei, 1: pp. 209-10.

⁹⁸Sliozberg, Dela minuvshikh dnei, 3: pp. 32-3. See also Spasovich, Zastol'nye rechi, pp. 81-2.

⁹⁹Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1902-3, p. 2.

revealed in an anonymous article in Novoe Vremia. According to this article, one could not compare the advokatura with Russia's other free professions (svobodnye professii); musicians and artists were not subject to any formal demands in order to enter their respective professions, nor did they belong to a special korporatsiia. The advokatura, however was different. According to the Judicial Reforms, the article stated, "the Russian advokatura represented a tightly linked korporatsiia, united by an elected council and even named in law 'soslovie.'"¹⁰⁰ This proud title placed certain moral and social demands on the members of the prisiazhnye poverennye. Therefore, the article concluded, one could not compare the advokatura with Russia's other free professions nor could one allow unrestricted admissions to the estate, meaning, in other words, that because the advokatura was a recognized soslovie (and not simply a free profession), Jews should not be given unlimited entry into the estate.

Thus, the large presence of Jewish sworn attorneys represented a permanent obstacle in any attempt to incorporate the advokatura into Russia's traditional, hierarchical soslovie social order. The November 8, 1889 legislation, however, did not end the polemics surrounding Jewish advocates. Jewish sworn attorneys, admitted prior to the above regulations, were not removed from the soslovie, and their continued presence provoked recurrent attacks in the press. Jewish advocates were portrayed as being more cunning, more obsequious, more resourceful and more aggressive than their Russian counterparts. In 1905 Vladimir Ptitsyn - himself a sworn attorney - accused the Jews of taking over both the St. Petersburg Commercial Courts and the St. Petersburg Bar. Jewish advocates, Ptitsyn concluded, had achieved the "supreme position in the

¹⁰⁰Novoe Vremia, no. 9048 (May 8, 1901), p. 2.

Russian advokatura and push the Russians into the background."¹⁰¹ Undoubtedly, the recriminations surrounding the admittance of Jews left the Bar internally divided and externally open to anti-Semitic attacks and denunciation.

C. Remuneration

The councils' power to control the fees of prisiazhnye poverennye was, in fact, quite limited. Sworn attorneys were free to make their own arrangements with their clients. Only in civil cases where no written agreement existed between two parties was the council asked to step in and actually decide the fee. Although this proved to be a very rare occurrence, it nevertheless gave the council an indirect influence over the earnings of sworn attorneys. In 1868, the Ministry of Justice published a tariff which automatically applied to any case the council of the Bar was asked to resolve. According to this tariff, in any suit between 500-2000 roubles, remuneration was set at 10%. As the value of the suit increased, the percentage fee that the attorney received was lowered. Thus, in a 2000-5000 rouble suit, remuneration was 10% for the first 2000 roubles and then dropped to 8% for the remainder of the claim. Remuneration was also provided for the losing advocate but at either one-quarter or one-third the above rate, depending on what side the advocate had represented.¹⁰² One must add that the latter part of the tariff - compensation for losing sworn attorneys - was never truly implemented.

¹⁰¹V. Ptitsyn, Russkaia advokatura i evrei(St. Petersburg, 1905), p. 11.

¹⁰²Vas'kovskii, Organizatsiia advokatury, pt. 1: p. 331.

Thus, advocates usually did not receive anything for their services if they lost the case.¹⁰³

How this tariff applied to civil cases, not resolved by the council, is still difficult to determine. Arsen'ev asserts that most sworn attorneys, at least initially, adhered to these tariff guidelines, and in straightforward, petty cases, an advocate's honorarium was often less than the percentage designated in the tariff.¹⁰⁴ There is enough evidence to suggest, however, that on an individual basis, advocates regularly exceeded these tariffs. "I can speak from experience," wrote Spasovich, "that the council, on more than one occasion, has had to reconcile itself to earnings of 30% and 40% of the awarded sum."¹⁰⁵ The Murav'ev Commission also raised the problem of excessive fees, noting that in some cases, advocates received 20%, 50%, and even up to 80% of the settlement.¹⁰⁶ It took a special ruling by the Moscow and St. Petersburg Councils to limit compensation in cases involving crippling injuries to 10%.¹⁰⁷

But unlike their French and English counterparts, who, both practically and symbolically, had moderated the advocate/client financial relationship, the lack of regulations concerning compensation left the Russian advokatura open to harsh criticism. Naturally, the press publicized instances of excessive remuneration; in one celebrated case, prisiazhnyi poverennyi Vintergal'ter received 15, 000 roubles for a journey to Vienna where he spoke no more than 15 words, all of which turned out to be incorrect. Vintergal'ter was eventually suspended for ten

¹⁰³Arsen'ev, Zametki, pt. 1: p. 126.

¹⁰⁴Ibid., p. 138.; See also Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 169-173.

¹⁰⁵Spasovich, "Ob organizatsii advokatury," p. 10.

¹⁰⁶Vysochaishe uchrezhdennaia . . ., p. 172.

¹⁰⁷A. Markov, Pravila advokatskoi professii v Rossii(Moscow, 1913), pp. 339-341. Some advocates also charged a preliminary fee. See Sudebnaia Gazeta, no. 33(1900), pp. 2-3.; Sudebnaia Gazeta, no. 37(1900), pp. 4-5.

months, but in the eyes of Novoe Vremia, this penalty was still quite palatable if on average, an advocate always received 1000 roubles per word.¹⁰⁸ The aggressive pursuit of still greater financial rewards led to the characterization of advocates as hired merchants or mercenaries. "Striving for profits, advocates begin, on the one hand, to suck out all the juices from their clients and, on the other hand, openly prefer and support the wealthy clients, refusing to help those poor people whose pockets are not deep enough to satisfy their wolfish appetites."¹⁰⁹

The unregulated system of remuneration also left the advokatura exposed to attacks on ethical grounds. There was no problem in civil cases, where the advocate was responsible to his client, but in criminal cases, where a sworn attorney was responsible both to the truth as well as to his client, this system of remuneration raised clear ethical dilemmas. In theory, the fees were decided before the case, but in practice, the fees were dependent on the outcome of the case. Sudebnaia Gazeta described this precarious relationship. If a defendant was convicted, then he agreed to pay an accepted fee, but if he was convicted of a lesser charge, then the fee gradually increased up to the point that if a defendant was actually acquitted, the honorarium would be as much as five times the original fee.¹¹⁰ Naturally, under such circumstances, an advocate strove for the acquittal of his client, but in the process, critics charged, an advocate became preoccupied with the commercial aspect of his undertaking while losing sight of his responsibility before the law and the truth.

The question of how advocates should get paid has always presented difficulties, but from the time of ancient Rome, advocates have

¹⁰⁸Novoe Vremia, no. 4643(1889), p. 1.

¹⁰⁹Vas'kovskii, Budushchee ruskoi advokatury(St. Petersburg, 1893), p. 13.

¹¹⁰"O gonorare," Sudebnaia Gazeta, no. 13(March 25, 1900), pp. 2-3.

been conscious of the need to separate themselves from the taint of money and the accusation of being simply a trade. One can debate how successful other legal professions have been in this pursuit, but undeniably, the Russian advokatura seems to have been unable to meet this challenge. Although both the Moscow Council and the St. Petersburg Council recognized the potential conflict of interests involved in such an arrangement, both refused to alter the system of free agreement of fees. But only by changing the system of remuneration, Sudebnaia Gazeta argued, would the advokatura win the respect of Russian society. Such reforms would remove the "hired, mercenary character of the advokatura, which is impossible to reconcile with the [advokatura's] appointment: service to society and the state."¹¹¹

D. Appointment of Cases

Depending upon the nature of a case, different procedures existed for appointing sworn attorneys. In civil cases, the matter was straightforward; according to article 367, part 4 of the Judicial Reform, prisiazhnye poverennye were appointed to indigent clients free of charge if the latter possessed a certificate of poverty (pravo bednosti). In criminal cases, the chairman of the regional judiciary appointed sworn attorneys, although these appointments were not, it appears, limited to indigent people. Article 566 of the Ustav ugolovnago sudoproizvodstva stated that such appointments were simply made at the request of the defendant. The council, however, played an important financial role in this process. In order to pay advocates for their service, article 398 of the Judicial

¹¹¹"Izmeneniia v ustroistve advokatury," Sudebnaia Gazeta, no. 44(November 2, 1897), p.4. See also Vysochaishe Uchrezhdennaia . . ., pp. 78, 171-2.

Reforms called for a tax to be levied on the earnings of all prisiazhnye poverennye. This tax was to be collected from all sworn attorneys in Russia, sent to the Ministry of Justice, and then redistributed amongst sworn attorneys based on the total number of appointed cases each individual advocate had conducted. According to the Judicial Reforms, the council was only responsible for distributing the money, but once the statute was implemented, it assumed authority for collecting the tax as well.

Returning to the first category (i.e. civil suits), it was at the court's discretion whether a person was poor enough to qualify for an appointed sworn attorney, although this appears to have been a mere formality. The number of people utilizing this right steadily increased over the years. In St. Petersburg, for example, the number increased from 4 in 1877-8 to 773 in 1905-6.¹¹² Sworn attorneys were appointed under a seniority system except in St. Petersburg which originally assigned cases alphabetically. Only in 1874 did the St. Petersburg Council transfer to a seniority system.

Once an advocate received a right of poverty case, then he was obliged to pursue it both in the place of first instance (most likely the district court) and through the initial round of appeals, including the regional sudebnaia palata. In 1877, the St. Petersburg Bar Council ruled that prisiazhnye poverennye were required to appeal right of poverty cases, if so requested, to the Cassation Department, although in order to prevent people from outside the region from applying for an advocate, the Council stipulated that such cases had to originate within the St.

¹¹²Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1877-8, p. 4.; Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1905-6, p. 17.

Petersburg district.¹¹³ The statistical breakdown of these right of poverty cases is quite revealing. Of the 773 appointed cases in 1905-6, 294 involved factory or railroad injuries; 312 cases were concerned with demands for support either from a wife or children, or were demands for maintenance from children born out of wedlock; and 167 cases involved inheritance disputes or problems over various documents. 702 of the 773 cases took place in district court.¹¹⁴ Advocates were entitled to receive a percentage of the winnings of any appointed case unless the suit was settled amicably in which case the advocate did not receive anything.

The appointment process was not without its problems for the council, primarily because it was not allowed to review the contents of each individual case before appointing an advocate. This often placed a sworn attorney in an untenable position, forced to take a case that was either unwinnable, personally objectionable, or even illegal. Due to these potential conflicts, each council gradually developed the means by which a sworn attorney could withdraw from appointed cases. In the 1880's, both the Moscow Council and the Kharkov Council ruled that if an advocate, by himself, decided that there was no legal means to conduct an appointed case, he could reject it. All he was required to do was inform the Council of this rejection.¹¹⁵ In St. Petersburg, a different procedure was developed. Originally, if a sworn attorney wanted to drop an appointed case, he had to convince his client; if the client agreed, then the case was stopped, but if the client refused, then the sworn attorney was obliged to pursue the case, despite any personal objections he might hold.

¹¹³Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 156-9.; Gernet, Istoriia russkoi advokatury, 2: 169-70.

¹¹⁴Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1905-6, pp. 17-18.

¹¹⁵Cherkasova, Formirovanie, p. 99.

In reality, this meant that any use of an advocate's personal judgement in appointed cases was forbidden. In 1887, however, the St. Petersburg Council reversed its previous ruling; if an advocate appealed to the council, stating that a given appointed case was either illegal or immoral, then the council was obligated to enter into an investigation of such an appeal and, if it concurred, it would release a sworn attorney from a case.¹¹⁶ Judging from the available data, it appears that the vast majority of appeals to the St. Petersburg Council were approved; in 1905-6, 43 out of 59 appeals to the St. Petersburg Council were accepted. The reasons for removal included: 1)if the suit was either unfounded or obviously impracticable; 2)if the suit was immoral; 3)the death of a client; 4) if the case did not fall under the jurisdiction of the law courts set up by the Judicial Reforms; 5)if the client rejected the services of an sworn attorney; 6) if the advocate did not live in the city where the case was assigned; and 7) if the advocate was over the age of 60.¹¹⁷

The council's role in the appointment of advocates in criminal cases is much more complicated. As previously mentioned, the responsibility of each council in this area was restricted to collecting and distributing the tax on an advocate's earnings. For the first five years of the Bar's existence, however, the tax was simply ignored both by the government and by the advokatura. Only in 1871 were the respective councils asked to collect the tax, then established at 10% . This tax, however, did not apply to all earnings - only payments received from civil cases in the reformed courts were subject to tax. Thus all earnings from

¹¹⁶Istoriia russkoi advokatury, 2: pp. 262-263.

¹¹⁷Ibid. pp. 257-259. Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1900-1, pp. 74-5.

civil and criminal cases, which occurred in the Justice of the Peace courts or in the pre-reform courts, did not have to be declared.¹¹⁸

The number of appointed criminal cases was much higher than the just described right of poverty cases. By 1882-3, there were 1,482 appointed criminal cases in St. Petersburg alone.¹¹⁹ Dissatisfaction with the tax, however, soon swept the advokatura. To many, the 10% tax was seen as another unfair burden placed on the advokatura. Hardest hit were young advocates, just beginning to establish a practice, and provincial advocates, whose honorarium was not as high as their urban counterparts. Other sworn attorneys saw the tax as a pointless transfer of money from one pocket to the other. Indeed the government was supposed to redistribute the tax according to the national percentage of appointed criminal cases within each district, but at least in St. Petersburg, the Council received the exact amount back from the government which it had originally collected.¹²⁰ The modest payment for each appointed case - 7 to 10 roubles in St. Petersburg - did not compensate for the added aggravation.¹²¹

The attitude of the respective councils towards the enforcement of the 10% tax remained ambivalent as well. Determining how much money an advocate actually made was not easy, and the Moscow Council found it awkward to pry into an advocate's private financial affairs when it truly had no legal right to do so.¹²² The Moscow Council's failure to enforce the tax ultimately compelled the Moscow District Court to assume responsibility for collecting the tax in 1875.¹²³ Even distributing

¹¹⁸Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 172.; K. Rikhter, Zakon o 10% sbore(Moscow, 1878), pp. 18-21.

¹¹⁹Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 397.

¹²⁰Ibid., pp. 173-177.

¹²¹Ibid., p.181.

¹²²Rikhter, Zakon o 10% sbore, pp. 13-14.

¹²³Ibid., p. 2.

the tax proved difficult for the Moscow Council. The St. Petersburg Council faced similar problems; by the early 1880's, the 10% tax had also fallen into abeyance, primarily because the St. Petersburg Council failed to enforce the regulation. But even though the St. Petersburg Council sympathized with its members, it nevertheless decided to start enforcing the tax, mainly out of fear that if it did not, the court would. Such threats seemed to have fallen on deaf ears, for in 1882, 70 sworn attorneys in St. Petersburg signed a petition requesting that the 10% tax be discontinued.¹²⁴

The fate of the 10% tax remains a bit of a mystery; at some point in the 1880's it simply stopped being collected. According to Gessen, the Moscow archive made no reference as to when or why the tax stopped. It simply stopped.¹²⁵ A possible explanation behind this conundrum was provided by K. Rikhter. Writing in 1878, Rikhter argued that it was an advocate's moral duty to conduct all appointed cases free of charge. In return for this complimentary service, however, Rikhter demanded that the 10% tax - the means by which compensation was provided for these appointed cases - be abolished.¹²⁶ Rikhter's solution appears to have been adopted. The tax was no longer collected, but advocates continued to be assigned criminal cases by the respective chairman of the regional courts. Although the number of appointments continued to grow - there were 2336 such appointments in St. Petersburg in 1903-4 - no compensation was provided.¹²⁷

¹²⁴ Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1881-2, pp. 20-21.; Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1882-3, pp. 20-23.

¹²⁵ Gessen, *Istoriia russkoi advokatury*, 1: p. 250.

¹²⁶ Rikhter, *Zakon o 10% sbore*, pp. 53-4.

¹²⁷ Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1903-4, p. 26.

But beyond the controversy surrounding the 10% tax, there were also a growing number of complaints surrounding the council's supervision of the whole appointment process. Without question, many sworn attorneys conscientiously prepared for their appointed cases, but this still did not stop critics from charging, for example, that the respective councils did not respond to requests for advocates quickly enough. Strong objections were voiced as well over the decision to allow advocates to reject an appointed case, reminiscent of the heated debates which occurred within the bureaucracy when the Judicial Reforms were first being discussed.¹²⁸ Finally, the councils were accused of not severely disciplining advocates who indifferently fulfilled their appointed cases.¹²⁹ Indeed, the percentage of appointed cases won appears to have been very low, although this does not prove, by itself, that prisiazhnye poverennye were apathetic. Many of these appointed cases were simply unwinnable.¹³⁰ But there were other, more official charges of insouciance as well. The St. Petersburg Sudebnaia Palata informed the St. Petersburg Council that appointed sworn attorneys either did not appear on the day of the trial or did not notify the court that they were unprepared. The St. Petersburg Council, in turn, tried to instil some professional pride in the local advokatura; it stated that in the interest of jurisprudence and in order to preserve the dignity of the soslovie, sworn attorneys had to assiduously prepare for their appointed cases, but in light of council's

¹²⁸Pravo, no. 13(March 23, 1903), p. 917.; Sudebnaia Gazeta, no. 42(October 21, 1901), pp. 2-3.

¹²⁹I. Foinitskii, "Zashchita v protsesse ugovnom," Zhurnal Grazhdanskogo i Ugolovnogo Prava, no. 4(1885), pp. 44-5.; Vas'kovskii, Organizatsiia advokatury, pt. 1: p. 342.

¹³⁰Of the 773 right of poverty cases in St. Petersburg in 1905-6, only 100 results were reported to the Council. These results - 43 won, 45 lost, 12 stopped, 10 reconciled - do not appear that bad until one takes into consideration that advocates who lost appointed cases rarely reported the outcome to the Bar. Therefore, of the 673 unreported cases, one must assume that the vast majority were lost as well. See Istoriia russkoi advokatury, 2: p. 251.

weak enforcement record, these appeals appear to have had little impact.¹³¹

But whatever its imperfections, the most important defect of the whole appointment process was the fact that it absolutely failed to meet the growing need for legal assistance. In reality, appointments only occurred in those cities where the district court was located. Outside these areas, most requests for sworn attorneys were rejected for the simple reason that there were none, meaning that virtually everyone appeared in court in Imperial Russia without any form of legal representation.¹³² The challenge facing the councils - and the advokatura as a whole - was, in fact, to go beyond the appointment's process and institute a more comprehensive system of legal assistance .

E. Professional Ethics

The responsibility for creating a strict code of conduct, and transforming it into a living tradition within the soslovie, was one of the greatest challenges facing each council of the Bar. The inchoate nature of the code of ethics, articulated in the Judicial Reforms, has already been discussed. As a result, each council had to independently formulate a code of ethics and then enforce these standards through their disciplinary power. The disciplinary hearing, therefore, became the primary means by which the council pronounced its ethical judgements, although a specific written code of ethics, in fact, never appeared. Various attempts were made to collate these decision, however, by Arsen'ev, Makalinskii, Nos,

¹³¹Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1894-5 , pp. 19-20.

¹³²Sudebnaia Gazeta, no. 2(January 13, 1902), p. 4.

and finally, by Markov, whose Pravila advokatskoi professii v Rossii in 1913 represents the last, and most comprehensive, compilation of the Bar's rulings on professional ethics.

To begin with, each council demanded that a sworn attorney uphold the law at all times, even when not acting in his professional capacity as an advocate. Eventually, any act, public or private, which brought the soslovie into disrepute was subject to disciplinary hearings. According to the Moscow Council, ". . .the personality of a man - his character and moral qualities - cannot be split up into separate spheres. Acts, completed in the sphere of one's private life, can prove to be incompatible with the dignity and honour of that person as a member of a soslovie, and thereby demands, from the side of the council, a reprimand or even disciplinary punishment."¹³³ Therefore, over the objections of many members of the Bar, an advocate's individual morality, family relations and personal debts came under the jurisdiction of the advokatura's code of ethics. Only politics and religion theoretically remained outside the purview of the council as the distinction between one's professional and private affairs grew increasingly more blurred.

But the most formidable test for the councils of the Bar was establishing criteria for accepting and rejecting cases. This ethical dilemma, which has confronted all legal professions, was at the centre of the famous Lokhvitskii controversy. Lokhvitskii's pomoshchnik, N. Elkin, had managed, under false pretences, to swindle an elderly widow of both her house and 15,000 roubles. Elkin was subsequently convicted and twice sentenced to jail, but each time, his patron, Lokhvitskii, was able to overturn the verdict on appeal. This eventually led to a civil suit against

¹³³Markov, Pravila, pp. 11-12.

Elkin and a disciplinary complaint against Lokhvitskii for supporting an unfair claim. The Moscow Council ultimately upheld the complaint and suspended Lokhvitskii for three months. An advocate, the Council declared, "must be cautious, strict and scrupulous in the choice of cases he accepts, never defend unfair claims, and reject all doubtful cases. He is not a servant of his client, ready to do everything for money, but a defender and backer, who in civil cases defends and backs only those who act conscientiously."¹³⁴

Lokhvitskii appealed the Moscow Council's decision to the Sudebnaia Palata, only to have the Palata overturn the original decision and disbar him. The Sudebnaia Palata argued that the Moscow Council had been far too lenient, that an "advocate who submits to a civil court a notoriously unfair claim in the interest of his client . . . must be considered as a person committing a dishonest action."¹³⁵ Lokhvitskii appealed once again, this time to the Senate, which not only overruled the Palata's decision, but also chose to reinstate Lokhvitskii. "The civil court," the Senate argued, "does not aspire to the finding of absolute justice; it checks and defines the contested right by means set by law and in accordance with the evidence presented by the parties and decides on it on grounds of laws which preserve and defend the contested right."¹³⁶ Therefore, the Senate ruled that "if individual morality is not required from a party in a suit, the activities of a lawyer cannot be examined from the standpoint of principles of individual morality."¹³⁷

¹³⁴Kucherov, Courts, Lawyers, p. 164.

¹³⁵Ibid., p. 165.

¹³⁶Ibid., pp. 165-166.

¹³⁷Ibid., p. 166. Gessen signals out the Ruling Senate - and the State Council - as the two main defenders of the Judicial Reforms. See Gessen, Istoriia russkoi advokatury, 1: pp. 242-46.

Thus, it was the Senate, and not each respective council, which ultimately resolved this fundamental question of professional ethics, although two years later, the Senate did amend the above ruling. In a decision involving a private attorney, the Senate ruled in 1881 that the external legality of a case did not justify an advocate's action if he concealed "another wrong, directed towards the evasion or betrayal of the law."¹³⁸ But this new ruling did not diminish the controversy surrounding the actions of Lokhvitskii, whose death in 1884 sparked another round of heated debates on the ethical responsibilities of an advocate. To a few, Lokhvitskii was a hero, the man who had singlehandedly preserved the freedom and independence of the advokatura. According to D.I. Neviadomskii, Lokhvitskii's greatest supporter, Lokhvitskii had upheld what Bentham before had insisted was the highest ethical precept: legality(zakonomernost). An advocate can and must accept any litigation as long as the demands of the client were legal.¹³⁹

But to many critics, both inside and outside the soslovie, the Lokhvitskii decision symbolized the collapse of all professional standards within the advokatura. Scrupulousness(razborchivost), not legality, it was argued, must be the central tenant of professional ethics. "The Judicial Reforms did not intend to create a korporatsiia of capable and deft defenders of private interests, but people who would act in the interests of

¹³⁸Vestnik Evropy, no. 5(1886), p. 420. On May 25, 1885, the Senate ruled that disciplinary cases, involving prisiazhnye poverennye and chastnye poverennye, could no longer be appealed to the Senate, thus making the regional palata the final instance of appeal. Many objected to this decision, citing the Lokhvitskii ruling as an example of how important the right of final appeal to the Senate was. See G. Dzhanshiev, Voprosy advokatskoi distsipliny (Moscow, 1887), pp. 18-25.

¹³⁹D. Neviadomskii, Vechnye voprosy advokatury(Moscow, 1886), p. 42; D. Neviadomskii, "A.V. Lokhvitskii," Zhurnal Grazhdanskago i Ugolovnago Prava, no. 6(1884), pp. 50-53.

justice and would not defend immoral demands."¹⁴⁰ Indeed, for some reviewers, moral considerations were paramount; an advocate must reject "morally unjust cases," Vas'kovskii insisted, "even if from a legal point of view, [these cases] were fully just."¹⁴¹ The Lokhvitskii verdict, therefore, was seen by many commentators as the initial source of the advokatura's corruption, the decision which removed moral considerations from the advokatura's professional conduct. Advocates enjoyed the greatest prestige, wrote Dzhanshiev, "in social opinion where members of the advokatura have risen to the highest formal, abstract morality and have displayed a fervent desire to achieve the ethical ideals of their profession."¹⁴² But in light of the Lokhvitskii decision, opponents argued, the advokatura's moral obligations had been rendered null and void, thus eliminating the possibility of creating a true ethical basis for the advokatura.

The polemics surrounding the Lokhvitskii decision never did dissipate, although commentators were quick to point out the flaws in both Dzhanshiev's and Neviadomskii's reasoning. Vestnik Evropy, for example, objected to Neviadomskii's argument because he had given an absolute answer to a question which, by its very nature was "conditional and subject to exceptions."¹⁴³ Gessen was so unimpressed with both sides that he used the debate as an example of the intellectual shallowness of two of the supposed leaders of the Russian legal profession.¹⁴⁴ In the end, the St. Petersburg Council simply ruled that the selection of cases depended on the individual convictions of an advocate, although the

¹⁴⁰Iuridicheskii Vestnik, no. 9(1886), p. 198.

¹⁴¹E. Vaskov'kii, Osnovy voprosy advokatskoi etiki(St. Petersburg, 1895), p.6.

¹⁴²G. Dzhanshiev, Vedenie nepravykh del(Moscow, 1886), pp. 44-5.

¹⁴³Vestnik Evropy, no. 10(1886), p. 858.

¹⁴⁴Gessen, Istoriia russkoi advokatury, 1: p. 326.

Council also demanded that an advocate closely inspect a case, in order to avoid any reproaches.¹⁴⁵

The Lokhvitskii judgement, however, must not be seen as the advokatura's final word on professional ethics. Each council still had to supplement the other glaring gaps in the original Judicial Reforms, concerning, for example, a sworn attorney's professional conduct of a case. On the basis of numerous disciplinary decisions, each council ruled that advertising was forbidden, as was the use of middlemen.¹⁴⁶ Proper respect also had to be shown both to the court and to one's opponent, and although an advocate's subjective arguments could not be judged, flagrant unfamiliarity with the law could serve as grounds for commencing disciplinary hearings.¹⁴⁷

The advocate/client relationship also came under the jurisdiction of the council of the Bar. Before taking a case, a sworn attorney had to agree whether he would pursue the case through all potential appeals, as well as explain the legal issues involved.¹⁴⁸ Once he accepted a case, an advocate had to supply all relevant information to his client and answer any question his client might have. A sworn attorney could not settle a case out of court without the agreement of his client.¹⁴⁹ He also had to ensure that a case did not proceed too slowly. However, unless otherwise agreed, an advocate did not have to gather information and documents necessary for the case (this was to be done by the client) or take certain expenses upon himself.¹⁵⁰ If any demand of the client either violated the

¹⁴⁵Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 347-350.

¹⁴⁶Ibid., p. 345.

¹⁴⁷Ibid., p. 354.

¹⁴⁸Ibid., p. 400.: See also Cherkasova, Formirovanie, p. 55.

¹⁴⁹Markov, Pravila, p. 130.

¹⁵⁰Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 400.; Cherkasova, Formirovanie, p.55.

law or the honour of the soslovie, then the sworn attorney was obligated not to fulfil it.

F. The Disciplinary Hearing

The impact of all these ethical pronouncements naturally depended on the council's ability to enforce them. Thus, the individual disciplinary decisions, published by each council of the Bar, came under intense scrutiny. Every year, critics and supporters alike seized upon these punitive decisions - which occupied approximately three-quarters of each annual Bar report - for ammunition. So contentious were some of these judgements that Sudebnaia Gazeta described the St. Petersburg Bar Report as an annual "indictment against the local sworn advokatura."¹⁵¹ It was quite common for the press to highlight two or three of the most controversial decisions in order to emphasize either the severity or leniency of the respective council's decisions.

The disciplinary hearing closely followed the regulations articulated in the Judicial Reforms of 1864. An advocate was always subject to the disciplinary authority where the disputed case took place. Thus, if a St. Petersburg sworn attorney was conducting a case in Moscow, he was subject to the Moscow Council, and if that same advocate took a case in a district where there was no council, then he was subject to the disciplinary power of the local district court.¹⁵² Disciplinary proceedings could be instigated by a variety of people: members of the council, fellow sworn attorneys, pomoshchniki, government officials, and private citizens. For a long time, however, the pomoshchniki were not directly

¹⁵¹Sudebnaia Gazeta, no. 18(May 15, 1902), p. 7.

¹⁵²Sudebnye Ustavy 20 Noiabria 1864. . . Art. 384.

subject to the Bar's disciplinary power. This curious situation was the result of several controversial decisions made by the sudebnaia palata, which only recognized the council's absolute disciplinary authority over the pomoshchniki in 1902.¹⁵³

Once a charge had been filed, it was usually up to the chairman, alone, to determine whether a disciplinary hearing was required. In Moscow and Kharkov, for example, the full council was consulted only in two cases; 1) when there was a question of the actual jurisdiction of the council in a given case; and 2) when there were doubts that a violation of the disciplinary code had occurred and a hearing was necessary.¹⁵⁴ An explanation from the accused was sought only if the decision had been made to hold a disciplinary hearing.¹⁵⁵ If the accused refused or failed to provide an explanation, then the council proceeded to make a decision based on the available evidence.¹⁵⁶

In presiding over these hearings, the council actually acted in the capacity of a court, governed by the general principles of criminal law. Most proceedings took place behind closed doors, although in St. Petersburg, fellow members of the soslovie were allowed to sit in if both sides agreed. Such mutual agreement, however, appears to have been a rare occurrence.¹⁵⁷ The general assembly was not consulted in these disciplinary cases. The council's verdict could be appealed to the sudebnaia palata, and although the palata was not consulted very often, it nevertheless served as an important check on the council's authority. Of

¹⁵³A. Trainin, "Distsiplinarnoe proizvodstvo v Sovetakh prisiazhnykh poverennykh," in Istoriia russkoi advokatury, ed M. Gernet, 3 vols.(Moscow, 1914-1916), 2: pp. 289-297. See Chapter 4, pp. 191-93 for a complete discussion of the council's disciplinary power over the pomoshchniki.

¹⁵⁴Cherkasova, Formirovanie, p. 104.

¹⁵⁵Istoriia russkoi advokatury, 2: p. 283.

¹⁵⁶Sudebnye Ustavy 20 Noiabria 1864 . . .Art. 372.

¹⁵⁷Istoriia russkoi advokatury, 2: pp. 328-329.

the 1261 disciplinary proceedings between 1866 and 1886 decided by the St. Petersburg Council, only 56(4.4%) were appealed to the Sudbnaia Palata, of which only 22 had their previous decisions reversed.¹⁵⁸ The sudebnaia palata's right to overturn the council's ruling, however, was seen by many in the soslovie as an unwarranted interference by the courts into the internal affairs of the advokatura.

Anyone who reads these disciplinary hearings can immediately see why they were so amenable to different interpretations. To begin with, neither the name of the individual, charged with a violation, nor the name of the council member who wrote the decision was recorded. Naturally, this left the Bar open to the charge that it disingenuously resolved disciplinary cases behind closed doors. Moskovskiiia Vedomosti, for example, accused the advokatura of being "extremely forgiving towards the professional sins of their colleagues," and demanded that the names of all prisiazhnye poverennye, subject to disciplinary hearings, be made available to the public.¹⁵⁹ This demand, however, was strongly resisted. The objective of the annual Bar Report, the St. Petersburg Council insisted, was to first instruct the advokatura and second to acquaint Russian society with the general character and principles which governed the soslovie. Thus, the specific name of an individual advocate was not directly relevant.¹⁶⁰ In disputes involving small acts of negligence or petty misunderstandings, the Council was also opposed to

¹⁵⁸Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1885-6, pp. 38-39. The palata's reputation as an appeals court was later undermined by the Murav'ev Commission. It found that the palata was too large (20 or more members) and too fickle. Therefore, the Murav'ev Commission proposed that a permanent review body be appointed within each palata which would be responsible for all disciplinary matters involving prisiazhnye poverennye. See Vysochaishe uchrezhdennaia. . . p. 154.

¹⁵⁹Moskovskiiia Vedomosti, no. 210 (July 31, 1888), p. 2.

¹⁶⁰Sudebnyi Vestnik, no. 133 (1876), p. 2.

releasing the names of prisiazhnye poverennye involved. Such a publication would inevitably undermine society's confidence in an advocate, thereby making the punishment no longer proportional to the original offence. For similar reasons, the St. Petersburg Council objected to releasing the names of all acquitted advocates, and even those sworn attorneys who were subject to some sort of penalty should be protected by anonymity, the Council concluded, since they could still appeal these decisions.¹⁶¹

The volatile reaction to the release of the Bar's disciplinary decisions was also due to the disproportionately high number of cases that occurred within each district. Examining several reports at random, one can appreciate how the perception grew that the advokatura's professional standards were rapidly falling. In the 1901-2 St. Petersburg Bar Report, for example, 202 complaints were registered against a total of 905 advocates(530 prisiazhnye poverennye, 455 pomoshchniki).¹⁶² Temporarily ignoring the fact that a few members had more than one complaint filed against them, this meant that over the course of one year, approximately 20% of the St. Petersburg advokatura were subject to a disciplinary hearing. In the 1901-2 Moscow Bar Report, there were 203 complaints against 1035 advocates(563 prisiazhnye poverennye, 472 pomoshchniki) meaning that roughly 20% of the Moscow advokatura were subject to a disciplinary hearing as well.¹⁶³ Finally, in the 1902-3 Kharkov Bar, 30% of the district advokatura(135 complaints registered

¹⁶¹Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 295-296.

¹⁶²Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1901-1902, p. 116.

¹⁶³Otchet Soveta prisiazhnykh poverennykh okryga Moskovskoi Sudebnoi Palaty za 1901-1902 god., p. 12.

against a total of 454 advocates) were brought before the council for some sort of professional transgression.¹⁶⁴

Both Vas'kovskii and Gessen interpreted these high percentages as a symptom of the growing demoralization of the advokatura, though in fact, they could also be used in order to prove the opposite - that the councils were becoming more meticulous. Moreover, just because a complaint was filed against an advocate does not necessarily mean that he was guilty.¹⁶⁵ When one actually reviews the hundreds of cases brought before each council, one discovers that the overwhelming majority of these complaints were either very minor, unprovable, or completely unfounded, reflecting more on the client's misinterpretation of an advocate's responsibilities rather than any outright negligence. In a typical case, C. filed a complaint against sworn attorney N. stating that N. had failed to answer any of C.'s letters concerning C.'s right of poverty case. In the hearing, it was revealed that not only had N. answered C.'s letters, he had also informed C. of the hopelessness of his suit. Therefore, the St. Petersburg Council chose to dismiss the complaint.¹⁶⁶

Every annual Bar Report was littered with such cases. In any given year, several disputes were resolved privately before the hearing took place, thereby rendering the original complaint obsolete. Some complaints involved only minor disagreements, such as the return of various documents, while others were completely outside the jurisdiction of the council. Finally, in some cases, complaints involved inappropriate, but not necessarily negligent behaviour. In these instances, the council

¹⁶⁴Otchet Kharkovskago Soveta prisiazhnykh poverennykh za 1902-1903, p.10.

¹⁶⁵Vas'kovskii, "Advokatura," p. 269.; Gessen, Istoriia russkoi advokatury, 1: p.381.

¹⁶⁶Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1901-2, p. 120.

would inform the sworn attorney of his infringement but not impose any penalty. Thus, in one case, sworn attorney N. wrote a hostile letter to a former client which, the St. Petersburg Council ruled, was incompatible with the dignity of the profession. At the hearing, N. was informed of the inappropriateness of his letter but did not receive any formal penalty.¹⁶⁷

Once one has worked his way through these minor and unsubstantiated complaints, the next most common forms of punishment were warning and rebuke. These two penalties were regularly invoked if it could be proven that a prisiazhnyi poverennyi had either failed to return certain documents, proceeded with a case too slowly, ignored an appointed case, or demanded an excessive honorarium. Depending on the severity of the violation, an advocate could be suspended and even expelled for the above offences, although certain extenuating circumstances were taken into account. In a typical case, K. had retained pomoshchnik X. to conduct her divorce case and had paid X an advance honorarium of 200 roubles. After four months of waiting, K. eventually learned that X. had done nothing about her case, and therefore demanded the return of her money and assorted documents. When X. failed to do this, K. lodged a complaint. The St. Petersburg Council ruled that X. had no understanding of his professional duties but, taking into account his relative inexperience, suspended him for only one month.¹⁶⁸ Expulsion often involved repeat defenders. Sworn attorney X. had three disciplinary complaints brought against him. Not only had X. failed to attend any of the hearings, he refused to answer the repeated inquiries on the part of the Council as to why he never

¹⁶⁷Ibid., pp. 363-364.

¹⁶⁸Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1905-6, pp. 319-321.

showed up. Therefore, when all these separate charges were examined at once, and X. yet again failed to appear, the St. Petersburg Council voted to expel him from the advokatura.¹⁶⁹

In reality, where the councils were most vulnerable to attack was not over the total number of disciplinary cases but the consistency of the decisions. According to the St. Petersburg Council, a warning or rebuke were designed to be instructive, while a suspension or expulsion were, obviously, designed to be punitive. Both the overall gravity of the violation and the relative degree of conscientiousness displayed by an advocate were taken under consideration before the council imposed a verdict.¹⁷⁰ As some of the above examples have already shown, this criteria proved to be very malleable. One of the harshest critics of the Bar's disciplinary decisions was Gessen, who regularly highlighted the inconsistencies of the Moscow Council of the Bar's disciplinary decisions. Uniform sentencing did not exist, precedents were not cited, and clear violations were mildly reprimanded and sometimes went completely unpunished.¹⁷¹ Yet even worse, from Gessen's point of view, was the Kharkov Council, whose verdicts he quoted as examples of unsound decisions. "Sworn Attorney D. acted incorrectly. Taking into account that the incorrect activities of D. did not have any harmful consequences, the Council finds it just not to subject D. to any disciplinary action."¹⁷²

Beyond these arbitrary elements, there other forms of subterfuge which further eroded the councils disciplinary power. The Murav'ev Commission commented that suspensions were often delayed to coincide

¹⁶⁹Ibid., pp. 326-328. Expulsions were, however, very rare. Between 1866 and 1888, only 12 sworn attorneys were expelled from the St. Petersburg advokatura. See Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 49.

¹⁷⁰Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 280-281.

¹⁷¹Pravo, no. 4(1900), pp. 219-224.

¹⁷²Gessen, Istoriia russkoi advokatury, 1: p. 381.

with periods when the courts were closed and advocates were on vacation, thus limiting the potential impact of the original sentence.¹⁷³ Moskovskiiia Vedomosti also noted that expelled prisiazhnye poverennye continued to practice as prisiazhnye striapchie.¹⁷⁴ A similar situation existed in St. Petersburg until 1881, when the Council ruled that it would, from then on, inform the sudebnaia palata, the district court, the local courts, and the commercial courts of any suspension or expulsion.¹⁷⁵ How carefully the specific courts observed these disciplinary sentences, however, is unclear.¹⁷⁶ Undeniably, the inconsistencies in the Bar's disciplinary record and the failure to enforce absolute standards of behaviour all meant that the previously described professional ethics did not have the intended influence that was hoped. But as Pravo later argued, if the councils were absolutely guilty of anything, it was of being too honest. By publishing all these decisions - irrespective of whether or not the original complaint was justified - the Bar inevitably invited greater criticism upon itself.¹⁷⁷

As the above evidence suggests, therefore, there is no easy way to summarize the first forty years of the sworn advokatura's professional development. In Moscow, St. Petersburg, and Kharkov, the sworn advokatura was engaged in a seemingly permanent struggle for greater internal cohesion and external acceptance, neither of which were immediately forthcoming. Each regional Bar suffered, in varying degrees, from similar institutional problems: an isolated leadership, an alienated

¹⁷³Vysochaishe uchrezhdennaia. . . p. 139.

¹⁷⁴Moskovskiiia Vedomosti, no 261(September 21, 1904), p. 2.

¹⁷⁵Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 281-2.

¹⁷⁶ In 1900, the Ruling Senate concluded that suspended sworn attorneys still had the right to conduct up to three cases in the Justice of the Peace courts. See Pravo, no. 38(1900), pp. 1802-3.

¹⁷⁷Pravo, no. 13(March 23, 1903), pp. 914-915.

general assembly, an inchoate code of ethics, an ambivalent disciplinary record, a unresolved remuneration policy and an inadequate appointments programme. On top of these tribulations, there was the divisive debate within the soslovie over the admission of Jewish candidates to the prisiazhnye poverennye.

Yet at the same time, to say, in absolute terms, that the Russian advokatura failed to live up to expectations would be to deny the unique origins of the soslovie and the environment in which it functioned. Even if the advokatura was, to certain degree, responsible for its own internal stagnation, much of the adversity influencing its professional development was beyond its control, most notably the 1874 counter-reforms and the autocracy's refusal to enforce the advokatura's monopoly right. Moreover, it must also be emphasized that none of the problems facing the advokatura were unique to Russia (or the nineteenth century, for that matter), nor were they inevitably fatal. Finally, seemingly against all odds, the soslovie of prisiazhnye poverennye in Moscow, St. Petersburg, and Kharkov had managed to retain its corporate independence as well as a significant amount of its original authority - over discipline, admissions (with the exception of Jewish candidates), appointments - granted in the Judicial Reforms. No other occupation in pre-revolutionary Russia, one must add, possessed equivalent professional powers. The advokatura's closest counterpart - the medical profession - for example, still existed as a traditional Russian soslovie, without any independent corporate authority and under the direct control of the state.¹⁷⁸

¹⁷⁸Nancy Frieden, Russian Physicians in an Era of Reform and Revolution (Princeton, 1981), pp. 105-9.

Therefore, despite all the internal shortcomings, the Moscow, St. Petersburg, and Kharkov sworn advokatura was still developing broadly along the lines of a 'liberal' profession, and nowhere is both its impact and potential more clearly revealed than when one compares the soslovie of prisiazhnye poverennye in the above three cities with the soslovie of prisiazhnye poverennye in the rest of the empire. It must be remembered that as late as 1904, more than one-half of all sworn attorneys practiced in areas where there was no council and no general assembly. Indeed, the 1874 temporary stoppage on the formation of new councils left 10(out of 13) sudebnaia palatas and 67(out of 104) district courts without any independent council of the Bar.¹⁷⁹ Of all the external factors affecting the advokatura's professional development, this was undoubtedly the largest. How these sworn attorneys were governed, therefore, remains the final variable that must be examined before the advokatura's overall professional growth is assessed.

IV. THE DEVELOPMENT OF THE ADVOKATURA IN NON-COUNCIL REGIONS

The December 5, 1874 legislation temporarily suspending the formation of new councils and subordinating the local prisiazhnye poverennye to the district court has already been discussed. The implications of this decision, however, were without question catastrophic for the Russian advokatura. When the Murav'ev Commission reviewed the advokatura in cities without an established Bar(Warsaw, Kiev, Odessa, Kazan, Saratov, Vil'na, and Tiflis), it

¹⁷⁹E. Chernomordik, "Uchrezhdeniia zameniaiushchie sovety prisiazhnykh poverennykh," in Istoriia russkoi advokatury, ed. M. Gernet, 3 vols.(Moscow, 1914-1916), 3: p.16.

concluded that prisiazhnye poverennye in these districts were simply "a collection of separate people of one and the same occupation, [without] any definite links amongst each other. . ."180 The low prestige, accorded to the advokatura in Russia, was also often attributed to the failure to institute a Bar in every district. At the same time, it must be acknowledged that while the court acquired absolute control over the local advokatura, it gradually, and with varying degrees of success, sought to delegate some of its managerial duties to the profession itself. In several cities, committees - recognized by the district court and granted certain consultative powers - were formed by the local sworn attorneys. However, although substantial authority, at times, was transferred to these committees, they remained a poor substitute for a true, independent Bar.

The first such committee was created in Warsaw on October 16, 1876. The initiative for creating this committee came from the Warsaw District Court; in order to provide proper supervision, the court wanted to establish a direct means of communication between itself and the local sworn attorneys. This committee consisted of five members, including a chairman, elected by the soslovie, although the court reserved the right to select its own chairman if it so desired. Its responsibilities, however, were quite limited. They consisted of: 1) distributing the various pronouncements of the court amongst the sworn attorneys; and 2) gathering information about sworn attorneys and submitting it to the court so that the court could fulfil its function as a council. The committee was only allowed to communicate with the chairman, vice-chairman, and procurator of the district, as well as to its fellow sworn

¹⁸⁰Vysochaishe uchezhdennaia. . .p. 118.

attorneys. All other correspondence was forbidden. The court also examined all of the committee's records and reserved the right to shut down the committee at any time. In the end, the court would have to call on this authority much earlier than it anticipated. The committee, dissatisfied with its role as mere intermediary, quickly overstepped its boundaries and began to give its opinions on disciplinary cases and admissions to the soslovie. After six years of such interference, the Warsaw District Court decided to dissolve the committee, stating that the whole experiment had not produced a single practical benefit.¹⁸¹

The unfortunate experience of Warsaw was not shared by all other district courts. The Vil'na District Court, which formed the Vil'na Commission in 1887, was much more successful in delegating authority to the advokatura. This commission's duties were both broader and more defined than its Warsaw counterpart. They included: 1) informing all sworn attorneys and pomoshchniki of decisions made by the district court; 2) providing suggestions to the court which would help sworn attorneys meet their professional obligations; 3) gathering, at the request of the court, all information concerning a disciplinary hearing; 4) presenting the court its findings about people applying to become sworn attorneys or pomoshchniki; 5) the collection and preservation of papers and documents, relevant to the korporatsiia; 6) the presentation of a yearly report. In order to meet these obligations, the Vil'na Commission was also granted a significant amount of autonomy. Its chairman could only come from the soslovie. Its internal rules were not subject to confirmation by the court. The Commission could be summoned both by the court and at the request of one-third of all Vil'na sworn attorneys.

¹⁸¹Istoriia russkoi advokatury, 3: pp. 28-31.

And finally, the Commission not only supplied information about the candidates, it also gave its preliminary conclusion about their suitability.¹⁸²

The attempt, in other cities, to establish some sort of liaison between the district court and sworn attorneys usually fell somewhere between the two extremes of Warsaw and Vil'na. The Kiev District court first organized a commission of sworn attorneys in 1881. It consisted of three members, appointed by the court, specifically responsible for gathering information about candidates applying to the sworn profession. Although three local sworn attorneys initially agreed to accept these conditions, disapproval from their colleagues eventually led to their resignations.¹⁸³ A second attempt to establish a link occurred in 1896, and it was much more effective than its predecessor. The Chairman of the Kiev District Court recognized the administrative committee of the local konsul'tatsiia as the representative body of the Kiev sworn attorneys. Significant authority was then transferred to the committee. In disciplinary cases, the committee not only provided information but also its preliminary conclusions, which the court rarely overruled. It dealt with admissions to the sworn advokatura and, in practical terms, managed the appointment of advocates in right of poverty cases.¹⁸⁴

The turn of the century saw the formation of several other commissions: Kazan(1898), Saratov(1899), Tiflis(1900), and Baku(1900). Despite some initial triumphs, growing conflicts with the district court, as well as internal dissension, ultimately doomed several of these commissions. The Kazan Commission was closed in 1902 after the

¹⁸²Ibid., pp. 31-32.

¹⁸³Gessen, Istoriia russkoi advokatury, 1: p. 307.

¹⁸⁴Istoriia russkoi advokatury, 3: pp. 32-36.

chairman of the local district court tried to change its regulations, while both the Tiflis Commission and the Baku Commission were shut down in 1911. The most interesting aspect of these commissions, however, was that in a few of them the distinction between the sworn advokatura and other legal representatives was not observed. In Tiflis, pomoshchniki, as well as sworn attorneys, were able to participate in the commission as voting members, and in Baku, the commission included sworn attorneys, pomoshchniki, and private attorneys.¹⁸⁵

Yet in reality, all of the above efforts could not compensate for the absence of a true professional Bar. Despite some relative successes, these commissions remained absolutely dependent on the district court. It was the court, alone, which gave them their legitimacy and it was the court which reserved the right to dissolve them at any time. Without any true guarantee of independence, therefore, it is impossible to equate these commissions with the councils previously described. And as for the district court itself, it too, proved to be a poor substitute for a council of the Bar. To begin with, the courts had neither the time nor the inclination to carefully review applications to the prisiazhnye poverennye, resulting in the acceptance of many applicants who, at best, only met the formal requirements for the advokatura. The Kazan District Court continued to use the October 19, 1865 temporary regulations as its admission criteria, while there were other examples of people being accepted into the prisiazhnye poverennye without any legal education.¹⁸⁶ The labyrinth of district courts - each operating in isolation of each other - also meant that no rejection from the soslovie was absolute. If, for example, an applicant

¹⁸⁵Ibid., pp. 47-49.

¹⁸⁶Gessen, Istoriia russkoi advokatury, 1: p. 247; Spasovich, "Ob organizatsii advokatury," p. 2.

knew that X. district court would not accept him into the prisiazhnye poverennye, he could still apply to Y. district court within the same sudebnaia palata, and, once accepted, announce that he was moving to X. In such a situation, there was nothing X. district court could do to either remove him from the prisiazhnye poverennye or restrict his right to practice.¹⁸⁷

The failure of the court to properly manage the advokatura was manifested in other areas as well. In many respects, the district court was in an adversarial position vis-a-vis the Russian advokatura. It had no links with the advokatura's customs and habits, and its sympathies, inevitably, rested with their fellow magistrates. "The court," said V. Volodimirov, "did not consider itself under any obligation to worry about the honour and dignity of the advokatura because its attitude toward the soslovie, with each day, became more and more hostile."¹⁸⁸ This overt tension made an energetic defence much more difficult, since the court was often anxious to prove its dominance over the advokatura. In one celebrated case in Kiev, 26 prisiazhnye poverennye were brought before a disciplinary tribunal after they jointly complained about the conduct of one magistrate.¹⁸⁹ Without any corporate institutions to protect the independence and dignity of the local advokatura, sworn attorneys were simply seen as lackeys to the court, their profession viewed simply as a "means to existence."¹⁹⁰

Most conspicuous, however, was the district court's reluctance to assume its disciplinary obligations. Feeling both alien and hostile to the

¹⁸⁷Sudebnaia Gazeta, no. 20(May 16, 1904), pp. 1-2.

¹⁸⁸V. Volodimirov, "K voprosy ob otkrytii sovetov prisiazhnykh poverennykh," Zhurnal Grazhdanskago i Ugolovnago Prava, no.5(1881), p.124-5.

¹⁸⁹Ibid., p. 128.

¹⁹⁰Ibid., p. 133.

advokatura's corporate traditions - and already burdened by its own judicial responsibilities - the district court proved both unwilling and unable to provide proper supervision for the local advokatura. In order to emphasize this point, the Murev'ev Commission pointed to the small number of disciplinary hearings which took place in regions under district court control in comparison to those under council control. Between 1887-89, 32% of all sworn attorneys in regions where there was a council were brought before a disciplinary hearing, whereas in non-council areas, that number was 17%. Between 1891-95, this trend continued; 31.4% of all sworn attorneys appeared before a council disciplinary hearing, as opposed to 17.6% in non-council areas.¹⁹¹ In the absence of a council, sworn attorneys felt under no obligation to file disciplinary charges against their fellow attorneys.¹⁹² No code of ethics existed, and each district court developed their own regulations. This meant that in one region - the Caucasus - where there were 8 district courts, there were 8 sets of rules and regulations for the advokatura.¹⁹³ Such was the low level of professional supervision that, according to Karabchevskii, members of the aristocracy often sought out sworn attorneys from districts without a council because they were under fewer ethical restrictions.¹⁹⁴

The abdication of responsibility on the part of the district court was summarized by a sworn attorney in the Caucasus: "What, for example, had the courts done to facilitate an advocate's work, to establish the best relationship between the court and the advokatura, and vice versa? Absolutely nothing. Did any such links between the sworn advocate and

¹⁹¹Vysochaishe uchrezhdennaia. . .p. 122.

¹⁹²Volodimirov, "K voprosy ob otkrytii," p. 126.

¹⁹³A. Frenkel, "Polozhenie prisiashnoi advokatury na Kavkaze," Iuridicheskoe Obozrenie, no 21(August 20, 1881), p. 799.

¹⁹⁴N. Karabchevskii, Shto glaza moi videli, 2 vols.(Berlin, 1921), 2:p.16.

the courts really exist? Absolutely none."¹⁹⁵ Advocates in the Caucasus, as well as the rest of the empire, could only look with envy to the colleagues in Moscow, St. Petersburg, and Kharkov, where a recognized Bar had been created. "There, the sworn advokatura, having its own independent position and the support of the Bar, as well as being a genuine korporatsiia, linked by moral and intellectual ties, is strong."¹⁹⁶

There had, therefore, been a dramatic bifurcation in the advokatura's professional development, a schism which would have clear ramifications well into the Soviet period. In Moscow, St. Petersburg, and Kharkov, the soslovie of prisiazhnye poverennye was, despite certain internal and external impediments, broadly evolving along the 'liberal' profession ideal, whilst in the rest of Imperial Russia, the soslovie of prisiazhnye poverennye had been converted into a more conventional Russian estate - without any corporate identity and under the control of the state. Spasovich bluntly summarized the legacy of the December 5, 1874 legislation: "Where there is no Bar, there is no genuine advokatura, but only a false likeness."¹⁹⁷

The Murav'ev Commission, which published its report in 1897, represented the most comprehensive attempt to clear up the advokatura's ambiguous position, but it too, in the final analysis, was unable to resolve the fundamental contradictions within Russia's limited social vocabulary.¹⁹⁸ On the one hand, the Murav'ev Commission not only

¹⁹⁵"O nashei prisiazhnoi advokature," Iuridicheskoe Obozrenie, no. 20(August 13, 1881), p. 775.

¹⁹⁶A.Frenkel, "Polozhenie prisiazhnoi advokatury," p. 796.

¹⁹⁷Spasovich, Zastol'nye rechi, p. 72.

¹⁹⁸During the 1890's, there was not one but two government commissions which investigated the advokatura. The first commission, headed by the director of the First Department Krasovskii, submitted its conclusions in 1893 only to see the new Minister of Justice - Murav'ev - form his own commission. The latter's official report, however - although published in 1897 - was not submitted to the State Council until 1904, and

called for the nationwide introduction of the Bar (albeit with a few unspecified exceptions),¹⁹⁹ it also worked out a complicated formula which numerically defined when the advokatura's monopoly right - in a particular region - would be implemented.²⁰⁰ In addition, the Commission recommended expanding the Bar's control over the pomoshchniki and more precisely defined the distinction between the prisiazhnye poverennye and the chastnye poverennye.

Yet paradoxically, while increasing the corporate rights of the soslovie, the Murav'ev Commission also increased the level of state control. Henceforth, each Bar Council would have to inform the local procurator of all applications to the prisiazhnye poverennye, so that the procurator could provide any information which might preclude a candidate's acceptance into the estate.²⁰¹ The procurator was also given the right to protest any Bar Council election if he thought some impropriety had occurred.²⁰² Finally, the Murav'ev Commission imposed a 10% limit on the number of Jewish prisiazhnye poverennye who could be members of any regional Bar, and ruled that no Jewish sworn attorney could be

therefore, because of political events, it was never seriously considered. See Gessen, Istoriia russkoi advokatury, 1: pp. 335-6.

¹⁹⁹Vysochaishe uchrezhdennaia, pp. 66, 117-123.

²⁰⁰Ibid., pp. 79-80, 184-195. In any city, where the sudebnaia palata was not located, the advokatura's monopoly right would be enforced whenever the number of prisiazhnye poverennye was double the number of district court judges. If the sudebnaia palata was located in the city, then the number of sworn attorneys would have to be double the number of district court and sudebnaia palata judges. For Moscow and St. Petersburg, the target number of sworn attorneys was raised by 50 and 100 respectively over the combined number of district court and sudebnaia palata judges. According to this formula, the Murav'ev Commission concluded that 59 regions had less than the required number of sworn attorneys, 4 regions had the exact amount and 29 regions had more than enough advocates in order to enforce the monopoly right.

²⁰¹Ibid., pp. 69, 133.

²⁰²Ibid., pp. 68, 129.

elected either chairman or vice-chairman of the Bar Council.²⁰³ Like so many other Tsarist commissions, the suggestions of the Murav'ev Commission would never be implemented, but nevertheless, its report reveals just how difficult it was to resolve the advokatura's ambiguous position.

Only in 1904 was the December 5, 1874 legislation finally rescinded and new Bar Councils formed in Novocherkassk, Odessa, Saratov, and Kazan. Not surprisingly, several of the above Councils turned to St. Petersburg Council for advice requesting, for example, information on how St. Petersburg organized the pomoshchniki.²⁰⁴ 1906 saw a Bar formed in Irkutsk and Omsk, but then, once again, the implementation of new Bars was suspended, leaving several major legal centres- Vil'na, Kiev, Tiflis, Tashkent, and Warsaw - still without an independent advokatura. Kiev finally formed a Bar in 1916, but it appears that the other cities remained without a Bar at least until the end of the Tsarist period. The longterm damage of the December 4, 1874 'temporary' legislation, therefore, was immeasurable. "Future historians of the reform courts," Vestnik Evropy commented in 1904, "will have difficulty explaining why a procedure, established by law and inviolable, with doubtless advantage for commerce, which had operated in three judicial districts, was not applied for so long to all the other [districts], even with absolutely identical situations and conditions."²⁰⁵

²⁰³Ibid., pp. 66-7. In 1901, the St. Petersburg Bar Council issued its own counter-proposal in which it removed all of the above restrictions on Jewish prisiazhnye poverennye and refused to recognize the added supervisory functions of the procurator. See Zamechaniia prisiazhnykh poverennykh okruga S.-Peterburgskoi Sudebnoi Palaty po proektu novoi redaktsii Uchrezhdeniia Sudebnykh Ustanovlenii (St. Petersburg, 1901), pp. 10-14, 29, 34-5.

²⁰⁴Otchet Soveta prisiazhnykh poverennykh pri. S. Peterburgskoi Sudebnoi Palate za 1905-6, p. 39.

²⁰⁵Vestnik Evropy, no. 9(1904), p. 329.

Therefore, if one is to talk about the professional development of the Russian prisiazhnye poverennye, one must carefully delineate between the soslovie in Moscow, St. Petersburg, and Kharkov and the soslovie in the rest of the Russian Empire. Despite strong regional differences, only Moscow, St. Petersburg, and Kharkov possessed the institutions - a general assembly and a Bar Council - which allowed for true professional development. As we have already seen, internal corporate solidarity and external professional recognition was not achieved overnight, but in light of the December 5, 1874 legislation, the position of the advokatura in these three cities was still far superior to anywhere else in the Empire. In reality, outside Moscow, St. Petersburg, and Kharkov, the advokatura's professional development was retarded by some 40 years.

CHAPTER THREE: THE PRACTICE OF LAW

I. THE RUSSIAN LEGAL SYSTEM

Any attempt to analyze the private legal practices of Russia's sworn attorneys must be predicated by a brief discussion of the legal system in which they operated. Finding a neutral point of reference in which to begin such a study, however, is an almost impossible task. In light of Russia's pre-1864 legal system, and in light of what was to occur after 1917, one can naturally appreciate why so many commentators see the years between 1864 and 1917 as ones of great promise, as the beginnings - despite obvious set-backs - of a genuine Russian legal culture. The numerous memoirs and articles, written by eminent ex-Tsarist court officials (judges, jurists, advocates) confirm that significant progress was made during these years. Waclaw Lednicki, a leading Moscow sworn attorney of Polish extraction, spoke for many when he stated that on the eve of the twentieth century, Russia had become "a law-abiding state. . . While criticism of the Russian autocratic system as such is well-founded yet obedience to law did exist there, and not only in theory; it had become an efficient and effective factor in Russian life."¹ O. O. Gruzenberg, one of pre-revolutionary Russia's greatest criminal lawyers, spoke in glowing terms about his fellow jurists:

Certainly one does not need to be ashamed of the legal profession that existed in Petersburg, Moscow, or Russia as a whole. What a pity that the names of the principal creators of the Russian legal profession, whom I encountered while they were still alive, are gradually fading into oblivion. They should be impressed in the memory of society, as should the fact that in a country where, as Alsakov remarked, only silence could be

¹ Andrzej Walicki, Legal Philosophies of Russian Liberalism (Oxford, 1987), p. 103.

heard and speaking in public was like committing a public indecency, exemplary legal discourse developed quickly.²

Such favourable reminiscences gain further credibility when one considers the unparalleled expansion that occurred within the Russian legal system after the Judicial Reforms were introduced. Over the span of fifty years(1864-1914), Russian experienced what can only be called a legal explosion, an unprecedented period of growth which, in terms of absolute numbers, was truly impressive. In 1871, for example, each Justice of the Peace heard, on average, 262 cases per year; by 1912, that number had increased to 1180. In the district courts, the total number of criminal cases increased from 5,274 in 1867 to 524, 563 in 1912, while during the same period, the number of civil cases increased from 16, 122(worth a total value of approximately 27 million roubles) to 147, 766(worth a total value of approximately 150 million roubles).³

But does the rapid expansion of the Russian legal system - and the rise of prominent judges, jurists, and advocates - symbolize the gradual transformation of Imperial Russia into a state based on the rule of law, with strong, independent judicial institutions? A definitive answer to such a question is impossible to make, for within Imperial Russia's overall legal development, one can isolate both positive and negative trends. Nevertheless, if one were to focus on those commentators, who wrote during the actual lifetime of the Judicial Reforms, as opposed to those former court officials, who wrote largely in exile, one would have to conclude that the answer was no, that ultimately for every one step forward there were two steps backward. Having itself been subjected to

²O.O. Gruzenberg, Yesterday: Memoirs of a Russian Jewish Lawyer. Trans. by D. Rawson, and T. Tipton(Berkeley, 1981), p. 39.

³E. Tarnovskii, "Statisticheskiiia svedeniia o deiatel'nosti sudebnykh ustanovlenii, obrazovannykh po Ustavam Imperatora Aleksandra II, za 1866 - 1912 gody," Sudebnye Ustavy 20 Noiabria 1864 g. za piat'desiat let(Petrograd, 1914) pp. 337-374.

numerous counter-reforms, the advokatura was in an unique position to appreciate the impact of the other measures directed against the original Judicial Reforms of 1864 (the creation of the land captains, the transfer of politically sensitive cases from the general to the military courts, etc.). As early as 1880, Spasovich declared that "the Judicial Reforms were decrepit and in shreds."⁴ Nine years later, Spasovich bemoaned the fact that due to Russia's ethnographic make-up, no one region seemed capable of accepting the Judicial Reforms as a whole. Instead the Judicial Reforms had been "introduced slowly and in bits and pieces, with features which undermined it."⁵ These deviations, Spasovich added, "had been converted into a general rule" further distorting the intent of the Judicial Reforms.⁶

Therefore, the net effect of all the counter reforms, imposed by the autocracy, was to vitiate and devalue the Judicial Reforms of 1864. Furthermore, on a practical level - where most people came face to face with the Russian legal system - one finds even more disarray and confusion. Civil cases were known to drag on for years, long delays were the norm, judges were overwhelmed. Gruzenberg described the gruelling life of a magistrate:

Their(the judges') salary was miserable, however. In addition, the work was extremely laborious. No judge dreamed of an eight-hour working day. He put in at least fourteen hours, and frequently eighteen. In criminal cases being tried before a jury, court was recessed only after midnight, in order to reduce the number of times the jury had to stay overnight in the court building. Upon returning home, the judges still had the task of checking the records of the proceedings and drawing up the verdicts in their final form.

It was no easier in the civil cases. The courts in the capital frequently sat until two or three o'clock. When the judges

⁴Spasovich, Zastol'nye rechi, p. 24.

⁵Ibid., p. 51.

⁶Ibid., p. 51.

returned home, there was the same bother with the records of the proceedings and an even more difficult and complicated statement of the rationale involved in a decision.⁷

At the centre of the problem was Russia's antiquated civil and criminal codes - the backbone of any legal system - which were littered with contradictions and inconsistencies dating back to the pre-reform era. In the well-known essay "Defense of Law," B. Kistyakovsky berated the current state of Russian civil law. "When people talk about the instability of our civil legal system, they usually point out the defectiveness of our property law. And in fact, our civil code is archaic, we have no commercial code at all, and certain other spheres of civil law go almost unregulated by precise norms of written law."⁸ L.P. Rastorguev, a Kharkov sworn attorney who for political reasons, found himself living in England, wrote of the legal difficulties foreign corporations faced in Russia. The law on companies, which had been issued in 1836, was "incomplete and confused and quite inadequate to meet all the requirements of the enormous modern development of this form of commercial undertaking."⁹ Rastorguev went to quote a special commission, which, in 1872, had examined the state of company law and concluded that: "Company law exists only on paper and in reality there is no company law"; and again, 'No attention is paid to the law when anyone wishes to form a Company.'¹⁰ Our civil law, concluded Borodin on the

⁷Gruzenberg, *Yesterday*, p. 36.

⁸B. Kistyakovsky, "Defense of Law," in B. Shragin and A. Todd(ed.), Landmarks: A Collection of Essays of the Russian Intelligentsia. Trans. by .M, Schwartz(New York, 1977), p. 134.

⁹L.P. Rastorgoeff, The Legal Position of English Companies in Russia(London, 1911), p. 2

¹⁰Ibid., p. 5.

50th anniversary of the Judicial Reforms, "does not answer the demands nor conditions of life"¹¹

Naturally, Russia's retrograde civil and criminal codes had a detrimental impact on the legal system as a whole. What was allowed by the courts one day was denied the next. Legitimate cases were often rejected because they did not come under the jurisdiction of Russia's outdated civil code. Just trying to determine what the law was on a specific issued proved to be extremely difficult. There was no clear distinction, for example, between formal laws and administrative orders; thus anyone who searched for a statute, wrote E. Berendts, had to sift through "a series of administrative orders which in essence were temporary and disagree with the other norms. . ."¹² A similar labyrinth confronted anyone who had to consult the criminal code, and in many ways, Russia's criminal law was even more discredited than her civil law

¹¹D. Borodin, Istoricheskii ocherk russkoi advokatury(Petrograd, 1915), p.77. The soslovie system proved to be an insurmountable obstacle to any reform of Russia's obsolete civil codes. As Thomas Owen has shown, the inevitable byproducts of a modern system of corporate law - stock markets, unrestricted incorporation, free enterprise - would have had disastrous consequences for the autocracy, for they would have sped up the demise of the dvorianstvo while simultaneously freeing all the other social estates and ethnic groups which the autocracy were trying to control, most notably the Jews. Such a result, of course, was unacceptable, and each reform commission, set up to examine the question of corporate law, was never able to overcome this fundamental obstacle. Indeed, between 1912 - 13, Russian corporate law took a giant step backwards when the autocracy chose to increase the economic restrictions on foreigners, Poles and especially Jews. See Thomas Owen, "Four Episodes of Corporate Law Reform in the Russian Empire: 1836 - 1914," Research in Economic History(London, 1988)pp. 277-99. William Wagner deals with the deficiencies in Russian family and property law, as well as with the various attempts, within the bureaucracy, to reform it. See William Wagner, "The Trojan Mare," in O. Crisp and L. Edmondson(ed.), Civil Rights in Imperial Russia(Oxford, 1989), pp. 65 - 84.; William Wagner, "Legislative Reform of Inheritance in Russia," in W. Butler(ed.), Russian Law: Historical and Political Perspectives(Leyden, 1977), pp. 143-178. Professor Wagner has also kindly loaned me a copy of his manuscript, In Pursuit of Orderly Change: Law, Marriage and Property in Late Imperial Russia. For a brief evaluation of the various reform commissions and their largely inconclusive results, see also I. Gessen, V dvykh vekakh(Berlin, 1937) pp. 158-9.; Wortman, The Development of a Russian Legal Consciousness, pp. 287-8.

¹²E. Berendts, Sviaz sudebnoi reformy s drugimi reformami Imperatora Aleksandra II i vliianie eia na gosudarstvennyi i obshchestvennyi byt Rossii(Petrograd, 1915), p. 122. (These two essays can also be found in Sudebnye Ustavy za piat'desiat let)

because so many people blamed the new criminal procedures, including juries, advocates, and glasnost, for Russia's dramatic rise in crime after 1866.¹³

The random, disorganized state of Russia's civil and criminal law was, according to Kistyakovsky, an accurate reflection of Russia's underdeveloped legal consciousness: "The broad strata of Russian society lack both a true understanding of the court as well as respect for it. ."¹⁴ Kistyakovsky went on to focus much of his opprobrium on the Russian intelligentsia. "Our public consciousness," he wrote, "never advanced any ideal of the legal individual.. Both sides of this ideal, the individual disciplined by law and by a stable legal order and the individual accorded all rights and making free use of them, are alien to our intelligentsia's consciousness."¹⁵ Other commentators pointed to more general flaws in the Russian character. Berendts, for example, claimed that Russians suffered from an excess of idealism. "These eternal searches for unrealizable ideals, for the best, the fullest truth, compels a Russian man to treat sceptically - and even with a certain amount of suspicion - those written norms, which are created by men, even if they are very powerful."¹⁶ When one takes the above picture of Russia's legal consciousness and adds to it the prevailing legal attitudes of the countryside - which remained under peasant customary law and where, according to one source, 80% of the population was without any understanding of formal law - one can appreciate why so many commentators remained fundamentally pessimistic about Russia's future

¹³Ibid., pp. 156-7, 172.

¹⁴Kistyakovsky, "Defense of Law," p. 135.

¹⁵Ibid., p. 118. For a summary of the intelligentsia's anti-legalistic attitudes, see Walicki, Legal Philosophies, pp. 9-104.

¹⁶Berendts, Sviaz sudebnoi reformy, p. 121.

legal development.¹⁷ "We are obviously going backwards," despaired Spasovich in 1881, "against law and legality."¹⁸

And yet, at the same time, the glowing reminiscences of Russia's post- 1864 legal system cannot be dismissed as mere aberrations. Even in their stripped down forms, Russia's judicial institutions - the offspring of the Judicial Reforms of 1864 - continued to hold both practical and symbolic significance. On the fortieth anniversary of the Judicial Reforms, Ruskaia Mysl' noted that despite all the counter-reforms, the autocracy had not managed to destroy "the basis of the new court" nor the "living spirit" inherent in the Judicial Reforms.¹⁹ There is a certain degree of truth in this assessment, and as recent research has shown, one should not be too quick to condemn the Judicial Reforms to oblivion. Bill Wagner's authoritative study of the Civil Cassation Department, Russia's highest court, has shown that where legislation was lacking, the courts stepped in and with some success updated Russia's property law, thereby making it more responsive to the social and economic needs of late nineteenth, early twentieth century Russia.²⁰ And despite the numerous counter-reforms, the new legal system continued to represent a major threat to the autocracy's absolute authority and indeed, to its very sense of legitimacy. "The independent courts," writes Richard Wortman, "defended standards of legality that the autocrat, in the midst of a bitter political struggle, could not observe."²¹ Therefore, by subtle, less overt

¹⁷M. Levitskii, "K voprosu o iuridicheskoi bezpomoshchnosti nashego naseleniia," Sudebnaia Gazeta, no. 26(June 27, 1904), p. 7.

¹⁸Spasovich, Zastol'nye rechi, p. 29.

¹⁹Ruskaia Mysl', no. 1(1905), p. 95.

²⁰William Wagner, "The Civil Cassation Department of the Senate as an Instrument of Progressive Reform in Post-Emancipation Russia: The Case of Property and Inheritance Law," Slavic Review, no. 1(1983), pp. 36-58.

²¹Wortman, The Development of a Russian Legal Consciousness, p. 288.

means, the Judicial Reforms slowly weaved their way into the fabric of Russian society.

The unfortunate reality, however, surrounding Russia's legal evolution was that although the long-term potential of the Judicial Reforms remained partially intact, its immediate failures were also painfully self-evident. Through the shell-like surface of the new legal system, wrote Russkoe Bogatstvo in another fortieth anniversary review, one could still clearly see "features of the old, seemingly long-buried pre-reform past," while Mir Bozhii added that the "the past forty year experience, and its practical results, gives only more proof that true justice is unthinkable without the corresponding political institutions."²² Ten years later, on the fiftieth anniversary of the Judicial Reforms, there was still little reason for optimism. E. Berendts concluded that although Judicial Reforms had undoubtedly strengthened the principle of legality in Russia, its influence had not been either "as deep or as broad" as the creators of the Judicial Reforms had originally intended.²³ Therefore, if one is to understand how sworn attorneys practiced law, one must not divorce the advokatura from the environment in which it developed. For 50 years, the advokatura not only had to confront a hostile autocracy, it also had to deal with an unstable, broken down legal system and a retarded legal consciousness.

²²Russkoe Bogatstvo, no. 11(1904), p. 258.; Mir Bozhii, no. 12(1904), p. 96.

²³Berendts, Sviaz sudebnoi reformy, p. 120.

II. MEMBERSHIP OF THE BAR

A. Family Background

With the exception of the growing predominance of Jews amongst sworn attorneys, no statistical information exists concerning the general social origins of the prisiazhnye poverennye. Any group portrait of the soslovie, therefore, is by necessity highly impressionistic. Nevertheless, by looking at the family histories of some of Russia's more renowned advocates, one discovers that the vast majority came from the middle ranks of society. Prince Urusov - a distinguished sworn attorney in the early years of the St. Petersburg Bar - was obviously a member of the nobility, but he was the only noteworthy advocate with aristocratic connections. Karabchevskii, one of the most accomplished criminal lawyers in the history of the sworn advokatura, was the son of a Crimean Police Chief. Alexandrov, the defender in the notorious Vera Zasulich trial, was the son of a priest, while Passover, Russia's greatest civil lawyer, was the son of an army doctor. A further examination confirms the relatively humble origins of the advokatura. Gruzenberg's father was a merchant. Stasov's father was an architect. Andreevskii - the 'poet amongst jurists' - was the son of a civil servant. Kerensky was the son of a school inspector. Although obviously the above list cannot be taken as true representative sample, it does correspond to the overall impression that one gets from reading about the sworn advokatura, that its members came predominantly from modest, less privileged families.²⁴ Indeed,

²⁴This observation is not only confirmed by the high percentage of Jews in the soslovie but also by the fact that the sworn advokatura came predominantly from the universities, not from the elite secondary schools. Of the 364 sworn attorneys, whose academic records were included in the 75th anniversary report of the St. Petersburg Commercial Courts, only 13(3.5%) were graduates of the School of Jurisprudence, while

judging from the financial difficulties, experienced by many novice attorneys-in-training, one could also add that on the whole, the prisiazhnye poverennye did not come from particularly wealthy families.

B. The Personal Finances of Sworn Attorneys

In comparison to Russia's other emerging professions, the sworn advokatura was a highly profitable profession in which to belong. Naturally, one's income depended on the size of one's practice as well as the overall wealth of one's clientele. According to Boris Gershun, a prominent St. Petersburg advocate, there were basically three categories of sworn attorneys: a small elite at the top of the soslovie with extensive practices and guaranteed incomes, a middle group, which was quite well-off, and a large contingent with relatively small practices.²⁵ Even a modest practice, however, provided a good living. According to a survey of 3,768 advocates, conducted at the turn of the century, 2900(77%) earned between 2000 and 5000 roubles; 770(20.4%) earned between 5000 and 10,000 roubles; 94(2.5%) made between 10,00 and 20,000 roubles; and 4(.1%) earned between 20,000 and 50,000 roubles.²⁶ In order to put these earnings in their proper perspective, one should note that the annual average income

7(2%) were graduates of the Demidov Judicial Lycee, 2 were graduates of the Military Judicial Academy and 1 sworn attorney was a graduate of the Alexandrine Lycee. Thus, 93.6% of the 364 sworn attorneys, included in this report, had studied at university, and two-thirds(247/364) were graduates of St. Petersburg University. See Ocherk istorii S-Peterburgskago Kommercheskago Suda, 1833-1908(St. Petersburg, 1908), pp. 99-219. A similar phenomenon was observed among the St. Petersburg pomoshchniki. In a 1892 survey of 214 attorneys-in-training, only 5 (3 from the School of Jurisprudence, 2 from the Military Judicial Academy) were not graduates from university. See Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1891-92, p. 26.

²⁵B. Gershun, "Vospominaniia advokata," Novyi Zhurnal, no. 43(1955), p. 135.

²⁶V. R. Leikina-Svirskaiia, Intelligentsiia v Rossii vo vtoroi polovine 19ovo veka(Moscow, 1971), p. 90.

for a doctor during this period was between 500 and 3000 roubles per year, and many physicians had to hold down more than one appointment just to procure this modest salary.²⁷ The incomes of sworn attorneys also compared favourably to those in state service, where more than one half of all civil servants earned less than 2000 roubles.²⁸ And when one contrasts the average wage of a teacher(180 - 400 roubles per year) or a labourer(180 - 360 roubles per year) with that of a sworn attorney, one is only left to conclude that despite the highly competitive nature of legal practice, most sworn attorneys were well compensated for their services.²⁹

And yet, at the same time, sworn attorneys - and especially their families - were particularly vulnerable to any sort of unexpected personal disaster. A sudden illness could leave a sworn attorney financially ruined, and if he died, his family could be left destitute, sometimes without even enough money to provide for a proper burial. In order to provide some kind of safety net, numerous attempts were made both in Moscow and St. Petersburg to organize pension plans and emergency aid funds. In Moscow, there were two such relief funds: the Liutera-Grave Mutual Aid Fund(Vspomogatel'naia kassa) and the Markov Temporary Mutual Aid Fund. The Liutera-Grave Mutual Aid Fund - open to both sworn attorneys and attorneys-in-training - was founded in 1877, with the aim to help both old and sick members of the estate as well as to render financial assistance to families of deceased sworn attorneys. The fund was not, however, officially attached to the Moscow Bar; instead, it was an independent organization and relied primarily on voluntary contributions. Initially, there were 35 members of the Liutera-Grave Fund

²⁷N. Frieden, Russian Physicians in an Era of Reform and Revolution, 1856-1905(Princeton, 1981), pp. 213-15.

²⁸L. Ermin, Intelligentsiia v pervoi russkoi revoliutsii(Moscow, 1966), p. 27.

²⁹Frieden, Russian Physicians, p. 217.

and by 1878, the membership had increased to 75. From this high water mark, however, the number of participants steadily decreased (1882 - 58 members; 1889 - 46 members; 1905 - 39 members; 1910 - 30 members). Despite its declining membership rolls, however, the financial capital of the fund continued to grow, from 5489 roubles in 1878 to 59,741 roubles in 1914, although there were accusations that the fund's resources had been exaggerated by its managers. Widows were the most frequent beneficiaries of the fund, although the average annual pension was just 180 roubles per year.³⁰

The second relief association in Moscow - the Markov Temporary Mutual Aid Fund - was founded in 1894, this time under the direct control of the Moscow Bar Council. A more permanent fund was envisioned - hence the 'temporary' moniker - but in the end, the Markov Fund stayed in business until 1912. After much internal debate, it was decided that contributions to the fund would be solicited on a voluntary basis and earmarked to assist all needy sworn attorneys, their families and other dependents. Requests for aid were submitted by individual sworn attorneys, but the fund also reserved the right to offer financial assistance to poverty-stricken advocates, even if they did not personally apply for such aid. For much of its eighteen year existence, however, the Markov fund was plagued by financial troubles. The average annual contribution decreased from 12.05 roubles per person in 1893-4 to just 5.88 roubles per person in 1900 and 3.88 roubles per person in 1904. While receipts steadily declined, the amount of economic aid remained relatively stable, usually fluctuating between 2000 and 2500 roubles per year. The Markov Temporary Mutual Aid Fund was finally disbanded in 1912, its

³⁰P. Vsesviatskii, "Organizatsiia soslovnoi vzaimopomoshchi," in Istoriia russkoi advokatury, ed. M. Gernet, 3 vols. (Moscow, 1914-16), pp. 328-34.

continued financial difficulties a testimony, according to P. Vsesviatskii, to the indifference of Moscow sworn attorneys towards the problems of the estate.³¹

Far greater success was enjoyed by the St. Petersburg Assistance Fund, which was founded in 1873 under the auspices of the St. Petersburg Bar Council. Its objectives were identical to that of its Moscow counterparts - to help needy advocates and their families. Contributions to the St. Petersburg Assistance Fund, however, were mandatory, although the sworn attorney himself selected how much (50, 25, 10, or 5 roubles) he could afford to give and at least initially, there was no penalty for failing to make a donation. Not surprisingly, the St. Petersburg fund quickly fell into arrears, prompting the Bar Council in 1883 to introduce disciplinary sanctions against non-paying advocates, a decision which quickly restored the fund's financial health. No formal rules governed how grants were distributed; thus sworn attorneys, who either had failed to contribute to fund or had transferred to state service, remained eligible for awards simply by virtue of the fact that they were or had been members of the estate. All grants were decided by the St. Petersburg Bar Council, either at the request of a sworn attorney or on the Council's own initiative. In extreme emergencies, a Bar Council member could immediately loan up to 100 roubles to a needy sworn attorney as long as he gave a report of his actions at the next Bar Council meeting. Between 1872-88, approximately 10 people received a grant every year, ranging from 50 to 1000 roubles, and during these same 16 years, the capital of the St.

³¹*Ibid.*, pp. 334-43. One should note that in 1900, work was begun on a proposal that would have led to the introduction of a voluntary pension scheme for Moscow sworn attorneys. After much research and debate, the Bar Council finally submitted a plan to the chairman of the Moscow *Sudebnaia Palata* in 1912. The chairman later informed the the Bar Council, however, that the proposal had not been approved by the Minister of Justice. See Gernet, *Istoriia russkoi advokatury*, 3: pp. 352-381.

Petersburg Assistance Fund steadily increased, from 5818 roubles to 18,847 roubles. By 1899, the fund's capital had further increased to 52,000 roubles and by 1914, to 114,346 roubles.³² In addition to the above fund, there was also the St. Petersburg Mutual Aid Fund, commonly known as the Bubnov-Planson Fund, which served as a pension scheme for those sworn attorneys who chose to join it.³³

C. The Growth of the Profession

Without question, the long-term success of the Judicial Reforms depended on there being enough sworn attorneys to meet the demands of the Russian people. From 1886 onwards (the first year of complete statistics), there was a steady increase in the total number of sworn attorneys: 1886 - 1617; 1890 - 1830; 1895 - 2149; 1900 - 2656; 1905 - 3709; 1910 - 4940. The profession's annual rate of growth, however, was much more uneven than has been originally presumed. After a very fast start, the years 1881 - 1895 witnessed a period of limited expansion, especially in Moscow, where the average yearly increase never got above 2%. Nationwide, the soslovie grew at an annual rate of just 2.6% between 1886-90 and 3.5% between 1891-5. This overall sluggishness was mainly attributable to the numerous counter-reforms imposed by the autocracy. Outside the first ten years, the soslovie's most intensive period of expansion was between 1901-1905, when the prisiazhnye poverennye grew at an annual rate of 7.9%.³⁴ This increase was largely the result of the autocracy's decision to re-admit Jewish attorneys-in-training to the rank of prisiazhnyi poverennyi.

³²Ibid., pp. 383-95.

³³Ibid., pp. 395-410.

³⁴Istoriia russkoi advokatury, 2: p. 11.

But did the numerical progress of the advokatura, uneven as it was, keep pace with Russia's growing demand for legal advice? On this question, the evidence appears quite conclusive; the sworn advokatura's expansion was neither fast enough nor broad enough to satisfy the ever-increasing needs of Russian society. Instead, advocates were disproportionately located in urban areas and European Russia, leaving rural districts, Central Asia, and Western Siberia largely in the hands of underground advocates. This uneven distribution can be seen on several levels. To begin with, there was an excessive concentration of sworn attorneys in Russia's two major legal districts - St. Petersburg and Moscow. For the most part, this was understandable, for as the political and economic centres of Imperial Russia, it was only natural that advocates would be attracted to these two cities. By 1910, the Moscow district had 25.8% of all Russia's sworn attorneys and attorneys-in-training, but only 14.3% of the population and only 13.2% of all criminal and civil cases. A similar disparity was noted in St. Petersburg, which in 1910 had 19.8% of all sworn attorneys and attorneys-in-training but only 6.7% of the population and 8.4% of all judicial cases. This heavy concentration of advocates in these two districts meant that on a strict proportional basis, Russia's other districts (with the exception of Warsaw) were underrepresented.³⁵

But even these figures are deceiving, since sworn attorneys were concentrated in a district's major urban areas and often in the city where the district's highest court, the sudebnaia palata, operated. In 1897, 58% of all sworn attorneys lived in the city where the sudebnaia palata was located, and in several regions, this percentage was much higher. In the Moscow district, for example, 79.5% of all sworn attorneys and attorneys-

³⁵ibid., p. 36.

in-training lived in Moscow proper while in the St. Petersburg district, 70.3% of all sworn attorneys and attorneys-in-training lived in the city of St. Petersburg.³⁶ This meant, in numerical terms, that in St Petersburg, there was one advocate per 3900 people, but in the rest of the district, there was only one advocate per 29, 200 people. A similar phenomenon existed in the Moscow district, where there was one advocate per 4700 people in Moscow proper but one advocate per 120, 500 people over the rest of the district.³⁷ Despite these poor ratios, the longterm trends were moving in the right direction; between 1897 and 1910, the average ratio of number of people per advocate decreased from one advocate per 29, 800 people to one advocate per 17, 900 people, an impressive reduction.³⁸ Nevertheless, the creation of chastnye poverennye and the continued persistence of the underground advokatura were just two of the most obvious manifestations of the sworn profession's failure to meet the growing need for legal advice.

We have already mentioned in Chapter 2 that there were two potential paths to the prisiazhnye poverennye - state service and the pomoshchniki. Gradually, the pomoshchniki became the dominant route; depending on the region, only approximately 15-25 % of all future sworn attorneys came from state service by the year 1900.³⁹ What is particularly interesting, however, is to look at the reverse flow - prisiazhnye poverennye to state service - for it does tend to highlight the advokatura's relative isolation from the rest of the Russian legal profession and especially the judiciary. Between 1870 and 1910, the percentage of all prisiazhnye poverennye, who annually chose to leave the

³⁶ *Ibid.*, p. 38.

³⁷ *Ibid.*, p. 42.

³⁸ *Ibid.*, p. 49. During the same period, England had one lawyer for every 1684 people. See Huskey, *Russian Lawyers*, p. 18.

³⁹ *Istoriia russkoi advokatury*, 2: pp. 15-26.

sworn advokatura (not including those who died) to either enter state service or pursue some other career, was quite small - 2.9% in St. Petersburg, 1.6% in Moscow.⁴⁰ Indeed, the latter category (sworn attorneys, who chose to pursue another career) naturally inflates the true percentage of those sworn attorneys who opted to return to state service, although by how much is impossible to say. Nevertheless, even if one takes the given figures, one can begin to appreciate how limited the direct links between the sworn advokatura and the other branches of the Russian legal profession actually were.

Many commentators considered the professional segregation of the advokatura to be, to a certain degree, unnatural. "Instead of being the nursery for future magistrates," Spasovich argued, "our soslovie became a mass refuge, a kind of asylum . . ." ⁴¹ A few advocates did become magistrates although one of the most famous sworn attorneys to make this transition - A.L. Borovikovskii - was specifically signalled out by I.V. Gessen for his incompetence.⁴² Vas'kovskii saw the advokatura's professional isolation as a major liability; in countries, where advocates regularly served as procurators and magistrates, advocates were not simply concerned with "financial profits and are encouraged to fulfil their duties honestly," whereas in Russia, where sworn attorneys had no real

⁴⁰Ibid., pp. 19, 23.

⁴¹Spasovich, Zastol'nye rechi, p. 4.

⁴²Borovikovskii was first an assistant procurator before he transferred to the St. Petersburg prisiazhnye poverennye. He became quite famous for defending a millionaire in an arson case and receiving a 5000 rouble honorarium for his efforts, an excessive fee which so outraged the local population that he even offered to return it. Soon afterwards, Borovikovskii returned to the magistracy as a member of the Odessa Sudebnaia Palata as well as a privat dotsent (lecturer) in civil procedure. During his tenure as a judge, Borovikovskii wrote Otchet sud'i, where he introduced his theory of judicial conscience (sudeiskaia sovest) - that a judge should be allowed to use his personal discretion to overrule what he perceived to be as an unjust law. Borovikovskii later went on to become the chief procurator of the Civil Cassation Department, and Gessen specifically mentioned Borovikovskii, and his rather dubious theory of judicial conscience as one of the primary reasons why he supported the founding of the newspaper Pravo. See Gessen, V dvukh vekakh, pp. 102-3, 146.

chance of becoming a magistrate, "the single aim, which they could strive for, was material gain."⁴³

There was one forum, however, which united procurators, judges, advocates and law professors: the Law Societies, which sprouted all over Russia (Moscow, St. Petersburg, Kiev, Kursk, Odessa, Kazan, Yaroslavl, the Caucasus). Just what percentage of sworn attorneys participated in these associations is impossible to say. It does not appear to have been very high, although several leading sworn attorneys (Muromtsev, Spasovich, Arsen'ev, Alexandrov) held prominent positions in the Moscow and St. Petersburg Law Societies. The Moscow Law Society, which was founded one year before the actual Judicial Reforms (1863), was attached to Moscow University and was envisioned as a union of legal scholars and practitioners. Its objective was to both study practical juridical questions as well as to spread basic legal knowledge by means of publications, lectures, etc.⁴⁴ Towards that end, the Moscow Law Society published the influential journal, Iuridicheskii Vestnik and organized the Congress of Jurists in 1875.⁴⁵ The Moscow Society also sponsored detailed studies on

⁴³Vas'kovskii, Budushchee russkoi advokatury, pp. 7-8.

⁴⁴S.A. Muromtsev, "Moskovskoe iuridicheskoe obshchestvo za istekshee dvadtsatipiatiletie," Dvadtsatipiatiletie iuridicheskago obshchestva, sostoiashchago pri Imperatorskom Moskovskom Universitete (Moscow, 1889), pp. 3-40.

⁴⁵Iuridicheskii Vestnik, which was largely recognized as Russia's best legal periodical, was closed down by the Society in 1892, when the government attempted to place the journal under censorship review, and it was only re-introduced in 1914. Like most legal journals, Iuridicheskii Vestnik also suffered from low subscription rates; in 1889, for example, its total circulation was just 1026. Two judicial periodicals - Sudebnyi Vestnik and Iuridicheskaiia Letopis - ultimately went out of business because of low subscription rates, while the Zhurnal Grazhdanskago i Ugolovnago Prava noted in 1892 that the combined circulation of Russia's 3 leading periodicals was just 2500 while the total number of judicial personnel was over 30,000. Sudebnaia Gazeta argued that these figures were a symptom of the general apathy of Russian jurists and their indifference towards acquiring further judicial knowledge. Pravo was the one legal periodical that defied this trend; it started with a circulation of 2200 and eventually increased it to over 10,000. See Vestnik Evropy, no. 11 (1893), p. 932.; "Neskol'ko slov o prekrashchenii dvukh iuridicheskikh izdanii," Sudebnaia Gazeta, no. 51 (December 20, 1892), pp. 2-3.; Zhurnal Grazhdanskago i Ugolovnago Prava, no. 10 (1892), pp. 159-162.; Zhurnal Grazhdanskago i Ugolovnago Prava, no. 2 (1893), pp. 159-160.; Gessen, V dvukh vekakh, p. 153. Brokgauz-Efron, Entsiklopedicheskii slovar, v. 81 (St. Petersburg, 1904), pp. 412-3

such varied topics as customary law and railroad legislation. In 1898, however, the Moscow Law Society was shut down by the government due to its "oppositional and radical character" and was only re-opened in 1910.⁴⁶

The St. Petersburg Law Society was founded in 1877 with a similar set of objectives as its Moscow counterpart. It discussed both general and technical legal questions - the death penalty, prison reform - as well as published an influential periodical: the Zhurnal Grazhdanskago i Ugolovnago Prava.⁴⁷ Of the St. Petersburg Law Society's original 30 members - which included members of the State Council, Senators for the Cassation Department, St. Petersburg University Law Professors, and procurators - there were three sworn attorneys - Spasovich, Gaevskii, and Rikhter. Spasovich went on to chair the criminal section, while several eminent sworn attorneys participated in the work of the civil section.⁴⁸ Sliozberg, a well known Jewish sworn attorney and the first pomoshchnik ever elected to the editorial board of the Zhurnal Grazhdanskago i Ugolovnago Prava, described the congenial environment in which the the St. Petersburg Law Society functioned. "To work in the[St. Petersburg] Law Society was especially pleasant, because the work took place in a purely scholarly atmosphere, amongst people who had been educated in the shadow of the Judicial Reforms of 1864, far away from the policies and not having anything to do with the course, adhered to during the reign of Alexander III. The atmosphere was free from anti-semitism."⁴⁹ Although little is known about the specific make-up of the other Law

⁴⁶G. Sliozberg, Dela minuvshikh dnei, 1; p. 234.

⁴⁷In 1894, the title of the journal was changed to Zhurnal Iuridicheskago Obshchestva pri Imperatorskom S.-Peterburgskom Universitete, and in 1899, the title was changed yet again, to Vestnik Prava.

⁴⁸Iuridicheskoe obshchestvo pri Imperatorskom S.-Peterburgskom Universitete za dvadtsat piat let(1877-1902)(St. Petersburg, 1902), pp. 2-49.

⁴⁹Sliozberg, Dela minuvshikh dnei, 1: p. 245.

Societies, the experiences of the Moscow and St. Petersburg Law Societies do tend to suggest that on a selective level, a forum did exist where leading sworn attorneys could exchange their views with other jurists.

III. LEGAL PRACTICE IN TSARIST RUSSIA

A. Civil Practice

It will no doubt come as a bit of a surprise to those, well-versed in the great political trials of the 1870's to learn that far from being great civic activists, most sworn attorneys in late nineteenth and early twentieth century Russia were caught up in the day to day struggle to make a living. Such an observation is not meant to impugn the mystique which has always surrounded Russia's leading sworn attorneys. As we will see in Chapter 6, individual members of the sworn advokatura courageously defended Russia's political opponents and nascent civil liberties at a time when no other institution could provide comparable support. The tendency to idealize the advokatura, however, must be modified. As it turns out, most sworn attorneys were not involved with political trials; instead, their legal practice developed in a relatively normal environment and involved disputes which from time immemorial have required lawyers: wills, contracts, divorce, robbery, murder, etc.

To begin with, the life of a sworn attorney was in many ways a solitary affair. There were no law firms; with the exception of the major political trials, most prisiazhnye poverennye practiced individually, although it was quite common for a highly successful advocate to directly employ several attorneys-in-training as his associates. The home of a sworn attorney usually doubled as his office. Thus, in order to impress a future client, it was important to have a well decorated and even

luxurious apartment.⁵⁰ Whether a sworn attorney chose to place a sign on his home, stating his name and occupation, appears to have depended on local custom. "In Russia," wrote Gershun, "plaques on the entrance door of an apartment were strictly forbidden in St. Petersburg, tolerated in Moscow, and permitted in other cities, but it was really considered to be in bad taste to have a plaque on the street."⁵¹

The most famous Russian advocates were, of course the great criminal defenders - Spasovich, Karabchevskii, Gruzenberg - men who made their reputations at the celebrated political trials of the 1870's and beyond. Defending political criminals, however, is not what most lawyers do for a living. As M. M. Vinaver noted, the principle task of an advocate, not only in Russia but all over the world, is the "realization of civil justice in a country," a responsibility which often remains hidden from public view.⁵² For most sworn attorneys, therefore, their professional (as well as financial) success was dependant on developing a large civil practice, dealing with questions of civil and administrative law. If one was to reach the top of the profession, this invariably meant working for the large financial institutions, spawned by Russia's economic transformation, or wealthy individuals. "Every enterprise," wrote Gershun, "required a jurisconsult (juriskonsult) and some - such as banks, insurance companies, and railroads - needed several jurisconsults."⁵³ Thus Michael

⁵⁰P. Pavlov, O professii iurista (Moscow, 1917), p. 29. A Moscow commission, which was responsible for constructing a pension scheme, used the average yearly rent, paid by a sworn attorney, as an example of the soslovie's general prosperity. A married sworn attorney, with children, paid an average rent of 988 roubles per year, while an experienced advocate (26-35 years in the profession), married and with children, paid an average of 1407 roubles per year. See Istoriia russkoi advokatury, 3: pp. 373-4

⁵¹Bakhtmeteff Archive. Archive of Boris Gershun B. Gershun, Essai sur la profession d'avocat: Manuel Pratique (unpublished manuscript), p. 29.

⁵²M. Vinaver, "Grazhdanskaia khronika," p. 94

⁵³Gershun, "Vospominaniia advokata," p. 135. The origins of the word juriskonsult have yet to be established, although the term's usage dates back to the time of Peter the Great. In the case of the advokatura, it meant a sworn attorney who not only appeared in court but also served as a legal adviser to institutions. The term juriskonsult,

Wolff, a distinguished St. Petersburg sworn attorney was the jurisconsult to a match factory.⁵⁴ Other sworn attorneys specialized in administrative cases, involving trading companies, or worked for the railroads. Even foreign companies sought out Russian advocates. In Moscow, for example, there was a small cadre of sworn attorneys who owed their financial success to their German background and to the growing number of German firms who had their headquarters in Moscow and required German-speaking Russian advocates.⁵⁵ Outside the corporate and financial world, there were the usual profitable specialities - such as inheritance - which, provided that a sworn attorney had a particularly wealthy clientele, paid a significant honorarium for a minimum amount of work.⁵⁶

If one had the right connections, then one could, quite quickly, build up a sizable practice. In 1878, for example, S. A. Andreevskii resigned as the assistant procurator of St. Petersburg after he refused to participate in the prosecution of Vera Zasulich. Thanks to the patronage of A. F. Koni, Andreevskii became the jurisconsult to the St. Petersburg Mezhdunarodnyi Bank at 3000 roubles per year. On top of his salary from the bank, Andreevskii earned an additional 8000 roubles during his first

however, was also used by legal advisers, who were attached to various government ministries. See. W. Butler, Soviet Law (London, 1988), p. 90.; Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1890-91, p. 27.; Brokgauz-Efron, v. 81, p. 419.

⁵⁴M. Wolff, "The Memoirs of Marc M. Wolff: Russian Lawyer and English Barrister," Yearbook on Socialist Legal Systems (New York, 1989), p. 348.

⁵⁵Stolichnaia advokatura, pp. 94-5, 152-3. English companies also sought out sworn attorneys. A.Y. Gal'pern, for example, was the jurisconsult for several English companies, as well as for the British Embassy. See Bakhmeteff Archive. Ob'edinenie russkikh advokatov vo Frantsii, Box 3 (Gal'pern).

⁵⁶Stolichnaia advokatura, p. 54.

year in private practice, meaning he was making nearly four times as much as a sworn attorney then he had as an assistant procurator.⁵⁷

The career of Boris Gershun represents a more typical route to the top of the prisiazhnye poverennye. The son of a doctor, Gershun first trained in the Judicial Department of the Ruling Senate, where he was assigned to the commercial courts. After spending just fifteen months in state service, however, Gershun transferred to the pomoshchniki, where he was attached to V. N. Gerard - a highly respected sworn attorney and a long serving member of the St. Petersburg Bar Council. When Gershun entered the prisiazhnye poverennye in 1900, he was quickly recognized as a leading expert in civil law and his practice soon thrived. He became the iuriskonsult for several trade and industrial companies(17 at one time) as well as the legal adviser for several prominent members of the aristocracy. So successful was Gershun that unlike most of his colleagues, who had at most one pomoshchnik, Gershun had upwards of ten attorneys-in-training working in his office. Like many high profile sworn attorneys, Gershun also took an active interest in soslovie affairs, serving as a member of the Bar Council and supervising conference meetings for attorneys-in-training. Gershun's tireless devotion to the advokatura stretched long past 1917, where, in exile, he was chairman of the Union of Russian Advocates in France.⁵⁸

No discussion of pre-revolutionary Russia's great civil lawyers is complete, however without some mention of Alexander Passover, a

⁵⁷M Gol'dshtein, *Rechi i stat'i*(Paris, 1929), pp. 20-21.

⁵⁸Bakhmeteff Archive. Ob'edinenie russkikh advokatov vo Frantsii, Box 3(Gershun). The Union of Russian Advocates in France was founded in 1926, and as late as 1938, there were 221 members of the Union. It was primarily concerned with helping advocates in need, but it also organized lectures and social events. Under Gershun's leadership, the Union also solicited biographies from former Russian advocates, and these recollections were ultimately included in the Union's Memorial of the Russian Advokatura in Emigration. The last meeting of the Union was in 1971.

brilliant, eccentric man who was generally recognized as Russia's foremost expert in civil law. A graduate of Moscow University, Passover initially trained for a professorship and then became an assistant procurator, only in both cases to find his future advancement blocked because he was Jewish. Refusing to change his religion, Passover eventually became a sworn attorney, first in Odessa and then, in 1872, in St. Petersburg, where he quickly established his pre-eminence in the area of civil law. According to Gruzenberg, Passover "was showered with cases and huge sums of money."⁵⁹ Such was the demand for Passover's services that he often passed highly profitable cases to his colleagues. Gruzenberg, who was then just a novice attorney-in-training, described such an instance:

"I came to let you know," [Passover] said, "that in the next few days, a wealthy man from Odessa, by the name of Shpolyansky, will visit you. He has been arraigned for his conduct as a contractor to the Navy Department. His case will be heard in the Sevastopol naval court, and according to my calculations it will last about a month and a half. Here is your chance to provide for yourself for two or three years. Be sure not to miss this opportunity and set such-and-such a fee." And Passover named a huge figure.

For goodness' sake, Alexander Yakovlevich," I protested. "What fool would give such money to a beginning attorney, still on probation and not widely known to the public?"

"What fool? The one who trusts my judgement."⁶⁰

Such was Passover's reputation that people came from all over Russia to consult with him, but undoubtedly, his greatest triumphs occurred before Russia's highest court, the Civil Cassation Department. "There," wrote M.L. Gol'dshtein, Passover "knew no rivals. White-haired Senators not only agreed with him, but submitted to his mind, logic, knowledge, brilliance and profundity. One can say that the practical

⁵⁹Gruzenberg, *Yesterday*, p. 42.

⁶⁰*Ibid.*, pp. 42-3.

achievements of the Civil Cassation Department were the result of Passover's influence, that the principle decisions which became standards, were inspired by Passover."⁶¹ Like Gershun, Passover's influence was also felt by the soslovie. In 1880, he became the first Jewish member of the St. Petersburg Bar Council, and he intermittently served in the Bar's executive branch until 1889, when he resigned over Spasovich's decision to release the statistics on the number of Jewish sworn attorneys in the prisiazhnye poverennye.⁶² Passover's scholarly reputation was enhanced, however, by his masterful performances as chairman of the judicial conferences, organized for beginning attorneys-in-training, and yet despite his undisputed brilliance, Passover died in 1910 without leaving behind a single published word. "My professional position frees me from intellectual pursuits," Gruzenberg quotes Passover as saying. "Why should I take four books that others have written and make from them a fifth one of my own - and a poor one?"⁶³

The prowess of Russia's leading civil lawyers, therefore, clearly equalled, and in many ways, surpassed that of the great criminal defenders. Whatever progress was made in the development of a coherent system of civil law in pre-revolutionary Russia - as well as in the creation of a more stable environment in which economic transactions could take place - was, to a certain degree, attributable to the prisiazhnye poverennye. "All our judicial practices," wrote Sliozberg, "represent not only the work of the judiciary, but also either the work of advocates, their attorneys-in-training, or the auxiliary organs of justice. All Cassation policies, which have had so much significance for our rights, were drawn up with the

⁶¹M.L. Gol'dshtein, Advokatskie portrety(Paris, 1932), pp. 20-21.

⁶²Sliozberg, Dela minuvshikh dnei, 1: p. 211.

⁶³Gruzenberg, Yesterday, p. 42. For two other accounts of Passover, see Gershun, "Vospominaniia advokata," p. 141.; M Vinaver, Nedavnee(Paris, 1926), pp. 84-122.

energetic and continuous participation of the advokatura. The advocate raises questions, the advocate puts forwards considerations, interprets the law, disputes, reasons. . ."⁶⁴ Boris El'kin, a St. Petersburg pomoshchnik, gave one such example of the advokatura's influence. Using the Polnoe Sobranie Zakonov and the pre-reform civil code, El'kin explained how in one particular appeal, he, along with Gershun, persuaded the Civil Cassation Department that there existed a legal responsibility for tardiness(prosrochka) in Russian law even though there was no clear precedent.⁶⁵ The sworn advokatura's influence, of course, was not restricted to the courtroom. In their everyday consultations with clients - giving advice, preventing misunderstandings, managing legal transactions - sworn attorneys provided another invaluable service.

And yet for all their positive contributions, the fate of the advokatura still remained tightly linked to the fate of the Russian legal system as a whole. On a practical level, this meant dealing with a whole series of aggravations. If one wanted a copy of a legal document in Moscow, wrote G. Bertgol'dt, , one had to pay a secretary an extra fee - on top of the given price - just to get it copied. How do you explain to a simple client, asked Bertgol'dt, that this supplemental fee "was not a bribe."⁶⁶ Resentful judicial personnel often were suspicious of sworn attorneys and saw them not as their colleagues but their rivals. The relationship between sworn attorneys and magistrates were also, at times, acrimonious. Gruzenberg, who states in his memoirs that in general,

⁶⁴G. Sliozberg, "Advokatura za 25 let," p. 33. See also Gessen, Istoriia russkoi advokatury, 1: pp. 195-7.; N.Vil'skii, "Demoralizuetsia li nasha advokatura," p. 70.

⁶⁵Bakmeteff Archive. Ob'edinenie russkikh advokatov vo Frantsii, Box 3(El'kin).

⁶⁶G. Bertgol'dt, "Iz zapisok moskovskago advokata," Sudebnaia Letopis, no. 20(1909), p. 3. Bertgol'dt also mentions that these reproductions were usually filled with mistakes.

Russian judges "were selfless and dedicated figures." describes the aggressive attitude of one judge towards sworn attorneys:

Petty tyrants also found their way in the Criminal Department of the Senate, which generally speaking, maintained considerable eminences. One of these tyrants, who is well worth mentioning, was G.P. Repinsky. Given to shouting and swearing, he presided in the fourth section, which handled political and literary cases. To appear before him was torture, for he would abuse a person without provocation. In order to protect the defendants in a case, one had to endure his insults without a word. He showed no mercy toward anyone not even the pride of the judiciary, W.D Spasowicz.⁶⁷

But besides the day to day polemics with a perfunctory judge or a dishonest secretary, there were other, more fundamental deficiencies with the Russian legal system which dragged down the sworn advokatura. In his 1888 after-dinner speech, Spasovich spoke of the longstanding prejudices of the Russian legal system. "It is difficult to fight a stock company (aktsionernoie obshchestvo) especially if its income is guaranteed by the government; behind it stands all the ministers. Certain defeat awaits if I have a suit with a city. And if my opponent is a prince, I will perish. . .not because behind him [stands] the law, but behind him [stands] power, behind him [stands] the Ministry of Justice."⁶⁸ The absence of modern, comprehensive civil and criminal code also adversely affected the public image of the prisiazhnye poverennye. According to I.V. Gessen, the advokatura's reputation was severely damaged by "the obsolescence and unfairness of [Russia's] commercial(material'nyi) law . . . Judges applied the law, one might say, passively, according to their duties, but this

⁶⁷Gruzenberg, *Yesterday*, p. 45. For a further illustration of the antagonistic relationship between judges and sworn attorneys, see Sudebnyi Vestnik, no. 100(1876), p. 2.; Volodimirov, "K voprosy ob otkrytii," p. 130.; Vestnik Evropy, no. 6(June, 1988), pp. 881-2.; Spasovich, Zastol'nye rechi, p. 50. Stolichnaia advokatura, pp. 186-190.

⁶⁸Spasovich, Zastol'nye rechi, p. 49.

had not led to an indictment against them. The advocate actively defended the application of a law, even if it was an unjust law, and the law's odium was transferred to him despite the fact that the Judicial Reforms demanded from him an oath. . . [to uphold] the law and deprived [advocate's of] the right to reject a court-appointed defence."⁶⁹ One must be careful, therefore, not to place the advokatura either professionally or morally above the legal system in which they practiced. The big civil cases, as Muromtsev later explained to Gessen in one particularly iniquitous dispute, "were always fishy(s dushkom)," and therefore, as officers of the court, sworn attorneys regularly found themselves being incriminated by Russia's biased, fragmented, out of date legal system.⁷⁰

It also must be remembered that Passover, Gershun and Andreevskii were representatives of a very small minority of sworn attorneys, that tiny elite which managed to monopolize the most lucrative cases. In order to understand the advokatura's overall public standing, however, one must attempt to analyze how the profession, as a whole, practiced law. For most members of the soslovie, life as a sworn attorney was much more of an uphill struggle, a seemingly endless search for that one big case which, if victorious, could provide financial security for years to come. The unfortunate irony behind the situation was that although there was a shortage of sworn attorneys on a national level, there was a surplus of advocates in Russia's major legal centres, especially in light of the limited number of civil suits which were brought before the district court.⁷¹ When the Murav'ev Commission examined

⁶⁹Gessen, V dvukh vekakh, p. 172

⁷⁰Ibid., p. 173.

⁷¹The district court was the court of first instance for all suits, valued at 300(later increased to 500) roubles, i.e. the most expensive and, potentially, the most profitable disputes. All other civil suits were transferred to the Justice of the Peace Courts, unless one came under the jurisdiction of the volost courts. For a detailed description of the Russian court system, see Brian Levin-Stankevich, Cassation, Judicial Interpretation and

this very question in 1897, it discovered that there were 2200 civil suits before the St. Petersburg District Court and 295 sworn attorneys, or approximately 7 civil cases per sworn attorney. In Warsaw, there were 304 sworn attorneys and only 2000 civil cases heard by the district court, or approximately 6 civil cases per sworn attorney.⁷² Of course, not all remunerative cases went to trial, but nevertheless, the true ratio between sworn attorneys and the number of civil cases was much worse, since attorneys-in-training, private attorneys, and even underground attorneys syphoned some of these cases away from the prisiazhnye poverennye.⁷³ This added competition was, of course, directly attributable to the government's failure to enforce the original monopoly right, as promised in the Judicial Reforms. By necessity, therefore, sworn attorneys became more and more concerned with making a living - and making money - provoking the inevitable response from the soslovie's critics, that the prisiazhnye poverennye were not living up to their ethical and moral obligations.

Without a constant stream of civil cases, most sworn attorneys were left no choice but to build up an alternative practice, a mixture of administrative, civil, and criminal law which inevitably included a significant number of tedious, unprofitable disputes. Such work was far removed from the rather glamorous practices of Russia's leading sworn

the Development of Civil and Criminal Law (Ph.D. diss., SUNY-Buffalo, 1984), pp. 76-192.

⁷²Vysochaishe uchrezhdennaia. . . , p. 195.

⁷³The publication of several instruction manuals on how to be an advocate - which explained how individuals could personally handle relatively straightforward legal matters - also undercut the practices of sworn attorneys. For examples of these manuals, see: I.V., O tom, kak zashchishchat sebia na sud, ne imeia poverennago zashchitnika (Viatka, 1903).; Semenov and Sokolov, Advokat-praktik (St. Petersburg, (1900).; P. Briunelli, Khodatai po delam (St. Petersburg, 1911).; P. Briunelli, Krest'ianskii advokat (St. Petersburg, 1912).

attorneys. An anonymous article, signed 'old advocate', spoke of the spiritual drudgery which could accompany a career in the advokatura. For every minute of interesting work came hours of monotonous, boring preparation. This work, the old advocate added, "enslaves us - advocates - entirely, and each of us. . . becomes, by the end of our legal careers, mere machines, programmed to conduct judicial cases. Dead thoughts, a knack for judicial cliches, a weariness of attending to people and cases, passivity, inertia - this is all that remains of an advocate, who has reached old age."⁷⁴

Within this throng of advocates, one discovers what can only be described as the dregs of the profession, sworn attorneys who either maliciously abused their positions or out of ignorance violated established procedure. Stolichnaia advokatura, in what must be considered the ultimate insult, went so far as to counterpoise individual sworn attorneys with the pre-reform striapchie, stating that in terms of overall intelligence and sophistication, they were essentially on the same level.⁷⁵ Several fleeting portraits of such opportunistic, disingenuous advocates exist: one sworn attorney, who used his position as chairman of a bankruptcy dispute to personally enrich himself, another sworn attorney who represented both sides of a dispute, yet another sworn attorney who, in a straightforward inheritance case, insisted that he be paid one rouble per dessiatina of land in order to extract a higher fee.⁷⁶ How widespread such ethical and professional violations were is impossible to estimate, but as we saw in the previous chapter, the Bar Council's inconsistent disciplinary record no doubt led many sworn attorneys to believe that they could get away with such conduct.

⁷⁴Sudebnoe Obozrenie, no. 14(April 4, 1904), p. 300

⁷⁵Stolichnaia advokatura, pp. 61, 121.

⁷⁶G. Bertgol'dt, "Iz zapisok moskovskago advokata," Sudebnaia Letopis, no 17(1909), p. 3.; M. Bolkvadze, Ispoved' advokata(Kiev, 1904), pp. 31-3.; Stolichnaia advokatura, p. 161.

How does one characterize, therefore, the typical legal practice of a Russian sworn attorney? The stereotyped image of an advocate, of course, centres on his public role - a legal representative, pleading in court. The sworn advokatura was not bereft of gifted speakers, especially amongst its elite members, but amongst the soslovie at large, public advocacy was in many ways a lost art. Spasovich, himself one of the Bar's most spellbinding courtroom orators, admitted that the sworn advokatura "did not place as much significance, as Western Europe does, to legal eloquence in comparison to written preparation."⁷⁷ Unlike an English barrister or a French *avocat*, protocol did not restrict a Russian sworn attorney's activities to only arguing in court and seeing clients in chambers. On the contrary, an advocate's legal practice usually revolved around "bankruptcy disputes(konkursy), public auctions, the search for debtors, evictions from apartments, the selling of debtor's property, occasionally composing judicial documents and even more rarely giving serious judicial speeches."⁷⁸ Sworn attorneys seemed to be constantly on the go, moving from government departments, police stations, banks, and the offices of notaries. Some sworn attorneys even resorted to hiring agents to drum up business. Pleading in court, in many ways, was seen as only a tangential part of one's professional responsibilities. There are a great number of sworn attorneys, wrote Grebenshchikov, "who plead only by appointment of the court, but primarily act in bankruptcy disputes or busy themselves with the recovery of straightforward documents and other such things, demanding not so much knowledge in the sphere of juridical and social sciences but a certain cunning and street smarts."⁷⁹

⁷⁷Spasovich, "Ob organizatsii advokatury," p. 8.

⁷⁸"Izmeneniia v ustroistve advokatury," Sudebnaia Gazeta, no. 40(October 5, 1897), p.2. See also "Advokaty i poverennye," Sudebnaia Gazeta, no. 11(1893), p. 11.

⁷⁹M. Grebenshchikov, "Zadacha advokatury," p. 3.

Sworn attorneys, in other words, were more inclined to play the private role of a solicitor - the collector of evidence - as opposed to the public role of an advocate - the presenter of legal arguments in court. From a modern perspective - and especially from an American point of view, where there is no divided legal profession - the professional activities of Russia's sworn attorneys seem almost conventional. In nineteenth century Russia, however, the prisiazhnye poverennye were primarily compared with English barristers and French *avocats*. Thus Grebenshchikov's comment - that if a French *avocat* saw what a sworn attorney did he would be "horrified" reflected a widely held opinion, that the prisiazhnye poverennye had failed to meet the elevated standards of a true legal profession.⁸⁰ The active pursuit of clients by sworn attorneys, the technical nature of their work, their seemingly constant preoccupation with money were all seen as beneath the dignity of a true advocate. Even when fulfilling their designated responsibilities, sworn attorneys were portrayed as excessively greedy. Their "reputation as strict executioners of the law presented itself in an unfavourable light," wrote N. Gratsianskii, because "the public had begun to believe that the insolvent debtor was only a sacrifice for an advocate's appetites."⁸¹

The duties of a barrister and a solicitor - combined, in Russia, into one sworn attorney - were viewed by critics of the soslovie as being incongruous. "On the one hand," wrote Vas'kovskii, the sworn attorney "is a scholarly jurist with the highest academic credentials, a servant of justice, an assistant of the court, the equal of the procurator. On the other hand, [the sworn attorney] is the hired agent of private individuals, performing for him that troublesome, unattractive, and even personally

⁸⁰*Ibid.*, p. 2.

⁸¹Gratsianskii, "Bezuriaditsa v advokature," pp. 106-7.

humiliating work, such as running around the offices of judges [and] the police or the cataloguing and selling of the last property of a confused debtor, etc."⁸² If the stringent, professional regulations of the French legal profession were applied to the prisiazhnye poverennye, Vas'kovskii added, then a "good one-half of all sworn attorneys would be expelled from the soslovie "for activities, incompatible with the profession."⁸³

The growing links between prisiazhnye poverennye and private financial institutions, where sworn attorneys not only provided legal advice but also became active participants in business ventures, were also seen as inconsistent with an advocate's general responsibilities. Stolichnaia advokatura commented that amongst Moscow sworn attorneys, there was a strong tendency "if not for a decisive break from the soslovie's ranks, then for a temporary application of one's strength and one's leisure towards a different sphere of work that, for many, serves as a stepping stone to a different profession."⁸⁴ When a Moscow special committee investigated the extramural activities of the profession, it found that sworn attorneys were working as directors and secretaries of credit and stock companies, managers of different philanthropic societies, as a business manager of a newspaper, a secretary of a racing society, and as an agent of an insurance society.⁸⁵ Not only did these auxiliary posts undermine the very independence of the soslovie, but how, it was asked, could a sworn attorney fulfil his responsibilities to the profession if he had so many external obligations.

⁸²Vas'kovskii, Budushchee russkoi advokatury, pp. 4-5.

⁸³*Ibid.*, p. 6. Vas'kovskii was later denied a professorship at Novorossisk University for his general lack of scholarship, and just one of the many criticisms levelled against him, was that he had given an over-idealized portrait of the French legal profession. See A. Zagorovskii, Otsenka sochinenii privat-dotsenta Vas'kovskago(Odessa, 1903) pp. 2-3.

⁸⁴Stolichnaia advokatura, p. 139.

⁸⁵Doklady po voprosu o covmeshchenii zvaniia prisiazhnago poverennago s drugimi dolzhnostiami i zaniatiiami(Moscow, 1888), p. 4.

The Bar Councils recognized that the growing links between the prisiazhnye poverennye and private enterprise were damaging the profession's reputation, but its efforts to control the extraneous activities of its members met with little success. The Judicial Reforms themselves only listed one occupation which was judged to be at variance with the duties of a sworn attorney: state service. During the first few years of its existence, however, the St. Petersburg Bar Council added several new restrictions. In 1869, the Bar Council announced that before an applicant could be accepted into the prisiazhnye poverennye, he had to provide certification that he had ceased all private commercial activities. In 1873, the St. Petersburg Bar Council expanded this limitation by declaring that all broking in business transactions or the buying and selling of immovable property was forbidden for members of the St. Petersburg prisiazhnye poverennye.⁸⁶ These restrictions, however, appear to have done little to break the expanding links between sworn attorneys and private enterprise, and the St. Petersburg Bar Council eventually sanctioned these contacts. Although some occupations, most notably that of insurance agent, remained out of bounds, other business pursuits gradually became more acceptable. Sworn attorneys were granted the right to work for credit societies, mortgage societies, and even sit on the board of directors - as long as these activities did not either lower the social opinion of the advokatura or interfere with an advocate's professional responsibilities.⁸⁷

The Moscow Bar tried to take a much tougher line. In 1888, the previously mentioned special committee outlined two restrictions on the future activities of a sworn attorney: 1) all outside activities, which

⁸⁶Arsen'ev, Zametki, pt. 1, p. 114; pt. 2, p. 256.

⁸⁷Markov, Pravila, pp. 58-9, p. 61.

affected either a sworn attorney's dignity or the soslovie's honour, or could influence the degree of faith and respect which society held for sworn profession, were prohibited; and 2) all outside activities, which deprived a sworn attorney of his independence or professional time, were prohibited.⁸⁸ Whether these rules were adopted by the Moscow Bar Council remains unclear. In other decisions, however, it appears that the Moscow Bar Council tried to keep the distinction between one's professional responsibilities and other business pursuits quite clear. A sworn attorney, for example, could not be involved in the management of a business enterprise; if he was, the Moscow Council argued, he would worry too much about the economic and industrial side of business, problems which had nothing in common with those of a professional advocate.⁸⁹

Despite these attempts to uphold the integrity of the soslovie, public opinion continued to associate the sworn advokatura with their economic pursuits, not with their public appearances in court. As Kistyakovsky noted, in Russia "the fight for law is too easily obscured by other aspirations, and our prominent lawyers nearly always turn into ordinary businessmen."⁹⁰ Advocates were seen more and more as merchants, not as independent, professional men. Thus, the practice of civil law - despite the advokatura's many positive contributions - did not enhance the reputation of the soslovie.

⁸⁸Doklady, p. 5

⁸⁹Markov, Pravila, pp. 60, 66.

⁹⁰Kistyakovsky, "Defence of Law," p. 136.

B. Criminal Practice

Thanks to the growing competition for civil cases, opportunities clearly existed for those prisiazhnye poverennye who decided to specialize in criminal law. Leading sworn attorneys usually took criminal cases only when they were appointed by the court, although a few top advocates - Aleksandrov, Potekhin - had large civil and criminal practices.⁹¹ Therefore, for a young sworn attorney, just entering the profession, criminal law was the natural place to start.⁹² It is much more difficult, however, to characterize the legal practices of Russia's criminal advocates. The most famous criminal defenders (Spasovich, Karabchevskii, Gruzenberg) specialized in political cases, but their experiences were far removed from that of the average criminal advocate who had to deal with forged passports, factory injuries, robberies, murder, etc.. Nevertheless, a few general comments can be made. To begin with, sworn attorneys were restricted by the fact that they were not allowed to participate in the preliminary investigation conducted by the judicial investigator. Instead, they became involved only when the accused had been formally informed of the investigation's results.⁹³ Some commentators objected to these restrictions; a sworn attorney, they argued, should be present in the preliminary investigation not only to protect the rights of his client but also to catch the mistakes, often committed by young, inexperienced judicial investigators.⁹⁴ Such objections were

⁹¹Sudebnaia Gazeta, no. 11(1893), p. 12.; Pravo, no. 2(1916), p. 100.; Wolff, "The Memoirs," pp. 349-50.

⁹²Stolichnaia advokatura, p. 162.

⁹³K. Dvorzhitskii, "O zashchite na predvaritel'nom sledstvii," Sudebnaia Gazeta, no. 42(1904), p. 2. In 1897, advocates were given the right to participate in preliminary investigations involving juveniles. See Huskey, Russian Lawyers, p. 17.

⁹⁴"O zashchite na predvaritel'nom sledstvii," Sudebnaia Gazeta, no. 43(1904), p. 3.

dismissed, however, because it was feared that advocates would use such a privilege in order to drag out the judicial process.

Sworn attorneys usually had the best chance of success in a criminal trial if they argued before a jury, for within Russian society, there was a distinct bias towards the defendant. In the eyes of the people, wrote one former advocate, "the police, the judicial investigators, the procurators were not people, trying to protect society from crime. . .but some kind of hound or borzoi, pursuing the unfortunate hare - the defendant."⁹⁵ On the other side of the table sat the accused - alone, already in jail, and facing the possibility of a long exile in Siberia. This natural sympathy towards the defendant, plus the excessive penalties imposed by the Russian criminal code, played into the hands of a criminal advocate. P.I Kicheev, described one such case involving a peasant women who, while fleeing her oppressive husband, mistakenly bought a forged passport. Not for a minute, wrote Kicheev, did I think that this women would "be convicted by a jury despite her full awareness of the committed crimes. . ."⁹⁶ And Kicheev was right; the defendant was acquitted.

The life of a criminal lawyer, however, appears to have been a difficult one. As Gruzenberg noted, "There were only a few prominent criminal lawyers, whose names were well known. This was due to the fact that a criminal law practice was very exhausting and wore out the nerves quickly. It meant that one was always in public view, undergoing a continuous examination, dealing under stress with impromptu situations(for one could not foresee everything no matter how well he prepared), and weltering in people's tears and grief."⁹⁷ On top of these

⁹⁵N.T., "Iz vospominanii advokata," Russkoe Bogatstvo, no. 10(1883), p. 60.

⁹⁶P.I Kicheev, Zakon i zhizn'(Moscow, 1899), p. 104. For a discussion of Russian juries, see J. Atwell, "The Russian Jury," Slavonic and East European Review (January, 1975), pp. 44-62.

⁹⁷Gruzenberg, Yesterday, p. 37.

personal strains, Russia's criminal defenders were also subject to an almost endless barrage of criticism. The intelligentsia's moral absolutism, it seems, was incapable of accepting the principle that every man - even a guilty one - deserved legal representation. As we saw in Chapter 2, the system of remuneration, which made a sworn attorney's fee dependant on the outcome of the case, was also viewed by many as being unethical and in need of immediate reform. Still others criticized the advokatura for their absence at most criminal trials and for the fact that sworn attorneys were able to exempt themselves from certain court-appointed defences.⁹⁸ Therefore, criminal defence -with the exception of the great political trials - was not a very reputable field of specialization, and even though the advokatura was partially to blame for this, one cannot help but feel that the recurring attacks levelled against criminal defenders - both in the press and in Russian literature - were more of a reflection on Russia's underdeveloped legal culture than on any inherent deficiency within the soslovie itself.

C. Consultation Bureaus

Although there were no law firms in pre-revolutionary Russia, there was one institution where sworn attorneys and attorneys-in-training practiced collectively: the konsul'tatsiia (consultation bureau). The first consultation bureau was founded in 1870 by 30 sworn attorneys in St. Petersburg, with the dual aim of rendering constructive service to society as well as of extending the benefits of legal advice to a broad

⁹⁸St. Petersburg sworn attorneys, for example, were not required to take an appointed case if it occurred outside the boundaries of the city. See Foinitskii, "Zashchita v protsesse ugovnom," p. 35.

spectrum of the population. Despite such noble aspirations, however, the St. Petersburg Consultation Bureau was not constructed as a philanthropic organization; on the contrary, even though the founders agreed that indigent people would not have to pay for legal advice, they nevertheless insisted that the konsul'tatsiia be managed on a fee-paying basis, where sworn attorneys would be compensated for their work. To make the consultation bureau a purely benevolent institution, they argued, was counter-productive. From a financial standpoint, most advocates could not afford to participate without receiving some form of compensation. Such philanthropy would also lead to a steady flow of straightforward, uninteresting, petty cases to the bureau, decreasing the likelihood that sworn attorneys would want to work at the konsul'tatsiia. On the other hand, introducing a financial incentive would not only attract more advocates, it ensured that everyone - not simply the very poor - would have the right to utilize the services of the consultation bureau.⁹⁹

Thus, the first konsul'tatsiia was founded both as a humanitarian and as a profitable institution.. The bureau's office was located in the St. Petersburg District Court, and was open for two hours in the afternoon. Oral advice on fairly uncomplicated matters was given immediately, while with more complex questions, a sworn attorney had between two and three weeks in which to respond. Although there were a few exceptions, the konsul'tatsiia dealt only with civil cases in the district courts. Criminal cases, it was argued, required a firm acquaintance with all the details of a case - a condition which made immediate advice almost impossible give - as well as the fact that a system of appointing advocates to indigent clients in criminal cases already existed. The Justice of the

⁹⁹A Rikhter, "Desiatiletie konsul'tatsii prisiazhnykh poverennykh," Zhurnal Grazhdanskago i Ugolovnago Pravo, no. 6(1880), pp. 3-5.; Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, pp. 233-6.

Peace courts were excluded from the jurisdiction of the konsul'tatsiia because of the bureau's limited manpower resources.¹⁰⁰

Most of the bureau's earnings came from written advice; 88% of all oral advice was provided without charge (the average cost for paid oral advice between 1870-79 2 r. 30 k.) while 97% of all written counsel was paid for by the client (average fee - 39r. 78k.).¹⁰¹ Advocates were able to retain 70% of all earnings from written advice, the remaining 30%, as well as any money received from oral opinions, was reserved for the konsul'tatsiia.¹⁰² The clientele of the St. Petersburg Consultation bureau was quite varied, including public and private institutions (zemstvos, factories, merchant societies), sworn attorneys and attorneys-in-training - themselves seeking legal advice - and private individuals. Most sworn attorneys who chose to join the konsul'tatsiia were recent additions to the soslovie, usually without an established practice.¹⁰³ The attrition rate appears to have been quite high; of the 30 founding members of the konsul'tatsiia in 1870, only 9 were still associated with the bureau in 1879.¹⁰⁴

Whether the St. Petersburg Consultation Bureau achieved its original objectives is difficult to say. There is no disputing that sworn attorneys proffered a significant amount of advice; between 1870-87, the konsul'tatsiia gave out 14,385 pieces of oral advice (11,408 without charge)

¹⁰⁰Rikhter, "Desiatiletie konsul'tatsii," pp. 10-12.; Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 236.

¹⁰¹Whether one chose to pay for oral advice was up to the individual's discretion. Rikhter, "Desiatiletie konsul'tatsii," p. 29

¹⁰²Ibid., p. 9. In 1887, the advocate's share increased to 80%. See Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 245.

¹⁰³In 1875, the bureau decided to admit attorneys-in-training if they had completed at least two years in the pomoshchniki. Few attorneys-in-training, however, decided to take advantage of this opportunity. In 1876, in their first year of eligibility, 16 attorneys-in-training joined the konsul'tatsiia, but just two years later, there were only 6 attorneys-in-training, attached to the bureau, and thereafter, the participation of pomoshchniki in the affairs of this konsul'tatsiia was minimal. In 1905, only 8 attorneys-in-training were members of this konsul'tatsiia. See Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 246.

¹⁰⁴Rikhter, "Desiatiletie konsul'tatsii," p. 25.

and 614 pieces of written advice, with total receipts of 29, 724 roubles.¹⁰⁵ These glossy statistics, however, did not satisfy the critics of the St. Petersburg konsul'tatsiia. The number of consultations, although generally not decreasing, did not expand at the rate which had been anticipated. According to the bureau's detractors, this was largely because having notified the surrounding cities of the bureau's presence, its members sat back and waited for people to come to them.¹⁰⁶ The zeal which had initially been displayed by the founders of the konsul'tatsiia, soon diminished; sworn attorneys, for example, began to skip their scheduled shifts.¹⁰⁷ No doubt this general apathy was directly related to the fact that the konsul'tatsiia quickly proved to be an inadequate source of income for prisiazhnye poverennye. On average, a sworn attorney gave out 12 pieces of oral advice and composed one written document, for which he received, after the bureau had taken its share, only 27r. 64k.¹⁰⁸

Some 25 years later, the St. Petersburg Consultation Bureau was still suffering through a period of stagnation. On the surface, there had been a significant jump in the number of oral consultations, from 1273 in 1901-2 to 5115 in 1902-3, 6435 in 1903-4, and 5385 in 1904-5. In a 1905 Pravo article, however, F. Zeiliger showed that the number 5385 in fact only represented the number of tickets which had been distributed to people who came to the bureau to seek advice, even though many people left without ever seeing an attorney or alternatively, had to return again when they received another ticket. The true number of visitors who received oral advice in 1904, Zeiliger argued, was not 5385 but 1586 - the number written in the official book which recorded consultations and only 534

¹⁰⁵Makalinskii, S-Peterburgskaia prisiazhnaia advokatura, p. 247.

¹⁰⁶Pravo, no. 5(1905), p. 352.

¹⁰⁷Rikhter, "Desiatiletie konsul'tatsii," pp. 27-8.

¹⁰⁸Ibid., pp. 33-5.

more than the total in 1882.¹⁰⁹ It was creative accounting, therefore, not better service, which explained the apparent upsurge in the number of consultations provided by the konsul'tatsiia at the turn of the century.

Following St. Petersburg's example, sworn attorneys began to organize consultation bureaus in Moscow, Kharkov, Kiev, and Odessa. The Kiev Consultation Bureau, which included both sworn attorneys and private attorneys, reserved the right to expel a bureau member for any professional indiscretion, thereby assuming the moral authority of the Bar Council which, thanks to the December 5, 1874 legislation, had never been established in Kiev.¹¹⁰ In 1888, the St. Petersburg pomoshchniki organized their own konsul'tatsiia attached to the Justice of the Peace courts, but despite the fact the the new bureau was intended for attorneys-in-training, sworn attorneys actually dominated its membership. In 1890, for example, there were 32 sworn attorneys and only 17 attorneys-in-training attached to this new konsul'tatsiia. The gap eventually narrowed by 1900(33 sworn attorneys, 25 attorneys-in-training) only to become more pronounced by 1905(47 sworn attorneys, 29 attorneys-in-training). This apparent anomaly was due to several factors. Whereas attorneys-in-training had to be approved by the bureau's general meeting before they could be admitted, a sworn attorney merely had to announce his intention of joining the bureau and he immediately became a member. More importantly, Rule 2 specifically stated that a pomoshchnik had to have completed at least two years of his apprenticeship, as well as possess a license to practice before the Justice of the Peace courts, before he could be accepted. As a result, Jewish attorneys-in-training, who comprised almost 43% of the St. Petersburg pomoshchniki in 1890, could not join their own konsul'tatsiia.

¹⁰⁹Pravo, no. 19(1905), p. 1560-1.

¹¹⁰Rikhter, "Desiatiletie konsul'tatsii," p. 9.; Istoriia russkoi advokatury, 3: pp. 35-7.

Finally, after 1900, attorneys-in-training were more attracted to the new district consultation bureaus, which were under the direct control of the Komissia pomoshchnikov and whose membership included a much higher percentage of attorneys-in-training.¹¹¹

The development of the above mentioned St. Petersburg district consultation bureaus was just one example of the rapid expansion which occurred after 1900 in the number of konsul'tatsii. By 1904, there were 50 such consultation bureaus in Russia, many of which were more public service orientated than the original St. Petersburg konsul'tatsiia.¹¹² The Zhitomir Consultation Bureau, which was attached to the local temperance society can be seen as one example of these new legal aid centres. By the end of 1904, there were 14 advocates (9 sworn attorneys, 5 attorneys-in-training) working at the Zhitomir bureau. The konsul'tatsiia was open for 317 days, during which time 1394 people visited the bureau (1056 men, 338 women). 55% of the visitors were illiterate. In terms of social background, the overwhelming majority of those, seeking advice, were peasants (65%), followed by members of the petty bourgeoisie (28%), nobles (5%), bureaucrats and members of the clergy (2%). Most of the inquiries (68%) revolved around civil disputes, of which the greatest number of appeals involved questions about land (514/950), followed by inheritance disputes (187/950) and questions about loans (103/950). Only 7% of all inquiries involved criminal cases, while 8% involved administrative cases (mainly passport problems) and 19% of all appeals were placed in the miscellaneous category. For these 1394 appeals, the bureau received 520 roubles, of which it appears that 223r. 25k.

¹¹¹Kratkii ocherk deiatelnosti konsul'tatsii pomoshchnikov prisiiaznykh poverennykh pri S. Peterburgskom stolichnom mirovom s'ezde za XXV letnii period (St. Petersburg, 1913), pp. 5-10. For a discussion of these new bureaus, see Chapter 6, pp. 286-88.

¹¹²I. Gessen, "Iuridicheskaiia pomoshch naceleniiu," Obrazovanie, no. 1 (1904), pp. 107-8.

were divided amongst the advocates. 20% of all advice was given gratuitously, 68% cost between 25k. and 1 rouble, while 12 % cost 1 rouble or above. The average cost of a piece of legal advice from the Zhitomir Consultation Bureau was just 38 k.¹¹³

One must not underestimate the importance of these consultation bureaus, for they personified the new found commitment to public service which swept the advokatura - and especially the pomoshchniki - at the turn of the century. Yet, as we shall see in Chapter 5, the konsul'tatsii were just a drop in the bucket when one considers what was required in order to overcome Russia's legal backwardness and lack of legal culture. Despite some individual successes, therefore, the consultation bureaus were not in a position to substantially change Russia's existing legal consciousness.

IV. THE PUBLIC ROLE OF SWORN ATTORNEYS

That most sworn attorneys chose to practice civil law in pre-revolutionary Russia is not, in and of itself, an earth shattering discovery, especially when one considers what most lawyers do for a living today. Nevertheless, this revelation necessitates a fundamental re-appraisal of the sworn advokatura's public role, for whereas volumes have been written about the sworn advokatura as the undisputed defenders of civil rights - freedom of the press, religion, speech, etc. - hardly a word has been spoken about advocates as defenders of economic interests and, on a more fundamental level, as defenders of private property.

¹¹³Otchet o deiatel'nosti konsul'tatsionnago biuro prisiazhnoi advokatury pri zhitomerskom gorodskom komitet popechitel'stv o narodnoi trezvosti(Zhitomer, 1905), pp. 3-11.

From a western perspective, of course, there is no inherent contradiction in jointly defending civil rights and property rights, and indeed, since the time of Locke, liberal western thinkers have seen the two as inextricably linked. Such was not the case in nineteenth century Russia. Richard Wortman, in his persuasive essay "Property Rights, Populism, and Russian Political Culture," writes that "in early twentieth century Russia, property rights and civil rights belonged to antagonistic and irreconcilable political doctrines. On the one hand, the concept of property rights had become attached to the fate of the tsarist state, which disdained and violated all other rights. On the other, the champions of civil rights, with only a few exceptions, lacked a morally viable concept of property that could sustain individual freedom in the new society."¹¹⁴

The advokatura was one of the exceptions, although one must hasten to add that in their political pronouncements, sworn attorneys displayed the same kind of dualistic thinking which Wortman describes above. The demand for civil rights, voiced by both the St. Petersburg Bar and the Union of Advocates in 1905, made no mention of property rights except for the latter's vague reference to the inviolability of the individual and his home.¹¹⁵ Any attempt to portray the Union of Advocates as the defenders of private property, however, would be totally misguided. At the meeting of the All-Russian Union of Advocates in March of 1905, the Union declared that as part of its social-economic programme, it would seek to defend the workers' interests and liberate them from the "oppressiveness of the present capitalist system."¹¹⁶

¹¹⁴R. Wortman, "Property Rights, Populism, and Russian Political Culture," in O. Crisp and L. Edmondson, Civil Rights in Imperial Russia (Oxford, 1989), p. 32.

¹¹⁵Otchet Soveta prisiazhnykh poverennykh pri S. Peterburgskoi Sudebnoi Palate za 1905-6, pp. 13-14.; TsGAOR, f. 518, d. 28, p. 1.

¹¹⁶TsGAOR, f. 518, d. 28., p. 4.

The advokatura's political role - and its staunch commitment to civil rights - will be closely examined in Chapter 6, but as we see from the above, sworn attorneys did not openly extol the virtues of private property in their public declarations, and indeed, it was political suicide to do so. The advokatura's public reticence on this issue, however, should not be construed to mean that sworn attorneys were somehow against the principle of private property. It was not simply coincidence, after all, that within the Kadet party, the three strongest opponents of mandatory land expropriation - Maklakov, Rodichev, and Muromtsev - were all sworn attorneys.¹¹⁷ As we have seen in this chapter, the practice of civil law - whether working for a bank, writing a will, or serving an eviction notice - intrinsically linked the advokatura with the principle of private property. Indeed, between 1878 and 1902, when there were no open political trials and therefore, no forum in which sworn attorneys could publicly defend Russia's neutralized civil rights, public opinion increasingly associated sworn attorneys with their practice of civil law, an association which, as we have seen, brought the profession little honour.

Therefore, whether as part of one undivided theory or two separate principles, the advokatura appears to have been the one of the few Russian institutions which, in its professional capacity, defended both property rights and civil rights. Far from increasing the soslovie's popularity, however, this dual allegiance only heightened the advokatura's sense of isolation. The other major proponents of private property - the autocracy and the landed nobility - naturally objected to the advokatura's broader commitment to civil rights, while the intelligentsia, with its idealistic image of the Russian commune, was resolutely opposed

¹¹⁷J. Zimmerman, "The Kadets and the Duma, 1905-7," in C. Timberlake(ed.), Essays on Russian Liberalism(Columbia, Missouri, 1972), p. 118.

to the expansion of private property. The advokatura's public commitment to both property rights and civil rights was, in the Russian context, a complete contradiction, and only serves to highlight the advokatura's ambiguous position in Russia's social and political order.

CHAPTER FOUR: TRAINING FOR THE BAR

I. CHOOSING A LEGAL CAREER

It is ironic to consider that on the eve of the twentieth century, Imperial Russia - a society long condemned as having no legal culture - was in fact producing more law graduates in 1900 than any other academic speciality. By 1899, 43%(7182 out of 16,294) of all students in higher education were registered in the law faculty.¹ On top of this, the elite secondary school, the School of Jurisprudence, was also producing law graduates, albeit in much smaller numbers.²

But quantity must not be confused with quality. The products of both these institutions - the universities and the secondary schools - were, for different reasons, equally flawed. By the end of the nineteenth century, most 'promising' young minds were attracted to the law faculty thanks to its well deserved reputation for being the easiest faculty within the university.³ Others chose to study law because it offered a wide range of

¹Leikina-Svirskaja, *Intelligentsiia v Rossii*, pp. 56-59. The overall popularity of the law faculty was subject to major fluctuations during the latter half of the nineteenth century. Although there had been a steady increase in the number of law students between 1865 and 1870 - from 1953 to 3047 - this trend was reversed during the 1870's. By 1875, only 1867 students were registered in the law faculty, and by the end of the decade that number was just 1831. The fortunes of the law faculty were reversed, however, in the 1880's; by 1885, enrollment had increased to 3670, and by 1895, there were 5103 law undergraduates. The sharp downfall in the law faculty's enrollment between 1870 and 1880 was later attributed to the lack of opportunities for law graduates and the 1870 *gimnaziia* reforms, which had made entry into university much more difficult. See N. Rennenkampf, "Sud'by privilegirovannykh i neprivilegirovannykh iuristov," *Zhurnal Grazhdanskago i Ugolovnago Prava*, No. 1(1881), p. 87; S.S. Rozenberg, *Sud'by nashei korporativnoi prisiazhnoi advokatury*(St. Petersburg, 1896), pp. 12-3.

²The total enrollment of the School of Jurisprudence on the eve of World War I was just 350. See Samuel D. Kassow, *Students, Professors, and the State in Tsarist Russia*(Berkeley, 1989), p. 19.

³Dominic Lieven, *Russia's Rulers under the Old Regime*(London, 1989), pp. 103-4.; S. Zhivago, "Chego nedostaet v universitete nashim budushchim iuristam," *Russkaia Mysl'*, no. 10(1902), p. 12.

career opportunities outside the law upon graduation.⁴ Only a relatively few seemed to have been genuinely interested in the law prior to their admission, and no doubt the personal and economic hardships of university life quickly snuffed out any nascent idealism that these students might have possessed. In the end, it was not the pursuit of knowledge, and especially not knowledge of the law, which motivated these students but the desire to possess the ultimate academic credential in Imperial Russia: a university degree. "The diploma gave well-known rights and advantages," wrote Russkaia Mysl' in 1902, and "these rights and advantages must 'somehow' be acquired at all costs in order to 'somehow' get fixed up and settled down."⁵

Many traced the lack of intellectual curiosity amongst Russian law undergraduates to the excessive rigours of the Russian gimnaziia. Although there were, of course, individual exceptions, the Russian gimnaziia appears to have produced largely apathetic, cheerless graduates, totally unprepared for higher education. Sudebnaia Gazeta was especially critical in its evaluation, concluding that the Russian gimnaziia had managed to destroy "all interest in theoretical knowledge" while failing to provide a basic understanding of either "scholarly principles, abstract ideas, or logical thoughts."⁶

But if Russian students did not live up to expectations, then neither did Russian universities. Both the rigid university law curriculum and rote-memory exams represented a natural continuation of the much hated gimnaziia system.⁷ The student's interests were never taken into account. Compounding this sense of alienation was the fact that students were

⁴Kassow, Students, Professors, p. 59.

⁵Zhivago, "Chego nedostaet v universitete. . .", p. 12.

⁶"O prichinakh nepodgotovlennosti molodykh sudebnykh deiatelei," Sudebnaia Gazeta, no. 37(September 14, 1902), p. 3

⁷Zhivago, "Chego nedostaet v universitete. . .", p. 13.

obliged to study a wide range of required subjects, including Roman Law and Church Law, but what they did not study to a sufficient degree was Russian law, especially on a practical level.⁸ Civil and criminal law, for example, were not introduced into the curriculum until the third year of study. Within such a rigid and impractical atmosphere, students quickly developed one simple desire: to pass while doing the minimum amount of work possible. The structure of exams greatly assisted students in this aspiration, since they regularly only tested what the professors had discussed in their lectures.⁹ According to one graduate, "only an idiot" could have failed the final law exams at Moscow University.¹⁰ A Russian law degree, concluded Russkaia Mysl', did not signify the attainment of a satisfactory level of education but in the majority of cases merely represented a "series of random numbers" from a lottery.¹¹

Yet even when taking into account the depressed nature of Russian universities, it is hard to imagine that these university graduates were academically inferior to the products of the elite secondary schools and, more specifically, the School of Jurisprudence. As other historians have argued, it was probably true that most graduates of the School of Jurisprudence possessed more polish and elan than their university contemporaries, but even when taking this into account - as well the intellectual insouciance of many university law graduates - one still finds it difficult to equate a 3 year high school study of law with a 4 year

⁸Ibid., p. 20. Calls to increase the amount of practical training were largely rejected, for fear that such a change would probably produce more harm than good. "The problem of the university consists not in preparing practical jurists, but theoretical jurists; practice must be acquired only upon leaving university, when one is presented with the necessity of applying his theoretical knowledge to life." V. Deriuzhinskii, "Sudebnye deiateli ob universitetskoii podgotovke molodykh iuristov," Zhurnal Ministerstva Iustitsii, No. 7(September, 1902), p. 233.

⁹Zhivago, "Chego nedostaet v universitete. . .", p. 13.

¹⁰Kassow, Students, Professors, p. 77.

¹¹S. Zhivago, "Chego nedostaet v universitete. . .", p. 15.

university course. Simply contrasting the respective syllabuses illustrates the vast differences which existed between these two types of academic institutions. To begin with, in the School of Jurisprudence's first year law syllabus, only 13 of the 32 scheduled hours of classroom instruction were actually devoted to the study of law; the rest of the time was occupied by such traditional high school subjects as psychology, history, Russian, Latin, German, and French. In total, graduates from the School of Jurisprudence studied State Law for just 2 hours per week for one year, whereas their counterparts in university studied the same subject from between 5-6 hours per week for 2 years. Similar lop-sided contrasts existed for virtually all of the major subjects. The School of Jurisprudence, for example, devoted 4 hours per week in the second year and 3 hours per week in the final year to the study of civil law. In sharp comparison, university graduates studied civil law from between 5-6 hours per week for two years.¹² When one also takes into account that visiting St. Petersburg professors were forced to simplify their lectures in order to make them intelligible for their younger audience, and that School of Jurisprudence graduates completed their formal education some 4 years before their university compatriots (20 as opposed to 24), one must seriously question whether the academic preparation provided by the School of Jurisprudence - especially in law - was in any way superior to that of the universities. One commentator observed in 1881 that in its more than 40 years existence, the School of Jurisprudence had failed to produce a single recognized legal scholar, with the noted exception of K.P. Pobedonostev, who as it turned out had done most of his scholarly work while at Moscow University.¹³

¹²N. Rennenkampf, "Sud'by privilegirovannykh. . .", p. 90.

¹³Ibid., p. 88.

But in light of their elite, privileged secondary education, graduates from the School of Jurisprudence could, with confidence and a fair degree of security, look towards the future. Not only did they enter the bureaucracy with the right to the 9th chin, whereas a university graduate with a first-class degree only had the right to the 10th chin, but they also knew that a disproportionately high number of their fellow graduates occupied the upper levels of the bureaucracy.¹⁴ For university law graduates, the choices were much more stark. For those who contemplated a traditional legal career either in the Ministry of Justice or the advokatura, two options were generally available. One could either join the kandidaty na sudebnyia dolzhnosti (candidates for judicial appointments), a 3-4 year apprenticeship within the Ministry of Justice, or one could join the pomoshchniki, a 5 year apprenticeship under the personal supervision of a sworn attorney. For reasons which will quickly become obvious, neither of the above alternatives proved to be very attractive with university law graduates. Therefore, en masse, they chose a third option; to abandon their chosen course of study and pursue either a more lucrative career with banks, customs houses, and stock companies or a non-legal career within the bureaucracy.¹⁵

Thus most law graduates were immediately lost to the profession upon graduation, but before turning to the pomoshchniki - the natural training ground for the advokatura - some attention must be given to the candidates for judicial appointment. Not only did many state lawyers, initially trained as candidates, eventually transfer to the advokatura, but

¹⁴Of the 46 jurists appointed to the State Council between 1894 and 1914, 22 were graduates of the School of Jurisprudence. See Lieven, Russia's Rulers, p. 73.; For a description of the privileges, granted to School of Jurisprudence graduates, see: "K voprosy o privilegirovannykh iuristakh," Sudebnaia Gazeta, no. 11(March 13, 1894), pp. 1-2.

¹⁵"K voprosu o kandidatakh na sudebnyia dolzhnosti," Sudebnaia Gazeta, no. 29(July 21, 1902), p. 3.

during the course of a candidate's preparation, some were actually called upon to serve as advocates in court proceedings. Naturally, the Ministry of Justice bore the brunt of the university's lax standards and poor preparation. According to a survey of judicial personnel within the Ministry of Justice, candidates possessed, at best, only a cursory knowledge of Russia's judicial institutions, judicial procedures, the Code of Laws and the Judicial Reforms of 1864. The regional chairman of one sudebnaia palata described an embarrassing encounter with a candidate who, when asked a specific legal question, "announced that he had never seen the Code of Laws of the Russian Empire and did not even know of how many volumes it consisted."¹⁶ In reality, all of the accumulated deficiencies of the Russian educational system were exhibited by these candidates, including, one must add, the inability to write clear and grammatically correct Russian.¹⁷

The training program that these candidates were supposed to follow was largely based on the Prussian model. The end results, one must hasten to add, were strictly Russian. Candidates were primarily required to study under the supervision of a procurator, although in times of need, a candidate could also be asked to fill in either as a judicial investigator or as an advocate. There was no guarantee, however, that an aspiring candidate would receive all the necessary professional training that was required. On the whole, members of the judicial department were not interested in preparing candidates; they had their own responsibilities, and not surprisingly, had no desire to add any extra duties on top of them.¹⁸ There were no specific guidelines that a candidate was

¹⁶Deriuzhinskii, "Sudebnye deiateli. . .", p. 225.

¹⁷*Ibid.*, p. 223.

¹⁸I.M. Tiutriumov, "Kandidaty na sudebnyia dolzhnosti," Zhurnal Ministerstva Iustitsii, no. 10(December, 1896), pp. 68-9.

supposed to follow, nor was there any specific course of study that a candidate was supposed to complete. In 1880, N. Murav'ev summarized the isolated position of the candidates within the bureaucracy: "The judicial soslovie does not consider them[the candidates] as their junior members and looks at them either indifferently or with something like condescending contempt."¹⁹

A candidate's sense of insecurity was compounded by the fact that he received no official state salary for the duration of his 3-4 year apprenticeship. This naturally imposed great hardships on most candidates; in a survey conducted of Moscow candidates in 1890, only 20% had the financial resources to live without a salary.²⁰ Limited financial aid was available from the state from 1875 onwards, but nevertheless, many candidates were still forced to either seek out private work or, if the opportunity presented itself, accept a temporary appointment as a judicial investigator, just in order to survive.²¹ The situation improved slightly in 1891, when salaries were introduced for senior candidates. By 1896, however, only a small number of candidates(180) had actually received a state salary, and in fact, many candidates were now in worse shape than before because they could no longer supplement their incomes by temporarily acting as judicial investigators.²²

One can appreciate, therefore, why so few graduates were attracted to a legal career in the Ministry of Justice, but as previously mentioned, candidates were also called upon to act as an advocate as well.

¹⁹N. Murav'ev, "Kandidaty na sudebnyia dolzhnosti," Zhurnal Grazhdanskago i Ugolovnago Prava, no. 1(January/ February, 1880), p. 2.

²⁰N. Murav'ev, "Po voprosy o kandidatakh na sudebnyia dolzhnosti," Juridicheskaja Letopis(September, 1890), p. 170.

²¹"Kandidatskii vopros," Sudebnaia Gazeta, no. 14(April 7, 1891), p. 1; "K voprosu o polozhenii nashikh molodykh iuristov," Sudebnaia Gazeta, no. 46(November 17, 1891), p. 5.; "Novyi zakon o kandidatakh na sudebnyia dolzhnosti," Sudebnaia Gazeta, no. 2(January 12, 1892), p. 9.

²²Tiutriumov, "Kandidaty na sudebnyia dolzhnosti," pp. 59-60.

Article 416 of the Judicial Reforms stipulated that as a last resort, appointed civil and criminal cases would be handled by candidates if a sworn attorney was not available. In most major cities, where there were a sufficient number of prisiazhnye poverennye, such appointments were rare, but in the provinces - and especially during the uezdnyi session of the district court - virtually all appointed defences were conducted by candidates.²³ Naturally, such appointed defences abetted the professional growth of a state lawyer, exposing him, from the opposite angle, to some of the problems he would face in the future. But just as with the appointment of sworn attorneys, it is difficult to determine how conscientiously candidates fulfilled their designated responsibilities. Much depended on the personal inclinations and individual skills of the candidate involved. Some candidates brought little enthusiasm to their appointed cases. Others simply were not ready professionally for such responsibilities, and more importantly, had no one to turn to for advice. In such cases, the candidate often left such a bad impression that his client walked away wondering if he might not have been better off without an advocate in the first place. Supervision of candidates, acting as advocates, appears to have been non-existent; some candidates were eventually paid for their appointed cases even though these defences were supposed to be gratuitous. Such violations were largely overlooked, however, because the economic position of most candidates was so desperate. There was no code of ethics to govern candidates, nor did they have any right to refuse an appointed case.²⁴

But on the other side of the spectrum, there were some candidates who vigorously assumed their responsibilities as an advocate. Reputations

²³N.Murav'ev, "Kandidaty na sudebnyia dolzhnosti, Zhurnal Grazhdanskago i Ugolovnago Prava, no. 6(November/December, 1880), p.4.

²⁴Ibid., pp. 7-12.

could quite quickly be made in the provinces. "Two or three trips to the same village, two or three successful results, and a state defender(candidate) acquires a lasting, famous popularity. . ."25 The primary black mark on the records of these earnest candidates was that in attempting to match the eloquence of their favourite prisiazhnye poverennye, they often tended to overlook the relevant legal issues of the specific case they were conducting.²⁶ Candidates who possessed strong rhetorical skills and later found their professional advancement in the Ministry of Justice blocked, regularly transferred to the advokatura. "Many of the best and most talented representatives of our advokatura," wrote N. Murav'ev, "began their careers as candidates and by taking obligatory(i.e. appointed) cases."²⁷ Such was the exodus of fluent orators from the Ministry of Justice to the advokatura that it left the procuracy with relatively few gifted public speakers.

The candidate stage, therefore, must be seen as one of the preparatory schools of the advokatura, although obviously, the overwhelming majority of candidates went on to a career within the Ministry of Justice. The other source for the prisiazhnye poverennye was, of course, the pomoshchniki. From the very start, it must be stressed that the pomoshchniki - as well as the advokatura as a whole - were primarily the product of the universities; only a relative handful of graduates from the School of Jurisprudence and the other elite secondary schools eventually joined the advokatura.²⁸ But just as with the candidates, most pomoshchniki were thoroughly unprepared for the career upon which they were about to embark. One advocate, in recalling his university days,

²⁵ibid., p.4.

²⁶ibid., p. 11.

²⁷ibid., p. 9.

²⁸Rennenkampf, "Sud'by privileirovannykh . . .," p. 87.

commented that upon graduation, he did not have even "the slightest understanding of the advokatura" despite the fact that his lectures on civil procedure had been given by a Moscow prisiazhnyi poverennyi.²⁹ On top of being inadequately prepared, a future pomoshchnik faced even more personal and financial insecurity than his counterpart who chose to become a candidate. Even though a candidate received no official salary for his apprenticeship, at least his longterm career prospects were still relatively straightforward. A clairvoyant pomoshchnik, on the other hand, was forced to contemplate a five year uphill struggle during which he would have both to establish a reputation and acquire a practice. Such anxieties were only heightened by the fact that in principle, there would be no guaranteed source of income throughout the entire 5 year apprenticeship. The pomoshchniki, Arsen'ev concluded in 1875, was not "the best school for a young man entering life straight from university. [It] did not give him regular, permanent work because [a pomoshchnik] often found himself without any cases or business at all."³⁰

What motivated, therefore, a young man to join the pomoshchniki? For some, it was the prospect of great financial reward, but for many others, the advokatura was the only option available. This primarily applied to Jewish law graduates, although others fell into this category as well. Employment in the Ministry of Justice, for example, required a certificate of approval from your respective university. If, like Karabchevskii, one had been involved in a student disorder or had come under the jurisdiction of the university courts, then the advokatura

²⁹N. Vil'skii, "Demoralizuetsia li nasha advokatura," Zhurnal Grazhdanskago i Ugolovnago Prava, no. 1(1891), p. 64. See also S. Lomnitskii, Zabytoe soslovie(Odessa, 1890), pp. 15-17.

³⁰Arsev'ev, Zametki, pt. 1: p. 31.

remained the only viable alternative if one still aspired to a legal career.³¹ Disgruntled candidates for judicial appointment were also natural contenders for joining the pomoshchniki. Finally, at the turn of the century, the ranks of the pomoshchniki were swelled by an increasing number of politically active young men who saw the advokatura as the one profession in which they could openly fight for what they believed.

But besides the above people, there was a significant percentage of new attorneys-in-training who joined the pomoshchniki without any intention of either practicing law or joining the Bar. These 'nominal' attorneys-in-training saw the pomoshchniki as a temporary stopgap measure on the way to either regular employment or state service. But even amongst those who had no options, the advokatura was often the career of last resort, especially in the early years of the Bar. Karabchevskii, who had never even stepped foot inside a courtroom prior to his acceptance into the pomoshchniki, brought little enthusiasm to his new vocation. "A career as an advocate," wrote Karabchevskii, seemed to "lack colour and social significance. The prospect of conducting cases also disturbed me. I was fascinated by the alluring, attractive image of the 'pleading' French advocate - the *maitr'e* - and horribly repelled by the antiquated, historical look of the Russian 'khodatai(legal practitioners)' or 'striapchii'."³² Such was the somber, pessimistic mood of many young university graduates as they set off to find a patron and begin their career in the pomoshchniki.

³¹N.P. Karabchevskii, "Kak ya stal advokatom," Okolo pravasudie(St. Petersburg, 1902), pp. V-VI.

³²ibid., p. XV .

II. LIFE AS A POMOSHCHNIK

Chapter 1 has already discussed the perfunctory attention that was given to the pomoshchniki at the time of the creation of the advokatura. The Judicial Reforms themselves contained only a passing reference to the pomoshchniki; as previously mentioned, article 354 designated three separate ways of becoming a prisiazhnyi poverennyi, one of which was to spend five years under a sworn attorney's personal supervision as his pomoshchnik(assistant). Unfortunately, article 354 made no mention of the corporate structure of the pomoshchniki, nor did it define the supervisory and disciplinary power of either the patron or the Bar over these young trainees.³³ The government's decision not to enforce the monopoly right of sworn attorneys complicated matters still further. Although it appears to have been the intention of the founders of the Judicial Reforms to restrict the rights of attorneys-in-training to conduct litigation, the subsequent failure to recognize the monopoly right meant that the legal distinction between the prisiazhnye poverennye and the pomoshchniki largely disappeared. Therefore, by default, both branches of the advokatura initially had an equal right to appear in all of Russia's courts with the noted exception of the commercial courts.³⁴

³³These multiple oversights were later attributed to the mistaken assumption, amongst the founders of the Judicial Reforms, that the judicial department, not the pomoshchniki, would serve as the primary preparatory school for the advokatura. See Vysochaishe uchrezhdennaia . . ., pp. 197-98

³⁴St. Petersburg attorneys-in-training were able to practice before the commercial courts after 1870 if they had received a license from the St. Petersburg Council of the Bar. The Council granted a license if a pomoshchnik had: 1) already completed two or more years of his apprenticeship; 2) received approval from his patron; and 3) passed a test, administered by the Council, in commercial law and jurisprudence. Between 1872 and 1888, 164 prisiazhnye striapchie licenses were given to attorneys-in-training, or approximately 10 per year. See Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 95-6.

The chastnye poverennye legislation of May 25th, 1874 ended this period of temporary equality between the prisiazhnye poverennye and the pomoshchniki, but in the process of solving one problem, the chastnye poverennye legislation created many more. Against the strenuous objections of the St. Petersburg Bar, article 406¹⁷ granted all attorneys-in-training the right to become private attorneys as well, provided that they were accepted by local court and paid the required license fee. Although the intention of the above legislation was to increase the number of state-recognized legal practitioners, the end result was that it became more difficult for a young attorney-in-training to practice law, since he was now required to purchase a license if he wanted to practice in the regional courts. Not only was the cost of a license often prohibitive for a pomoshchnik, just beginning to establish a practice, but it also meant that his access to the courts was largely dependent on the caprice of the local judicial authorities, who could, without reason, refuse an application for a license.³⁵ Thus, the number of attorneys-in-training, officially sanctioned to practice in the district courts, decreased dramatically. One year after the chastnye poverennye legislation, only 104 out of the 250 St. Petersburg attorneys-in-training had managed to obtain a license to practice in the district court. In 1877, only 82 St. Petersburg attorneys-in-training possessed a district court license, and by 1880, that number had fallen to 56.³⁶

³⁵V. Bauder, "Pomoshchniki prisiazhnykh poverennykh," Iuridicheskii Vestnik, no. 1(1887), p. 132.

³⁶Zakliuchenie Soveta prisiazhnykh poverennykh pri S-Petersburgskoi Sudebnoi Palate po proektu polozheniia o pomoshchnikakh prisiazhnykh poverennykh(St. Petersburg, 1902), p. 24. The chastnye poverennye legislation also had a negative impact on the growth of the pomoshchniki. In 1874, for example, 78 new attorneys-in-training were accepted into the St. Petersburg pomoshchniki; in 1880, only 30 new attorneys-in-training joined the pomoshchniki. Similarly, the exodus from the pomoshchniki also increased during this period; in 1874, 18 attorneys-in-training chose to leave the pomoshchniki, whereas in 1876, that number was 65. It was not until 1885-86, in fact, that the St. Petersburg pomoshchniki passed its 1876-77 total. Rozenberg attributes

The chastnye poverennye legislation, however, affected each individual pomoshchnik regardless of whether or not he purchased a license. A non-licensed pomoshchnik, for example, could still present himself to society as an advocate even though he did not command all the rights of an advocate, most notably, the right to appear in court.³⁷ On the other hand, the decision to become a private attorney also meant that a pomoshchnik was now subject to two disciplinary bodies: the court, which by law supervised the chastnye poverennye, and the Bar. Therefore, the legal position of the pomoshchniki, already opaquely defined in the original Judicial Reforms, became even more irregular. From an internal standpoint - i.e. in relation to his patron - a pomoshchnik, who retained both these titles, remained a pomoshchnik, but from an external point of view - i.e. in relation to the public and the court - a pomoshchnik was, in fact, a private attorney since he had received his license from the court.³⁸

The precarious legal standing of the pomoshchniki would remain a constant liability in the overall professional development of the advokatura. The one unquestioned legal requirement, articulated in the Judicial Reforms, which seemingly had to be observed was that before one could join the pomoshchniki, an applicant had to first find a patron amongst the prisiazhnye poverennye who would be willing to act as his supervisor. Yet even this requirement lacked a firm legal basis. Although article 355 of the Judicial Reforms carefully defined the eligibility requirements for the prisiazhnye poverennye, there was no accompanying amendment for the pomoshchniki. Therefore, it was up to each

this decline primarily to the excessive cost a a private attorney's license. See Rozenberg, Sud'by nashei korporativnoi prisiazhnoi advokatury, pp. 17-18.; Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, p. 75.

³⁷Pravo, no. 13(March 23, 1903), p. 921.

³⁸Sudebnaia Gazeta, no. 5(February 14, 1890), p. 3.

individual Council of the Bar, or, where a Bar did not exist, each district court to impose admission guidelines on the pomoshchniki. These varied substantially from city to city. In St. Petersburg, for instance, the Bar Council ruled that one could be jointly employed in state service and as a pomoshchnik even though article 355 specifically forbade sworn attorneys from remaining in state service, whereas the Moscow Council of the Bar vigorously applied article 355 to the pomoshchniki and demanded that all future attorneys-in-training resign from state service.³⁹ Another important regional difference occurred between St. Petersburg and Kharkov; the St. Petersburg Council of the Bar insisted that before one could be admitted into the pomoshchniki, one had to have graduated from university, whereas the Kharkov Council of the Bar gave an applicant up to two years to complete his university course after his initial acceptance into the pomoshchniki.⁴⁰

But beyond these purely legal considerations, the entire process of finding a patron - let alone a patron who was actually interested in providing genuine supervision - was fraught with difficulties. To begin with, most prisiazhnye poverennye opted not to have any assistants. In 1895, only 42%(175/421) of all St. Petersburg prisiazhnye poverennye chose to supervise a pomoshchnik. In Moscow, that percentage was only 35%(125/368) and in Kharkov, the percentage of prisiazhnye poverennye with attorneys-in-training was a minuscule 27%(55/171). Of those sworn attorneys with assistants, the overwhelming majority only had one. Returning to 1895 and the 125 Moscow prisiazhnye poverennye who acted as patron, 78.4% only had one pomoshchnik; 14.4% had 2; 4% had 3, and 3.2% had 4.⁴¹

³⁹Makalinskii, *S. Peterburgskaia prisiazhnaia advokatura*, pp. 51-55.

⁴⁰Lomnitskii, *Zabytoe soslovie*, p. 29.

⁴¹Spasovich, "Ob organizatsii advokatury," pp. 14-15.

The fact that a sworn attorney agreed to supervise a pomoshchnik, however, did not necessarily mean that a formal relationship now existed between the patron and his apprentice. On the contrary, most prisiazhnye poverennye assumed the title of patron in order to facilitate an applicant's initial entry into the pomoshchniki, not with the intention of providing any actual supervision. Karabchevskii's initial interview with his future patron - sworn attorney O. - sheds an important light on this process. It seemed that sworn attorney O had the curious habit of accepting everyone who asked him to be his patron, including people who were clearly not eligible for the pomoshchniki at all: army officers, priests, even women. Having therefore sponsored so many applications which had ultimately been rejected by the Council of the Bar, O. was forced to admit to Karabchevskii that at the present time, he did not even know how many attorneys-in-training he actually had. In the end, O. agreed to accept Karabchevskii as his pomoshchnik but only with the proviso that he would not be transferring any cases to Karabchevskii.⁴²

The whole patron/pomoshchnik relationship, therefore, was a fiction, a simple formality used to cover-up the fact that most attorneys-in-training practiced independently. Sliozberg succinctly described the patron/pomoshchnik relationship in his memoirs: "The first did not supervise, the second did not help."⁴³ As early as 1875, Arsen'ev admitted that he knew of only one sworn attorney who actually sat down with his attorneys-in-training and discussed what they had done.⁴⁴ By 1890. Lomnitskii estimated that only 10% of Moscow and St. Petersburg patrons actually provided some form of supervision for their attorneys-in-

⁴²Karabchevskii, "Kak ya stal advokatom," pp. XXII-XXIV.

⁴³G. Sliozberg, Dela minuvshikh dnei, 1: p. 191.

⁴⁴Arsen'ev, Zametki, pt. 1: p. 34.

training.⁴⁵ Yet even in these cases, where direct links were maintained between the patron and his assistant, many attorneys-in-training practiced independently. V. Novikov, the pomoshchnik of the prominent St. Petersburg defence attorney M.K. Adamov, wrote that even though his formal duties included conducting Adamov's civil litigation and helping Adamov receive clients in the evening, he nevertheless still had time to develop his own successful independent practice.⁴⁶

Unfortunately, Novikov does not describe the exact financial arrangement which existed between Adamov and himself. In general, however, it appears that only a handful of attorneys-in-training received a salary from their patron even if they worked directly for him. Of the 160 St. Petersburg attorneys-in-training surveyed in 1890, only 7 received a salary directly from their patron, while 43 stated that they worked in their patron's office but without any financial remuneration.⁴⁷ Of course, even a successful sworn attorney, who paid his pomoshchnik a salary, was not necessarily a good supervisor. The advice Maklakov received, on the eve of his search for a patron, was particularly illuminating. "Don't go," he was advised, "to the famous advocates. They are busy with other things and you won't learn anything from them. But do not go to an unknown advocate, either; they do not get good cases. Go to someone who is not known, but soon will be."⁴⁸ Thus, Maklakov turned down the opportunity to serve under Plevako, a prominent sworn attorney, and instead, chose to study under Lednicki.

⁴⁵Lomnitskii, Zabytoe soslovie, pp. 61-2.

⁴⁶V. Novikov, "Moe advokatskie vospominaniie," Novyi Zhurnal(Vol. 55, 1958), p. 184

⁴⁷Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S-Peterburgskoi Sudebnoi Palaty za 1890 g., pp. 24-5.

⁴⁸V.Maklakov, Iz vospominanii(New York, 1954), p. 234.

But even Maklakov had only a formal relationship with his patron, primarily because they had different specialties; Lednicki was a civil attorney and Maklakov was a criminal attorney.⁴⁹ Long intervals, therefore, regularly separated the meetings between a pomoshchnik and his patron. In one revealing incident, a Moscow sworn attorney introduced a pomoshchnik to a colleague only to discover that his colleague was, in fact, the patron of this pomoshchnik and that they had not actually seen each other in two years.⁵⁰ Such relationships, however, appear to have been quite common. In 1889, for example, the St. Petersburg Council of the Bar demanded that all patrons forward the addresses of their attorneys-in-training to the Bar. In response to this request, several prisiazhnye poverennye embarrassingly had to inform the Bar that they did not know where their attorneys-in-training were living, and despite the fact the the St. Petersburg Council gave local sworn attorneys an additional two months to track down their assistants, 37 attorneys-in-training were eventually stricken from the rolls for lack of a proper address.⁵¹

Thus, despite the deceptive titles of patron and assistant, virtually all attorneys-in-training practiced independently, often without any regard for the traditions of the prisiazhnye poverennye. In the early years of the Bar, a talented attorney-in-training could quite quickly establish his own successful practice, but with the steady growth of the advokatura competition gradually stiffened. Sliozberg described how young advocates in St. Petersburg used to lurk together in the lobby of the court, looking for criminal cases. Not only were these the most common cases - as well as

⁴⁹Ibid., p. 235.

⁵⁰Stolichnaia advokatura, p. 144.

⁵¹Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1889-90, p. 18.

the easiest to prepare - but a well publicized criminal case was often the quickest means by which a pomoshchnik could establish his reputation. In order to gain publicity, therefore, young advocates were careful to maintain good relations with the court reporter of the the local newspapers.⁵² Some even resorted to advertising their services. "Every August," wrote one Polish sworn attorney, "one can meet new disciples of the soslovie of prisiazhnye poverennye. With a portfolio under their arm, they scurry about the offices of the court and principally, the Justice of the Peace Courts. At the same time, there appears, in the papers, the usual announcements about wishing to conduct someone else's cases."⁵³ Most attorneys-in-training, in fact, practiced in the lower courts; according to the previously mentioned 1890 survey of St. Petersburg attorneys-in-training, 42% of their cases occurred in the Justice of the Peace Courts.⁵⁴ This inevitably brought them face to face with Russia's non-licensed 'underground' advocates - the direct descendant of the pre-reform striapchie whose deceitful, spurious methods will be examined in Chapter 5. Indeed, in light of the lack of interaction between the patron and his pomoshchnik, one could even go so far as to say that the underground advocate, not the prisiazhnye poverennye, was the greatest influence on the pomoshchniki. But with such role models, presciently asked Sudebnaia Gazeta, "is it possible for a pomoshchnik to act normally?"⁵⁵

There were other pressures exerting themselves on the pomoshchniki as well. Virtually everyone recognized that the five year apprenticeship requirement was too long and in many ways, counter

⁵²Sliozberg, Dela minuvshikh dnei, 1: pp. 202-204.

⁵³Lomnitskii, Zabytoe soslovie, p. 15.

⁵⁴Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S-Peterburgskoi Sudebnoi Palaty za 1890 g., p. 26.

⁵⁵"K voprosy o polozhenii nashikh molodykh iuristov," Sudebnaia Gazeta, no 47(November 24, 1891), p. 4.

productive. As early as 1868, the St. Petersburg Council of the Bar petitioned the government to have this period shortened, but their appeals amounted to nothing.⁵⁶ Many attorneys-in-training also found themselves in considerable financial difficulties. Lomnitskii commented that the pomoshchniki consisted primarily of young people "without any means."⁵⁷ Only 5%, he added, had any sort of financial security prior to their admission to the pomoshchniki.⁵⁸ Thus, many attorneys-in-training were forced to supplement their incomes and work outside their chosen profession, as proofreaders, tutors, or, in the specific case of St. Petersburg, state bureaucrats. In light of their material needs, attorneys-in-training were also forced to resort to subterfuge and other dubious methods of attracting clients. Vas'kovskii deplored the negative environment in which most young advocates worked, where "cunning" and "quick thinking" were needed to get ahead. "Little by little," Vas'kovskii added, a pomoshchnik "forgets that his vocation is to serve justice and [instead] begins to serve the exclusive interests of his clients, always trying to satisfy their demands and wishes no matter how illegal, unjust, and immoral they might be at times."⁵⁹

But paradoxically, the Bar was probably more concerned with those attorneys-in-training who did not practice as with those who did. The problems with the 'nominal' pomoshchnik - someone who assumed the title without any intention of joining the prisiazhnye poverennye - remained a constant source of concern for the Bar. In its 1889-90 Bar Report, the Moscow Council of the Bar identified several categories of nominal attorneys-in-training. Some joined the pomoshchniki simply

⁵⁶Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 24-29.

⁵⁷Lomnitskii, Zabytoe soslovie, p. 6.

⁵⁸Ibid., p. 14.

⁵⁹Vas'kovskii, Budushchee russkoi advokatury, p. 5.

while they waited to hear the results from their other entreaties. Others became attorneys-in-training because the title bolstered their applications to the judicial department or other bureaucratic institutions. Still others saw the pomoshchniki as their ultimate back-up plan; if, by chance, all else failed, they could still apply in five years to the prisiazhnye poverennye.⁶⁰

It is, of course, difficult to estimate the total number of nominal attorneys-in-training. Nevertheless, of the 397 people admitted into the Moscow pomoshchniki between 1879 and 1888, 180(45%) never bothered to complete their training and instead, chose to pursue a career outside the advokatura.⁶¹ A similar predicament existed in St. Petersburg. Sudbnaia Gazeta, basing its opinion on the 1890 survey of the St. Petersburg pomoshchniki, concluded that up to 50% of all St. Petersburg attorneys-in-training fell into this nominal category.⁶² Some even went off to do their military service when they were supposed to be busy pursuing a career in the St. Petersburg pomoshchniki.⁶³

Yet even this was not the end of the problems with the pomoshchniki. Amongst those attorneys-in-training who did practice, some came to the conclusion that it was to their personal advantage not to join the prisiazhnye poverennye. As long as one remained a pomoshchnik, for example, one was not required to pay the 10% tax or conduct gratuitous appointed cases. According to N. Gratsianskii, the privileged position of a longterm pomoshchnik within the advokatura explained why some attorneys-in-training chose to spend up to 18 years in the pomoshchniki.⁶⁴ Finally, we have already discussed how after the

⁶⁰Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1889-1890 god., pp. 14-15.

⁶¹Ibid., p. 15.

⁶²Sudbnaia Gazeta, no. 2(January 13, 1891), p. 2.

⁶³Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1889-1890, p. 19.

⁶⁴Gratsianskii, "Bezuriaditsa v advokature," p. 91.

November 8, 1889 legislation, Jewish attorneys-in-training were, for all practical purposes, excluded from the prisiazhnye poverennye. Obviously, this meant that a considerable contingent of trainees - 42% in St. Petersburg - now had no prospects for promotion. Indeed, Jewish attorneys-in-training were even further restricted by the November 8, 1889 legislation because they were now no longer eligible for a private attorney's license as well. Thus, along with the 'independent', 'nominal', and 'longterm' pomoshchnik, there was also the 'terminal' pomoshchnik who, for all intensive purposes, was legally denied the chance of becoming prisiazhnye poverennye.

Therefore, as a preparatory school for the advokatura - theoretically designed to acquaint young advocates with the traditions and customs of their chosen profession - the institute of the pomoshchniki was, without question, an unmitigated failure. Only in Moscow and St. Petersburg, however, were any attempts made to change the situation; the one other recognized Bar - Kharkov - did not publish any rules for the pomoshchniki until 1912.⁶⁵ And as for the rest of Russia, attorneys-in-training permanently remained without any supervision and, with the exception of the chastnye poverennye license requirement, under no professional restrictions. In reality, the only true legal body which exercised any authority over the pomoshchniki was the district court, but one must emphasize that a pomoshchnik only came under its jurisdiction if he possessed a license. Otherwise, all disciplinary decisions were left up to the personal discretion of the patron.⁶⁶ Therefore, how the Moscow and St. Petersburg Bar Councils tried to stem this decline and restore central control over the pomoshchniki must now be examined.

⁶⁵X.M. Charykhov, "Pomoshchniki prisiazhnykh poverennykh," in Istoriia russkoi advokatury, ed. M.Gernet, 3 vols.(Moscow, 1914-16), 3: p. 245.

⁶⁶Sudebnaia Gazeta, no. 2(January 14, 1890), p. 2.

III. ATTEMPTS TO REFORM THE POMOSHCHNIKI

A. Disciplinary Power

The most direct means by which the Bar sought to re-establish its supremacy was to apply the disciplinary powers, delegated in the original Judicial Reforms, to the pomoshchniki, but once again, thanks to the legal confusion surrounding article 354, this took more than 35 years to accomplish. The initial incident which triggered this long running controversy was the Bar's seemingly straightforward pronouncement on June 11, 1870 that henceforth, in order to give its junior members more experience, attorneys-in-training would be appointed to criminal cases on an the same basis as sworn attorneys. In the fall of 1870, however, a pomoshchnik by the name of Liutse refused such a case; by law, he contended, a pomoshchnik was not obliged to accept appointed criminal cases. When the Bar Council was informed of Liutse's non-compliance, a disciplinary hearing naturally resulted, but not only did Liutse fail to attend this hearing, he categorically rejected the Bar's jurisdiction over the pomoshchniki, claiming that no such powers were designated in the Judicial Reforms. Such a challenge could not go unanswered. It had only been in January, 1870 that the St. Petersburg Council of the Bar had first asserted its sway over the pomoshchniki; prior to that time, the Council had indirectly resolved disciplinary complaints involving attorneys-in-training, consulting only with the accused's individual patron. Therefore, in order to defeat Liutse's challenge to its authority, the St.

Petersburg Council voted in October, 1870, to expel Liutse from the pomoshchniki.⁶⁷

This was not the end of the dispute. Liutse appealed his expulsion to the St. Petersburg Sudebnaia Palata which, in a pivotal decision, overturned the Council's ruling and chose to reinstate Liutse. The reasoning behind the Palata's decision serves to highlight the legal conundrum that the Bar found itself vis-a-vis the pomoshchniki. There was no acknowledgement in the Judicial Reforms, the Palata concluded, that the pomoshchniki existed as a "korporatsiia" tightly linked with the "soslovie" of prisiazhnye poverennye, nor was there any absolute recognition of the Council's right to control the professional activities of the pomoshchniki. Therefore, despite the Palata's expressed sympathy with the intentions of the Bar Council, it nevertheless endorsed the view that only the personal patron exercised any legal authority over his assistant.⁶⁸

The Palata's decision - to deny the right of the Bar to govern the pomoshchniki - was finally reversed in 1902, and although the St Petersburg Council of the Bar later tried to minimize the impact of the Palata's original ruling, it clearly restricted the Bar's ability to control the activities of attorneys-in training. The immediate consequence was that the Council had to return to the pre-1870 system of indirect supervision via the patron, but in light of the Liutse verdict, the Bar now required future attorneys-in-training to agree, in writing, that they would obey all decisions and proclamations, published by the Bar. As part of this agreement the Council also reserved the right to summon any pomoshchnik, accused of a professional violation, before its disciplinary

⁶⁷Zakliuchenie Soveta . . pp. 11-13.

⁶⁸Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 80-81.

tribunal; if guilty, then the appropriate punitive sentence would be pronounced by the Bar and in turn enforced by the patron.⁶⁹ It was through this method that Liutse was finally expelled from the pomoshchniki. After Liutse had been reinstated by the Sudebnaia Palata, Liutse's patron was requested by the Council to withdraw his original consent to act as supervisor, and once this occurred, Liutse yet again found himself expelled from the pomoshchniki. When another sworn attorney later proposed to supervise Liutse, the Council refused to confirm this agreement, ensuring that Liutse remained permanently excluded from the pomoshchniki.⁷⁰

But even though the Bar Council had got its man, this system of indirect authority remained an ineffective method of regulating the affairs of the pomoshchniki. The Moscow Bar later admitted that only the most exceptional cases, involving attorneys-in-training, were brought before its disciplinary tribunal.⁷¹ The Bar Council's limited authority was further eroded in 1880, when the Ruling Senate pronounced that a pomoshchnik had the right to appeal all disciplinary judgements to the sudebnaia palata. Ever since the Liutse verdict, the St. Petersburg Palata had refused to interfere with the Council's disciplinary powers, but from 1880 onwards, the Palata began to reinstate expelled attorneys-in-training, declaring that according to articles 367 and 368 of the Judicial Reforms, the Council's punitive authority did not go beyond the prisiazhnye poverennye.⁷²

⁶⁹Ibid., p. 82.

⁷⁰Zakliuchenie Soveta. . . p. 16.

⁷¹Otchet Soveta prisiazhnykh povernnykh okruga Moskovskoi Sudebnoi Palate za 1889-1890 god., p 20.

⁷²Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, p. 83.

B. The Soslovie Patron

Indirect disciplinary control, therefore, was not a very satisfactory response to the continued professional autonomy enjoyed by the pomoshchniki. An alternative way of regulating this institute had to be found, one where the responsibilities and traditions of the advokatura were instilled in each recruit. Thus, a fifty year odyssey began in search of a substitute form of supervision. At various intervals, the St. Petersburg and the Moscow Councils of the Bar would experiment with loose forms of soslovie control, tight forms of personal control, and compromises somewhere inbetween, but in the end, the only positive reforms regarding the pomoshchniki would come from the pomoshchniki itself.

Not surprisingly, the St. Petersburg Council responded much more decisively to this challenge than its counterpart in Moscow. As early as 1869, when it was already clear that no true supervision was being provided by the patron, the St. Petersburg Council decided to impose certain guidelines. It first chose to apply the admission criteria, as specified in article 355, to the pomoshchniki with the noted exceptions of part 1 (the 25 year old age requirement) and part 4 (the previously mentioned restriction on state service). Outside the enforcement of article 355, the Council also sought to strengthen the patron/pomoshchnik relationship. A pomoshchnik was now required to inform his patron about all independent litigation, while the patron, in turn, was ordered to submit a bi-annual report to the St. Petersburg Council of the Bar detailing the activities of his assistant.⁷³

But despite the appeals for increased vigilance, the patron/pomoshchnik relationship began to deteriorate still further. Calls

⁷³Zakliuchenie Soveta . . . pp. 8-9.

to replace the personal patron with a system of soslovie patronage - where the Bar, not the individual sworn attorney, would be responsible for the supervision of the pomoshchniki - began to be voiced. Leading this charge were the St. Petersburg attorneys-in-training themselves. They elected a special commission - the forerunner, it appears, of the pomoshchniki's official representative body, the Komissiiia pomoshchnikov - which submitted a reform proposal to the Bar in January, 1871. In it, the commission recognized the need to subordinate the pomoshchniki to the Bar's authority, but at the same time, it insisted that this control should be exercised directly and not through a patron. According to the commission's prototype, a pomoshchnik would in the future spend the first two years of his apprenticeship under the observation of a specially selected sworn attorney, and only at the beginning of his third year - and with the approval of the Bar - would a pomoshchnik then become eligible to practice independently.⁷⁴

This reform project coincided with the Palata's verdict in the Liutse case, and it was most likely pressure from the latter which pressed the Bar into action. In November, 1871 the St. Petersburg Council introduced its own reform proposal where they largely adopted the suggestions of the special commission; instead of selecting a personal patron, the Bar proposed that henceforth, a pomoshchnik would be placed under the supervision of either a specific member of the Council or a sworn attorney selected by the Bar. This plan was approved by both the Bar and the St. Petersburg Sudebnaia Palata, and was next sent on to the Ministry of Justice for further consideration. The Ministry, however, not only disregarded the Bar's recommendations, it chose to undercut the Bar's

⁷⁴Ibid., pp. 13-14.

power still further for it was approximately at this time that the Ministry chose to equate the chastnye poverennye and the pomoshchniki.⁷⁵

It was left to Arsen'ev in 1875 to revive the call for soslovie patronage. Basing his model on the French system of collonnes(units), Arsen'ev proposed a system of group meetings; each pomoshchnik would belong to a conference section, once again headed either by a member of the Council or a specifically chosen sworn attorney, which would discuss both practical judicial questions and contemporary professional issues. Such seminars, Arsen'ev believed, would have more "moral significance" than the occasional advice of a personal patron, since attorneys-in-training would be supervised by a leading member of the Bar.⁷⁶ In response to his critics who argued that the Bar lacked the resources to implement such a reform, Arsen'ev also proposed to shorten the length of service of a pomoshchnik - from 5 to 3 years - and stipulated that a pomoshchnik would only be required to attend these conferences for the first two years of his training.⁷⁷

Sceptics remained, however, to the introduction of the soslovie patron; a university law graduate, - often with his own private practice - would not willingly give up his free time, it was contended, in order to attend obligatory lessons.⁷⁸ Yet support for the conferences steadily

⁷⁵Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 105-107.

⁷⁶Arsen'ev, Zametki, pt. 1: p. 40.

⁷⁷Ibid. p. 41. Accusations of elitism were also directed against Arsen'ev, even amongst those who supported the switch to the soslovie patron. Only the the very best stagaires, wrote P. Levenson, participated in the French collonnes system. Therefore, Levenson proposed a conference system which would incorporate all attorneys-in-training and exclusively discuss practical matters(writing Cassation appeals, participating in mock trials, etc.). See P. Levenson, "Shkola prisiazhnoi advokatury." Sudebnyi Vestnik, no. 110(May 23, 1876), pp. 1-2; P. Levenson, "Shkola prisiazhnoi advokatury," Sudebnyi Vestnik, no. 111(May 26, 1876), pp. 1-3. Arsen'ev immediately responded to these attacks, accusing Levenson of distorting his original proposal. Arsen'ev also defended his collonnes model; besides practical questions, his system would deal with the moral qualities of an advocate as well. See Sudebnyi Vestnik, no. 115(May 30, 1876), pp. 1-2.

⁷⁸B. Bobrishchev-Pushkin, "Shkola prisiazhnoi advokatury po proekty P. Levensona," Sudebnyi Vestnik, no. 131(June 18, 1876), p.3.

increased - both within the pomoshchniki and the prisiazhnye poverennye - and in 1877, an acceptable formula for reform was finally endorsed. Although a pomoshchnik was still required to register with a personal patron, the bulk of his professional training would now take place in group meetings organized by the Bar. Thus, before a pomoshchnik could be considered for acceptance into the prisiazhnye poverennye, he was now required to attend two years worth of conferences, chaired by a leading member of the profession, as well as present three papers at these meetings.⁷⁹ In order to ensure that these obligations were met, the chairman of each conference group was requested to present a report to the Bar on every member of his section. Although the conference rules were partially revised in 1880, the principle responsibilities- 2 years attendance and 3 conference reports - remained in operation for the remainder of the Bar's existence.⁸⁰

At approximately the same time, the Moscow Council of the Bar attempted to assert its statutory authority over the pomoshchniki. For the first ten years of its existence, the Moscow Council had shown little interest in the affairs of the pomoshchniki. Instead, they had become firm defenders of the patron's absolute power, so much so that in its 1870-71 Bar report, the Council announced that it did not "have any information on the activities of attorneys-in-training."⁸¹ In reality, the only contact that the Moscow Bar had with the pomoshchniki was that once a year, it counted them. This hands-off attitude, however, eventually began to change. The problem of the nominal pomoshchnik first prompted the

⁷⁹Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 97-98. The St. Petersburg Bar also announced in 1877 that before a pomoshchnik could be admitted to the prisiazhnye poverennye, he had to participate in at least ten trials - civil or criminal - involving a jury. See Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, p. 90.

⁸⁰Ibid., pp. 102-104.

⁸¹"Organizatsiia pomoshchnikov prisiazhnykh poverennykh v Moskovskom okruge," Vestnik Prava, no. 2(February, 1901), p. 104.

Moscow Council into action; in 1873, it sent a circular to all sworn attorneys asking them to be more circumspect in their selection of assistants, but despite this appeal, problems with the pomoshchniki continued to persist. Disciplinary complaints began to be filed against attorneys-in-training, once again confirming the lack of any authoritative control over the pomoshchniki.

Yet as the primary upholders of the personal patron system, the Moscow Bar initially chose to ignore these complaints and instead, simply passed them on to the patron. Mounting criticism, however, ultimately convinced the Moscow Bar that in order to protect the interests of the advokatura, the pomoshchniki had to be brought under executive management. Thus, in 1878, the soslovie patron was introduced in Moscow as well; all attorneys-in-training were divided into conference groups under the directorship of a specially selected sworn attorney. Just as in St. Petersburg, it was envisaged that the successful completion of these obligatory meetings would ensure that a pomoshchnik became a responsible member of the advokatura. A future attorney-in-training still had to select a patron, but after 1878, the patron exercised no real authority over his assistant. As part of these reforms, the Moscow Bar also presented the pomoshchniki with their own corporate institution; the Komitet pomoshchnikov (Committee of Attorneys-in-Training).⁸² Although obviously, the intention of the 1878 regulations was to provide more comprehensive training regimen, its initial impact was to significantly decrease the number of attorneys-in-training; the total membership of the Moscow pomoshchniki fell in 1878 from 193 to 90.⁸³

⁸²Ibid., p. 111.

⁸³Ibid. p. 112. The primary casualty of this plunge appears to have been the 'nominal' pomoshchnik although Vestnik Prava does mention that several attorneys-in-training chose to leave the pomoshchniki at this time simply because they did not want to be subordinated to the Moscow Bar.

C. The Battle over the Pomoshchniki

No sooner had both the Moscow and St. Petersburg Councils of the Bar converted to the soslovie patron then cries were heard urging the Bar to return to the good old days of the personal patron. Despite the best intentions of the Bar, the conference system - the backbone of the soslovie patron - never caught on. Sliozberg describes the calamitous state of the group meetings by the end of the 1880's; attendance was not strictly enforced, reports were often plagiarized, and the links between the group leaders and the individual members were largely fictitious.⁸⁴ A similar set of circumstances developed in Moscow. Attorneys-in-training found it insulting that as mature adults, long since graduated from university, they now had to make mandatory presentations to a group. As a result, just as in St. Petersburg, absenteeism grew, unsatisfactory reports were delivered, indifference steadily increased.⁸⁵

Thus, the introduction of the soslovie patron had only made matters worse; not only were the conferences a major disappointment in their own right, they had failed to alter the unbridled status of the pomoshchniki - the very reason for their creation in the first place. After just 6 years of soslovie rule, the St. Petersburg Council of the Bar was the first to reverse itself and call for the reinstatement of the personal patron. According to its 1883 reform proposal, the Bar now believed that only a strong, active personal patron could ensure that the necessary links

⁸⁴Sliozberg, Dela minuvshikh dnei, 1: p. 201. The one exception to this rule were the conferences supervised by Passover. According to Sliozberg, Passover repeatedly displayed his intellectual brilliance at these conferences and was especially well-known for his gruelling cross-examination of all speakers. See Sliozberg, Dela minuvshikh dnei, 1: p. 211; Novikov, "Moe advokatskie vospominaniie," p. 185.

⁸⁵"Organizatsiia pomoshchnikov. . ." Vestnik Prava, no. 2(February, 1901), pp. 112-113.

between the prisiazhnye poverennye and the pomoshchniki were maintained. Therefore, the Bar recommended that from now on, all attorneys-in-training should be subordinated to their respective patrons for 3 years without any right to independent practice.⁸⁶ This prescription was greeted by sharp criticism, especially amongst attorneys-in-training. Not only did losing the right to practice independently destroy their financial base, but the return of the personal patron - especially with his enhanced powers - would inevitably mean that fewer sworn attorneys would be willing to sponsor trainees. Therefore, in order to defend the privileges of the St. Petersburg pomoshchniki, the Komissiiia pomoshchnikov issued its own counter-proposal in October, 1883, where it moved that all attorneys-in-training should remain under the jurisdiction of the Bar, not the individual patron. After discussing these projects in December, 1883, the St. Petersburg General Assembly decided to reject both of them and instead, formed a special commission to work out an alternative plan.⁸⁷

This special commission, which published its findings in 1885, began its report by emphasizing the shortcomings in both of the above proposals. By decreasing the number of potential supervisors, the commission argued, the 1883 Bar Council prototype would have basically destroyed the pomoshchniki as an institute and forced aspiring young advocates to seek their training in the judicial department, far away from the traditions of the Bar. On the other hand, the Komissiiia pomoshchnikov's programme was simply a perpetuation of the status quo, where attorneys-in-training were subject to no constraints.⁸⁸ Yet despite certain reservations, the special commission still voted to return to

⁸⁶Zakliuchenie Soveta. . . pp. 34-35.

⁸⁷Ibid., pp. 35-37.

⁸⁸Makalinskii, S. Peterburgskaia prisiazhnaia advokatura, pp. 114-115.

the personal patron, for the simple reason that in times of difficulty, it guaranteed that a pomoshchnik would have someone to turn to for advice. Therefore, four regulations were introduced in order to strengthen the position of the patron: 1) all applicants, wishing to enter the pomoshchniki, would have to register with a sworn attorney; 2) no attorneys-in-training would be allowed to conduct litigation in the reformed courts without the written approval of their patron, with the exception of civil cases in the Justice of the Peace Courts, which did not require the patron's approval; 3) in order to conduct litigation in the general courts, a pomoshchnik would be required to have a license from the Bar; and 4) a sworn attorney could not have more than 3 attorneys-in-training. The commission also sought to affirm the Bar Council's legal authority over the pomoshchniki by urging that the following legislative changes be adopted by the government: 1) a pomoshchnik should be absolutely subordinated to the Council's disciplinary power; 2) the chastnye poverennye regulations should no longer apply to the pomoshchniki; 3) attorneys-in-training should not be allowed to petition before the general courts without the Council's approval; and 4) the length of service for an individual pomoshchnik should be reduced from 5 to 4 years. But just as in 1871, the Commission's report was ultimately lost in the black hole of the Ministry of Justice, which refused to implement the proposal even though it had been approved by both the St. Petersburg Bar Council and the St. Petersburg Sudebnaia Palata.⁸⁹

This was where matters stood until March 18, 1889, when the St. Petersburg Council decided that despite the Ministry's lack of approval, two of the 1885 reforms could be implemented immediately without official acquiescence. Thus, the Council announced that as of May 1, 1889

⁸⁹Ibid., pp. 115-117.

attorneys-in-training would now have to: 1) receive written approval from their patrons for every piece of litigation in which they were personally involved; and 2) obtain a license from the Bar in order to appear before the court as a certified pomoshchnik.⁹⁰ Naturally, attorneys-in-training were enraged by the Bar's unilateral action. Was a pomoshchnik supposed to ask his client to wait while he went off in search of his patron's approval? What if the patron was away or sick? Many questioned if the patron was even in a position to decide whether or not his assistant should take a case, but there was no doubt that the client/advocate relationship would be significantly undermined, since a pomoshchnik was now required to inform his patron of all relevant information, including that told in confidence.⁹¹

The uproar surrounding the Bar's actions was short lived, however, but only because the position of the pomoshchniki was thrown into further disarray by the November 8, 1889 legislation restricting the admission of Jews into the prisiazhnye poverennye. Yet just like the original Judicial Reforms and the chastnye poverennye legislation before it, the November 8, 1889 regulations had left the pomoshchniki in an ambiguous position. A strict interpretation of the above legislation found that although it clearly stipulated that all Jewish applicants to the prisiazhnye poverennye and the chastnye poverennye first be approved by the Ministry of Justice, it made no such demand on the pomoshchniki. And as we have already seen, the pomoshchniki had existed as a separate, legal entity ever since the Liutse verdict. Therefore, the only person who strictly exercised any lawful authority over a pomoshchnik was still his

⁹⁰Zakliuchenie Soveta. . . pp. 39-40.

⁹¹Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S-Peterburgskoi Sudebnoi Palaty za 1889g., pp. 25-27.

patron, and this could not be legally interfered with either by the Council of the Bar or the Ministry of Justice.

Neither the St. Petersburg nor the Moscow Council of the Bar interpreted the above legislation in this manner. On the contrary, the November 8, 1889 legislation played into the hands of those who wanted to remove the strong Jewish presence from the pomsoshchniki. It also provided a pretext to end, once and for all, the junior branch's autonomous status and reimpose a strict personal patron. Both of these objectives were present in the St. Petersburg Bar Council's proposal, which was brought before the general assembly on February 4, 1890. Initially, this proposal emphasized the intolerable situation of the nominal pomoshchnik. The Bar argued that thanks largely to the fictitious patron/pomoshchnik relationship, many attorneys-in-training had acquired habits and attitudes which were directly opposed to the traditions of the prisiazhnye poverennye, but because the only established criteria for entering the sworn profession was the completion of a 5 year apprenticeship, the Bar was often forced to accept people "whose links with the soslovie were simply formal."⁹² In order to correct this regrettable state of affairs, the Bar insisted that the patron be established in the direct sense of the word. Thus, the February 4, 1890 proposal announced that henceforth, the written consent of the patron was required for all civil litigation, conducted by a pomoshchnik. In addition, criminal disputes could be conducted only at the beginning of the third year of the apprenticeship and with the general approval of the Bar; individual supervision of criminal cases was deemed inappropriate because a pomoshchnik required more independence in such cases than

⁹²Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1889-90, p. 20.

in a civil cases. The patron/pomoshchnik relationship was further enhanced by the stipulation that all attorneys-in-training now had to live in the same city as their patron and that each patron was limited to one assistant, although with the approval of the Council, that number could be increased to a maximum of three.⁹³

The re-establishment of the personal patron was, of course, consistent with all of the St. Petersburg Bar Council's reform proposals since 1883. What made the new programme so distinctive was the Bar's attempt to apply the November 8, 1889 legislation to the pomoshchniki. Since the declared purpose of the pomoshchniki had always been to prepare attorneys-in-training for a career in the advokatura, the February 4, 1890 proposal stated, it had always been assumed that all applicants to the pomoshchniki possessed the right to conduct civil and criminal petitions in court. Under this new legislation, however, a Jewish pomoshchnik was no longer able to fulfil this requirement because in essence he was no longer entitled to a private attorney's license. Furthermore, the Bar argued, it would be disadvantageous both for the individual involved and the korporatsiia as a whole if the pomoshchniki became overrun with such individuals; the patron would not be able to utilize his assistants to the maximum advantage, and the number of nominal attorneys-in-training would inevitably rise. Therefore, the February 4, 1890 reform project stated that any pomoshchnik, who in the course of his first three years had not received a private attorney's license would be removed from the pomoshchniki.⁹⁴

The liberal press quickly rallied to the defence of Jewish attorneys-in-training. Vestnik Evropy argued that since the decision not to grant a

⁹³Ibid., pp. 21-22.

⁹⁴Ibid., pp. 22-23.

private attorney's license to Jews was based solely on religion, not competence, there was no justification to remove all Jewish attorneys-in-training from the pomoschniki, especially since the November 8, 1889 did not unconditionally ban their admission to the prisiazhnye poverennye. A pomoshchnik, Vestnik Evropy added, could also continue to function quite competently as an advocate even if he did not appear in court.⁹⁵ But despite the obvious antagonism to this amendment within the profession, it was the return of the strict personal patron, not the Jewish question, which publicly united the opposition to the February 4, 1890 regulations. As a result, the February 4, 1890 regulations were rejected by an overwhelming majority of St. Petersburg sworn attorneys, and in the wake of this defeat, a new commission was formed - this time including members of the Komissiiia pomoshchnikov - to draft yet another strategy for reforming the pomoschniki.

The results of this commission, which appeared at the end of 1890, represents the last major attempt to reorganize the St. Petersburg pomoschniki. It attempted to find the common ground between the soslovie and the personal patron by combining both systems in the spirit of compromise. According to this plan, the future training of a pomoshchnik would be divided into two periods; for the first two years a pomoshchnik would be under the strict supervision of his personal patron and, in the absence of the latter, the leader of his conference group. All relevant information, involving the conduct of either a civil or criminal case, was to be reviewed by the personal patron during these two years. On top of this requirement, a pomoshchnik would also now be asked to help his patron in all certificate of poverty cases and criminal cases, appointed by the court. If a pomoshchnik had conducted 10 civil

⁹⁵Vestnik Evropy, no. 3(March, 1890), pp. 393-394.

cases, of which no less than 3 had been in the reformed courts, and spent no less than 2 years in the pomoshchniki, he could begin to practice independently, although the patron still reserved the right to demand an explanation from his assistant in any specific case. Alongside this personal supervision, the plan also demanded that a pomoshchnik participate in at least two years worth of conferences, organized by the Bar, which would discuss primarily practical legal questions.⁹⁶

Other longstanding anomalies were addressed by the commission in this reform proposal as well. The Bar's absolute disciplinary power was confirmed by the commission. The right of a pomoshchnik to remain in state service was also confirmed, although in the future, the Council would have to approve such an appointment. Finally, the commission declared that if a pomoshchnik did not transfer to the prisiazhnye poverennye upon the completion of his 5 year apprenticeship, then the Council would decide on an individual basis whether or not that person should remain in the pomoshchniki.⁹⁷ This was clearly a concession directed to Jewish attorneys-in-training, since it meant that they would no longer be subject to automatic expulsion if, after 5 years, they were denied admission to the Bar.

But just like so many of its predecessors, this reform proposal was also bound for oblivion. In the beginning of 1891, the first of two government commissions was formed in order to investigate the current state of Russia's legal system. Thus, pending the outcome of this inquiry, the St. Petersburg Council of the Bar chose not to implement the above reform proposals. As a result, the Bar was left with the compromise between the personal and the soslovie patron - the same general formula,

⁹⁶Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S-Petersburgskoi Sudebnoi Palaty za 1890g., pp. 43-48.

⁹⁷Ibid., p. 44.

in other words, which had existed in St. Petersburg since 1877, and in the final analysis, this middle road never brought order and stability to the pomoshchniki. A poll of St. Petersburg attorneys-in-training in 1908 concluded that in almost 50% of the cases, the patron/ pomoshchnik relationship was pure fiction. The criticisms of the patron in this 1908 poll also sounded all too familiar: "The patron did not teach me anything." "Several patrons treat their attorneys-in-training worse than their servants." "My role is that of a work horse."⁹⁸ Therefore, the sum total of five reform proposals in St. Petersburg between 1883 and 1890 was simply the preservation of the status quo.

The Moscow Council of the Bar reacted with even greater vigour to the November 8, 1889 legislation than its St. Petersburg counterpart. Ever since the introduction of the soslovie patron in 1878, the Moscow advokatura had grown more and more polarized over the pomoshchniki issue. As a result, two opposing parties had emerged within the profession; the liberal party, which supported the principle of soslovie patronage, and the conservative party, which demanded the return of the personal patron.⁹⁹ In light of the consistent supremacy of the liberal view throughout the 1880's, the March 3, 1890 rules on the pomshchniki came as a complete shock to the Moscow advokatura. The conferences, the Bar declared in the above pronouncement, had been a complete failure, met on all sides only by indifference. Therefore, without even bothering to consult the soslovie at large, the Moscow Council announced that it had decided to re-introduce the personal patron. According to the March 3, 1890 regulations, a pomoshchnik would no longer be able to maintain an independent practice; instead, all private litigation would have to first be

⁹⁸"Anketa ob ekonomicheskome i professional'nom polozenii pomoshchnikov prisiazhnykh poverennykh," Pravo, no. 15(April 11, 1908), pp. 859-860.

⁹⁹Stolichnaia advokatura, pp. 142-143.

approved by the patron. In order to ensure that proper surveillance was maintained, each sworn attorney would be limited to one assistant, although this could be increased with the approval of the Bar. The Komitet pomoshchnikov was abolished, and the Bar reserved the right to review all applications to the pomoshchniki. Finally, all future attorneys-in-training were required to produce authorization that they could receive a private attorney's license from of the local or regional courts. This last plank was clearly directed against the Jews who as we have seen were no longer eligible for such a license after the November 8, 1889 legislation.¹⁰⁰

The similarities between the above Moscow proposal and the initial St. Petersburg proposal were not coincidental; the chairman of the Moscow Bar - A.A. Kriukov - had requested a copy of the February 4, 1890 regulations from his counterpart in St. Petersburg - V.O. Liustikh.¹⁰¹ And just as in St. Petersburg, the issue that galvanized the opposition to these new rules was not the removal of Jewish attorneys-in-training but the abrogation of a pomoshchnik's right to practice independently - plus, one must add, the heavy-handed methods employed by the Bar to introduce these reforms. The leading critic was Kriukov himself, whose dissenting opinion was published in the 1889-90 Moscow Bar Report. The Bar, Kriukov argued, had no legal right to interfere with the freedom of action enjoyed by the pomoshchniki, and that rather than being a detriment, this freedom had contributed to the education of attorneys-in-training by providing them with much-needed practical experience.¹⁰²

The belief that the Moscow Bar had significantly overstepped its lawful authority was shared by several other commentators as well. It did

¹⁰⁰Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1889-1890 god., pp. 7-9.

¹⁰¹Istoriia russkoi advokatury, 3: p. 192.

¹⁰²Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1889-1890 god., pp. 9-11.

not take a jurist, G. Dzhanshiev stated, to know that any retrospective application of the March 3, 1890 rules to those currently in the pomoshchniki would be against the law.¹⁰³ The Judicial Reform, Dzhanshiev also stressed, was not the only legislative act which defined who could and could not be an advocate; there was the chastnye poverennye law, plus the recently approved zemskii nachalnik legislation, which had also expanded the number of state recognized legal practitioners.¹⁰⁴ Moreover, the chastnye poverennye made no stipulation that a pomoshchnik had to possess a private attorney's license. On a practical level, Dzhanshiev noted that the high cost of a private attorney's license would sharply reduce the number of applicants to the advokatura. In addition, the absolute subordination of a pomoshchnik to his patron would turn him into the "hack(remeslennik)" of the legal profession, doomed only to deal with narrow, technical questions.¹⁰⁵

As we already saw in Chapter 2, all attempts to discuss the implications of the March 3, 1890 rules were thwarted; a petition signed by 54 sworn attorneys was summarily dismissed by the Moscow Bar.¹⁰⁶ Even those who appreciated the need to reform the pomoshchniki were alienated by the Bar's methods. It was beyond belief, wrote Sudebnaia Gazeta, that "jurists, people with higher legal education" could possess such an underdeveloped sense of "loyalty and elementary justice."¹⁰⁷

¹⁰³G. Dzhanshiev, Po povodu novoi organizatsii pomoshchnikov prisiazhnykh poverennykh(Moscow, 1890), pp. 10-11.

¹⁰⁴Ibid., p. 18.

¹⁰⁵Ibid., pp. 20-21.

¹⁰⁶The Moscow General Assembly did get a chance to debate these new regulations on December 2, 1890. Sudebnaia Gazeta reports, however, that no discussion took place at this gathering - only "abuse" and "criticism." When one sworn attorney, who opposed the March 3, 1890 rules, asked for an explanation, Plevako - the chairman of the meeting - cut him off. To criticize the activities of the Bar Council, Plevako stated, was to turn its members into defendants, which was insulting for their honour and dignity. See "Mezhduusobitsa v srede moskovskoi prisiazhnoi advokatury," Sudebnaia Gazeta, no. 50(December 16, 1890), p. 3.

¹⁰⁷Sudebnaia Gazeta, no. 22(June 3, 1890), pp. 2-3.

Although the Moscow Council tried to justify its actions by stating that it was simply enforcing the November 8, 1889 legislation, its primary defence rested upon anti-Semitism. As Sudebnaia Gazeta stated, the Moscow Council had responded to the charges of improbity with the cry, "The fatherland is in danger."¹⁰⁸ Amongst the sworn profession, the Bar's primary defender was A. Shmakov, who somehow managed to equate the November 8, 1889 legislation with the Monroe Doctrine. Just as the Monroe Doctrine had sought to protect America from the "yellow peril" and the the rise in Chinese immigration, the November 8, 1889 legislation had sought to preserve the predominance of the Russian people within their own country. Similarly, Shmakov argued that the greatest threat to the Moscow advokatura was the rise in the number of Jewish advocates in the profession. Therefore, Shmakov concluded, "One must keep Russia for the Russians and in particular, preserve a Russian advokatura in Moscow."¹⁰⁹ The anti-Semitic defence was picked up by the right-wing press as well. Novoe Vremia chose to contrast the actions of the Moscow Council with its counterpart in St. Petersburg. In St. Petersburg, Novoe Vremia argued, the "Jewish majority is strong. The majority of the members of the Bar Council are its delegates. If they are not Jews, then they are Judophiles of the first order."¹¹⁰ According to Novoe Vremia, this strong Jewish influence explained why the February 4, 1890 proposed regulations had been defeated, but in Moscow, on the other hand, the majority of the Bar Council did not consist "of Jews and their supporters."¹¹¹ Thus, the Moscow Council had been willing to act, and Novoe Vremia defended the March 3, 1890 regulations, insisting that

¹⁰⁸"Mezhduusobitsa v srede moskovskoi prisiazhnoi advokatury," Sudebnaia Gazeta, no. 50(December 16, 1890), p. 3.

¹⁰⁹A. Shmakov, Evreiskiiia rechi(Moscow, 1897), p. 62.

¹¹⁰Novoe Vremia, no. 5044(March 15, 1890), p. 1.

¹¹¹Ibid., p. 1.

the Bar was well within its legal rights to reject the petitions calling for an extraordinary meeting.

But even those who expressed anti-Semitic views were nevertheless unhappy with the March 3, 1890 reforms. One commentator in Sudebnaia Gazeta, while professing to be neither a "Judophile" nor a "Judophobe," stressed that if any limitations were going to be placed on Jewish attorneys-in-training, then they could only be done "via legislation" and not by institutions, easily distracted by "purely selfish considerations."¹¹² But nothing could stop the determination of the Moscow Council of the Bar; even before all legal appeals had been exhausted, 102 attorneys-in-training were expelled from the pomoshchniki.¹¹³ And in the end, the Moscow Sudebnaia Palata defended the right of the Moscow Bar to implement the March 3, 1890 regulations. In two separate judgements - on October 13, 1890 and February 14, 1891 - the Palata ruled that it could not overrule the March 3, 1890 regulations, since they had not transgressed the limits of the Bar's legitimate authority. The Moscow Palata did find an irregularity, however, in the compulsory expulsion of the attorneys-in-training; in this particular instance, the Palata ruled, the Council had neither sought a preliminary explanation from the attorneys-in-training, as stipulated in article 371 of the Judicial Reforms, nor had it formulated specific charges against each individual pomoshchnik. Therefore, 19 attorneys-in-training, who had brought suit against the Moscow Council, were ordered to be reinstated into the pomoshchniki.¹¹⁴

¹¹²"Mezhduusobitsa v srede moskovskoi prisiazhnoi advokatury," Sudebnaia Gazeta, no. 50(December 16, 1890), p. 4.

¹¹³Sudebnaia Gazeta, no. 22(June 3, 1890), p. 2.

¹¹⁴Istoriia russkoi advokatury, 3: pp. 199-200.

The Moscow Palata's rulings were appealed to the Senate, but it would take some four years before Russia's highest court would return its verdict. In the intervening years, the full impact of the March 3, 1890 regulations was felt by the Moscow pomoshchniki. A petition, signed by 48 attorneys-in-trainings, reflected the damage which had been inflicted on the Moscow pomoshchniki as a result of the March 3, 1890 reforms: 1) the abrogation of the right to independent practice had resulted in severe economic hardship for many attorneys-in-training, since most patrons could not ensure that their assistants received sufficient earnings; 2) legal practices had been transferred from the sworn to the private profession; 3) many patrons were still unable to supervise their assistants because of other commitments; and 4) the abolition of the Komitet meant that attorneys-in-training no longer had a forum in which they could interact with each other.¹¹⁵

The personal patron, therefore, had not been the antidote to ills of the Moscow pomoshchniki, and when the Ruling Senate finally announced its decision in 1895, it struck down several important planks of the March 3, 1890 regulations. Article 416¹⁷ of the chastnye poverennye legislation, the Senate concluded, gave all attorneys-in-training the right to practice independently as private attorneys, a privilege which the Bar could not interfere with. Furthermore, there was no stipulation in the Judicial Reforms that a pomoshchnik had to possess a private attorney's license before he could be admitted into the pomoshchniki. Finally, the Senate ruled that the Bar Council had exceeded its authority by imposing a limit on the number of attorneys-in-training a patron could have; such a restriction could only be imposed through legislative means.¹¹⁶ But the

¹¹⁵ibid. p. 200-201.

¹¹⁶"Organizatsiia pomoshchnikov. . "Vestnik Prava, no. 2(1901),p.115.

Senate's ruling was not entirely unfavourable for the Moscow Bar. It recognized, for example, that the pomoshchniki were legally subordinated to the disciplinary power of the sworn profession, and that it was within the Bar's prerogative to publish uniform norms for its junior branch. Thus, on March 6, 1896, the Moscow Council of the Bar unveiled new regulations which excluded the offending paragraphs, cited by the Ruling Senate, but kept in tact the remainder of the March 3, 1890 rules, most notably, the strict personal patron.

But the mood in the Moscow Bar was changing once again, this time swinging back to the liberal wing of the profession. On October 7, 1898, the Moscow Bar opted to follow the St. Petersburg model and find some sort of middle ground between the soslovie and personal patron. Small conferences, chaired by specially selected sworn attorney, were re-introduced in order to supplement the training provided by the personal patron.¹¹⁷ The first attempt at organizing these gatherings, however, was a complete failure, primarily because the conferences were not made obligatory, but even after this loophole was removed in 1900, the critiques of the conferences remained painfully familiar; the 1901-02 Moscow Bar Report specifically cited the indifference on the part of the group leaders, who regularly never bothered to attend the meetings they were supposed to be leading.¹¹⁸

The call to reform the Moscow pomoshchniki would be voiced yet again in 1903 and 1908, but in the end, no substantial changes would result from these appeals. Thus, just like St. Petersburg, Moscow was left with an unhappy compromise between the soslovie and personal patron, an ambivalent combination which, as we have seen, never met the needs of

¹¹⁷Ibid., pp. 116-118.

¹¹⁸Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1901-1902 god., pp. 9-10.

the pomoshchniki. In his 1898 after dinner speech, Spasovich deeply lamented that the Bar had not organized an efficient preparatory training program for the advokatura. "We constantly contradict ourselves in regard to the organization of our young brothers. We are guilty in that we managed quite well from 1866 to 1883, and then, suddenly and without reason, deviated from the stage(i.e. the soslovie patron) to the [personal] patron."¹¹⁹ But the personal patron, Spasovich went on to say, was simply a "convention, a fiction, false and hypocritical."¹²⁰ In the end, the only beneficiaries of the Bar's half-measures and indecision were the Jews. Until 1912, when the November 8, 1890 restrictions were at last applied by the government to Jewish attorneys-in-training, the pomoshchniki remained open to all applicants.¹²¹ Thus one-third(1646/4858) of the pomoshchniki was still Jewish in 1912, and in several cities, that percentage was much greater.¹²² However, since the November 8, 1889 legislation had placed restrictions on their right to appear in the reform courts, many Jewish attorneys-in-training ended up practicing in the commercial courts.¹²³ Indeed, in 1914, one-quarter(964/3990) of all prisiazhnye striapchie in Russia were still Jewish.¹²⁴

¹¹⁹Spasovich, Zastol'nye rechi, p. 73.

¹²⁰Ibid., p. 73.

¹²¹Between 1890 and 1895, while the March 3, 1890 rules were in force, no Jewish applicants were accepted into the Moscow pomoshchniki. See Kucherov, Lawyers, Courts, p. 276.

¹²²"Evrei v russkoi advokature," Vestnik Prava, no. 6(1916), pp. 162-163. The percentage breakdown per city of Jewish attorneys-in-training in 1912 was as follows: St. Petersburg - 48%; Moscow - 27%; Kiev - 39.5%; Kazan - 10.6%; Saratov - 15.7%; Kharkov - 30.4%; Novochoerkassk - 22%; Odessa - 53.5%; Vil'na - 38%; Warsaw - 36.4%; Irkutsk - 19.7%; Tashkent - 13.8%; Omsk - 17.5%. By 1915 the percentage of Jewish attorneys-in-training in the pomoshchniki had already dropped from one-third to one-quarter, but this was still much higher than the percentage of Jews in the sworn profession(8.4%).

¹²³Kratkii ocherk deiatelnosti konsul'tatsii pomoshchnikov prisiazhnykh poverennykh pri S. Peterburgskom stolichnom mirovom s'ezde za XXV letnii period(St. Petersburg, 1913), p. 6.

¹²⁴"Evrei v russkoi advokature," Vestnik Prava, no. 6(1916), p. 163.

Thus, despite years of debate, countless proposals, and radical shifts in policy, the Bar's struggle to change the professional status of the pomoshchniki had ignominiously failed. Yet at the same time, it must be stressed that not all the efforts to reform this institute came from above. On the contrary, it was from the opposite direction, from below, where the most decisive reform proposals originated. As we shall now see, in both Moscow and St. Petersburg attorneys-in-training used their ambiguous, quasi-independent status in order to establish their own professional identity, often over the objections of the Bar itself.

IV. THE CORPORATE ORGANIZATION OF THE POMOSHCHNIKI

The St. Petersburg Komissiiia pomoshchnikov (Commission of Attorneys-in-training) was founded on November 20th 1872. Just like the senior branch, the Komissiiia had its own general assembly, its own elected leaders, and even published its own annual report. Within one month of its creation, it was formally recognized by the Bar, which saw many advantages in this new organization; the Komissiiia, it was thought, would help the Bar gather information about prospective applicants as well as assist in the overall supervision of the pomoshchniki.¹²⁵ Misunderstandings quickly developed, however, between these two institutions over the relative independence of the Komissiiia. From the very beginning, the Komissiiia and Bar clashed over which branch regulated the admissions process. The Komissiiia also demanded that two of its representatives attend all disciplinary hearings involving attorneys-in-training. Although the Bar refused this request, it did allow the Komissiiia to organize its own disciplinary tribunal, but even this

¹²⁵Zakliuchenie Soveta. . .p. 19.

concession failed to satisfy the Komissiiia. It insisted that all complaints, brought against attorneys-in-training, should first be heard by the Komissiiia, and then, only if an appeal was filed, transferred to the Bar. The Bar rejected this plan as well, emphasizing that as the elected leaders of the soslovie, it reserved the right to resolve all disciplinary complaints regardless of the Komissiiia's opinion.¹²⁶

Over the next ten years, the acrimonious relations between the senior and junior branches of the Bar continued to persist. In 1881, the Komissiiia again tried to appropriate more power by declaring that it, alone, reserved final judgement on all admissions questions. They justified this action for the following reasons: 1) as an independent institution, charged with the self-management of the pomoshchniki, the Komissiiia controlled admissions in the exact same manner as the Bar Council. Therefore, since the Bar Council's rejections based on article 380(moral objections) could not be appealed to the sudebnaia palata, then similar rejections, upheld by the Komissiiia, should not be appealed to the Council; 2) such decisions could not be arbitrarily imposed, since a rejection on moral grounds required the support of at least 7 members of the Komissiiia; and 3) the right of the Komissiiia to pronounce definitive verdicts had been confirmed by custom and recognized by the Bar.¹²⁷ The Council, however categorically rejected the Komissiiia's bid for self-rule. By law, a pomoshchnik was still subordinated to a sworn attorney and therefore, an "independent soslovie of attorneys-in-training simply cannot exist."¹²⁸

¹²⁶Ibid., p. 21.

¹²⁷Othet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1881-1882, p. 14-15.

¹²⁸Ibid., p. 13-14.

Yet surprisingly, despite these serious disagreements, the Bar remained an active supporter of the Komissiiia. In 1882, when the St. Petersburg Sudebnaia Palata inquired into the origins of the Komissiiia and its alleged disciplinary authority over the pomoshchniki, the Bar rallied to the Komissiiia's defence. In its explanation to the Palata, the Bar explained that the Komissiiia was the result of a private agreement amongst attorneys-in-training, and as such, had no genuine punitive authority. Nevertheless, despite its unofficial status, the Bar stressed that the Komissiiia played a valuable managerial role; it both provided relevant information about future applicants and served as a centre, where attorneys-in-training could interact with each other.¹²⁹

The Palata appears to have been unimpressed by this defence; on March 5, 1883, it ruled that the Komissiiia's existence had no legal basis and ordered that it be shut down, but for some reason, this ruling was never enforced.¹³⁰ Instead, the Komissiiia continued to stand up for the interests of the pomoshchniki; its disciplinary power was retained, it developed its own mutual aid fund for financially needy members, and most importantly, it began to play a more active social role. For example, it selected criminal defenders amongst attorneys-in-training to accompany the uezdnyi session of the St. Petersburg district court so that people in outlying regions could have access to an advocate.¹³¹ The Komissiiia also played a vital role in the development of the district konsul'tatsii - legal aid bureaus which sprang up all over St. Petersburg at the turn of the century. These konsul'tatsii were dedicated to providing low cost, and often free legal advice to working class and indigent people,

¹²⁹Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1882-1883, pp. 15-20.

¹³⁰Zakliuchenie Soveta. . . p. 34.

¹³¹Otchet Komissii pomoshchnikov prisiazhnykh poverennykh okruga S. Peterburgskoi Sudebnoi Palaty za 1901g., pp. 26-28.

and it was within these bureaus that a whole new generation of social activists was born.¹³²

Ultimately, the Komissiiia's commitment to public service won many admirers and, to a certain degree, ensured its future existence. Because the members of the St. Petersburg pomoshchniki had voluntarily accepted the duties of public service, wrote O. Vert, they had won "proper sympathy, and only from this source could they derive the necessary strength for their future existence and development."¹³³ Indeed, Vert believed that the St. Petersburg pomoshchniki had overcome their ambiguous legal position and become a true korporatsiia, the first korporatsiia, in fact, which had not been been created either at the "initiation of the government or with its preliminary approval."¹³⁴

Not everyone was so enamoured with the activities of the Komissiiia. As a result of the November 8, 1889 legislation, Jewish attorneys-in-training, who now had no hope of joining the prisiazhnye poverennye naturally turned to the Komissiiia as the one corporate forum in which they could participate, but even though their continued presence helped stabilize this theoretically very transitory body, the growing power of Jewish attorneys-in-training was also accompanied by strong anti-Semitic attacks against the Komissiiia. The Komissiiia pomoshchnikov, wrote Novoe Vremia, was supposed to have been a self-governing organization for beginning advocates, but instead, it has "been turned into

¹³²The St. Petersburg Bar Council, which first expressed an ambivalent attitude towards these new konsul'tatsii, ultimately asserted its control over the bureaus. In 1902, a new set of rules were published which stated that henceforth, the konsul'tatsii would be under the joint supervision of both the St. Petersburg Bar Council and the Komissiiia. See Gessen, Istoriia russkoi advokatury, 1: pp. 389-90, 395-6.; Otchet Soveta prisiazhnykh poverennykh pri S. Petersburgskoi Sudebnoi Palate za 1902-3, pp. 31-7. For an in-depth discussion of the political implications of the konsul'tatsii, see Chapter 6, pp. 286-88.

¹³³O. Vert, "Molodaia advokatura," Zhurnal Iuridicheskago Obshchestva, no. 2(February, 1898), p. 77.

¹³⁴Ibid., p. 70.

an independent union of people towards which it is impossible to give the name 'beginning.' On the contrary, because it was so difficult for Jews to enter the prisiazhnye poverennye, longterm attorneys-in-training have converted the korporatsiia of pomoshchniki into a personal union. . ."135 The Jewish attorneys-in-training, Novoe Vremia, continued, now have absolute control over the pomoshchniki. "They are members of the Komissiia, they control the debates at the general meetings, they create 'fraternal' ethics and found principles of honesty, good, and justice primarily for their personal needs and tastes. . ."136

But despite these anti-Semitic attacks, the Komissiia pomoshchnikov was generally accepted as the model organization of attorneys-in-training in Russia. What was never recognized - especially by the St. Petersburg Bar - was the Komissiia's assertion of complete professional autonomy. On the 25th anniversary of the Komissiia in 1897, V.O. Liustikh, a leading sworn attorney, spoke of its many accomplishments, but at the same time, he stressed that the pomoshchniki must not be "an independent korporatsiia, having its own independent court and management; the title 'pomoshchnik' is only a passing, temporary stage, the aim of which is to achieve the title prisiazhnyi poverennyi."137 Liustikh's wish, however, that the Komissiia go 'arm in arm' with the Bar Council, was never realized; in fact, the professional split between the two branches of the advokatura was accompanied by both a generational and political split as well, divisions which will manifest themselves when the advokatura's political role is discussed in Chapter 6.

135 Novoe Vremia, no. 9524 (September 9, 1902), p. 3.

136 Ibid., p. 3.

137 Istoriia russkoi advokatury, 3: p. 262.

The uninterrupted existence of the Komissiiia pomoshchnikov was in sharp contrast to the situation in Moscow. As previously mentioned, the Komitet pomoshchnikov was formed in 1878 as part of the introduction of the soslovie patron. It was responsible for; 1) gathering information about people applying to the pomoshchniki or attorneys-in-training applying to the prisiazhnye poverennye; and 2) informing the Bar Council about any professional violations committed by a pomoshchnik.¹³⁸ The Moscow Council went to great lengths to define the limits of the Komitet's authority, but just as with the Komissiiia in St. Petersburg, the Komitet began to assert its jurisdiction over disciplinary complaints and admissions questions. A similar split, therefore, evolved in Moscow between the two branches of the advokatura, but unlike their St. Petersburg colleagues, the Moscow Komitet also managed to divide the pomoshchniki as well.¹³⁹ The clearest manifestation of this was the previously mentioned appeal by the Komitet to the Moscow Bar, requesting that the latter impose some sort of restriction on the number of Jewish attorneys-in-training in the pomoshchniki.

The controversy surrounding the Komitet was finally resolved in 1890, when as part of the March 3, 1890 regulations, the Moscow Bar chose to abolish it. According to the Bar, not only had the Komitet failed to live up to expectations, its very existence was illegal "because it is based on the assumption that a special pomoshchniki soslovie exists which the law does not recognize."¹⁴⁰ Therefore, for the next 10 years, the Moscow pomoshchniki had no corporate institution. It was only in 1900, when the liberal wing of the Moscow Bar returned to power that a slimmed-down version of the Komitet was re-introduced. Generally, it was hoped that

¹³⁸ibid., p. 263.

¹³⁹"Organizatsiia pomoshchnikov. . ." Vestnik Prava, no. 2(1901), p. 112.

¹⁴⁰Istoriia russkoi advokatury, 3: p. 267.

this new Komitet would serve as a source of unity, while its specific functions focused on helping to organize the conference groups. The Komitet's uncertain legal status, however, once more hindered its development; in a report to the Moscow Bar in 1902, the Komitet complained that because its competency remained undefined, every potential decision first raised the question, "Did the Komitet have the right to undertake these actions?"¹⁴¹ The Komitet would, in fact, enjoy its greatest triumphs after 1905, but in 1914, the Moscow Sudebnaia Palata ruled that Komitet's existence had no legal basis and thus, for the second time, it was abolished.¹⁴²

But despite the ups and downs of its corporate institutions, Moscow attorneys-in-training were also invigorated by a growing commitment to public service. At the beginning of the 1890's a group of attorneys-in-training founded the Itinerant Club (Brodiachii Klub), an organization dedicated to raising the advokatura's level of social involvement. The club, whose members included V.A. Maklakov, P.N. Maliantovich, N.K. Murav'ev, and N.V. Teslenko, acquired its name because it had no permanent meeting place and therefore, met every week at a different location.¹⁴³ In his memoirs, Maklakov talks of the idealism of this club; a career in the advokatura was seen as a chance to serve what "was right, not the interests of the individual client. . ." ¹⁴⁴ Besides discussing current affairs, the members of the club joined the local konsul'tatsiia - also run by attorneys-in-training - where they gave free legal advice to workers and peasants.¹⁴⁵ Eventually, the corps of the Itinerant Club transferred to the

¹⁴¹Otchet Soveta prisiazhnykh povernnykh okruga Moskovskoi Sudebnoi Palaty za 1902-1903 god., p. 13.

¹⁴²Istoriia russkoi advokatury, 3: pp. 270-273.

¹⁴³Gessen, Istoriia russkoi advokatury, 1: p. 382.

¹⁴⁴V. Maklakov, Iz vospominanii, p. 231.

¹⁴⁵This konsul'tatsiia was attached to the Congress of the Justice of the Peace Courts. In fact, when the Moscow Bar objected to the fact that this konsul'tatsiia was

prisiazhnye poverennye, but the influence of its former members, now commonly referred to as the 'young advocates,' continued to grow. A second club was formed which became more deeply involved in political cases: striking workers, peasants involved in agrarian uprisings, etc.¹⁴⁶ Finally, this group of 'young advocates' began to elect their candidates to the Bar Council, reversing, at last, the inertia which had for so long retarded the development of the Moscow advokatura.¹⁴⁷

Thus, the history of the pomoshchniki was not without its professional triumphs. This does not mean, however, that the Bar's worries were unfounded; clearly from the Bar's perspective the unregulated status of the pomoshchniki could not be tolerated. One cannot have a profession where the supervisor remains unconcerned about his trainees, where no one attends 'obligatory' group meetings, where the recognized disciplinary code does not equally apply to all members, and where the junior branch attempts to usurp the lawful powers of the senior branch. But as we have now seen, all of the above disputes were simply the visible manifestations of a problem which traced its origins back to article 354 of the Judicial Reforms. From the very beginning, the legal status of the pomoshchniki had been inexactly defined, and in the final analysis, only the government could change this fact. Repeated appeals by the Bar, however, fell on deaf ears; the autocracy never offered any positive legislative support and in the end, only made matters worse when it chose to equate the chastnye poverennye with the pomoshchniki. In retrospect, without greater legal

operating outside Bar's authority, the Congress intervened by saying that the konsul'tatsiia was actually under its jurisdiction. This forced the Bar to back down. See. Maklakov, Iz vospominanii, pp. 231-232.

¹⁴⁶Gessen, Istoriia russkoi advokatury, 1: p. 384.

¹⁴⁷Ibid., p. 387.

authority, all of the Bar's proposals and counter-proposals were inevitably doomed to fail because they were only attacking the symptoms, not the root of the problem. And as for the attorneys-in-training themselves, they were left in a professional vacuum; they were neither a legally recognized soslovie or an independent korporatsiia in their own right, but at the same time, they were not fully attached to the soslovie of prisiazhnye poverennye either. The final irony of this ambiguous relationship was that at the turn of the century, it would be the pomoshchniki - an institute which the Bar always considered to be alienated from the traditions and ideals of the profession - which would serve as the primary source of the advokatura's renewal.

CHAPTER FIVE: THE CHASTNYE POVERENNYE AND THE UNDERGROUND ADVOKATURA

I. THE CHASTNYE POVERENNYE

A. The Creation of the Chastnye Poverennye

We have now examined what in the past has always been considered to be Russia's established legal profession: the prisiazhnye poverennye and the pomoshchniki. Only absolute faith in the sworn profession's miraculous conception, however, has allowed historians to largely disregard the continued importance of Russia's organic legal heritage - the striapchie tradition - on the Russian advokatura. The origins of the pre-1864 striapchie, as well as their initial impact on the soslovie of prisiazhnye poverennye, has already been discussed; as we saw in Chapter 2, the Judicial Reforms of 1864 did not, as it is often perceived, eliminate the anarchic practices of the pre-reform legal practitioner, mainly because the sworn profession's monopoly right was never enforced. Thus, ten years after the original reforms, the autocracy was faced yet again with the problem of somehow breaking the striapchie legacy, and as a result, on May 25, 1874, it chose to introduce the chastnye poverennye.

Without question, the creation of the chastnye poverennye was an attempt by the autocracy to somehow legitimize the striapchie tradition, and as such, historians have been careful to delineate its development from that of the established, 'professional' sworn attorney. In practice, however, this distinction was not readily discernible. By law, sworn attorneys and private attorneys were joint members of the advokatura, while attorneys-in-training, as we have just seen, were required to obtain a

private attorney's license if they wanted to practice in the reformed courts. To make matters more confusing, Russia's limited social vocabulary had difficulty distinguishing between these two branches of the advokatura. As a result, during the course of its existence, the chastnye poverennye were known as an institut(its most common designation), a free professiia, and most importantly, as a soslovie; at the time of its introduction, for example, Vestnik Evropy talked about the recent creation of a "soslovie of non-sworn attorneys."¹ Thus, both in terms of public perception, as well as from a purely legal standpoint, no firm boundaries separated the prisiazhnye poverennye and the chastnye poverennye.

But the chastnye poverennye represented a dual-edged sword, for not only did they significantly undermine the concept of the 'professional' advocate in pre-revolutionary Russia, they never accomplished its original objective, namely the elimination of the striapchie tradition. On the contrary, non-licensed legal practitioners - after 1874 commonly known as underground advocates - continued to thrive both in the city and in the countryside, and in many instances, the real differences between a private attorney and an underground attorney - in terms of education, clientele, ethics - were negligible. Thus, rather than embodying a separate tradition, the chastnye poverennye serve as a vital bridge between Russia's western-oriented legal profession, the prisiazhnye poverennye, and Russia's organic legal practitioner, the striapchie, connecting, as it were, all the disparate branches of the Russian advokatura.

From the very beginning it must be emphasized that the chastnye poverennye were introduced in 1874 as a temporary measure, to exist only until such time that there were a sufficient number of sworn attorneys.

¹Vestnik Evropy, no. 8(1874), p. 783.

This day of reckoning, however, never came; instead the prisiazhnye poverennye and the chastnye poverennye were both recognized as full fledged members of the Russian advokatura. This was confirmed in article 406¹ of the May 25, 1874 legislation, which stated that in all civil cases before both the general and the Justice of the Peace courts, legal representation could be provided either by a sworn attorney or a private attorney.²

But despite the fact that they were joint members of the advokatura, the internal organization of the chastnye poverennye - as well as the individual demands placed on its members - was radically different from that of the prisiazhnye poverennye. Admittance to the chastnye poverennye required that an applicant apply for a licence from the appropriate court (the sudebnaia palata, the district court, or the Justice of the Peace court). The above petition had to include certain documents, such as personal references, as well as proof that the applicant was not subject to any of the restrictions articulated in article 246 of the civil code (Ustav grazhdanskago sudoproizvodstva).³ There were no educational requirements, but the court reserved the right to examine any applicant in order to ensure that he had the appropriate knowledge to

²Uchrezhdeniia sudebnykh ustanovlenij, Art. 406¹. The chastnye poverennye legislation was simply appended on to the original Judicial Reforms.

³Ibid., Art. 406⁵. According to article 246, the following people were not eligible to act as attorneys: 1) illiterates; 2) juveniles; 3) monks (unless they were representing their monastery or dwelling place, or had been granted power of attorney by the head of the monastery); 4) members of the white clergy (unless they were representing the Ecclesiastical Department, their family, or their personal charges); 5) debtors; 6) students, who had not completed their course of study (unless they were defending members of their immediate family); 7) those placed under someone's personal guardianship; 8) members of judicial institutions or the procuracy (unless they were representing their children, parents, sisters, or spouse, and if the specific case did not fall within same jurisdiction of the court in which they practiced); 9) people, excommunicated from the church by an ecclesiastical court; 10) those, who had been deprived of all rights; 11) those, who had been accused of crimes which would lead, if convicted, to a deprivation of all rights; 12) all those, removed from government service by a court, excommunicated from the church for vice, or removed from the soslovie in which they originally belonged; 13) all those, who had been forbidden by the court to appear as a legal representatives.

conduct litigation. Such a test was not required if the applicant possessed a license from an equal or higher court, or if the applicant had a degree in law.⁴

In reality, the primary obstacle to becoming a private attorney was financial; a yearly license cost 40 roubles per year in order to practice before the Justice of the Peace courts, and 75 roubles per year for either the district court or the sudebnaia palata.⁵ Private attorneys were restricted to the court where they held their license, although multiple licenses were permitted and article 406⁴ gave all private attorneys the right to appeal any specific case, in which they were personally involved, to the Ruling Senate regardless of the specific licenses they maintained.⁶ Disciplinary power was held solely by the court which issued the license, and they could impose four potential penalties on a private attorney: 1) Warning; 2) Rebuke; 3) Temporary suspension; 4) Expulsion.⁷ In addition, the Minister of Justice could unilaterally remove a private attorney from any particular case if, in the Minister's opinion, the latter was involved in any sort of activity, not compatible with the calling (zvanie) of attorney.⁸ Finally, as previously mentioned, article 406¹⁷ applied the May 25, 1874 legislation to the pomoshchniki.

One can immediately begin to distinguish the obvious differences between the prisiazhnye poverennye and the chastnye poverennye. To begin with, the chastnye poverennye had no identity as a korporatsiia; there was no elected leadership or self-management, admissions and

⁴Ibid., Art. 406⁶.

⁵Ibid., Art. 406⁹.

⁶In 1878, the Ruling Senate expanded this right; private attorneys could now appear before the Ruling Senate even if they had not been directly involved with a particular case in the lower courts. See S. M-ant, "Iz zhizni advokatury: Institut chastnykh poverennykh," Vestnik Prava, no. 26 (June 28, 1915), p. 779.

⁷Uchrezhdeniia sudebnykh ustanovlenij, Art. 406¹³.

⁸Ibid., Art. 406¹⁵.

discipline were regulated by the court, and the Minister of Justice reserved the right to interfere at any time. The ethos of public service was also totally absent, confirmed by the fact that private attorneys were not required to take appointed cases. One need not search too long for historical precedents; private attorneys had much in common with Bludov's narrow, technical vision of an advocate's responsibilities as well as with the other pre-1861 reform projects. There was also a natural base of support for the chastnye poverennye, especially amongst those who, from the outset, had been opposed to the sworn profession's monopoly right.⁹ But despite the fact that this underlying antagonism to the principles, expressed in the Judicial Reforms, continued to persist some ten years after its introduction, it was primarily practical considerations - the continued practices of the pre-reform striapchie - which explain the motivation behind the May 25, 1874 legislation. The persistence of the pre-reform striapchie was, according to Moskovskiiia Vedomosti, like an "ulcer" undermining the "good principles upon which the Judicial Reforms were based."¹⁰

The creation of the chastnye poverennye, therefore, was largely an admission of defeat; the best of the pre-reform legal practitioners were to become private attorneys, where ideally, since direct supervision would now be provided by the courts, they would be better regulated and command more respect. Both at the time of its introduction and in retrospect, most commentators saw no alternative to the May 25, 1874

⁹Gessen, Istoriia russkoi advokatury, p. 56.

¹⁰"O pravilakh 25 Maia 1874 g. otnositel'no chastnykh poverennykh," Moskovskiiia Vedomosti, no. 162(June 27, 1874), p. 1. For a further discussion on the origins of the chastnye poverennye see also: I Tulub'ev, "Golos iz provintsii(o chastnoi i prisiazhnoi advokature)." Sudebnaia Gazeta, no. 34(August 23, 1887), p. 4; E. Vas'kovskii, "Advokatura," pp. 274-5.; Ministerstvo Iustitsii za sto let: 1802-1902(St. Petersburg, 1902), pp. 132-3; S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 25(June 21, 1915), pp. 756-57.

legislation. "The basic aim of the May 25 regulations," wrote the Zhurnal Grazhdanskago i Ugolovnago Prava in 1875, was to "remove people who knew nothing of judicial practice and were plainly amoral, from the advokatura . . ."¹¹ Criticism of the reform centered mainly on the fact that this new legislation only defined the negative, not positive entry requirements, meaning that there was no indication as to what intellectual and practical experience was required in order to be a private attorney.¹²

As previously noted, the Bar objected most strenuously to the application of the May 25, 1874 legislation to the pomoshchniki, but at the same time, the creation of the chastnye poverennye was not without its benefits to the prisiazhnye poverennye. The sworn profession's absolute monopoly could still only be declared by the Ministry of Justice, but until such recognition was officially bestowed on the prisiazhnye poverennye, the May 25 legislation specifically stated that only sworn attorneys and private attorneys could serve as legal representatives.¹³ The realization of the second monopoly right, however, proved to be as elusive as the first; article 389 of the Judicial Reforms, which granted all near relatives and co-litigants the right to act as legal representatives, remained in force while article 406¹⁸ of the chastnye poverennye legislation gave all citizens the right to act as attorney (poverennyi) in the Justice of the Peace Courts up to three times per year. Additional exemptions existed within the civil and criminal codes as well. Articles 44 and 245 of the civil code (Ustav Grazhdanskago Sudoproizvodstva) stated that in regions, where there were not a sufficient number of sworn attorneys, legal representation in the Justice of the Peace and the reformed courts could be provided either

¹¹Zhurnal Grazhdanskago i Ugolovnago Prava, no. 1(1875), p. 103.

¹²Moskovskija Vedomosti, no. 203(August 14, 1874), p. 3.

¹³Arsen'ev, Zametki, pt. 1: p. 51.

by private attorneys or by outsiders(postoronniki) as indicated by the Judicial Reforms.¹⁴ Article 44 and 565 of the criminal code(Ustav ugolovnago sudoproizvodstva) stated that in criminal cases before the Justice of the Peace and the district courts, defenders could be, besides sworn attorneys and private attorneys, anyone who by law was not forbidden to practice.¹⁵ Due to these myriad of legal loopholes, therefore, the advokatura's monopoly right remained unenforced, and as we will see later in this chapter, this allowed the pre-reform striapchie, after 1874 re-incarnated as underground advocates, to continue to flourish.

At the same time, it must be stated that the chastnye poverennye were also closely linked to the striapchie tradition. Most early private attorneys were drawn from the pre-reform legal practitioners. Who was admitted to the chastnye poverennye, asked N. Gratsianskii? None other than the pre-reform "smart operators," including retired military and judicial officers, who had committed various indiscretions while in office.¹⁶ The general background of private attorneys in Poland was also virtually identical to that of the pre-reform striapchie; the Polish chastnye poverennye consisted primarily of "former clerks of the gmynnnye courts, former minor chinovniki and officers, bankrupt pomeshchiki, former traders, merchants, craftsman and the like, people with middle, lower, or domestic education."¹⁷ There were, no doubt, intelligent, honest, conscientious members of the chastnye poverennye, but overall, they clearly were not of the same intellectual standard as the prisiazhnye poverennye. According to M. Vismont, some members of the chastnye

¹⁴The one difference between these two courts was that illiterate people were allowed to appear as an attorney in the Justice of the Peace courts but not in the reformed courts. See article 45 of the Ustav grazhdanskago sudoproizvodstva.

¹⁵See above, Footnote number 3.

¹⁶Gratsianskii, "Bezuriaditsa v advokature," p. 98.

¹⁷M. Vismont, "Nechto o polozhenii advokatury v guberniiakh Tsarstva Pol'skago," Sudebnaia Gazeta, no. 22(June 22, 1891), p. 6.

poverennye possessed the necessary practical knowledge in order to be an advocate, but "it was hardly possible to place this knowledge on the same level with the preparation of a sworn advocate."¹⁸

The link between the chastnye poverennye and the striapchie tradition has, in fact, been long established.¹⁹ What has not been discussed, however, is the fact that a significant percentage of the chastnye poverennye - especially in the western provinces - were Jewish. In Russia's nine western gubernii, for example, 29% of all private attorneys, attached to the district court and 56% of all private attorneys, attached to the Justice of the Peace Courts, were Jewish.²⁰ These statistics do not include Poland, where 25% of all private attorneys were Jewish.²¹ Thus, even if political motives were behind the creation of the chastnye poverennye, it is hardly imaginable that the autocracy wanted to create an alternative legal profession, dominated by Jews. Just as with the prisiazhnye poverennye and the pomoshchniki, anti-Semitic attacks were levelled against the chastnye poverennye. According to M. Petrulan, Jewish private attorneys primarily took Christian cases and often exploited Russia's trusting, simpleminded peasants, "materially ruining them and morally corrupting [them]."²² Christian private attorneys, he added, could not compete with their Jewish rivals because their numbers were so small; they were like "a drop in the sea."²³ The influx of Jews only ended with the November 8, 1889 legislation which stipulated that Jewish applicants to the chastnye poverennye, just like Jewish applicants to the sworn profession, had to first be approved by the Ministry of Justice.

¹⁸Ibid., p. 6.

¹⁹Kucherov, Courts, Lawyers, p. 159.

²⁰Vysochaishe uchrezhdennaia. . . p. 217.

²¹Ibid., p. 218.

²²M. Petrulan, Chastnaia sel'skaia advokatura v severo-zapadnom(Vil'na, 1891), p. 20.

²³Ibid., p. 22.

For the next 18 years, not a single Jewish applicant was accepted into the chastnye poverennye, although Jews, registered as private attorneys prior to 1889, were at least initially able to get their licenses renewed.²⁴

But besides the religion controversy, the creation of the chastnye poverennye also raised the awkward question of gender. Up until 1864, no restrictions were placed on a women's right to appear in court as a legal representative, and although this was rare, Spasovich did write that he had known women with sizable legal practices in the pre-reform era.²⁵ The Judicial Reform itself did not categorically deny women the right to seek admission to the prisiazhnye poverennye, but since women were not permitted to attend lectures on law at any university, they effectively had no chance of becoming sworn attorneys.²⁶ Obviously, a different set of circumstances existed with the chastnye poverennye, where no educational requirements existed. Therefore, since the May 25, 1874 legislation did not explicitly exclude women from the chastnye poverennye, several courts began to grant licenses to women who passed the necessary exams. These actions quickly alarmed the Ministry of Justice, and on April 30, 1875, it ordered that such appointments be stopped. The Imperial Ukaz of January 14, 1871, the Ministry announced, had specifically prohibited women from working in any state or public organization, and therefore, since a private attorney's license gave one the right to appear in judicial institutions and subordinated one to the court, it

²⁴S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 27(July 5, 1915), p. 801. This policy was finally reversed in 1907 when 93 Jews were accepted into the chastnye poverennye. The opportunity for Jews to become private attorneys, however, was quickly limited; in 1908, only 81 Jews were admitted into the chastnye poverennye; 1909 - 30; 1910 - 4; 1911 - 1; 1912 - 0; 1913 - 0; 1914 - 8; 1915 - 22. See "Evrei v russkoi advokature," Vestnik Prava, no. 6(February 7, 1916), p. 163.

²⁵N. Pavlova-Sil'vanskaia, "O prave zhenshin byt advokatami," Russkoe Bogatstvo(May, 1905), p. 16.

²⁶N. Zinchenko, Zhenshina-advokat(St. Petersburg, 1898), pp. 20-21.

was clear that women were not eligible for admission into the chastnye poverennye.²⁷

The application of the January 14, 1871 Ukaz to the chastnye poverennye was hotly disputed by the press. This proclamation, it was argued, had only applied to state service and state appointments - two categories which had no direct relation to the chastnye poverennye. In September, 1875, E. F. Koz'mina - a female private attorney who had already been licensed by the Nizhegorod District Court and the Moscow Sudebnaia Palata - appealed the Ministry's decision, and in a surprising verdict, the Ruling Senate announced that the January 14, 1871 Ukaz did not prevent women from becoming private attorneys.²⁸ The impact of the Senate's decision was short-lived, however, for several weeks later - on January 7, 1876 - the Ministry of Justice came out with an official decree which stated that the original January 14, 1871 Ukaz, forbidding women from working in any state institution, also applied to the chastnye poverennye.²⁹ In order to end all ambiguities, a new amendment - article 406¹⁹ - was added to the chastnye poverennye legislation which plainly stated that women could not become private attorneys.³⁰

²⁷N. Pavlova Sil'vanskaia, "O prave zhenshchin . . ." p. 17.

²⁸Ibid., pp. 18-19. See also S M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 26(1915), p. 780.

²⁹PSZ, 1876, No. 55455.

³⁰Even this prohibition was conditional; women still possessed the right to conduct up to three civil cases per year in the Justice of the Peace Courts and an unlimited number of criminal cases. Therefore, thanks to above loopholes, women still appeared in court as attorneys after the publication of this amendment and in one known case, even practiced as an underground advocate. See Sudebnoe Obozrenie, no. 15(April 11, 1904), p. 326. See also: "K voprosu o prave zhenshchin byt poverennymi na sude," Sudebnaia Gazeta, no. 16(1893), p. 9.; Z. Shpits, "Zhenshchina - poverennaia," Sudebnaia Gazeta, no. 8(1893), pp. 8-9.; A. Ternovskii, "K voprosu o zhenskoi advokature," Sudebnaia Gazeta, no. 21(1893), p. 5.; "Raz'iasnenie senata o prave zhenshin zanimatsia advokatskoi praktikoi," Sudebnaia Gazeta, no. 49(December 5, 1893), p. 8.; V. Volzhin, "K voprosu o zhenskoi advokature," Sudebnaia Gazeta, no. 50(1895), p. 6-7.; Novoe Vremia, no. 7787(October 31, 1897), p. 2.; N. Pavlova-Sil'vanskaia, "O prave zhenshchin . . ." pp. 19-20.

B. The Distribution of Licenses

Every reformed court in Imperial Russia was empowered to accept applicants into the chastnye poverennye. When one looks at the total number of licenses awarded, however, it becomes apparent that the practices of private attorneys were concentrated in Russia's lowest reformed courts, the Justice of the Peace courts. According to the Ministry of Justice's Statistics Department, 1836 private attorney licenses were granted in 1895: 106 for the various regional sudebnaia palata, 539 for the district courts, and 1191 for the Justice of the Peace courts. The total number of licenses, however, did not equal the total number of private attorneys. According to the Murav'ev Commission, it was usual for a private attorney with a license for the sudebnaia palata to also have a license for the district court. There were also 217 private attorneys who possessed licenses for both the regional district court and the Justice of the Peace court. Thus the true number of private attorneys in 1895 was 1513, although even this number was inaccurate because it did not include attorneys-in-training who had managed to obtain a private attorney's license. Thus, of the 1513 private attorneys, 974(64%) were only licensed to practice in the Justice of the Peace Courts.³¹

Private attorneys were also more inclined to practice outside the major legal centres, where there were inevitably fewer sworn attorneys and less competition. Indeed, if one looks only at the total number of licenses, which were granted to private attorneys, then one discovers that in most areas, the chastnye poverennye were the advokatura's dominant branch. Within the Moscow district, for example, only 3 cities(Moscow, Yaroslavl, and Nizhegorod) out of 14 had more sworn attorneys and

³¹Vysochaishe uchrezhdennaia. . pp 219-220.

attorneys-in-training then private attorneys, although once again, it must be stressed that the majority of the above private attorney licenses had been granted by the Justice of the Peace courts.³² This concentration of private attorneys outside the main cities and in the lower courts appears to have, at least partially, mitigated the economic impact of the May 25, 1874 legislation; most sworn attorneys practiced in the major legal centres and in the higher reformed courts.³³ Nevertheless, the increased number of recognized advocates inevitably meant greater competition, since there were fewer cases available.³⁴

Several objections were raised to the method of distributing licenses. The whole system was seen as an anomaly; a person, who had a license from the regional sudebnaia palata - the highest regional court - still required a second license if he wanted to practice in the district court and a third license if he wanted to practice before the Justice of the Peace court.³⁵ There were also numerous complaints about the method of examination. The tests varied significantly from region to region, court to court; often, the examiners were more interested in an applicant's personal background than his level of education. And as for the the exams themselves, they were viewed as a simple formality, since "in the

³²Sbornik statisticheskikh svedenii Ministerstva Iustitsii(St. Petersburg, 1901), p. 2-6. One discovers the same phenomenon in most regions. In the Kharkov district, only 2 cities(Kharkov, Ekaterinoslav) out of 12 had more sworn attorneys than private attorneys. In the Kazan district, only one city(Kazan) out of 7 had more sworn attorneys. The St. Petersburg district was a noted exception, but only because the Baltic region had been annexed to the district in 1889. As a result, 5 out of 11 cities(St. Petersburg, Riga, Reval, Mitau, Libau) in the St. Petersburg district had more sworn attorneys than private attorneys.

³³Istoriia russkoi advokatury, 2: p. 55.

³⁴N. Vil'skii, "Demoralizuetsia li nasha advokatura, " p. 75.; "Prichiny, vliiaiushchiia na nravstvennuiu neustoichivost russkoi prisiashnoi advokatury," Iuricheskoe Obozrenie, no. 263(April 10, 1886), pp. 395-6.

³⁵"K voprosu o chastnoi advokature," Sudebnaia Gazeta, no.41(October 8, 1894), p. 4. Private attorneys, who had received a license from the Congress of the Justices of the Peace could petition before all the lower courts, under the jurisdiction of the Congress. S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 26(1915), p. 779.

majority of cases, the court decided beforehand whether or not to give a license to an applicant."³⁶ Often, the local courts favoured friends or relations; a chinovnik, recently fired for some impropriety, would a short time later re-emerge as a private attorney, while the Congresses of the Justices of the Peace regularly "became encircled by an entire throng of relatives under the title 'private practitioner.'"³⁷

Therefore, taking into account the arbitrary nature of the admissions process - as well as the private attorney's discredited ancestry - it is not surprising that the final product was a poorly educated, unqualified legal practitioner, totally unprepared for a career in the advokatura. Vestnik Prava referred to the chastnye poverennye, attached to the uezdnyi courts as a state within a state; professional ethics were like a Chinese grammar book, close links were maintained with court officials, switching sides was a common phenomenon.³⁸ All of the above transgressions, of course, bear the stamp of the striapchie tradition, but just as with the pre-reform practitioners, there were some individual private attorneys who were well respected. "We are not defending the chastnye poverennye," wrote Sudebnaia Gazeta, but at the same time, one could still find amongst them "very honourable people, thoroughly acquainted with the law and conscientiously fulfilling their duties."³⁹ Some even claimed that in terms of ethical standards, the chastnye poverennye were superior because the number of disciplinary penalties, involving Moscow and St. Petersburg private attorneys was much lower in comparison to the number of disciplinary penalties, involving sworn attorneys in those

³⁶" K voprosu . . .," Sudebnaia Gazeta, no. 41(1894), p. 3.

³⁷"Nastoit li neotlozhnaia neobkhodimost v kakikh libo pravilakh, kotoryia by ograzhdali krest'ian ot eksploatatsii ikh khodataiami," Sudebnaia Gazeta, no 1(January 1, 1889), pp. 5-6.

³⁸S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 29(July 19, 1915), pp. 850-51

³⁹Sudebnaia Gazeta, no. 12(March 22, 1887), p. 2.

two cities. Although this was statistically true, the most probable explanation for this discrepancy was the fact that the Bar Council was much more demanding than the respective courts.⁴⁰

Once a private attorney received his license, it appears to have been a simple formality to have it renewed every year thereafter. Each particular court, however, reserved the right not to renew the license even if a particular private attorney had not been subject to a disciplinary hearing. The zemskii nachal'nik legislation in 1889, which abolished most of the Justice of the Peace courts in Imperial Russia, did not have any immediate impact on the distribution of licenses. Private attorneys, who wanted to practice in the lowest reformed courts, were now forced to apply to the local uezdnyi s'ezd, and although the Ruling Senate stipulated that the s'ezd should initially look at all applications - including those from past private attorneys - afresh, it appears that virtually all licenses were renewed, including those of Jewish private attorneys.⁴¹ The one additional requirement, resulting from the zemskii nachal'nik legislation, was that all non-Christian candidates to the chastnye poverennye, applying for a license for the first time from the uezdnyi s'ezd, had to have their applications reviewed by both the Ministry of Justice and the Ministry of Internal Affairs, before any official acceptance could be given.⁴²

40I. Tulub'ev, "Golos iz provintsii," Sudebnaia Gazeta, no 35(August 29, 1887), p. 5.

41S. M-ant, "Institut chastnykh poverennykh," Vestnik Pravo, no. 27(1915), p. 801.

42S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 26(1915), p. 781.

C. The Chastnye Poverennye and the Sworn Profession

We have not seen the vast disparities which existed between the prisiazhnye poverennye and the chastnye poverennye; whereas the intention of the 1864 Judicial Reforms was to create a true korporatsiia of university-educated legal practitioners, the May 25, 1874 legislation sought to produce a temporary association of advocates, drawn primarily from the pre-reform striapchie. These radical differences in professional orientation were also reflected in the specific rights and obligations granted to each member of the above organizations. On paper as well as in practice, several privileges were retained by the prisiazhnye poverennye. To begin with, according to article 383 of the Judicial Reforms, a sworn attorney could appear in all of the reformed courts in the region where he was registered, whilst a private attorney was restricted to those courts where he held a license. The license itself represented an added burden for the chastnyi poverennyi for whereas a private attorney was required to purchase one annually, a sworn attorney required no further accreditation. The professional security of a sworn attorney was also much greater for at least theoretically, he could be removed only by a trial of his peers. A private attorney, on the other hand, could be removed from a case immediately by the Minister of Justice without any recourse to appeal. The sworn profession defended these privileges by stating that they also assumed greater responsibilities; unlike private attorneys, they were liable for both the 10% tax and for conducting appointed civil and criminal litigation. Defenders of the chastnye poverennye, however, were quick to minimize these personal sacrifices; appointed cases were rare, the tax was not collected and if it was, it would

only go to paying sworn attorneys who took appointed cases in the first place.⁴³

In theory, therefore, the dissimilarities between the legislation of November 20, 1864 and the legislation of May 25, 1874 were obvious, but in practice, these differences seemed to dissipate; the prisiazhnye poverennye and the chastnye poverennye were, by law, joint members of the advokatura, they shared the same professional titles, and in their public role - that of legal representative - it was virtually impossible to distinguish between a sworn attorney and a private attorney. This was seen as early as 1875, when Arsen'ev noted that "the position of a private attorney, as a legal practitioner, cannot be distinguished from that of a sworn attorney."⁴⁴ Thus, from the day of its creation, the chastnye poverennye began to encroach on the professional integrity of the prisiazhnye poverennye. The demand that all attorneys-in-training purchase a private attorney's license was the first manifestation of this convergence. In 1884, an even more serious breach occurred when the Ruling Senate declared that a private attorney, who had satisfied the necessary educational and moral requirements - as well as had practiced law for no less than five years - could seek admission to the prisiazhnye poverennye. In order to arrive at this decision, the Ruling Senate examined the respective training programs of the pomoshchniki and the chastnye poverennye and concluded that they were roughly parallel; whereas a pomoshchnik was under the control of a sworn attorney, a private attorney was overseen by the court, which carefully screened all applicants and provided permanent supervision. Therefore, the Ruling Senate declared that since a pomoshchnik by law did not perform any

⁴³I. Tulub'eev, "Goloz iz provintsii," Sudebnaia Gazeta, no 35(August 29, 1887), pp. 3-5

⁴⁴Arsen'ev, Zametki, pt. 1: p. 55.

duties which could not be conducted by a private attorney, the latter should have an equal right to apply to the prisiazhnye poverennye.⁴⁵

Unfortunately, it is impossible to quantify how many private attorneys took advantage of this opportunity. In those cities, however, where an established Bar existed, the above 1884 ruling was strongly resisted. Both the St. Petersburg and Kharkov Bar Councils still refused to accept any private attorneys. The apparent silence of article 354 of the Judicial Reforms on this issue, the Kharkov Bar insisted, should not be interpreted to the advantage of the private attorney. Furthermore, in a seemingly parallel situation, the Judicial Reforms had specifically denied prisiazhnye striapchie the right to apply to the prisiazhnye poverennye.⁴⁶ The St. Petersburg Bar Council also emphasized that the training that a pomoshchnik received, especially in the conduct of criminal cases, could not be compared with that of a private attorney.⁴⁷ Thus, both the St. Petersburg and the Kharkov Bar Councils upheld the narrowest interpretation of article 354 and did not accept private attorneys into the prisiazhnye poverennye. In the one exception, the Moscow Bar Council reviewed applications from private attorneys on a case by case basis.⁴⁸ But outside these cities, all three branches of the advokatura were under the court's control, meaning there was no established Bar to prevent private attorneys from joining the prisiazhnye poverennye.

But in the final analysis, it truly did not matter if private attorneys chose to become sworn attorneys or not, for in real terms, the distinction between these two branches of the advokatura had already been lost. According to Sudebnaia Gazeta, there was no "qualitative difference in

⁴⁵Makalinskii, *S. Peterburgskaia prisiazhnaia advokatura*, pp. 12-14.

⁴⁶*Ibid.*, pp. 17-18

⁴⁷*Ibid.*, p. 21.

⁴⁸*Istoriia russkoi advokatury*, 2: p. 215,

those activities, which occupies the sworn advokatura on the one hand, and the private [advokatura] on the other."⁴⁹ The Murav'ev Commission was even more damning in its assessment. Like so many other observers, it accepted the need for the chastnye poverennye, but at the same time, the Commission objected to how this new institution had been lumped together with the prisiazhnye poverennye. Since a private attorney could take the same cases in the same courts as a sworn attorney - without having to possess either a law degree or having completed a practical training course - the demands of the sworn profession, in effect, had become "superfluous."⁵⁰ There was no doubt, the Commission added, that the government's negative attitude towards the exclusive rights of the sworn profession had resulted in the "development of the chastnye poverennye and the full decline of the prisiazhnye poverennye, since identical rights are acquired by private attorneys under conditions, incomparably simpler and easier than sworn attorneys, with the added advantage for the former that they are free from all duties and restraints which are established for the latter."⁵¹ Such a union could hardly be seen as positive, the Commission added, when "the actual interests of the litigant and the court demands the raising of the standards of those judicial representatives, who belong to the soslovie of prisiazhnye poverennye."⁵²

The one signpost which separated a private attorney and a sworn attorney was, of course, Bar membership, but this was only relevant in Moscow, St. Petersburg, and Kharkov. Outside these three cities, all licensed advocates were under the direct supervision of the court, and

⁴⁹"Reforma advokatury," Sudebnaia Gazeta, no 8(February 24, 1891), p. 4.

⁵⁰Vysochaishe uchezhdenaia. . p. 178

⁵¹Ibid., p. 178

⁵²Ibid., p. 178.

therefore - despite the vast differences in education and training - only the odd privileges and responsibilities, articulated in the original Judicial Reforms, separated sworn attorneys from private attorneys. "If one compares the rights of a private attorney and a sworn attorney in those districts where there is no Bar, "Sliozberg commented on the 25th anniversary of the Judicial Reforms, than it seems that "there is nothing which distinguished one from the other, except that the first must possess a license from a judicial region . . .and pay the given fee."⁵³

The Caucasus, therefore, can be seen as a microcosm of how the distinction between the prisiazhnye poverennye and the chastnye poverennye gradually blurred. Like everywhere else, private attorneys in the Caucasus had come primarily from the pre-reform practitioners - "a mass of people who could not be admitted into the sworn advokatura."⁵⁴ The general public, however, was not able to distinguish the legal subtleties between sworn attorneys and private attorneys. Therefore, they usually "confused these two categories of attorney, the more so because private attorneys sometime signed themselves 'attorney at law(poverennyi po sudebnym delam)' or simply 'attorney'. . ." ⁵⁵ As a result, to the sins of the sworn profession were added the sins of the private profession, thus depriving the prisiazhnye poverennye of the prestige and authority it had originally been assigned in 1864.⁵⁶ The creation of the chastnye poverennye, Iuridicheskoe Obozrenie concluded,

⁵³Sliozberg, "Advokatura za 25 let," p. 31.

⁵⁴"Prichiny, vliiaushchiiia. . .," Iuridicheskoe Obozrenie, no. 263(April 10, 1886), p. 395.

⁵⁵Ibid., p. 396.

⁵⁶The advokatura's overall independence was further undermined by the fact that in the Caucasus, a chinovnik - actually employed in state service - could also be a member of the chastnye poverennye. It was only in 1890 that the Ruling Senate categorically forbid those in state service from being private attorneys. See Iuridicheskoe Obozrenie, no. 264(April 17, 1886), pp. 420-21.; "K voprosu o sovместimosti zvaniiia prisiazhnago poverennago s drugimi zaniatiiami," Sudebnaia Gazeta, no 12(March 22, 1892), pp. 7-8.

had deprived the sworn profession in the Caucasus the possibility of becoming a "true korporatsiia."⁵⁷

But as we saw in Chapter 4, the ramifications of the May 25, 1874 legislation were also directly felt by the pomoshchniki. According to Gratsianskii, this legislation "broke the organic link of the pomoshchniki with the korporatsiia of prisiazhnye poverennye."⁵⁸ If a pomoshchnik wanted to practice in the reformed courts, he was now required outright to join the chastnye poverennye, often at a prohibitive cost. In essence, this also meant that all new advocates, whether private attorneys or attorneys-in-training, began at the same level even though they possessed disparate credentials. Once again, the Murav'ev Commission assessed the damage. In their estimation, the creation of the chastnye poverennye had basically destroyed the significance of the pomoshchniki. Any attorney-in-training, who also possessed a private attorney's license, had the "right to practice independently and could devote himself to this during the course of his entire training, without any supervision or leadership from the sworn attorney with whom [he had originally] signed."⁵⁹ But this traffic was not simply one way; private attorneys also decided to join the pomoshchniki, seemingly because it added a certain amount of prestige to their other job title.⁶⁰ As a result, the real differences between the prisiazhnye poverennye and the chastnye poverennye became even more ephemeral because so many attorneys-in-training were also private attorneys.

⁵⁷"Prichiny, vliiaushchiia. . .," Iuridicheskoe Obozrenie, no. 263(1886), p. 395.

⁵⁸Gratsianskii, "Bezuriaditsa v advokature," p. 97.

⁵⁹Vysochaishe uchrezhdennaia. . .p. 198. For similar assessments of the impact of the chastnye poverennye legislation on the pomoshchniki, see: Rozenberg, Sudby, pp. 22-3.; "Reforma advokatura," Sudebnaia Gazeta, no 8(1891), pp. 3-5.

⁶⁰Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1889-90 god., pp. 15-16.

Therefore, it is not possible to divide the history of the Russian advokatura into two distinct halves. Although the prisiazhnye poverennye and the chastnye poverennye were the product of two seemingly incompatible pieces of legislation, they jointly made up the Russian advokatura. One could, therefore, as V. Svarichevskii did, write that "the soslovie of our legal advokatura is composed of three groups: sworn attorneys, their attorneys-in-training, and private attorneys."⁶¹ And in absolute terms, one must emphasize that the chastnye poverennye remained the largest component of the advokatura until 1901, when the total number of sworn attorneys finally surpassed the the total number of private attorneys(2615 vs. 2572).⁶² Even then, this triumph was not complete, for attorneys-in-training, who actually had purchased a private attorney's license, were not included in the final total of the chastnye poverennye. The paradox of this whole situation was that despite the obvious harm that the May 25, 1874 legislation had inflicted on the sworn profession, few called for its outright repeal. M. Petruslan was in the minority in 1902 when he claimed that due to the increase in the number of sworn attorneys, the need for chastnye poverennye had long since passed.⁶³ Most commentators, however, took the opposite approach; the prisiazhnye poverennye had not grown to a sufficient degree that it was possible to contemplate the outright dissolution of the chastnye poverennye. In 1887, for example, when rumours were ripe about the imminent abolishment of the chastnye poverennye, Sudebnaia Gazeta chose to defend this institution. The sworn profession, it argued, was

⁶¹V. Svarichevskii, "Khodatai," Zhurnal Iuridicheskago Obshchestvo, no. 3(1897), p. 51.

⁶²Sbornik statisticheskikh svedenii Ministerstva Iustitsii(St. Petersburg, 1901), pp. 46-47.

⁶³M. Petruslan, "Nenormal'nost iuridicheskago polozheniia chastnykh poverennykh," Iuridicheskaia Gazeta, no. 55(August 22, 1902), p. 2.

excessively concentrated in the major cities; within the Moscow region, for example, the Vologod District Court, which was divided into 5 u'ezd had but 1 sworn attorney directly attached to the court. Similarly, the Vladimir District Court was divided into 13 u'ezd and had only 4 sworn attorneys. The same phenomenon existed in the St. Petersburg region; the Novgorod District Court had just 2 sworn attorneys for 7 u'ezd courts.⁶⁴ Thus the overwhelming consensus was that outside the major legal centres, and especially in rural areas, the chastnye poverennye were not only needed, but an absolute necessity.⁶⁵

The other main reason for the maintenance of the chastnye poverennye was the recurring problem still posed by the underground advokatura. "In actual fact," wrote Sudebnaia Gazeta, "the social ulcer was not the private attorney but the so called 'underground advocate.'"⁶⁶ If the chastnye poverennye were abolished, then inevitably people would turn to the non-licensed legal practitioner, simply because there were not enough sworn attorneys. Thus, the original evil, which had led to the May 25, 1874 legislation in the first place, still endured, thereby justifying the continued existence of the chastnye poverennye.

Other rationales behind the perpetuation of the chastnye poverennye existed as well. There was still an underlying suspicion of what the consequences might be if the sworn profession's monopoly right was enforced. Another commentator pointed to the clear practical benefits

⁶⁴Sudebnaia Gazeta, no. 12(March 22, 1887), pp. 3-5.

⁶⁵"K voprosu o chastnoi advokature," Sudebnaia Gazeta, no. 6(February 6, 1893, pp. 3-4.; "K voprosu o chastnoi advokature," Sudebnaia Gazeta, no. 50(December 11, 1894), pp. 7-8.; Y. Berman, "Chastnaia advokatura," Vestnik Prava, no 15(April 12, 1915), p. 450.

⁶⁶"K voprosu o chastnykh poverennykh(po povody predpolozhenii Ministerstva iustitsii o probrazobanii chastnoi advokatury)," Sudebnaia Gazeta, no. 51(December 23, 1890), p. 6. See also "Pis'mo v redaktsiiu(po povody predpolagaemago unichtozheniia instituta chastnykh poverennykh)," Sudebnaia Gazeta, no. 6(February 8, 1887), p. 3.; Sudebnaia Gazeta, no 48(1896), p. 5.; B. Friedman, K voprosu o chastnoi advokature(Vil'na, 1897), pp. 24-6.

of the chastnye poverennye; in terms of fees, the government received up to 100, 000 roubles per year from private attorneys.⁶⁷ But while there was an overwhelming acceptance of the need for the chastnye poverennye, there were also numerous calls for reform. Private attorneys, themselves, could not be blamed for the rogues and charlatans which made up the ranks because it was the court which controlled the admissions process. Thus, there were repeated calls for stricter educational requirements and more challenging exams, which would ensure that only qualified applicants were accepted into the chastnye poverennye. There were also demands for increased supervision.⁶⁸ Spasovich - who referred to both the chastnye poverennye and the pomoshchniki as the 'sub-advokatura' - suggested that in the long term, private attorneys could become the equivalent of English attorneys or French *avoués*. In the immediate future, however, Spasovich argued that the advokatura's success depended on absorbing the most talented members of the sub-advokatura - i.e. attorneys-in-training and the private attorneys.⁶⁹

That even Spasovich contemplated a semi-union with the chastnye poverennye shows that the latter's general level of acceptance was much higher than originally perceived. Far from wishing to abolish the chastnye poverennye, most commentators believed that it should be given greater legitimacy. Its temporary status should be withdrawn, and most importantly, the chastnye poverennye should be organized into "a 'korporatsiia,' which was how the sworn advokatura, more or less, was

⁶⁷D. Volkov, "K voprosu o chastnykh poverennykh" Sudebnaia Gazeta, no. 11(March 15, 1887), pp. 3-4.; I. Tulub'ev, "Golos iz provintsii," Sudebnaia Gazeta, no. 34(August 23, 1887), p. 2.

⁶⁸"K voprosu. . .," Sudebnaia Gazeta, no. 41(1894), p. 3.; Vas'kovskii, Budushchee russkoi advokatury, pp. 18-19.; Y. Yablonovskii, "Advokatura v sviazi predstoiashchimi reforma sudoustroistva," Sudebnaia Gazeta, no. 22(May 28, 1895), p. 2-3.

⁶⁹Spasovich, "Ob organizatsii advokatury," pp. 11-12, 19-20.

organized."⁷⁰ It was this recognition - as a korporatsiia - which the chastnye poverennye most coveted. If given such status, its supporters argued, the chastnye poverennye would at last be able to guard over the honour and morality of its members, thereby undoubtedly improving the administration of justice.⁷¹

But as we have seen throughout this dissertation, the autocracy was most reluctant to recognize any institution as a korporatsiia. It had already denied this right to over half of all sworn attorneys, and it certainly was not about to grant it to private attorneys. What happened, in fact, was that in absolute terms, the chastnye poverennye began to shrink; from a total of 3407 in 1890, the number of private attorneys fell to 2662 in 1907 and 2099 in 1913.⁷² Most historians have interpreted this decrease as the ultimate triumph of the sworn profession, and although this may well have been true in Moscow and St. Petersburg, which by 1914 contained 44.4% of all sworn attorneys and attorneys-in-training but only 16.8% of all private attorneys, it does not apply to the rest of Russia.⁷³ As we have already seen, sworn attorneys were not regularly in direct competition with private attorneys; they practiced in different courts and in different regions. Moreover, the available evidence strongly suggests that this decline in the number of private attorneys was the result of a deliberate decision to reduce the number of licenses, granted by the courts to private attorneys. Where this order originated is difficult to say. Sudebnaia Gazeta refers to a circular sent by the Ministry of Justice and Ministry of Internal Affairs to the various Congresses of Land Captains and local procurators, stating that no one should be granted a private attorney's

⁷⁰Friedman, K voprosu, p. 11

⁷¹Ibid., pp. 19-21.

⁷²Huskey, Russian Lawyers, p. 21.

⁷³Berman, "Chastnaia advokatura," p. 450.

license. The local courts, however, had plenty of reasons of their own why they did not want to register private attorneys; the zemskii nachal'nik and city courts did not wish to have private attorneys who would question their authority and point out their mistakes. Thus, it became increasingly difficult for even a qualified applicant to receive a private attorneys' license. In several regions, all applications to the chastnye poverennye were rejected even though there was not a single sworn attorney or attorney-in-training in these areas.⁷⁴

This growing selectivity was also accompanied by a diminished applicant pool. Thanks to the November 8, 1889 legislation, Jewish candidates were no longer accepted into the chastnye poverennye, thus depriving the institute of one of its main sources of applicants.⁷⁵ Thus, after the turn of the century, the chastnye poverennye were clearly in retreat. The last attempt by the government to reform the chastnye poverennye - which sought to simplify its organization by making the district court responsible for all licenses - was rejected by the Third Duma.⁷⁶ The relative demise of the chastnye poverennye, however, should not be interpreted as the end of Russia's organic legal tradition. On the contrary, the defenders of the chastnye poverennye proved absolutely right in one respect; the decrease in the number of private attorneys did mean that more and more people - both in the city and in the countryside - turned to the underground advokatura for advice.

⁷⁴K voprosu o reforme chastnoi advokatury," Sudebnaia Gazeta, no. 34(August 25, 1891), p. 6.

⁷⁵S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 26(1915), pp. 780-81.; S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 29(1915), p. 852.; Sudebnaia Letopis, no. 9(May 2, 1909), p. 5. Jewish private attorneys, who had been accepted into the chastnye poverennye prior to the November 8, 1889 legislation, could not retrospectively be removed from the institute because of their religion. See Sudebnoe Obozrenie, no. 9(1904), pp. 197, 200-1.

⁷⁶S. M-ant, "Institut chastnykh poverennykh," Vestnik Prava, no. 28(1915), p. 827.

Therefore, it is within the underground advokatura where one finds the true legacy of the pre-reform striapchie tradition.

II. THE UNDERGROUND ADVOKATURA

A. The Practice of Underground Advocates

Without question, the podpol'naia advokatura represented one of the most destructive influences on the administration of justice in Imperial Russia. The corrupt, dishonest ways of these underground, or street, advocates were well-chronicled in the periodic press; they either submitted claims which had no basis or lost cases which, from a legal standpoint, should have been won. They often wrote both sides of a case (collecting two fees in the process), they repeatedly swindled Russia's naive peasants, and their endless supply of petitions clogged the courts and led to long delays.

In reality, the creation of the chastnye poverennye was just one of several attempts to limit the predominance of the podpol'naia advokatura. Warnings from the courts - to stay away from these charlatans - were issued. Sworn attorneys and attorneys-in-training, not just in Moscow and St. Petersburg but all over Russia, organized special konsul'tatsii (legal aid bureaus) to provide proper, low cost - and even free - legal advice. The government even prosecuted some underground advocates but none of the above measures proved capable of breaking Russia's organic legal tradition. There were other social forces at work - ignorance, poverty - which explained the persistence of the striapchie tradition and made the podpol'naia advokatura almost invulnerable. "False litigation has deep roots in our benighted narod, especially in our city proletariat," stated Moskovskiiia Vedomosti, and this nescience was

easily exploited by the podpol'naia advokatura.⁷⁷ All of the previously described legal loopholes - in the Judicial Reforms, the chastnye poverennye legislation, the civil and criminal codes - which gave individuals the right to appear in court as a legal representative, also made it extremely difficult to crack down on these street advocates. In the end, it would not only be the established advokatura whose reputation would suffer from the continued existence of the podpol'naia advokatura, but Russia's entire system of justice.

Several types of cases fell into the domain of these underground advocates: inheritance disputes, property transactions, bankruptcy, divorce, land disputes, personal injury, passport problems, etc. They practiced in both the cities and the countryside, in both the reformed courts and non-reformed, peasant volost courts, occasionally appearing in person but usually under the cover of anonymity. Ghost written petitions, in fact, were their speciality.⁷⁸ For those street advocates who did choose to practice before the courts, the most irritating restriction was the limit on the number of civil cases which one could conduct before the Justice of the Peace Courts(3), although this obstacle often proved to be just a minor inconvenience.⁷⁹ Yet most underground advocates, as previously stated, shied away from making personal appearances in court. In fact, when a

⁷⁷V. Shevaldyshev, "K voprosu o iuridicheskikh bezplatnykh konsul'tatsiakh," Moskovskiiia Vedomosti, no. 352(December 22, 1902), p. 5.

⁷⁸Such anonymous petitions became much more prevalent after 1890, when an amendment to the civil code changed how civil disputes were conducted. Instead of appearing personally or through an attorney, a participant could, after 1890, submit a written petition which the court would use in order to reach a verdict. There was no stipulation, however, that a registered attorney had to sign such a petition; they could be written by anyone. This reform proved to be highly profitable for underground advocates, and it was probably not coincidental that after 1890, written petitions became the most common method of resolving civil disputes. See PSZ, no. 6931(1890), art. 145¹. I. S-v., O pravozastupnichestve v nashem grazhdanskom sudoproizvodstve(Odessa, 1904), pp. 23-4.

⁷⁹"Koe chto o nepatentovannykh 'advokatakh,'" Sudebnaia Gazeta, no. 37(September 13, 1892), p. 4. There was no limitation on how many times an underground advocate could appear in the volost courts as an attorney. See Iuridicheskaia Gazeta, no. 16(October 13, 1905), p. 2

street advocate's case did go to trial, he sometimes sought out a recognized advocate to plead for him in court, reserving for himself the role of "impartial witness."⁸⁰

Such acts of duplicity were the norm for Russia's podpol'naia advokatura. Indeed, as one descends into Russia's legal backwaters, one discovers a world populated with various shady, unprincipled characters, legal hustlers with nicknames such as the 'cross-eyed fish(kosaia kambala)' and the 'tailless ox(beskhvostyi vol).' In one very colourful article, Moskovskiiia Vedomosti identified four separate categories of underground advocates. The 'heathens(yazychniki)' not only filed written petitions but also appeared in court as advocates in petty criminal cases. They were particularly well-known for their oratorical eloquence, and for the fact that they were all natural alcoholics. The 'inveiglers (vtraviteli)', who were the assistants to the heathens, wrote similar petitions as well, but they also managed to increase their business by stirring up trouble at the local inn. The 'divorcers(razvoditeli)' were educated people - notaries, ex-seminarists, even former sworn attorneys - who for some reason had lost both their jobs and, according to Moskovskiiia Vedomosti, their sense of decency. As their name suggests, they specialized in divorce cases, and were not particularly squeamish about the methods which they employed; when the law called for it, for example, they provided the adulterers. Finally, there were the 'scarecrows(pugal'shiki)', described by Moskovskiiia Vedomosti as one of the most repulsive branches of the podpol'naia advokatura. The scarecrows did not stop at anything; if they did not have a practice, then by various disingenuous methods, such as an anonymous letter, they would

⁸⁰Moskovskiiia Vedomosti, no. 261(September 21, 1901), p. 1

create a dispute and then, like magic, suddenly appear on the scene and offer their services.⁸¹

In reality, the lengths to which the podpol'naia advokatura were willing to go in order to attract clients were legendary. One underground advocate utilized the stage-acting services of his mistress. As he walked into the local Justice of the Peace Court, a crowd would slowly gather around him. Suddenly, a woman would approach him, loudly exclaiming, "Mr. Attorney, how can I ever thank you for delivering my family forever from poverty." Modestly, the underground advocate would accept these compliments. The end result of this well-rehearsed drama, however, was that the underground advocate acquired several new clients.⁸² Another underground advocate, calling himself a prisiazhnye striapchie and a attorney-at-law, managed to worm his way in with the local business community, gradually building up a large practice. Eventually, the local authorities realized that this man was a fraud, but just as they were about to arrest him, he disappeared, along with the profits. It turned out that this underground advocate had been all over Russia and Poland, spending no more than one year in any particular city and always leaving before his past caught up to him.⁸³

Where did these underground advocates come from? Just as with the pre-reform striapchie - and the chastnye poverennye - they came from everywhere; retired chinovniki, former military officers, merchants, semi-literate peasants, etc. In his memoirs Za pravo, V. Berenshtam described the background and professional activities of one street advocate named Barkatov. Barkatov had been educated at a seminary and eventually,

⁸¹Moskovskiiia Vedomosti, no. 235(August 26, 1904), p. 4.

⁸²Moskovskiiia Vedomosti, no. 244(September 4, 1904), p. 4.

⁸³"Bedstvo podpol'nago poverennago i prodelki podpol'nykh poverennykh," Sudebnaia Gazeta, no. 37(September 14, 1896), p. 2.

became an assistant to a clerk of a judge. It was here where he developed his practice: "The public considered that if a secretary's assistant himself wrote [a petition], it means that the case will be more believable. . ."84 Undoubtedly, the most famous underground advocate was Lenin. Lenin had been officially registered as a pomoshchnik both in Samara and St. Petersburg, but during his exile in Shushensk, when theoretically, he had lost the right to practice, Lenin continued to give legal advice and write petitions for local peasants and fellow exiles.⁸⁵

But despite the proliferation of underground advocates, it does not appear that their pursuits, from a purely financial standpoint, were especially well-rewarded. On the contrary, most underground advocates eked out a miserly existence. The going rate for a street advocate in the village of Khvalynsk, for example, was 45 copecks (or a bottle of vodka) for a simple application and 1-3 roubles for a local court petition, depending on how many legal references one wanted in the claim.⁸⁶ Sometimes, street advocates took on all the expenses himself, simply because the more cases an underground advocate pursued, the greater the likelihood that he might actually win one.⁸⁷ There were some underground advocates, however, who lived not only openly as underground advocates, but even luxuriously. Somehow, they managed to ingratiate themselves with members of the court, the bureaucracy, and the local society to such an extent that they even became involved in local philanthropic activities. All these links, however, were used to expand their legal practices, to find

⁸⁴V. Berenshtam, Za pravo (St. Petersburg, 1906), p. 84

⁸⁵I. Sternik, VI. Lenin - jurist (Tashkent, 1969), pp. 234-253.

⁸⁶Iuridicheskaja Gazeta, no. 23 (March 23, 1903), pp. 1-2.; Y. Gorodyskii, "Ocherki sudebnoi praktiki," Zhurnal Ministerstva Iustitsii, no. 9 (1896), p. 58.

⁸⁷Iuridicheskaja Gazeta, no. 67 (October 13, 1905), p. 2.

out what a judge, or person in power, was thinking and then, act accordingly.⁸⁸

B. Underground Advocates in the Countryside

From the lowest volost court to the regional sudebnaia palata, the most vulnerable segment of the population to the machinations of the underground advocate was the peasantry. Recently arrived peasants could always be identified at the local court by their constant bowing, and their lack of education and extreme gullibility made them natural targets. One unscrupulous underground advocate went so far as to hire agents and dress them in peasant costume. When they met a peasant, who was, in fact, looking for legal advice, these agents would say that they knew an advocate who always won, and that by chance, they happened to be heading to see him now. The ever-trusting peasant naturally followed.⁸⁹ Even when peasants sought out proper legal advice from the local consultation bureau, they were still intercepted by underground advocates. Peasants actually mistook the name bureau for that of a person, so street advocates, who regularly lurked around the konsul'tatsiia, knew they had an easy catch when a peasant arrived, asking to see Mr. Bureau.⁹⁰

But most importantly, Russia's peasants had no understanding of formal law - a direct consequence of the fact that the pre-1864 peasant volost courts had not come under the jurisdiction of the Judicial Reforms. Instead, the volost courts continued to be based on peasant customary law. Whether these customs deserved to be recognized as law was hotly debated in the nineteenth century, and still is the subject of current

⁸⁸Moskovskiiia Vedomosti, no. 261(September 21, 1904), p. 1.

⁸⁹Sudebnoe Obozrenie, no. 17(April 25, 1904), p. 370.

⁹⁰Pravo, no. 40(1900), p.1899.

research today.⁹¹ What made (and makes) customary law so difficult to analyze was that by its very nature it was localistic and particularistic - directly applying to only one village. Supporters spoke romantically of the supremacy of these natural, popular laws as opposed to the dry formality of the civil code, but this dreamy picture of customary law clashed with the numerous on-the-spot reports that filtered back from the village. "Our villages and our entire population," wrote Sanktpeterburgskie Vedomosti, suffer "not from judicial helplessness but from a complete absence of judicial norms. . ."⁹² Customary law in each village was seen as a mirage, "a sphinx which still is not solved nor subject to interpretation."⁹³ The result was legal chaos; the uezdnyi s'ezd, which handled all appeals from the volost courts was more often than not unfamiliar with the specific customary law tradition in any one village. Therefore, it was not in a position to judge whether or not the correct decision had been made, and simply transferred the case to another volost court for re-examination.⁹⁴ On top of this confusion was the arbitrariness of the local administrative and judicial authorities; they did not feel constrained by the law, applied it incorrectly, and were easily corrupted.⁹⁵

The established advokatura - sworn attorneys, attorneys-in-training, and even private attorneys - were not in a position to fill this legal vacuum in the villages. To begin with, their numbers simply were not

⁹¹Peter Czap, "Peasant Class Courts and Peasant Customary Justice in Russia: 1861-1912," Journal of Social History, no. 2(1967), pp. 154-176.; Moshe Lewin, "Customary Law and Russian Rural Society in the Post-Reform Era," Russian Review(January, 1985), pp. 1-19.; Cathy Frierson, "Rural Justice in Russia: the Volost Court Debate: 1861-1912," Slavonic and East European Review(October, 1986), pp. 526-545.; Cathy Frierson, "Crime and Punishment in the Russian Village," Slavic Review(Spring, 1987), pp. 55-69.

⁹²Sanktpeterburgskie Vedomosti, no. 168(June 22, 1904), p. 2.

⁹³Ibid., p. 2.

⁹⁴O. Portugalov, "O grazhdanskoi nepolnopravnosti i iuridicheskoi bezpomoshchnosti krest'ianskago naceleniia Volzhskago i Kamskago kraia," Iuridicheskaja Gazeta, no. 91(December 29, 1902), p.2.

⁹⁵Lewin, "Customary Law," pp. 7-8.; Frierson, "Rural Justice," pp. 536-38.

large enough. One local zemstvo official complained that it was too expensive - and too time-consuming - to get a St. Petersburg advocate to come to his remote village.⁹⁶ Secondly, recognized advocates were usually excluded from the volost courts, a custom which received the force of law in 1889. Article 23 of the zemskii nachal'nik legislation specifically stated that a litigant must appear personally before the volost court unless one lived outside the volost or 15 versts from the court. In that case, a claimant could choose as one's legal representative either a member of one's family, house, or village, as long as that person was not "engaged in preparing someone else's litigation for a fee."⁹⁷ Finally, there was very little that a trained advocate - unfamiliar with customary law - could do to help a peasant. "To the vast majority of legal questions, raised by peasants," wrote M. Levitskii, "a sworn attorney can only give one answer: 'It is impossible to do anything here. This is not subject to any law.'"⁹⁸

In such an environment - no licensed advocates, no detailed code of laws - the podpol'naia advokatura could not help but thrive, but besides the previously described street advocates, who dealt primarily with petty civil and criminal cases within the village, a second category of underground advocate flourished in the countryside: the peasant advocate. Unlike the street advocate, the peasant advocate usually came

⁹⁶Sanktpeterbugskie Vedomosti, no. 233(September 28, 1905), p. 1.

⁹⁷PSZ., No. 6196(1889), Art. 23.; I. Shrag, "Krest'ianskie sudy," Iuridicheskii Vestnik, no.5/6(1877),pp. 80-81.; P. Skorobogatyi, "Deistviia, predshestvuiushchiia sudebnomu razbiratel'stvu v volostnykh sudakh," Iuridicheskii Vestnik, no. 4(1881), pp. 708-13.; V. Ptitsyn, Obychnoe sudoproizvodstvo(St. Petersburg, 1886), pp. 75-80. The zemskii nachal'nik legislation was especially damaging for the advokatura; not only did it ban advocates from appearing before the volost courts, it also greatly expanded the jurisdiction of these peasant courts. After 1889, all peasant cases, involving questions of land and inheritance, regardless of their total value, were transferred to volost courts, as were all cases, involving up to 300 roubles. Thus, not only did the established advokatura lose all peasant land disputes, it also lost a significant number of petty-bourgeois cases as well. According to one source, some attorneys lost "a good half of their practices and consequently, [one-half of their] earnings." See M. Petrulan, "Ekonomicheskii podryv advokatury," Sanktpeterburgskie Vedomosti, no. 171(July 17, 1905), p. 1.

⁹⁸M. Levitskii, "K voprosu. . .," Sudebnaia Gazeta, no. 26(1904), p. 7.

from the peasant society itself, officially responsible for handling the society's major civil litigation. Although the peasant advocate was clearly more conscientious than the street advocate, he was also less experienced and more naive. This was especially important since peasant advocates regularly appeared in both the reformed as well as the volost courts, sometimes even going face to face with a member of the advokatura.⁹⁹ Such confrontations usually proved to be a complete mismatch: "Semi-literate, or completely illiterate, not knowing the law or, still more dangerous, misunderstanding its meaning, not having any idea about formalities, protocol, or dates, these [peasant] attorneys often lose cases which, on their merits, seemed true."¹⁰⁰ Having lost the case in the first instance, these peasant advocates next chose to file numerous appeals, in the process running up huge expenses which the peasant society, in the end, would have to reimburse.¹⁰¹

By their nature, however, peasants were not a litigious group. Prior to 1864, they had both feared and avoided the courts (With the strong, do not fight. With the rich, do not go to court.).¹⁰² Only one aspiration could overcome this inherent suspicion of the judicial process: the desire for land. In any peasant society, wrote Moskovskiiia Vedomosti, there "exists a vague notion of some kind of long ago examined and officially rejected rights to this or that land. Peasants love to talk about these hazy land claims, and they are willing to mourn for that land which was unfairly taken away from them."¹⁰³ Therefore, despite such notions as family

⁹⁹M. Durasov, "Organizatsiia sel'skoi advokatury," Zhurnal Iuridicheskago Obshchestva, no. 4(1898), pp. 3-4.

¹⁰⁰Iuridicheskaiia Gazeta, no 67(August 26, 1892), pp. 1-2.

¹⁰¹Ibid., pp. 1-2.; See also Durasov, "Organizatsiia," pp. 3-4.

¹⁰²"Nastoit li neotlozhnaia neobkhodimost. . ," Sudebnaia Gazeta, no.1 (1889), pp. 5-6.

¹⁰³"Odna iz yazv derevenskoi zhizni(sel'skie advokaty)," Moskovskiiia Vedomosti, no. 8(January 8, 1891), p. 2.

property and communal property, land relations, from a strict legal standpoint, remained undefined; individual peasants and peasant societies still did not know "their own land, that land, on which they sit, [that land] for which they pay, or [that land] which had been redeemed."¹⁰⁴ Private land, acquired by merchants or other individuals, was also imprecisely defined; deeds of purchase included such ambiguous phrases as "more or less everything(bolee ili menee vse bez ostatka), not attached to the peasant allotment(nadel)" in order to demarcate what land had actually been sold.¹⁰⁵

The craving for land inevitably led to legal chaos. Peasants regularly went to court to verify old land claims without knowing the size of the allotment which they had possessed for the last ten years. "Masses of cases about the boundaries of the allotment are raised, but until now, there is no answer[to the question]who should mark out the peasant allotment. Meanwhile, the peasants. . .seek the limits of their redeemed land."¹⁰⁶ Street advocates were particularly skilful at manipulating the peasant's hunger for land. They would raise false hopes about winning "some sort of long ago lost court case, thereby initiating another groundless suit about land or losses, etc."¹⁰⁷ Moskovskiiia Vedomosti described the beginnings of a typical peasant suit. "My neighbour's market garden(ogorod) is bigger than mine," thought a peasant. "Is it possible for me to get half of it?" Next on the scene appears an underground advocate. He files a suit which eventually is rejected for lack of evidence, but far from being discouraged, this negative result is exactly what the

¹⁰⁴"Nastoit li neotlozhnaia neobkhodimost. . .," Sudebnaia Gazeta, no. 1(1889), p. 5. For a discussion of peasant land holdings, see T. Shanin, Russia as a 'Developing Society' (London, 1985), pp. 66-81.

¹⁰⁵Sudebnaia Gazeta, no. 1(1889), p. 6.

¹⁰⁶Ibid., p. 5.

¹⁰⁷"Oдна из yazv. . .," Moskovskiiia Vedomosti, no. 8(1891), p.2.

underground advocate wanted. If he had actually won the case, then his services would have no longer been required. Thus, the underground advocate began the long process of appeal, extorting more money from the peasant along the way. "Our general court institutions," Moskovskiiia Vedomosti concluded, "are literally jammed with such cases."¹⁰⁸

Unless the autocracy was willing to recognize the monopoly right of the advokatura, there was very little it could do in order to eradicate the podpol'naia advokatura from the countryside. Not only were these underground advocates close to the people - and affordable - but they were also accountable to no one. According to one survey of regional governors, it was virtually impossible to track down these underground advocates and punish them. They did not partake "either formally or officially in the initial impetus or [in the] direction of the cases, and several are not interested in the outcome. Therefore, the struggle with them is already difficult and, from a legislative standpoint, almost always fruitless. Often, representatives of this nomadic underground advokatura do not have a clear occupation or even a permanent place of residence."¹⁰⁹ There was one proposal, submitted by the Ministry of the Interior, to restrict the activities of the podpol'naia advokatura in the countryside, but this was abandoned after the 1889 zemskii nachal'nik legislation. The powers of the land captain, which included the right to examine all volost court decisions, were deemed sufficient in order to overcome any injustices, precipitated by the podpol'naia advokatura.¹¹⁰

¹⁰⁸"Neobkhodimaia reforma (ob ogranichenii vrednoi deiatel'nosti poverennykh po krest'ianskim delam," Moskovskiiia Vedomosti, no. 135 (May 18, 1889), p. 2.; According to Sudebnoe Obozrenie, nine-tenths of all cases, brought before the Kamenets-Podol'sk district court involved peasant land disputes, the vast majority of which, from a legal standpoint, were totally groundless. See Sudebnoe Obozrenie, no. 8 (1904), pp. 185-6.

¹⁰⁹Iuridicheskaia Gazeta, no. 67 (1892), p. 2

¹¹⁰Iuridicheskaia Gazeta, no. 2 (January 8, 1892), p. 1.; Sudebnaia Gazeta, no. 13 (March 13, 1891), p. 12.

C. The Scourge of the Podpol'naia Advokatura

As we have now seen, the persistence of the pre-reform striapchie tradition was due to a variety of reasons: ignorance, poverty, legal loopholes, etc. Besides these inherently negative explanations, however, the continued existence of the podpol'naia advokatura was also due to the fact that they did undeniably fulfil an important social need. More and more people, of all backgrounds, required legal services, and this growing demand, in the end, could only be met by these underground advocates. Even Berenshtam, who founded one of the first konsul'tatsii, reluctantly accepted that there was no alternative to the podpol'naia advokatura. Underground advocates, he wrote, "are needed by the working-class, not only needed but difficult to replace, due to their accessibility to the poor, working people [and because] at the present time, genuine, scrupulous jurists do not go and help these people. . ."111

The fact that the podpol'naia advokatura filled in a gap in the market, however, cannot begin to justify the irremediable damage that these street advocates inflicted on Russia's judicial system. It is impossible to estimate how many peasants were persuaded by a perfidious street advocate to file a hopeless suit which in the end, only enriched the advocate. Fraud, therefore, was an endemic feature of Russia's legal system; a wily underground advocate, for example, would demand ten roubles from an unsuspecting widow for a petition - 1 rouble for the work and 9 roubles for a non-existing official stamp. Other street advocates would get peasants to sign a promissory note and then, take

¹¹¹Berenshtam, Za pravo, p. 84.

them to court in order to get at their property or money.¹¹² No insignificant amount of roubles, Moskovskiiia Vedomosti concluded, had been transferred into the lap of this "crooked profession."¹¹³

But the harm of the podpol'naia advokatura cannot simply be calculated in financial terms. Their collective actions undermined Russia's entire system of justice. They either arranged or themselves gave false testimony. They constructed false bankruptcies, composed fictitious transactions, hid the transfer of land under someone else's name, and maliciously stretched out the judicial process. They even filed appeals without their client's knowledge. In the end, Russia's legal system could not cope with this avalanche of cases. Not only were many suits unwarranted, some were unfathomable. Juridicheskaia Gazeta described the four categories of petitions which were regularly presented before the volost courts. The first group of petitions were generally comprehensible, but only because they had been written by the volost clerk. The second group simply mentioned a random collection of laws, designed to cause as much confusion as possible. The third group of petitions mentioned no laws, and the fourth group was totally unintelligible.¹¹⁴ V. Zybov described the strain that this surfeit placed on one region, where 1599 suits were brought before the zemskii nachal'nik. In 180 cases, the complaints were rejected outright, while in another 128 cases the suits were dismissed because they did not come under the jurisdiction of the courts. 172 cases were stopped and another 162 were reconciled. Of the remaining 851 cases that were actually examined, 387 were resolved, 218 were transferred, and

¹¹²Moskovskiiia Vedomosti, no. 244(1904), p. 4.; Pravo, no. 45(1900), p. 2138.; S. Takgauz, "Po povodu fel'etona "Advokatura v sviazi s predstoiashchimi reformami sudoproizvodstva," Sudebnaia Gazeta, no. 5(February 2, 1896), p. 7.

¹¹³Moskovskiiia Vedomosti, no. 244(1904), p. 4.

¹¹⁴Juridicheskaia Gazeta, no. 8(January 27, 1902), p. 2.

246 were stopped.¹¹⁵ Thus, one can see how overloaded the Russian legal system had become; the vast majority of these suits, Zybov stated, were groundless. The podpol'naia advokatura was in no small measure responsible for this deluge, but since an underground advocate's living was dependent on the number of cases he brought before the court, there was no incentive for him to change his ways.¹¹⁶

The established advokatura, of course, could not help but be adversely affected by the proliferation of the podpol'naia advokatura. Far from representing a superior alternative, some commentators began to accuse the sworn profession of emulating these underground advocates. Unfortunately, wrote Moskovskiiia Vedomosti, "the sworn advokatura has not had any influence on this secret advokatura, nor has it assisted in removing this social ulcer but on the contrary, often yields to its corrupting influence. Both the prisiazhnye poverennye and the chastnye poverennye have begun, as it were, to imitate underground advocates in the utilization of various dirty tricks and contrivances in judicial matters and to excel on the same slippery slope."¹¹⁷ Foinitskii also accused the prisiazhnye poverennye of sinking to the level of the pod'polnaia advokatura. The moral standards of the sworn profession had been reduced to such an extent, he argued, that "the border between the prisiazhnye poverennye and the chastnye poverennye, between sworn attorneys and the petitioners of the 'good-old times,' is lost."¹¹⁸

¹¹⁵V. Zybov, K voprosu o zemskoi advokature(St. Petersburg,1899), p. 16. See also Gessen, "Iuridicheskaia pomoshch naceleniiu," pp. 102-3.

¹¹⁶It appears that peasants also risked very little in the volost courts. Individual petitioners did not have to personally appear before the volost court, they received a percentage of the profits if they won and did not have to pay the court costs if they lost. See Iuridicheskaia Gazeta, no. 67(October 13, 1905), p.2.

¹¹⁷"Tainaia advokatura," Moskovskiiia Vedomosti, no. 343(December 13, 1896), p. 2.

¹¹⁸I. Foinitskii, "Zashchita v protsesse ugovnom," p. 50. For similar evaluations, see: "Neobkhodimaia reforma(ob dogranichenii vrednoi deiatel'nosti poverennykh po krest'ianskim delam)," Moskovskiiia Vedomosti, no. 135(May 18, 1889),p.

Even more damaging for the reputation of the sworn profession, however, was the charge of open collaboration with the podpol'naia advokatura. One article in Sudebnaia Gazeta accused members of the prisiazhnye poverennye of hiring underground advocates to act as middlemen. Such underground advocates would wander around a city - the local courts, the railroad station, city squares - searching for potential clients and delivering them to a recognized advocate, who in turn, would pay the underground advocate/middleman for his services. According to Sudebnaia Gazeta, sworn attorneys "were not squeamish [about utilizing] the services of these subjects which, in essence, explains the existence, as well as the proliferation of this sort of brokering. . ."119 Only the most "dignified representatives" of the prisiazhnye poverennye, the article continued, "avoid such sorts of market devices and therefore, sometimes sit [around] without a substantial practice."120

Therefore, the advokatura - unfairly, in many respects - received much of the blame for the underground advocate's continued existence. Such a phenomenon could not occur, wrote one commentator, "if the patented jurist sincerely wished to save the public from the exploitation of the street advocate. It is difficult to believe in the sincerity of the patented jurist and their desire to impartially help simple people because they also need to make as much money as possible for as little work as possible."121 The means by which both the prisiazhnye poverennye and the pomoshchniki chose to fight the podpol'naia advokatura- the

2.; Moskovskiiia Vedomosti, no. 261 (September 21, 1904), p. 1.; P Kotliarevskii, Russkaia advokatura i zakon (Kiev, 1905), pp. 136-7.

¹¹⁹"K voprosu of podpol'noi advokature," Sudebnaia Gazeta, no. 49 (December 3, 1900), p. 3.

¹²⁰Ibid., p. 3.

¹²¹M. Kel'manovich, "Iz advokatskoi etiki," Sudebnaia Gazeta, no. 11 (March 18, 1901), p. 7.

konsul'tatsiia - also came under sharp criticism. Many people, it was argued, chose not to go to these legal aid centres; either they were too far away, or their opening hours were too inconvenient. Another problem was that these konsul'tatsii only offered free oral - not written - advice, yet in many cases people required additional written documentation which in the final analysis proved to be too expensive to purchase. When a worker was told something which he did not want to hear - for example, in a factory injury case - he simply accused the advocate of being under the control of the factory owner. Finally, many people simply did not find the konsul'tatsiia a pleasant place to visit; they found the atmosphere too 'dry and formal' and instead, preferred to turn to the underground advocate who did not speak ceremoniously and with whom they could share a drink.¹²²

The sworn profession was not the only institution, however, which became involved with the campaign against the podpol'naia advokatura. Several zemstvos also attempted to participate in this struggle, but their actual contribution was sharply restricted by the government. Due to its proximity to the people, the zemstvo was viewed by many as being in the best position to fight the podpol'naia advokatura. The zemstvo had the added advantage of already having experience in attracting doctors and teachers to the countryside. Kuz'min-Karavaev described the salient features of what a zemstvo advocate would look like; he would be drawn from the entire advokatura - the prisiazhnye poverennye, the pomoshchniki, the chastnye poverennye - and would receive a minimum salary. Each zemstvo would hire two advocates in

¹²²Moskovskiiia Vedomosti, no. 352(December 22, 1902), p. 5.; Moskovskiiia Vedomosti, no. 244(1904), p. 4.; Levitskii, "K voprosu of iuridicheskoi bezpomoshchnosti," Sudebnaia Gazeta, no. 26(1904), p. 6.; Sudebnoe Obozrenie, no 48(November 28, 1904), pp. 975-6.; M. Berenshtam, "Iuridicheskiiia konsul'tatsii v Rossii i rabochie sekretariaty v Germanii," Russkoe Bogatstvo, no. 3(March, 1903), pp. 3-5.

order to ensure that each participant in a dispute could consult with an attorney, and everyone within a given community, regardless of their social background, would have equal access to the zemstvo attorney.¹²³ Sceptics argued that this whole project would be too expensive, that the zemstvos, on a national level, lacked the resources to make this plan viable. Where would these advocates - who had no knowledge of customary law - come from? Proponents of the zemstvo advocate responded by saying that the zemstvo advocate would actually save a region money by ending all unnecessary litigation while simultaneously educating people about the law.¹²⁴

In 1896 and 1897, zemstvos in Lokhvitskoe, Perm, Chernigov, and other areas actually hired advocates, but these experiments proved to be short-lived.¹²⁵ In 1898, the Ruling Senate announced that legal aid was not one of the recognized activities in which the zemstvos had been authorized to participate and therefore, they had no legal right to hire advocates.¹²⁶ Surprisingly, this verdict - which clearly benefited the podpol'naia advokatura - was not without its supporters in the press. Greater access to legal advice, it was feared, would only mean more, not less unnecessary litigation. In the process, there was the added risk that the zemstvo advocate would appeal against all of the land captain's decisions, in effect undermining the latter's authority.¹²⁷

Thanks to the Ruling Senate's 1898 decision, therefore, the zemstvo was forced to the sidelines in the fight against the podpol'naia

¹²³V.D. Kuz'min-Karavaev, "Zemskaia advokatura," Pravo, no.40(October 3, 1899), pp. 1812-1813.

¹²⁴V. Zubov, K voprosu o zemskoi advokature, pp. 17-18.

¹²⁵V. D. Kuz'min-Karavaev, "Zemskaia advokatura," Pravo, no 39(September 26, 1899), pp. 1753-5.

¹²⁶Moskovskiiia Vedomosti, no 237(August 19, 1898), p. 2.; Sanktpeterburgskie Vedomosti, no. 160(June 15, 1903), p. 2.

¹²⁷Moskovskiiia Vedomosti, no. 217(August 9, 1897), p. 2.; Moskovskiiia Vedomosti, no. 237(1898), p. 2.; Iuridicheskaia Gazeta, no.28(April 17, 1903), p. 1.

advokatura. As a last resort, people turned to the state as the one institution which had the resources to create an alternative to the underground advocate. M. Durasov called on the government to introduce a special sel'skii(village) advocate - drawn from educated jurists - in order to protect the peasantry from the ravages of the podpol'naia advokatura. For such a program to work, Durasov insisted that a sel'skii advocate should be guaranteed a minimum salary as well as the right to state service(i.e. granted a chin). At the same time, in order to preserve his impartiality, Durasov also demanded that a future sel'skii advocate be granted complete independence from the local judicial bureaucracy.¹²⁸ Just as with the zemstvo advocate, however, there were objections to the sel'skii advocate. Critics opposed the creation of yet another advocate - beneath the prisiazhnye poverennye, the pomoshchniki and the chastnye poverennye - as well as the likelihood that these sel'skii advocates would be granted basic monopoly rights over all peasant cases in a region. Once again, Iuridicheskoe Obozrenie commented, peasants "will be denied the rights, equally [enjoyed] by all other citizens of the state, to select freely and independently from those people who they personally would prefer[to represent them], but [instead] will be compelled to select attorneys from a single korporatsiia of sel'skii practitioners."¹²⁹ The sel'skii advocate, therefore, was seen as perpetuating the legal backwardness of the peasantry.

In reality, what the struggle against the podpol'naia advokatura required was greater recognition by the government of the existing

¹²⁸Durasov, "Organizatsiia sel'skoi advokatury," pp. 13-17. Some commentators also suggested that Russia should introduce the German system of anmeldstube - state bureaucrats who composed individual petitions for the general public. See M. Kel'manovich, "K voprosu o bor'be s ulichnoiu advokaturou," Sudebnaia Gazeta, no. 3(January 20, 1902), p. 6.

¹²⁹A. Frenkel', "Sel'skaia advokatura," Iuridicheskoe Obozrenie, no. 158(April 5, 1884), p. 420.

advokatura, but as we have now seen throughout this dissertation, this support was never forthcoming. Instead, a very half-hearted approach was adopted; occasionally, a court would banish the local underground advocates from its premises, or individual street advocates would be tried for various acts of fraud, but in light of the seriousness of the problem, these isolated incidents could never serve as a deterrent for the podpol'naia advokatura.¹³⁰ Decisive legislation was only enacted on June 15, 1912, when the local courts were finally granted broad powers to punish underground advocates. Anyone, who dishonestly gave legal advice or composed judicial documents, could now be punished by the courts, as could anyone who tried to conduct someone else's litigation by covertly acquiring the rights to the case.¹³¹ In light of the underground advocates long history, however, the impact of this legislation was clearly negligible. The reality of the situation was that Russia's pre-1864 system of legal representation - the striapchie tradition - had managed to survive intact all the way up until 1917 with incalculable damage to Russia's nascent legal consciousness, and more specifically to the Russian advokatura.

¹³⁰Sudebnoe Obozrenie, no. 32(August 8, 1904), pp. 628-9.; Pravo, no. 46(1900), p. 2201.; Pravo, no. 50(1900), p. 2407.; Pravo, no. 51(1900), pp. 2452-3.; Sudebnaia Gazeta, no. 49(1900), p.3.

¹³¹Vas'kovskii, "Advokatura," p. 278.

CHAPTER SIX: THE ADVOKATURA AND POLITICS

I. THE POLITICAL TRIALS OF THE 1870's

Throughout this dissertation, we have analyzed the sworn advokatura's incompatibility with Russia's existing hierarchical soslovie social order. Everything about the prisiazhnye poverennye - their corporate independence, their public prominence, their open admissions policies, their economic power, their commitment to the rule of law - threatened the autocracy and provoked some sort of counter reform. It was inevitable, therefore, that the advokatura's search for professional identity would spill over into the political arena, for without radical change, sworn attorneys could not fulfil their designated professional duties. This growing antagonism ultimately culminated in 1904, when the St. Petersburg and Moscow prisiazhnye poverennye, in an unprecedented joint declaration, called for a complete transformation of the existing political system.

Several of Russia's emerging professions, it must be added, followed the above pattern - moving from professional consciousness to political resistance - yet in many ways, the advokatura's political evolution was unique. As the only institution in pre-revolutionary Russia which could publicly defend the rule of law and individual rights, the sworn advokatura found itself thrown into political opposition almost from the day of its creation. "We are knights of the living word," Spasovich exclaimed in 1873, "more free today, than the press," and at the great political trials of the 1870's, as well as at the post-1901 political trials, the sworn advokatura emerged as one of the autocracy's most outspoken

critics.¹ Yet in between these two dramatic periods, the prisiazhnye poverennye were forced to endure almost 25 years without any open political trials. For an entire generation, in fact, advocates were excluded from virtually all branches of public service, during which time their political influence was reduced to almost zero.

There were other irregularities in the advokatura's political development as well. While the sworn advokatura, thanks to these political trials, was quickly establishing an anti-state reputation, its elected leaders(i.e. the Bar Councils) were deliberately trying to avoid politics in the hope that an impartial prisiazhnye poverennye would, in the long run, acquire more respect. This neutral policy was most seriously tested in 1905 in St. Petersburg, when the Bar Council sought somehow to reconcile the political aspirations of the soslovie - especially amongst its younger members - with what it perceived to be as the advokatura's higher professional duties.

This chapter, therefore, will trace the advokatura's erratic, uneven political evolution, focusing on how the soslovie of prisiazhnye poverennye, - as an institution - and individual sworn attorneys - in their professional capacity as legal representatives in court - became embroiled in politics. Naturally, such a study must begin with the great political trials of the 1870's, for it was here that the sworn advokatura first emerged as a political force. Ostensibly, all these trials were criminal trials, although the nature of the actual offences changed dramatically during this period, from conspiring in a ghoulish murder(the Nechaev case) to participating in political propaganda(the trial of the 193) to committing one of the first acts of premeditated terrorism(Vera Zasulich). Without underestimating the advokatura's importance, it must be

¹Spasovich, Zastol'nye rechi, p. 5.

stressed that it shared centre stage with the other two combatants at these trials: the government and the defendants. All three protagonists, in fact, sought to use the publicity, attached to these trials, for their own political ends.

Undoubtedly, the autocracy emerged as the loser in this process. From their perspective, these political trials were intended to drive a wedge between the people and the revolutionaries, thereby increasing support for the government. If anything, however, these prosecutions exposed the government's own incompetence. The Minister of Justice - Pahlen - brought an indifferent attitude to the management of these cases and simply assumed that the individual judges would go along with the government's case, a confidence which, despite the conservative beliefs of many magistrates, was totally misplaced.² More importantly, far from giving the prosecutions a legal pretence, the autocracy repeatedly exposed their own arbitrariness and disrespect for the law. Innocent people were arrested, prosecutors used discredited testimony, confessions were elicited under torture, etc. Furthermore, in 1872, political cases were removed from the general courts and transferred to a more reliable special court - the OPPS(Osoboe prisutstvie pravitel'stvuiushchego senata) - in total breach of the Judicial Reforms of 1864.³

While the autocracy was going through a series of embarrassing own goals, the defendants were successfully using these trials for their own political advantage. At the Nechaev co-conspirators trial and the trial of the 50, the defendants used the proceedings as their own personal

²Wortman, The Development of a Russian Legal Consciousness, pp. 279-80. Koni recounts an interesting conversation he had with B. Khvostov, a judge at the trial of the 50, who complained that magistrates simply did not know what was expected of them at these political trials. See A.F. Koni, Sobranie sochinenii, vol. 2(Moscow, 1966), p. 36.

³N. Troitskii, Tsarskie sudy protiv revoliutsionnoi rossii(Saratov, 1976), pp. 101-5.; William Fuller, Civil-Military Conflict in Imperial Russia, 1881-1914(Princeton, 1985), p.119-120.

platform, making speeches which denounced the autocracy and highlighted Russia's existing social iniquities. The Judicial Reforms, one must hasten to add, did not emerge unscathed from these hearings either. Defendants referred to the court as the enemy, the perverter of justice. "Now I see," claimed I.N. Myshkin, a defendant at the trial of the 50, "that we have no publicity, no glasnost, not. . . even the possibility to explain the true character of the case. And where can we do this? Between the walls of the court!. . . Here, one cannot hear an honest speech . . . Now I have the full right to say that this is not a court, but a shallow comedy."⁴ In light of the government's continued disregard for the rule of law, many of the defendants opted to make a political statement by boycotting the proceedings; at the trial of the 193, 120 defendants opted not to attend the actual pleadings. Nevertheless, thanks to their combativeness, a revolutionary dignity emerged amongst the defendants which, in certain circles, only increased their personal appeal and that of their cause.⁵

The defendants naturally had their misgivings about their chosen courtroom representatives. They saw the advocates as being dependent on the judicial system, providing a cloak of respectability to these manifestly illegal trials. In 1874, Peter Lavrov counselled his fellow revolutionaries on how to approach the question of legal representation: "Reject a defender who is not determined to defend your convictions, if not as true, then at the very least as unavoidable. Reject a defender who does not take it as his duty not to say a word - not a single word - degrading your program, your personality. If there is not such attorney, and there is a possibility that you will not find one, then defend yourself."⁶ The

⁴N. Troitskii, Tsarskie sudy, pp. 194-5.

⁵Ibid., p. 154.

⁶N. Troitskii, Tsarizm pod sudom progressivnoi obshchestvennosti, 1866-1895(Moscow, 1979), p. 235

hesitations of the revolutionaries were not without foundation. Rather than fighting for radical change, advocates were generally more concerned about promoting political reform - introducing civil rights, the rule of law, etc. First and foremost, Vinaver later wrote, advocates in the 1870's were fighting for the right to "freedom of thought, the freedom to express one's opinions."⁷

But even though most advocates did not hold the revolutionary sentiments of their clients, they were still subject to considerable pressures. Sworn attorneys were carefully followed by agents of the Third Section, some were arrested, and a few (Prince Urusov, D.V. Stasov) were even exiled for their personal associations with revolutionaries.⁸ As in all criminal cases, advocates were not allowed to participate in the preliminary investigation, and sometimes, they were literally only given hours to acquaint themselves with the results of the investigation before going to trial.⁹ The court also reserved the right to reject a defendant's choice of counsel if it thought that the advocate was "unreliable."¹⁰

Despite these obstacles, the political trials still provided a valuable platform from which the advokatura could both confront the state and defend the rule of law. Many of the objections, voiced by advocates at these trials, centered on procedural questions; at the trial of the 193, for example, advocates strongly protested the government's decision to divide the defendants into 17 different groups (in order to prevent disturbances) even though they had all been charged under the same indictment.¹¹ This technical strategy proved to be quite successful. By casting doubt on key pieces of evidence, exposing the biases of certain

⁷M. Vinaver, "Advokatura i pravovoe gosudarstvo," Pravo, no. 13(1905), p. 984.

⁸Troitskii, Tsarizm pod sudom, pp. 189-91, 195.

⁹Ibid., p. 199.

¹⁰Ibid., p. 190

¹¹Ibid., p. 218

witnesses, highlighting contradictions in testimony, and emphasizing the unfounded nature of many of the accusations, advocates were repeatedly able to undermine the government's case. In order to further mitigate the responsibility of their clients, advocates also stressed their moral attributes, a tactic most successfully employed by Aleksandrov in the Vera Zasulich case.

Finally, without overtly endorsing the more radical beliefs of their clients, advocates skillfully were able to reverse the spotlight and file their own political indictment against the autocracy. At the trial of the Nechaev co-conspirators, for example, Urusov explained that it was only natural that young people should be attracted to 'secret associations', given that they could not gather openly.¹² The going to the people movement, exclaimed Stasov at the trial of the 193, was simply the natural result of the younger generation's desire to be "closer to the narod."¹³ And what was inherently illegal, asked Taneev, about reading the works of Herzen, especially since Herzen's works "belonged to Russian literature, and everyone should study him if they want a full and basic understanding of Russian literature."¹⁴ In the process of defending their clients, therefore, advocates made numerous political excursions in ways which no other institution in pre-revolutionary Russia could. They also enjoyed, one must add, a considerable degree of success. At the Nechaev co-conspirators trial, 42 out of 78 defendants were acquitted, while at the trial of the 193, 90 defendants were acquitted. Finally, in what, from a strict legal standpoint, was at best an inappropriate verdict, a jury acquitted Vera Zasulich of the cold-blooded murder attempt of Governor Trepov. Needless to say, the government was up in arms over the advokatura's

¹²Ibid., p. 210.

¹³Ibid., p. 218.

¹⁴Ibid., p. 211.

superior tactics; the Third Section, for example, bitterly complained after the Nechaev co-conspirators trial that the advocates "had ennobled the personality of the defendants."¹⁵

If one advocate stood out above the rest at these political trials, it was V.D. Spasovich - the King of the Russian Bar, as he was affectionately known. The son of a doctor, Spasovich was born in Minsk in 1829, and although he was probably the greatest courtroom orator in pre-revolutionary Russia, his speech, according to Gruzenberg, "never sounded Russian but like a translation from Polish."¹⁶ He graduated from St. Petersburg University in 1849, and by 1857, he was a lecturer in criminal law at his alma mater, where amongst his many students was A.F. Koni - a man who himself would become a leading member of the judiciary. In 1861, Spasovich resigned from St. Petersburg University in protest over the government's reprisals against students, but in 1863, he published Uchebnik ugolovnago prava, one of the first attempts to analyze criminal law in pre-revolutionary Russia. Thus in 1866, at the ripe old age of 37, Spasovich decided to enter the St. Petersburg prisiazhnye poverennye and, until he died in 1906, he remained one of the soslovie's leading spokesman as well as a long serving member of the St. Petersburg Bar Council.¹⁷

Without question, Spasovich brought a level of academic scholarship and personal erudition to his legal activities that was virtually unmatched by anyone in the profession. Like Passover, his closest rival, Spasovich's influence on Russia's entire legal evolution was enormous.

¹⁵Ibid., p. 211 In 1879, after the Zasluch acquittal, Pahlen proposed to expand the government's jurisdiction over the prisiazhnye poverennye by giving the Minister of Justice the right to remove a sworn attorney from any case. This proposal, however, was rejected by the State Council. See Gessen, Istoriia russkoi advokatury, 1: pp. 237-43.

¹⁶Gruzenberg, Yesterday, p. 39.

¹⁷Vinaver, Nedavnee, p. 19-20.; A.F. Koni, Ottsy i deti sudebnoi reformy(Moscow, 1914), pp. 227-8. Troitskii, Tsarizm pod sudom, pp. 187-8.

Not one-tenth of the Cassation Department's decisions, wrote Dzhanshiev, could have been reached without the "assistance of this talented, hard working jurist."¹⁸ From his courtroom speeches, it was apparent that Spasovich's expertise stretched into the realm of psychology, philosophy, sociology, and even the natural sciences. Besides his legal work, Spasovich was an accomplished commentator on the poetry of Shakespeare, Byron, Pushkin and Lermontov, he organized the Shakespeare circle in St. Petersburg, and he was the author of the history of Polish literature.

If there was a central tenant of Spasovich's personal philosophy, it was his unquestioned belief in personal freedom, the need to protect the individual from the oppressiveness of the state: "I propose a toast to the human personality, for its inviolability from the state, for its distinctiveness and originality, serving as the source of all human creativity, for its natural crooked line as well as its linear geometry."¹⁹ The enemies of personal freedom were, in Spasovich's eyes, the state, the church, nationalism and state socialism, but although Spasovich accepted the need for change, he believed, like all good liberals, that it must come gradually. In one of his last letters(1906), Spasovich confirmed that for his entire lifetime, he had been "for all progress, but legal, for all evolution, but not revolution, for the establishment of an order according to all parties, in the arena of parliament, but without bloodletting and killing."²⁰

The political trials provided Spasovich with the stage from which he could promote his liberal beliefs, and his summation at the trial of the 193 provides just one illustration of how he rallied to the defence of the individual. Within the speech, Spasovich focused on the intellectual

¹⁸G. Dzanshiev, *Epokha velikikh reform*(Moscow, 1898), p. 839.

¹⁹Vinaver, *Nedavnee*, p. 12.

²⁰Troitskii, *Tsarizm pod sudom*, p. 188

immaturity of his client(Shchepkin). The fact that Shchepkin possessed certain banned books, Spasovich argued, did not mean that he was engaged in political propaganda; instead, he was simply going through an intellectual process that all critical thinkers went through and ultimately, Spasovich assured the court, Shchepkin would devote himself to more practical pursuits.²¹ Spasovich next went on to challenge the conspiracy law under which Shchepkin had been indicted. The revolutionary association, which Shchepkin was accused of belonging to, was "non-existent. Instead, it had been created by the imagination of the people who wrote the indictment."²² Furthermore, Spasovich argued, the government had not proven its case; it had not established any links, any conspiracy amongst the co-defendants. Spasovich's rhetorical technique, therefore, was similar to that of his colleagues; by stressing the moral attributes of his clients, highlighting various procedural irregularities and making subtle political remarks, Spasovich was able to effectively undermine the government's case while simultaneously promoting his own liberal political agenda.

Spasovich's abilities did not go unnoticed by the government. "Without exaggeration," wrote one agent of the Third Section, Spasovich had more "scholarly knowledge than the entire court and the procuracy."²³ Although no charges were ever filed against him, Spasovich was closely watched by the authorities. But ironically, despite Spasovich's unquestioned reputation as fighter for personal freedom, there was no love lost between him and the revolutionaries. Often, defendants preferred other advocates, primarily because as part of his strategy,

²¹V.D.Spasovich, Sem' sudebnykh rechei po ugolovnym delam, 1877-1887(Berlin, 1898?) pp. 2-3.

²²Ibid., p. 11.

²³Troitskii, Tsarizm pod sudom, p. 187.

Spasovich intentionally downplayed the significance of their revolutionary propaganda, describing it as insignificant or harmless.²⁴ Spasovich used the great trials of the 1870's, therefore, to promote his own political beliefs. As he informed one revolutionary, "Did you know that for all your actions, you are still not working for social revolution. No, that is still far off. Instead, you are clearing the path for us - the bourgeois-liberals, as you call us - and that is all. We are using your works and your sacrifices."²⁵

Unfortunately, it is very difficult to determine what impact this first group of political trials had on Russian society as a whole. There is no doubt that within the intelligentsia, the political trials were of particular interest, symbolized best by the shouts of approval which greeted the acquittal of Vera Zasulich.²⁶ Stenographic accounts of the major proceedings appeared in the newspapers, students demonstrated in support of the revolutionaries, and leading members of the intelligentsia (Tolstoy, Solov'ev) appealed for clemency for the murderers of Alexander II.²⁷ Information about the less prominent political trials, however, was not as readily available.²⁸ Moreover, amongst the overwhelming majority of the Russian population, the political trials were, at best, only of limited interest.²⁹ Public attitudes towards these trials, therefore, can only be described as mixed; according to the Soviet historian N. Troitskii, one must balance the sympathy that many

²⁴*Ibid.*, pp. 188-9, 212.

²⁵*Ibid.*, p. 224.

²⁶The unlikeliest supporter of Vera Zasulich was, without question, Fyodor Dostoevsky. See L. Grossman, *Dostoevsky*, trans. Mary Mackler (London, 1974), pp. 543-49.

²⁷*Ibid.*, pp. 121-42.

²⁸Troitskii, *Tsarskie sudy*, p. 131.

²⁹Troitskii, *Tsarizm pod sudom*, pp. 171-79.

expressed for the revolutionaries with the overall indifference that large segments of society showed towards these trials.³⁰

Yet at the same time, the impact of these political trials on the autocracy and the advokatura was profound. For the autocracy, the unexpected results from these proceedings precipitated a major shift away from the Judicial Reforms. The creation of the OPPS in 1872 was a fundamental violation of both the spirit and the letter of the Judicial Reforms, and after 1878, the autocracy decided that even the OPPS could not be trusted. Thereafter, all political trials were transferred to the military courts where civilians suddenly found themselves being tried under military laws of war in order to increase the severity of their punishment.³¹

On the other hand, thanks to these political trials, the advokatura had undoubtedly enjoyed its greatest period of renown. As noted in Chapter 2, the prisiazhnye poverennye were subjected to persistent attacks during their first ten years of existence - from the government, the press, and even from within the estate itself.³² At the height of the political trials, however, these diatribes appear to have died down. "The cries against us have ceased," Spasovich commented in 1878. "Even the distant peals of thunder have quieted down."³³ At the same time, the initial distrust of the revolutionaries towards the advokatura began to give way to a grudging respect. "All of the speeches of the advocates," wrote Vera Figner about the trial of the 50, "displayed a deep sympathy for the defendants."³⁴ The advokatura's moment in the public limelight,

³⁰Ibid., p. 180.

³¹For a complete discussion of the military courts, see Fuller, Civil-Military Conflict, pp. 111-128.

³²See Chapter 2, pp. 55-58.

³³As quoted by Troitskii, Tsarizm pod sudom, pp. 223-4.

³⁴Ibid., p. 214

however, was short lived. Although there were a few political trials between 1879 and 1882, most notably, the trial of Zheliabov and his fellow regicides, such proceedings virtually disappeared by the mid-1880's. The advokatura's political forum, therefore, had been effectively removed, not to return again until 1901, and thus began the long years of political isolation.

II. THE INTERREGNUM(1878-1901)

Soon after the government's decision to transfer all sensitive political trials to the military courts, the advokatura, once again, became the subject of critical reports, most of which have already been discussed within this dissertation. Several commentators focused on the Bar's internal weaknesses - the failure to implement a comprehensive training program for the pomoshchniki, the inconsistent disciplinary record of the Bar Council, etc. Other reviewers took a much more negative, derisive approach; some accused the advokatura of either being too mercenary or immoral, while others focused on the growing number of Jews within the estate. Yet ironically, the advokatura was, to a certain degree, a victim of its own success. Thanks to the political trials, Spasovich exclaimed, a "supernatural halo" had been placed above the heads of advocates, when in reality, their day to day responsibilities were much "more modest. . ."35

Unfortunately, once the advokatura fell from its pedestal, it soon discovered that it had no public activity with which to replace the political trials, no branch of public service with which they could be immediately identified. This lacuna explains, in many ways, the contrasting fortunes of the medical profession and the advokatura over the next 25 years. As

³⁵Spasovich, Zastol'nye rechi, p. 18.

Nancy Frieden has shown, the commitment of doctors to public service - symbolized by the zemskii vrach - was one of the main contributing factors in the medical profession's development in the latter half of the nineteenth century. Whether fighting cholera epidemics or promoting basic hygiene, doctors were increasingly perceived as dedicated public servants - hard-working, self-sacrificing, altruistic - and this growing respect, in turn, facilitated their professional development.³⁶ In sharp contrast, the advokatura had lost its most sympathetic public role - defender in political trials - and soon realized that it had no substitute. Unlike his western counterpart, sworn attorneys could not join state service. There was no parliament, only a negligible percentage of advocates became magistrates, the appointment process for indigent clients was largely inadequate, and legal aid was still in its infancy. The one remaining option, available to the advokatura - local self-government - appears to have held little interest.³⁷

As a result, the advokatura retreated to its normal, everyday legal practices - working for banks, drafting documents, defending suspected criminals - activities which as we saw in Chapter 3, only damaged the reputation of the soslovie.³⁸ The growing perception of the sworn attorney as a businessman - the defender of private property and nothing more - stemmed largely from the fact that he had no public role with which to contrast his private practices. Our advokatura, Vinaver quotes the satirist Saltykov as stating, has a merchant character because "it has no relation to the political life of the state."³⁹ The failure of the advokatura to move into more visible, public roles was also noted by Spasovich. The

³⁶N. Frieden, Russian Physicians, pp. 122-131.

³⁷V. Ptitsyn, Drevnie advokaty i nashi prisiazhnye tsitserony (St. Petersburg, 1894), p. 14.

³⁸See also M. Vinaver, "Ob advokature," Pravo, no. 20(1899), p. 1009.

³⁹Ibid., p. 1010.

advokatura will not succeed, he argued, "when it does not serve as a bridge or preparation for all spheres of social life, and not only the judiciary. I remember what the Belgian King, Leopold II, said in front of me, that all his ministers were advocates."⁴⁰ Of course the advokatura still fought for the rule of law, but its victories were now on a much smaller scale. These modest triumphs, moreover, did not seem to satisfy the community at large. "Our near-sighted society," wrote Vinaver, ". . . demanded a fairy tale. [Therefore], they were prepared to disavow that which yesterday was honoured."⁴¹ The advokatura's professional development, therefore, clearly suffered as a result of the loss of the political trials. Not only had the soslovie become more isolated, but its public image had also appreciably declined.

The one advantage that the advokatura had over the medical profession was that in at least 3 cities, it actually had an organized corporate body to defend its interests, but whereas the Bar Council was willing to confront the autocracy on matters which directly affected the soslovie - for example, by demanding that the advokatura's monopoly right be introduced - it shied away from making any direct political statements. Even a letter of condolence proved to be too controversial. Upon hearing the news of the death of Gambetta, the St. Petersburg Bar Council voted to send a telegram, expressing the Bar's regrets, to the Paris Bar, but two days later, this decision was rescinded. Gambetta, it was argued, was known as a politician, not as an advocate, and therefore, although every member of the St. Petersburg prisiazhnye poverennye was entitled to his own political opinions, the Bar Council - as the profession's representative organ - should not express any explicit political views.

⁴⁰Spasovich, Zastol'nye rechi, p. 68.

⁴¹Vinaver, "Advokatura i pravovoe gosudarstvo," p. 985.

Assuming a political role would not only be "outside the law" but would also harm the "living interests of the soslovie" by distracting the Bar Council from its designated responsibilities.⁴² In order to maintain its political neutrality, therefore, the St. Petersburg Bar Council decided not to officially acknowledge the death of Gambetta and refrained from sending the telegram.

Yet while the Bar Council took the high road, the reputation of the advokatura sunk to its very nadir. The Krasovskii Commission, the forerunner of the Murav'ev Commission, was typical when it accused the sworn advokatura of incompetence, dishonesty, and moral corruption. Within the soslovie of prisiazhnye poverennye, the Commission concluded in 1893, one found more and more advocates who were "not allies of the court in the discovery of the truth" but instead had become "abettors of people, interested in the concealment or distortion of the truth."⁴³ In reality, with its professional development seriously impeded by the government and without a clearly defined social role, advocates were open to all kinds of attacks. Even fellow jurists joined in on this assault. In a speech before the Senate in 1884, Chief Procurator N.A. Nekliudov accused advocates of violating "the laws of religion, the laws of social morality and the laws of the state" and demanded that limitations be placed on an advocate's courtroom powers.⁴⁴

Ultimately, under this constant barrage, Russia's fragile consensus, concerning a sworn attorney's public role, unravelled completely. The

⁴²Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1882-3, p. 14.

⁴³Vysochaishe uchrezhdennaia. . . , pp. 6-7.

⁴⁴Nekliudov maintained that an advocate should only be allowed to analyze evidence, explain relevant laws, and provide information which would either acquit his client or mitigate his responsibility. An advocate had no moral right, however, to reduce an act's "degree of culpability(stepen prestupnosti)", if that act was forbidden by law, nor did he have the right to "smear" the actions of people, not involved in the case. Gessen, Istoriia russkoi advokatury, pp. 255-6.; Vestnik Evropy, no. 4(1884), pp. 872 - 878.

Anglo-American tradition has long recognized that an advocate, by the very nature of his professional duties, has dual allegiances; he is simultaneously the defender of the public interest as well as the rights of the individual. Balancing these contradictory responsibilities has always been a formidable task, but in the Anglo-American legal tradition, at least, this balance has long favoured the individual. In late nineteenth century Russia, on the other hand, jurists began to put forward the theory that an advocate's primary obligation was towards society.

E. Vas'kovskii, a lecturer(privat-dotsent) at Novorossisk University, was the most prominent supporter of this thesis. In any trial, he argued, the interests of the state were represented by the procurator while the interests of society were represented by the advocate. According to Vas'kovskii, the state was actually the enemy of the accused while society was his defender. Society, he writes, "must, in its own interests, [and] in order to preserve its rights, take the accused under its protection in the same way as the state protects the victim."⁴⁵ Thus, it was in the name of society, not the individual, that an advocate appeared in court. In whose interest did an advocate act, asked Vas'kovskii? The state's? No, he argued, that was the procurator's responsibility. In the interests of the litigant, as a private individual? No, said Vas'kovskii, if this was true, then the advokatura would have no right to exist. "In the criminal process, the advocate, following the exclusive interests of his client, would play the role of accomplice and concealer of violations of the law. In the civil process, an advocate, seeking only advantage for his client, would become a hired sophist, no matter what trying to interpret the law in the favour of his client."⁴⁶ But by representing the interests of society,

⁴⁵As quoted by Kucherov, Courts, Lawyers, p. 197

⁴⁶E. Vas'kovskii, "Znachenie advokatury i zadachi eia organizatsii," Zhurnal Ministerstva Iustitsii, no. 9(September, 1895), pp. 119-120.

Vas'kovskii added, the advocate actually became a "servant of justice, an ally and assistant of the court."⁴⁷ Therefore, although Vas'kovskii acknowledged that advocates do defend the rights of individual people, they only did so "in the name of and in the interests of the social good."⁴⁸

Fellow jurists were quick to criticize Vas'kovskii for what was, at the very least, a fundamental misunderstanding of the entire judicial process. "What kind of theory is it," asked Professor Zagorovsky, "according to which the state appears as a bloodthirsty persecutor of the accused, i.e., of a person who will, perhaps, be proved innocent, according to which society must protect the accused from the attacks and 'abuses' of the state by sending a lawyer? Is the state not as interested as society in seeing to it that justice is done to the accused? And is not society as interested as the state in the punishment of a criminal?"⁴⁹ Others criticized Vas'kovskii for only analyzing in whose name an advocate acts, not how an advocate acts. Was an advocate a member of an immoral institution, asked one commentator when "he defends the legal rights of his client, and only because he pursues the interests of the latter."⁵⁰

Vas'kovskii was later denied a professorship at Novorossisk University for his alleged lack of scholarship, but he was never, one must hasten to add, completely discredited. His opinions, and especially his belief that an advocate's final allegiance must be towards society, struck a responsive chord both amongst fellow jurists and within the conservative press.⁵¹ According to Moskovskiiia Vedomosti, an advocate acted "not

⁴⁷Vas'kovskii, Organizatsiia advokatura, 2: p. 13.

⁴⁸Vas'kovskii, "Znachenie advokatury," p. 121.

⁴⁹As quoted by Kucherov, Courts, Lawyers, p. 198.

⁵⁰Sudebnaia Gazeta, no. 14(April 7, 1896), p. 4. See also M. Gol'dshtein, "Printsipy organizatsii advokatury, Vestnik Prava, no. 1(1900), pp. 55-60.

⁵¹M. Volkvadze recalled a lecture he had heard on this subject at university, where the professor stated that although it would appear, at first glance, that an advocate only represents his client, in reality, his primary responsibility was to serve "the social interest." Volkvadze, Ispoved' advokata, p. 10. See also D. Borodin,

only as a private representative but also as a social-judicial actor... who betrays the dignity of his calling if, for example, he strives at all costs towards the so called 'vindication' or liberation of a guilty person from punishment."⁵² The duty of an advocate, Moskovskiiia Vedomosti went on to argue, was to harmonize "the interests of justice with the interests of his client " and ensure that guilty people were sufficiently punished.⁵³

Thus, thirty years into the Judicial Reforms, there was still no broad agreement - or even basic understanding - as to what public role the advokatura should play in Russian society. Gessen would later deftly observe that the advokatura had not only been incompatible with the state system but also with Russia's "general level of culture."⁵⁴ The advokatura's political influence, therefore, must not be exaggerated. Not only had the autocracy responded to the advokatura's commitment to individual rights with suspicion and outright condemnation, so too, had leading jurists as well as a large segment of Russian society. What Russia lacked, of course, was a liberal tradition - a treatise on private property, a theory of individualism, a Bill of Rights - which advocates could rally around and defend. But without a liberal tradition, without broad popular

Istoricheskii ocherk, pp. 80-1. M. Gol'dshtein, "Pamiatnik piatidesiatiletiiu russkoi advokatury," Vestnik Prava, no. 22(May 31, 1915), p. 673. Vas'kovskii's belief - that advocates do not defend the rights of the individual but a greater social interest - would also have a persistent echo throughout the Soviet period. See Huskey, Russian Lawyers, pp. 146-7, 188-9.

⁵²Moskovskiiia Vedomosti, no. 111(April 24, 1901), p. 4

⁵³Ibid., p. 4

⁵⁴Gessen, Istoriia russkoi advokatury, 1: p. 331. Gol'dshtein picked up on this theme in his review of Gessen's book The more cultured a society, and the more conscious it is of its rights, Gold'shtein argued, the more it will value "its advokatura and appreciate it, for example, as in England and France. On the other hand, the more despotic a power and the more servile a society, the greater the persecution of the advokatura both by the power and by society itself . . ." M. Gol'dshtein, "Pamiatnik piatidesiatiletiiu russkoi advokatury," p. 673.

support, and finally, without an open, independent judicial system, the advokatura soon discovered that it was no longer an active political force.

It is little wonder, therefore that the mood of the advokatura after 1878 was one of deep depression. Spasovich spoke of the loss of spirit and the pessimism of the St. Petersburg prisiazhnye poverennye "Today all happiness is lost. The laughter had died out. The only possible humour is so-called gallows humour."⁵⁵ Vestnik Evropy also noted the rapid decline in the advokatura's fortunes. There used to be the expression "the position is worse than a governor's(polozhenie - khuzhe gubernatorskago)," but now, Vestnik Evropy commented, thanks to these unremitting attacks, the expression could be "the position is worse than an advocate's(polozhenie - khuzhe advokatskago)."⁵⁶ Thus, the heroic triumphs of the 1870's, when the prisiazhnye poverennye had been in the forefront of the struggle with the autocracy, were soon forgotten. Instead, the advokatura had deteriorated into a quiescent, inactive social force, the "outcast(pasynok)," as Gessen later described it, of the Judicial Reforms.⁵⁷

III. THE POLITICAL RE-EMERGENCE OF THE ADVOKATURA

It was only at the turn of the century that the advokatura re-emerged as a political force. No doubt this resurgence was directly attributable to the emergence of a new generation of advocates. These young advocates - recent admissions to the prisiazhnye poverennye plus attorneys-in-training - were distinguished from their older colleagues by their new found social activism, symbolized, at first, by their commitment to legal aid. As noted in Chapter 4, several new associations,

⁵⁵Spasovich, Zastol'nye rechi, p. 30.

⁵⁶Vestnik Evropy, no. 6(June, 1888), p. 876.

⁵⁷Gessen, V dvukh vekakh, p. 172.

such as the Vagrants Club in Moscow and the consultation bureau in St. Petersburg, were founded, and what separated these organizations from past one's was that instead of passively waiting for the people to come to them, these new konsul'tatsii went directly to the people. M.V. Berenshtam went so far as to put a sign on his door announcing when he would be available for advice, a clear violation of the St. Petersburg Bar Council's regulations.⁵⁸ Workers were the primary constituents of these consultation bureaus - seeking advice about wages, factory injuries, passports, alimony and land - and between 1899 and 1905, the number of konsul'tatsii in St. Petersburg increased from one to ten. There was an equally impressive increase in the total number of consultations, provided by these bureaus. Between 1899 and 1904, for example, the number of people, appealing to the Shlissel'burg consultation bureau jumped from 165 to 2122, while at the Petersburg konsul'tatsiia, the number of consultations increased from 670 in 1901 to 2504 in 1904.⁵⁹

In many ways, these young advocates were following the path, already forged by the medical profession, from social reform to political activism.⁶⁰ By concentrating on genuine social needs - legal aid, the defence of worker's rights - young advocates were also raising their political consciousness. V. Berenshtam, who founded the first St. Petersburg district konsul'tatsiia in 1899, provides numerous insights into the legal difficulties of Russia's working class in his book Za pravo. Obtaining compensation for crippled factory workers appears to have been the most persistent problem. Factory directors, Berenshtam writes, naturally tried to stretch out injury suits for as long as possible,

⁵⁸Gessen, Istoriia russkoi advokatury, 1: p. 388.

⁵⁹Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S. Peterburgskoi Sudebnoi Palaty za 1905g., pp. 186-7.

⁶⁰Frieden, Russian Physicians, pp. 179-99.

demanding, for example, that all witnesses be found and interviewed (this sometimes necessitated a trip to Siberia). If they lost, they immediately appealed, thus delaying the process even further. Crippled workers, of course, lacked the financial resources to continue such disputes (many lasted for more than one year), so ultimately, they decided to go to the 'eternal resting place (vechnoe mesto).'⁶¹ A factory manager would convince a crippled worker to take between 10 and 50 roubles for his injury, and then have the worker sign a receipt which stipulated that he could no longer bring any legal action against the factory. Since this was a private agreement, Berenshtam added, there was nothing he could later do to overturn it.⁶¹

The konsul'tatsii, therefore, began to reflect the rising social concerns of these young advocates. Individual bureaus started to reject certain types of cases: employers against workers, suits against indigent people, husbands, who chose to use their conjugal rights against their spouses, parents who chose to punish their children under article 1592 (disobedience of parental authority).⁶² In addition, advocates who were deemed defenders of capitalist interests (factories, railroads) were not allowed to sit on the executives of certain bureaus.⁶³ The politicization of the advokatura therefore, began in these consultation bureaus, where a whole new generation of social reformers was born.

If the konsul'tatsii was the first step in the sworn advokatura's political re-awakening, then no doubt the second step was Pleve's decision in 1901 to return politically sensitive criminal cases to the regular courts. Why Pleve chose to do this is unclear. Mandel'shtam, a prominent young

⁶¹Berenshtam, Za prava, pp. 21-22.

⁶²Otchet Komissii pomoshchnikov prisiazhnykh poverennykh okruga S. Peterburgskoi Sudebnoi Palaty za 1905g., p. 181.

⁶³Gessen, Istoriia russkoi advokatury, 1: pp. 390-1.

advocate, gave three reasons in his memoirs: 1) to significantly increase the level of repression; 2) to intimidate the revolutionaries; and 3) to give the impression that the government was headed down the path of legality, thereby giving these repressive policies more of a liberal tinge.⁶⁴ Obviously, Pleve had not studied the government's previous experience with political trials. Otherwise, he might have proceeded with more caution. The lessons of the 1870's however, were not lost on the revolutionaries. Revoliutsionnaia Rossiia, the Socialist Revolutionary newspaper, heralded the return of the political trials by describing the profound impression such trials had produced on Russian society 25 years before, and how defendants had turned these proceedings against the government. In an ominous prediction, Revoliutsionnaia Rossiia concluded by stating that "the government will quickly be convinced that there is only one difference between the heroes of the past and the present fighters, that instead of 10's and 100's, there are 1000's and 10, 000's."⁶⁵

This perspicacious warning, of course, quickly came true, leading to a dramatic increase in the number of political trials.⁶⁶ Once again, the advokatura, found itself thrust into the role of political opposition, but there was a subtle shift in how sworn attorneys conducted themselves in this second group of political trials. The older generation largely followed the tradition of the 1870's, using the political trials to defend civil rights, the rule of law, and individual freedom. The young advocates, however, gravitated more towards the defence of social groups - peasants, workers -

⁶⁴M.L. Mandel'shtam, 1905 god v politicheskikh protsessakh. Zapiski zashchitnika(Moscow, 1931), p. 41

⁶⁵Revoliutsionnaia Rossiia, no. 13(1902), pp. 3-4.

⁶⁶The Soviet historian, L.I Goldman, has calculated that whereas there were only 3 political trials in 1901, there were 498 by 1905, most of which involved strikes, demonstrations, distributing propaganda, attempted murder, and murder. See L.I. Goldman, Politicheskie protsessy v Rossii, 1901-1917(Moscow, 1932), pp. 188-205.

and outright revolution.⁶⁷ The young advocates also displayed far greater admiration for the people they were defending. Kerensky was typical when he stated that an advocate was a secondary figure in the social revolutionary struggle, the primary role belonging to the actual revolutionaries. Gruzenburg, the great Jewish advocate, responded on behalf of the older generation: "The state system changes. Power comes and goes. Parties rise and fall. But those principles of law and freedom, in whose name an advocate stands up for the defence of the individual, remains unshakable."⁶⁸

The split in the generations - and their respective attitudes towards these political trials - can best be appreciated by contrasting a representative of the 'fathers' - Karabchevskii - to one of the 'sons' - Mandel'shtam. Karabchevskii held a unique position in the St. Petersburg sworn advokatura, for unlike Passover, who had come from the procuracy, and Spasovich, who had come from the professorate, Karabchevskii actually spent his entire legal career in the prisiazhnye poverennye. As a pomoshchnik, he participated in the trial of the 193, and in the second group of political trials, Karabchevskii featured in several prominent cases. He defended Anichkov and Borman, who were accused of transporting Osvobozhdenie across the Finnish border, Sazonov, the assassin of Pleve, and Gershun, the socialist-revolutionary terrorist organizer.⁶⁹ He also participated in the civil suit, filed after the Kishinev pogrom.⁷⁰

⁶⁷Vinaver, "Advokatura i pravovoe gosudarstvo," p. 986. For a recent analysis of the split between the generations, see J. Baberowski, "Geschworenengerichte und Anwaltschaft," Jahrbucher fur Geschichte Osteuropas, vol. 38, no. 1(1990), pp. 56-67.

⁶⁸O.O. Gruzenberg, Ocherki i rechi(New York, 1944), p. 18.

⁶⁹Karabchevskii was to write in his memoirs that of all the political prisoners he defended, he had the most sympathy for Sazonov. Karabchevskii, Chto glaza moi videli, 2: p. 43.

⁷⁰Slizberg, Dela minuvshikh dnei, 3: pp. 68-73.

But even though Karabchevskii appeared in numerous political trials, he never himself interpreted his professional activities as being overtly political. The calling of an advocate was "above politics, above the prevailing social moods and tendencies, above the political forms of society."⁷¹ Service to the law and morality - this, Karabchevskii believed, was an advocate's true mission, and in order to maintain his professional integrity, he refused to join any political party.⁷² Not surprisingly, Karabchevskii's opinion of the young advocates was not very high - Kerensky, Rodichev, and Sokolov, he wrote in his memoirs, were all poor speakers and did not command much support within the soslovie.⁷³ What truly distinguished Karabchevskii, therefore, as a political defender from the older generation was his complete independence - his refusal to join any political party - and the fact that although he often did not share the personal convictions of his client, he was always willing to defend the rights of the individual. Ironically, this was most clearly illustrated in 1917 in a conversation between Kerensky and Karabchevskii. Kerensky offered Karabchevskii the opportunity to become a Senator in the Criminal Cassation Court, but Karabchevskii refused, saying he preferred to stay what he had always been: an advocate. But who are you going to defend, asked Kerensky, Nicholas II? "Oh I would most willingly defend him," Karabchevskii replied, "if you decide to try him."⁷⁴

⁷¹Karabchevskii, Chto glaza moi videli, 2: p. 68.

⁷²Ibid., p. 18. Karabchevskii did reveal his political preferences in his memoirs, however, where he specifically expressed his admiration for Stolypin. If given the chance, Karabchevskii believed, Stolypin could have introduced a constitutional regime to Russia.(p. 54)

⁷³Ibid., pp. 18-9. Karabchevskii later refers to Kerensky - along with Guchkov, Rodzianko, and Prince L'vov - as the "true torturers and hangmen" of the Tsar. Once the Tsar had abdicated, Karabchevskii argued, Kerensky and the others were responsible for his personal safety and that of his family's. When the time came, however, they shamefully left the Tsar to his fate out of fear for their own personal safety.(pp. 59-60)

⁷⁴S. Karachevtsev, Zhizn' i sud(Riga, 1930?), p. 9.

Ironically, both Karabchevskii and Mandel'shtam participated in the Anichkov/Borman process, but despite this joint appearance, these two men had vastly different objectives. Mandel'shtam had little respect for the great political defenders of the 1870's. Only Aleksandrov, in his Vera Zasulich summation, had given a "purely political speech," while the other prominent advocates, most notably Spasovich, had relied on judicial, not political arguments and had publicly belittled the beliefs of their clients.⁷⁵ Spasovich, Mandel'shtam, concluded, "fought for rights, not revolution."⁷⁶ In sharp contrast, the young advocates were far more overtly political. They often belonged to the same political parties as the men and women they were defending, a fact which prompted the Moscow sudebnaia palata to jokingly refer to them as "zachinshchiki (instigators)" as opposed to "zashchitniki (defenders)."⁷⁷ According to Mandel'shtam, the young advocates also displayed far more open sympathy for their revolutionary clients. They saw the defendants as their comrades, their equals, and sometimes, even as their moral superiors.

In order to unite their forces, these young advocates formed specific groups, devoted to political trials. In Moscow, Mandel'shtam writes, there was not one but two such circles. The first circle was a non-party organization whose membership included such diverse figures as V.A. Maklakov, the future Kadet leader, and D.I Kurskii, the future Bolshevik Commissar of Justice. Without a party affiliation, this circle was united around one common ambition - to fight the autocracy - and its members travelled all over Russia in the pursuit of this goal.⁷⁸ They eventually achieved such prominence that the arrival of a young

⁷⁵Mandel'shtam, 1905 god v politicheskikh protsessakh, p. 46.

⁷⁶Ibid., p. 46.

⁷⁷Ibid., p. 47.

⁷⁸Ibid., p. 51

advocate to the provinces was considered to be quite an event. A banquet would be prepared, which the visiting advocate - as well as the local revolutionary circles - would use for political speeches and other propaganda purposes. The second group of political defenders, which included A.P. Lednicki and I.N. Sakharov, was not, in the opinion of Mandel'shtam, as prominent as the Maklakov circle. Mandel'shtam also notes that for some unknown reason, there was a great deal of hostility between these two groups, and that this proved to be a particular problem for Mandel'shtam who unknowingly applied to and was accepted by both circles. Once he learned of this mutual dislike, however, Mandel'shtam resigned from the Lednicki-Sakharov circle.⁷⁹

Thus, the political trials serve to highlight the growing divisions within the advokatura. Whereas Karabchevskii's ultimate loyalty was to the soslovie, Mandel'shtam's allegiance was to the political struggle with the autocracy. Without question, the political trials proved to be another important catalyst in the overall politicization of the sworn advokatura. Compared with 1870's, the press coverage of these trials was much more extensive, thereby raising the public exposure of the sworn advokatura. Several young advocates, who distinguished themselves at these trials, were ultimately elected to the St. Petersburg Bar Council, most notably, N.D. Sokolov. At the same time, the sworn advokatura also began to make more explicit political statements. At the First Congress of Advocates (1903), for example, the final resolution promised to fight all capricious acts, committed both by the administration and by the courts, and also called for legislative reform.⁸⁰

⁷⁹Ibid., p. 52.

⁸⁰Little is known about this Congress, but Teslenko would later refer to this initial assembly as the place where the advokatura first outlined its political *raison d'être* - "the struggle for political freedom." Gessen, Istoriia russkoi advokatury, 1: p. 392-3.

The gradual politicization of the sworn advokatura abruptly turned into outright opposition on the fortieth anniversary of the Judicial Reforms. The St. Petersburg prisiazhnye poverennye had intended to meet at the local courthouse on the evening of November 21, 1904 in order to celebrate this important anniversary. On that morning, however, the Bar Council was informed that permission for this gathering had been revoked, and when they arrived at the courthouse, they found the doors locked. Infuriated, the meeting moved on to the city дума where Turchaninov, the Chairman of the Bar Council, announced that since the meeting could no longer be considered official, it was cancelled.⁸¹ Turchaninov went home, but the meeting took place anyway and a forceful resolution, condemning the autocracy, was passed. Not surprisingly, in light of the occasion, the circular listed all of the government's infringements of the Judicial Reforms - the creation of non-elected judges (the zemskii nachal'nik), the restrictions placed on juries, the absence of glasnost, the unfair punishment of advocates, etc. Thus, in the name of justice, the St. Petersburg prisiazhnye poverennye called for fundamental transformation of the ruling order, complete with freedom of speech, freedom of the individual, freedom of assembly, glasnost, and the participation of the people in a freely elected assembly.⁸²

⁸¹Turchaninov was one of the most respected members of the older generation of advocates. A graduate of the School of Jurisprudence, he actually helped draft the Judicial Reforms of 1864, and in 1866, he was a member of the first group of candidates who joined the prisiazhnye poverennye. A long time member of the Bar Council, Turchaninov was also one of the leading political defenders of the 1870's. According to Troitskii, only Spasovich participated in more political trials (13) than Turchaninov (11) between 1866 and 1895. Pravo, no. 46 (November 18, 1907), pp. 2958-2960. Russkaia Mysl', no. 12 (1907), pp. 219-221. Troitskii, Tsarizm pod sudom, pp. 186-7.

⁸²Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1904-5, pp. 15-16, 53-54.; Pravo, no. 48 (November 28, 1904), pp. 3342-5.; Moskovskiiia Vedomosti, no. 325 (November 24, 1904), p. 5.; Gessen, Istoriia russkoi advokatury, 1: pp. 401-3.

The Moscow prisiazhnye poverennye also used the fortieth anniversary as a springboard into action. On November 20, 1904, 123 Moscow sworn attorneys met and issued a 12 point resolution much along the lines of the above St. Petersburg decree, emphasizing the legacy of the Judicial Reforms and how the autocracy had violated both the spirit and letter of these reforms. Therefore, since justice was not possible without a fundamental transformation of the existing state system, the resolution called for the introduction of freedom of the individual, freedom of thought, speech, press, assembly, and union. The declaration also demanded the repeal of all arbitrary and exceptional laws limiting the rights of non-Russian nationalities. Four days later, the Moscow Bar Council adopted the November 20th resolution.⁸³

The above resolutions clearly struck a chord with the Russian advokatura at large. Letters and telegrams from all Russia (Tver, Simbersk, Kazan, Vladimir, Odessa, Smolensk, just to name a few cities) arrived in St. Petersburg and Moscow, voicing solidarity with their colleagues.⁸⁴ On November 30, in an unprecedented step, a combined meeting of the Moscow and St. Petersburg Bar Councils took place in St. Petersburg, and on December 1, a joint resolution, similar to the previous ones, was delivered to the Minister of Interior. Sviatopolk-Mirskii, however, rejected this joint resolution, stating that it was not possible to accept a resolution which called for fundamental changes in the Russian state system.⁸⁵

⁸³Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1904-5 god, pp. 29-35.

⁸⁴Ibid., pp. 31-8.; Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1904-5, pp. 16-7.

⁸⁵Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1904-5 god, pp. 38-40.; Sudebnoe Obozrenie, no. 49(December 5, 1904), p. 1003.

The advokatura's actions in November 1904, cannot, of course, be viewed in isolation. The above resolutions came on the heels of the November zemstvo congress and its demand for constitutional reform.⁸⁶ The advokatura's demands were also compatible with the moderate, liberal proclamations which came out of the banquet campaign of late 1904.⁸⁷ The prisiazhnye poverennye, therefore, by no means stood alone in 1904. That being said, one should not pretend that everyone was pleased by the advokatura's sudden political involvement; the actions of St. Petersburg sworn attorneys was strongly attacked in the right-wing press.⁸⁸ Nevertheless, for the advokatura, November 1904 must be seen as a culmination of a 40 year struggle for civil rights and individual freedom, a triumph, in other words, for the older generation of advocates. By leading this challenge, the Moscow and St. Petersburg Bar Councils had also seen their reputations enhanced by the events of November 1904 and the fact that they had enjoyed near unanimous support only added to their

⁸⁶Maklakov would in 1905 assert that the advokatura had been the first official corporation to demand a constitutional political system. Without denying the importance of the zemstvo congress, Maklakov emphasized that it had only been a private gathering, and that therefore, future historians "of the Russian renaissance will not forget the conduct of the advokatura." Gessen, however, would later downplay the significance of the November 20 resolution, stating that it did not have the same impact as the decisions taken at the zemstvo congress. Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1904-5 god, p. 44. Gessen, V dvukh vekakh, p. 183.

⁸⁷T. Emmons, "Russia's Banquet Campaign," California Slavic Studies, vol. 10(1977), pp. 45-86.

⁸⁸Grazhdanin, no. 94(November 25, 1904), p. 19. See also Moskovskiiia Vedomosti, no. 330(November 29, 1904), p. 4. The press also severely reproached the Kazan prisiazhnye poverennye at this time. According to a story in S.-Peterburgskiiia Vedomosti, Kazan sworn attorneys had refused to accept court appointed cases, thus forcing the district court to appoint attorneys-in-training in their place. S.-Peterburgskiiia Vedomosti found these actions reprehensible and accused Kazan prisiazhnye poverennye of being both unfamiliar with the law and irresponsible. A letter from the senior Kazan sworn attorney to Pravo, however, attributed this entire controversy to the disingenuousness of a telegraph operator who had misinterpreted what a local judge had said. Sworn attorneys had never refused court-appointed cases, and although it was true that two attorneys-in-training had been assigned to a case, this was because it was established practice in Kazan to appoint pomoshchniki - along with prisiazhnye poverennye - to criminal trials. S.- Peterburgskiiia Vedomosti, no. 324(November 26, 1904), p. 2.; Pravo, no. 51(December 19, 1904), p. 3528-9.

authority But as we will now see, the ascendancy of the Bar Councils - as well as the older generation of advocates - was short-lived.

IV. THE ADVOKATURA IN 1905

The unity which the sworn advokatura had displayed in November 1904 was soon shattered by the events of Bloody Sunday. Both the St. Petersburg prisiazhnye poverennye and the pomoshchniki were swift to condemn the government's brutal actions of January 9, 1905. In addition to once again calling for individual and political freedom, over 6000 roubles were raised by St. Petersburg sworn attorneys to assist victims of the tragedy. A special commission was also formed in order to determine whether it was feasible, on an individual basis, to bring legal action against the government.⁸⁹ This vigorous response, however, was not able to alleviate the growing tension within the advokatura. On January 11, unconfirmed reports began to circulate that a strike had been called for all advocates in St. Petersburg. In order to squash these rumours, a special circular was released by the Bar Council on January 15, signed by Turchaninov but actually written by Karabchevskii.⁹⁰ This circular affirmed that a strike-call had been agreed to at a private meeting of advocates, but that this order had no validity because it had not been approved by either the Bar Council or the general assembly. The whole notion that advocates could go on strike, the circular continued, was incorrect. There might come a time when all sworn attorneys, as one man, would consider it their moral duty to cease all professional activities,

⁸⁹In order to underscore the importance of the konsul'tatsii - and its growing reputation - it is interesting to note that it was to the consultation bureau that many victims of Bloody Sunday, and their families, first turned to for advice. Sudebnoe Obozrenie, no. 5(1905), p. 109.

⁹⁰Gessen, Istoriia russkoi advokatury, 1: p. 426.

but this could only occur when there had been a "fundamental breach in the conditions of the sworn advokatura."⁹¹ Without question, this circular represented a fateful retreat for the St. Petersburg Bar Council. Having committed itself to the political struggle in November, the St. Petersburg Bar Council was now, once again, drawing the line between its professional duties and its political objectives.

At the St Petersburg general meeting of sworn attorneys on January 30, the young advocates launched into an impassioned attack on the Bar Council's actions. M. Gold'shtein asserted that peace with the Bar Council was impossible because its members were representatives of the past generation, while Vinaver objected to the Bar Council's insistence that advocates remain within their narrow, professional sphere and avoid all politics. Vinaver went on to shed some light on the meeting of January 10, where the strike order had supposedly originated. After the tragic events of Bloody Sunday, Vinaver explained, a group of advocates had appealed to the Bar Council for an emergency meeting but that this request had been rejected. Nevertheless, a meeting did take place and a resolution was adopted which proclaimed that all of society must come to the aid of the working class and that each advocate should act as he saw fit. There was no official strike call, Vinaver concluded, some advocates simply had not been in a state to work, and this had been understood by everyone - the courts, Senators - with the exception of the St. Petersburg Bar Council. Thus, in a stunning rebuke of the Bar Council, the St. Petersburg general assembly repealed the January 15 circular by a vote of 62 - 57, declaring that it contradicted the advokatura's general mood, that it

⁹¹Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1904-5, p. 60. This day of reckoning, in fact, arrived in November 1918 when the St. Petersburg general assembly voted to dissolve the soslovie, stating that "an honest death is preferable to a disgraceful life. . ." As quoted in Kucherov, Courts, Lawyers, p. 316.

was based on inaccurate information, and finally, that both in tone and in content, the circular was inappropriate and insulting for members of the profession.⁹²

The split between the generations, therefore, was becoming more pronounced. While the young advocates wanted the advokatura to pursue a clear-cut political path, the senior members of the soslovie - symbolized by the actions of the St Petersburg Bar Council - had once again emphasized the need to first observe professional obligations. Some older members began to regret the estate's initial involvement in politics. V.Liustikh, a long-serving member of the Bar Council, remarked at the January 30 meeting: "I was always against the introduction of political passions into the business of the legal(advokatskii) soslovie. Today, we have been convinced, that this is inappropriate. We have always had disagreements and debates, but a mutual respect has always been observed as well. Today, intolerable words. . .have been uttered."⁹³

The tension within the St. Petersburg sworn advokatura was only exacerbated by the release of the February 18 rescript and the creation of the Bulygin commission. In a March 5 draft resolution, the St Petersburg Bar Council proposed that the Bar inform the Ministry of Internal Affairs about the estate's wish to participate in the Commission's work. The St. Petersburg general assembly, however, quickly rejected this overture to the government; Gessen argued that if the estate's announcement was expressed in the form of a request, then the sworn advokatura would "bind its own hands."⁹⁴ As a result, a much more sweeping resolution was adopted on March 9 which simply stated that the sworn advokatura

⁹²Sudebnoe Obozrenie, no. 6(1905), pp. 134-5. For Karabchevskii's description of events, see Chto glaza moi videli, 2: pp. 52-3.

⁹³Gessen, Istoriia russkoi advokatury, 1: p. 426.

⁹⁴S.-Peterburgskiiia Vedomosti, no. 56(March 7, 1905), p. 3.

should be one of the social groups, invited to participate in the work of the Bulygin Commission. The resolution imposed, however, certain restrictions on the Commission's mandate. The Bulygin Commission should only be charged with the drafting of an electoral law for a constituent assembly and that this law should have no religious or national restrictions and be based on a direct, equal, and secret ballot. In conclusion, the March 9 resolution called for the immediate introduction of freedom of speech, press, assembly, and union, the guarantee of the inviolability of the individual and his home, and a full amnesty for all political and religious prisoners. Once again, the young advocates had triumphed over the Bar Council, and their circle's growing predominance was confirmed by the election of three of its members - Vinaver, Gessen, and Rodichev - to a special seven man commission, formed after the March 9 general meeting.⁹⁵

The St. Petersburg Komissiiia pomoshchnikov and the Moscow general assembly approved similar resolutions, with the noted exception that neither called for the participation of sworn attorneys in the work of the Bulygin Commission.⁹⁶ The March 13 Moscow meeting was memorable, however, for an anti-Semitic speech, given by A. Shmakov. As noted in Chapter 4, anti-Jewish feeling had been quite strong amongst Moscow sworn attorneys and attorneys-in-training in 1889, and Shmakov had been one of the most outspoken supporters of the March 3, 1890 regulations, which had basically closed the Moscow pomoshchniki to all Jewish applicants. Whatever form of government Russia adopted in the future, Shmakov now argued, Jews must be barred from participating in

⁹⁵Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1905-6, pp. 12-3.; Pravo, no. 10(1905), p. 734.; Sudebnoe Obozrenie, no. 11(1905), pp. 259-60.; Jurist, no. 11(1905), pp. 418-9.

⁹⁶S.-Peterburgskiiia Vedomosti, no.51(March 2, 1905), p. 3.; Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1904-5 god, p. 46.

any state activity. Yet unlike 15 years before, when Shmakov's anti-Semitic views had found fertile ground, this time, a wave of protests greeted Shmakov's remarks. A. Rozenblium spoke for virtually all the assembled advocates when he stated that if Jews are allowed to participate freely in a Russian state, they would use that freedom "for the good."⁹⁷ Thus, it would appear that the anti-Semitic faction, which had been so powerful in 1890, had by 1905 been reduced to an almost invisible minority.

The culmination of all these political debates raging within the sworn advokatura was the first All-Russian Congress of Advocates, organized under the auspices of the recently formed Union of Advocates. According to Maklakov, the *raison d'etre* of the Union was straightforward: to demand the calling of a constituent assembly - based on universal suffrage - which would be responsible for the drafting of a constitution.⁹⁸ This Congress took place in Moscow between March 28-30, but unlike all the previous meetings of advocates, which had taken place within the jurisdiction of the estate's professional structure, this was the first purely political gathering of advocates. Approximately 200 delegates attended this Congress from 60 different cities, although approximately one-third of the delegates(71) came from Moscow, St. Petersburg, and Kiev.⁹⁹ In what was a radical departure from the practices of the established Bar, attorneys-in-training were given equal status as prisiazhnye poverennye.

The aims of the Congress were twofold: 1) to unite the social-professional activities of the advokatura; and 2) to achieve the liberation

⁹⁷Sudebnoe Obozrenie, no. 12(1905), p. 285. See also Otchet Soveta prisiazhnykh poverennykh okruga Moskovskoi Sudebnoi Palaty za 1904-5 god, pp. 52-3.

⁹⁸Maklakov, Iz vospominanii, pp. 322-23.

⁹⁹T. Emmons, The Formation of Political Parties and the First National Elections in Russia(London, 1983), p. 452.

of Russia on democratic/constitutional principles. The Congress began, however, with a resolution from the Polish advocates, declaring that they represented a separate entity and therefore could not participate in the All-Russian Union of Advocates. They did offer to attend the meeting, however, as long the Congress recognized Poland's independence. The actual political program, put forward at the Congress, was not substantially different from the resolutions, passed in November 1904 and March, 1905, except that it was more detailed. A new constitutional order was called for, to include a legislative branch, an independent judiciary, and full civil rights. What separated the Union's proposal from the previous Bar Council initiatives, however was that the Union's programme also included a socio/economic plank. Although the actual details were still to be formulated, the Union called for the liberation of all working people from the oppression of the current capitalist system.¹⁰⁰

Political considerations, therefore, dominated the agenda of the All-Russian Union of Advocates. This does not mean, however, that professional problems went undiscussed. On the contrary, the Congress stressed that in the future, the All-Russian Union of advocates would play a major role in the advokatura's professional development. It would organize conferences, formulate a comprehensive code of ethics, establish, as well as expand, institutions, dedicated to providing judicial help to the population, and much more.¹⁰¹ The implications of the Union's decision to enter into the realm of professional management is difficult to determine. On the one hand, for those cities where a Bar Council had never been introduced, strict professional guidelines could

¹⁰⁰TsGAOR, f. 518, d. 28, pp. 1-5.: Osvobozhdenie, no. 69/70(1905), pp. 309-11.; L.Z. Slonimskii, ed., Politicheskaia entsiklopediia, vol. 1(St. Petersburg, 1907), pp. 104-6.; Gessen, Istoriia russkoi advokatury, 1: pp. 417-9.

¹⁰¹TsGAOR, f. 518, d. 28, p. 5.

only be welcomed, whereas for Moscow, St. Petersburg, and Kharkov, the Union's pronouncement could easily have been interpreted as a threat to their regional autonomy.

Therefore, after the March Congress, the Union of Advocates clearly replaced each respective Bar as the political voice of the advokatura, and on May 9, the Union of Advocates chose to join the Union of Unions. Ultimately, its membership reached upwards of 2500 members with Moscow(600 members) and St. Petersburg(350 members) leading the way, but even though the young advocates were clearly in charge, the Union's membership still included a broad cross-section of attorneys.¹⁰² At the Third Congress of the Union of Unions, the Union of Advocates voted with the boycottist majority, but by far the Union's most vociferous protests came after the controversial detention of Vinaver and M. Berenshtam. Both Vinaver and Berenshtam were arrested for belonging to the Union of Advocates, and therefore, in solidarity, Union members signed petitions and had them published in newspapers, stating that they also participated in the Union of Advocates and that if such an act was a crime, they too should be arrested.¹⁰³

The emergence of the Union of Advocates, however, did not prevent further dissension from spreading within the ranks of the sworn advokatura, and for the first time, open schisms began to appear amongst the young advocates. In mid-April, 12 worker's delegates asked to attend the April 27 meeting of the St. Petersburg Komissiiia pomoshchnikov in order to outline their plans for the upcoming May 1 holiday. The Commission's officers, however, were reluctant to have these delegates

¹⁰²S. Galai, The Liberation Movement in Russia, 1900-1905(Cambridge, 1973), p. 247.; Maklakov, Iz vospominanii, pp. 322-5.

¹⁰³TsGAOR, f. 518, d. 28, p. 19.; Pravo, no. 30(1905), p. 2452. Berenshtam ultimately spent 44 days in jail, during which time he was only interrogated once. See Sudebnoe Obozrenie, no. 24(1905), p. 912.

attend their meeting. They were Mensheviks, their aims were unclear and their presence was potentially disruptive. The Komissiiia also preferred to defer this request to the Union of Advocates, believing that only the latter could resolve political questions. As a result, the Komissiiia turned down the appeal, but this rebuff met with a chorus of disapproval within the pomoshchniki, and at a May 18 meeting, A. Gal'pern accused the Komissiiia of expanding the gulf between the workers and the intelligentsia. A resolution, which censured the Komissiiia and informed the workers that the Commission's decision did not correspond to the wishes of the estate was next passed, prompting the officers of the Komissiiia to resign.¹⁰⁴

While politics continued to divide the young advocates, the St. Petersburg Bar Council turned its gaze back to soslovie matters. It still made political statements, but only in the context of discussing specific professional problems. Thus, for example, the Bar Council called yet again for the end of all restrictions on Jewish candidates to the prisiazhnye poverennye.¹⁰⁵ It also strongly objected to the growing number of illegal searches and arrests of advocates. Such unwarranted acts, the Bar Council stated, were both "insulting and harmful" and deprived advocates of the possibility of fulfilling their designated duties. Therefore, it demanded the end of such illegal arrests and insisted that confidential correspondences, between attorneys and their clients, not be seized.¹⁰⁶

¹⁰⁴Otchet Kommissii pomoshchnikov prisiazhnykh poverennykh okruga S. Peterburgskoi Sudebnoi Palaty za 1905g., pp. 11-2, 68-9, 77-8.

¹⁰⁵Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1905-6, pp. 4-7.

¹⁰⁶Ibid., pp. 48-53. So many advocates were arrested in 1905 that the St. Petersburg Bar Council began to appoint stand-ins in order to protect the client's, as well as the arrested advocate's, interests. Obstacles were placed in the way, however, of these deputies from seeing the arrested advocates and discussing the various cases, prompting the Bar Council to file a protest with the Department of Police(53).

The growing discontent within the sworn advokatura - between the old and young advocates, between the Bar Council and the Union of Advocates - exploded once and for all in October, 1905. On October 5-6, the second meeting of the All-Russian Union of Advocates took place in St. Petersburg, this time with only approximately 50 delegates attending. The second gathering took place under much more trying circumstances, with repeated interruptions by the police. Ultimately, it had to adjourn to a private apartment. Two crucial decisions were taken at the Second Congress. First, the delegates reversed the Union's previous decision and announced that advocates could participate in the forthcoming Duma elections. Second, although the Union expressed its support for a general strike, it also emphasized that due to the technical nature of an advocate's professional activities, a strike by prisiazhnye poverennye would not be appropriate. Despite the rising tensions, in fact, professional matters continued to concern the Union, and in its final resolution, it reiterated its plans to expand legal aid, draft a code of ethics, etc..¹⁰⁷

Events quickly forced local unions to reconsider the national executive's position on a strike. In Moscow, the local Union of Advocates voted against strike action, although the Moscow Bar Council did call for a temporary shutdown of the local courts due to the exceptional circumstances, gripping the country.¹⁰⁸ On October 14, however, the St. Petersburg Union of Advocates called a mandatory strike for all local sworn attorneys and attorneys-in-training.¹⁰⁹ In order to discuss the implications of this decision, the St. Petersburg Bar Council organized an emergency general meeting for the evening of October 16 and, in an

¹⁰⁷TsGAOR, f. 518, d. 28. pp. 29-30. Pravo, no. 40(1905), 3364-66.; Gessen, Istoriia russkoi advokatury, 1: pp. 419-420.

¹⁰⁸Gessen, Istoriia russkoi advokatury, 1: p. 428.

¹⁰⁹Otchet Soveta prisiazhnykh poverennykh pri S-Peterburgskoi Sudebnoi Palate za 1905-6, p. 54.

unprecedented step, invited attorneys-in-training to participate at the gathering. The latter's participation, however, was dependent on the general assembly's approval, and at the actual meeting, the majority of sworn attorneys voted against the inclusion of the pomoshchniki. The uproar over this vote was so great that the actual meeting was then cancelled.¹¹⁰

A heated exchange between the St. Petersburg Bar Council and the Komissiiia pomoshchnikov soon followed the above meeting. On October 27, the Komissiiia pomoshchnikov, expressing its solidarity with the narod, accused the Bar Council of deliberately "restraining the soslovie from actively participating in the political struggle" and for sowing "discord" within the profession.¹¹¹ In retaliation, the Komissiiia pomoshchnikov recommended that attorneys-in-training not provide information in regards to any disciplinary hearings which might result from the strike. The Bar Council responded by stating that the Komissiiia pomoshchnikov had over-stepped its authority and found it especially inappropriate that the Komissiiia had urged its members not give evidence in disciplinary cases. Moreover, even though the Bar Council recognized that many advocates were engaged in the struggle for freedom, this still did not give one group of advocates the right to impose their convictions on the rest of the soslovie.¹¹²

The whole strike question would arise once again in December 1905 when the St. Petersburg Bar Council struck down yet another resolution calling for a mandatory work stoppage. After 1905, however, the advokatura's involvement in politics - on a professional level - came to an end. As we have seen, the St. Petersburg Bar Council had long since

¹¹⁰Ibid., pp. 14-15.

¹¹¹Ibid., p. 61.

¹¹²Ibid., pp. 62-3.

turned its attention to soslovie matters. The new Bar Councils also appear to have adopted this impartial course. The recently formed Kazan Bar Council, for example, affirmed that as the official representative body of the soslovie, it only commented on political developments "when the professional interests of the sworn advokatura demanded it."¹¹³ Thus, the Kazan Bar Council refused to comment on the political activities of individual advocates, although it did proudly note that five sworn attorneys from Kazan, including three Council members, had been elected to the First Duma. Finally, the Union of Advocates, the advokatura's political wing, ceased to function entirely. Internal divisions, as well as a general lack of interest, led to its sudden demise.¹¹⁴

The advokatura's political passage between 1904 and 1905, therefore, underwent three distinct phases. First, the soslovie rallied around its existing corporate institutions, a strategy which proved to be unsuccessful because for the Bar, professional considerations outweighed political considerations. The sworn advokatura next turned to the Union of Advocates, but this broad coalition was eventually torn apart by the growing divisions within the soslovie. Finally, sworn attorneys headed to individual political parties, and although it is true that a significant number of advocates became Kadets, a fair number were sprinkled amongst the other political parties as well. In the first Duma, for example, there were 48 advocates (36 sworn attorneys, 7 attorneys-in-training, 5 private attorneys) of which only 22 (46%) were Kadets. The complete party breakdown is as follows: 22 - Kadets; 9 - Autonomists (5 - Polish Bloc; 2 - Group of the Western Provinces; 1 - Latvian Group; 1 - Lithuanian Deputies); 1 - Democratic Reformist; 7 - Trudoviks; 2 - Social Democrats; 3 -

¹¹³Otchet Soveta prisiashnykh poverennykh pri Kazanskoi Sudebnoi Palate, May 1905 - April 1906, p. 10.

¹¹⁴Gessen, Istoriia russkoi advokatury, 1: p. 421.

Octobrists; 1 - Bezpartiinyi Group; 3 - no party indicated.¹¹⁵ Surprisingly, Maklakov later objected to sworn attorneys becoming deputies because he thought that the two vocations were fundamentally incompatible.¹¹⁶

Party politics would also affect the political defenders as well. Mandel'shtam writes in his memoirs that his circle eventually disbanded and its members scattered amongst all the political parties, from right Kadets to Bolsheviks. Defendants also began to prefer advocates from their own party.¹¹⁷ Nevertheless, despite these developments, political trials remained an important forum for the advokatura up until 1917. There were several prominent trials after 1905 - the Trial of the First Soviet of Workers' Deputies, the Lena Goldfields trial, the Beilis trial, just to name a few - where advocates, once again at great personal risk, challenged the autocracy and defended the rule of law.¹¹⁸ Much of the advokatura's development, as we have seen throughout this dissertation, was plagued by adversity both from within and without the soslovie. Nevertheless, in this one particular area - public defence at political trials - the advokatura's triumph, seen in light of its own ideals, was complete. In his speech, commemorating the fiftieth anniversary of the Russian advokatura, Gruzenberg proudly recounted the heroic exploits of the soslovie: "Hundreds of cases involving peasants, workers, pogroms,

¹¹⁵This information was calculated from M.M. Boiovich, Chleny Gosudarstvennoi Dumi. Pervyi sozyv, 1906-1911 (Moscow, 1906). The same pattern holds true for the Third Duma. There were 38 advocates (28 sworn attorneys, 5 attorneys-in-training, 2 private attorneys, 2 former sworn attorneys, 1 former attorney-in-training) of which 16 (42%) were Kadets; 9 - Octobrists; 1 - Nationalist; 3 - The Polish Bloc; 3 - Progressives; 1 - The Right; 2 - The Muslim Faction; 3 - Trudoviks. See M.M. Boiovich, Chleny Gosudarstvennoi Dumi. Tretii sozyv, 1907-1912 (Moscow, 1910).

¹¹⁶Gessen, Istoriia russkoi advokatury, 1: p. 422.

¹¹⁷Mandel'shtam, 1905 god v politicheskikh protsessakh, p.57.

¹¹⁸Kucherov, Courts, Lawyers, pp. 243-68, 281-84. S. Anisimov also provides valuable insights into what it was like to be a political defender during this period. He particularly highlights the arbitrary behaviour of judges. At big political trials, Anisimov alleges, judges simply applied a mathematical formula to sentencing - one-third would be acquitted, one-third would be given prison sentences, and one-third would be given the death penalty. See S. Anisimov, Kak eto bylo (Moscow, 1931), pp. 134-5.

thousands of purely political cases were pleaded by steadfast and courageous counsels. With the greatest efforts, often forgetting their own interests, our colleagues in all corners of Russia fulfilled their modest but great office - the office of the defense of the individual against the onslaught of the state."¹¹⁹ To the very end, therefore, the sworn advokatura fought to remain knights of the living word.

¹¹⁹As quoted by Kucherov, Courts, Lawyers, p. 312.

CONCLUSION

The Judicial Reforms of 1864 have long been recognized as a major turning point in Russian history. Not only did these reforms represent the first legal limitation of the autocracy, they also established, despite numerous obstacles, some of pre-revolutionary Russia's most durable, liberal institutions: the jury, the independent judiciary, and of course, the Bar. Yet as we noted at the very beginning of this dissertation, the Judicial Reforms also represented a unique social experiment, an unparalleled attempt by the autocracy to take a 'liberal' profession - the advokatura - and adapt it to Russia's existing soslovie social structure. Without question, this ambiguous title played a pivotal role in the advokatura's future professional development. Was the advokatura to be a traditional soslovie - an estate, tightly placed within Russia's existing hierarchical social order - or was it to be a new, truly 'liberal' profession - self-governing and independent from the state?

Paradoxically, over the next 40 years, the advokatura would pursue both of the above routes. Any final assessment of its professional development, therefore must reflect this duality; the advokatura was not so much the sum total of its of its component parts but rather, the sum total of its manifest contradictions, and every stage of its professional development was accompanied by both internal resistance and external opposition. The core of the advokatura were the prisiazhnye poverennye and the pomoshchniki, the direct offspring of the Judicial Reforms of 1864. On the one hand, a strong argument can be made that no occupational group in pre-revolutionary Russia possessed more professional rights than the prisiazhnye poverennye in Moscow, St. Petersburg, and Kharkov - the three cities where the Judicial Reforms were fully implemented. With the exception of the limitation placed on the admittance of Jews, the

sworn advokatura in the above cities retained virtually all of the authority granted to them by the Judicial Reforms, including responsibility for admissions, appointments, ethics, and discipline. In addition, the Bar's domain rapidly expanded, to include mutual aid funds (for advocates in need) and special legal aid centres. Although there were important regional differences, each Bar utilized their respective powers both to protect the integrity of the soslovie and establish, at the very least, a nascent sense of professional identity. In the case of St. Petersburg, one can even go so far as to say that an exemplary Bar was instituted.

Yet at the same time, the prisiazhnye poverennye in Moscow, St. Petersburg, and Kharkov represented a unique phenomenon, a profession that was not equal to but less than the sum of its enumerated powers. On close inspection, it becomes apparent that although the soslovie of prisiazhnye poverennye possessed many of the theoretical attributes of a liberal profession, putting these ideal standards into practice proved to be far more elusive. At the top of the profession - the Council of the Bar - one finds an elite which for a variety of reasons, seemed unable to impose its vision, however limited, on to the profession at large, while at the bottom, one finds an alienated, sometimes powerless general assembly. On certain issues, for example the enforcement of professional ethics, the disciplinary record of the Bar Councils remained, despite extenuating circumstances, arbitrary and inconclusive. On other matters, most notably the crucial subject of remuneration, the Bar Councils remained silent, thereby exposing the soslovie to strong condemnation. The appointment of advocates to indigent clients proved inadequate in light of the growing demand for legal assistance, while the dispute over the admittance of Jews left each Bar Council, and the soslovie at large, hopelessly divided.

The debate over who was responsible for the pomoshchniki not only re-inforced this divide, it expanded it. Between 1864 and 1905, the Bar alternated between group supervision of attorneys-in-training (the soslovie patron) and individual supervision (the personal patron), yet despite numerous shifts in policy, a comprehensive, well-regulated preparatory training program proved to be beyond the reach of each respective Bar Council. Most attorneys-in-training, therefore, practiced independently, without any form of supervision and with little exposure to the traditions of the estate. Ultimately, as a result of this vacuum, attorneys-in-training began to establish their own professional associations, but this only exacerbated the tension within the soslovie because the pomoshchniki sought to usurp the lawful powers of the prisiazhnye poverennye.

From within, therefore, the soslovie of prisiazhnye poverennye had to confront its own internal dissension and inertia. But without issuing a blanket pardon, these deficiencies must be put in perspective. No legal profession has ever been created by fiat, and it would be hopelessly naive to assume that in the case of the Russian advokatura, corporate solidarity and an advanced professional ethos could be instantaneously achieved. It would have to evolve. Therefore, despite all the setbacks, it must be emphasized that the sworn advokatura in Moscow, St. Petersburg, and Kharkov were still developing along the lines of a liberal profession. The same cannot be said about the prisiazhnye poverennye in the rest of Imperial Russia. Outside these three cities, the corporate identity was ripped out of the sworn advokatura and what was left was not the soslovie, described in the Judicial Reforms, but a more conventional soslovie, one which the state could control. All soslovie matters - admissions, internal management, discipline - were transferred to the district court, which cared little for these added responsibilities. Indeed,

rather than supporting the ambitions of the advokatura, the district court often found itself in an antagonistic position vis-a-vis the local profession. A few district courts allowed sworn attorneys to form special committees which were to assist in the management of the local estate, but these organizations proved to be poor substitutes in comparison to the legitimate Bars which had been formed in Moscow, St. Petersburg, and Kharkov.

Between 1864 and 1905, therefore, the prisiazhnye poverennye were going in two opposite directions. In Moscow, St. Petersburg and Kharkov, the sworn advokatura was gradually developing along the lines of a liberal profession, whilst in the rest of Imperial Russia, the prisiazhnye poverennye were converted into a more traditional Russian soslovie. These two divergent paths cannot be reconciled; they only testify to the ambivalence, suspicion and outright hostility with which the autocracy viewed both the advokatura and, on a more general level, the entire legal system. Indeed, it must be remembered that only a relatively small percentage of the Russian population came under the jurisdiction of the Judicial Reforms of 1864. Peasants were the most obvious exception; they continued to be governed by customary law and their disputes were heard in the volost courts where sworn attorneys, by law, were forbidden to practice.

From above, therefore, the prisiazhnye poverennye had to confront an unsympathetic, antagonistic government. From below, the prisiazhnye poverennye had to ward off the challenge of both the chastnye poverennye and the podpol'naia advokatura. The institute of chastnye poverennye also found itself floating within the soslovie paradigm, although in sharp contrast with the prisiazhnye poverennye, there were no academic requirements to join the institute and it had no identity as a korporatsiia; instead it was under the direct control of the district court.

Yet notwithstanding the vast differences in professional orientation between the prisiazhnye poverennye and the chastnye poverennye, by law they jointly made up the advokatura, and it was not until 1901 that the prisiazhnye poverennye numerically became the single largest branch. By then, the distinction between these two branches had been significantly blurred. Attorneys-in-training were required to obtain a private attorney's license if they wanted to practice in the reformed courts, while for the sworn attorneys outside Moscow, St. Petersburg, and Kharkov, only the odd privileges, articulated in the Judicial Reforms, separated a sworn attorney from a private attorney.

No firm boundaries, therefore, divided the prisiazhnye poverennye from the chastnye poverennye, making it that much more difficult for the former to establish its own, independent professional identity. Few called for the outright repeal of the chastnye poverennye legislation, however, because undoubtedly, the greater danger came from the podpol'naia advokatura, the direct descendants of the notorious pre-reform striapchie. Although the professional monopoly of the prisiazhnye poverennye and the chastnye poverennye was recognized by law in 1874, it was never enforced, thus making it possible for Russia's uncontrolled organic form of legal representation - embodied in the underground advocate - to survive unchecked right up until 1917. Not only did the underground advokatura undermine the public standing of the prisiazhnye poverennye, its disingenuous methods managed to corrupt Russia's entire system of justice.

There was still one more source of opposition, blocking the advokatura's professional development, and that came from within Russian society itself. As a free, public profession, the long-term success of the soslovie of prisiazhnye poverennye was dependent on social opinion, but despite the advokatura's many positive contributions - in the area of

civil law, at the political trials - this public support was not forthcoming. Instead, the advokatura proved to be an anomaly; its combined support of both civil rights and property rights left it with few philosophical or political allies either on the left or on the right.

Forty years into the Judicial Reforms, therefore, the advokatura still stood at its professional crossroads. There had been no immaculate conception; instead, a hybrid advokatura emerged, one which lacked the internal coherence, the legal recognition, the political influence and the overall public prestige of a western liberal profession. Most obviously, this affected the administration of justice; the advokatura may have raised the public consciousness of legal issues, but from an institutional standpoint, it was never able to overcome Russia's underdeveloped, unstable legal system. The ramifications of the advokatura's uneven, disjointed professional development, however, were felt far beyond the judicial system itself. The advokatura was the harbinger of reform; it represented an alternative set of values - the rule of law, civil rights, private property, individual freedom - none of which had deep roots in Russian society. Thus, the erratic professional development of the advokatura can be seen as another example of Russia's uncertain path of modernization. Far from being fully integrated into Russia's social fabric and ruling political order, the advokatura grew increasingly isolated from its environment, and ultimately, this sense of alienation turned into outright opposition in 1905.

In the final analysis, therefore, the soslovie of prisiazhnye poverennye had proven to be incongruous with Russia's prevailing hierarchical social order. From the autocracy's perspective, the sworn advokatura - as articulated in the Judicial Reforms of 1864 - had been granted far too much independence and corporate autonomy. Moreover, it also represented an unprecedented source of social mobility; not only

did a career in the advokatura hold out the prospect of substantial financial reward, it also provided non-Russian ethnic minorities - most notably the Jews - the opportunity to move into positions of public influence. Such developments, from the government's point of view, could not be tolerated, so in response, the autocracy swiftly moved to undermine the professional integrity of the soslovie of prisiazhnye poverennye and recast it as a more traditional Russian estate. The original experiment, therefore, to take a western profession and somehow mould it into a Russian soslovie, had proven to be a failure. More research on Russia's other emerging professions is required, but undoubtedly, the inability to readily assimilate the Russian advokatura into the soslovie system begins to explain why the autocracy chose not to incorporate Russia's other emerging professions (with the noted exception of the doctors) into the existing soslovie structure, in the process creating that non-soslovie social category, commonly known as the intelligentsia.

The interrevolutionary years would see a slight change in the advokatura's fortunes, most notably with the opening of six new Bar Councils between 1904-6 (Novocherkassk, Odessa, Saratov, Kazan, Omsk, and Irkutsk).¹ The success of sworn attorneys at the political trials and in the Duma elections also points to a growing social acceptance of the soslovie. Yet despite some positive signs, the fundamental contradictions, which had impeded the advokatura's professional development during its first 40 years of existence, continued to persist right up to 1917. In many ways, the new Bar Councils emphasized just how neglected the prisiazhnye poverennye had been. Gessen ironically noted that on the fiftieth anniversary of the Judicial Reforms, the Kazan Bar Council still

¹The Irkutsk Bar Council's existence was brief; in 1906, the entire Council was arrested and its duties were returned to the district court. See Gessen, Istoriia russkoi advokatury, 1: p. 450.; Huskey, Russian Lawyers, p. 29.

found it necessary to issue basic instructions to its members, such as that sworn attorneys should not use middlemen to acquire clients or insult their fellow advocates.²

The advokatura's other deficiencies continued to manifest themselves as well. Several major legal centres - Warsaw, Vil'na, Kiev - remained without full-fledged, recognized Bar Councils.³ Internal questions - on the pomoshchniki, on the compatibility of combining a career in the prisiazhnye poverennye with other non-professional activities, on the admittance of Jews - remained unresolved.⁴ Enthusiasm for the konsul'tatsii, which had been such an important catalyst in the advokatura's political resurgence, began to wane.⁵ The advokatura's monopoly right remained unenforced, and although the number of chastnye poverennye did decline, the podpol'naia advokatura continued to represent an uncontrolled cancer on Russia's legal system. Finally, the autocracy's antipathy towards the soslovie of prisiazhnye poverennye continued unabated. In direct violation of the law, several advocates were arrested in the process of defending their clients, and in the most celebrated case, 25 sworn attorneys were randomly indicted after the St. Petersburg general assembly passed a resolution, condemning the Beilis

²Gessen, Istoriia russkoi advokatury, 1: p. 446.

³The Kiev administrative committee of the local konsul'tatsiia, which theoretically assisted the district court in the management of the local prisiazhnye poverennye, was also ignored on crucial questions, involving the soslovie. See Vestnik Prava, no. 4(January 27, 1913), p. 115. The Kiev Bar Council and general assembly was finally formed in 1916. See Vestnik Prava, no. 14(April 3, 1916), pp.363-4.

⁴Vestnik Prava, no. 19(May 12, 1913), 584-6.; Vestnik Prava, no. 42(October 20, 1913), pp. 3077-3080.; Vestnik Prava, no. 48(December 1, 1913), 3299-3301.; Vestnik Prava, no. 11(March 16, 1914), pp. 340-44.; Vestnik Prava, no. 31(August 1, 1916), p. 737-40.; Vestnik Prava, no. 40(October 2, 1916), pp. 954-8. On December 29, 1915, the Council of Ministers accepted the proposal of Khvostov - the Minister of Justice - to impose strict percentage limits on the number of Jewish prisiazhnye poverennye. According to this plan, Jews could make up 15% of the prisiazhnye poverennye in Warsaw, Vil'na, and Odessa, 10% in Petrograd and Kiev, and 5% in the rest of the country. See Vestnik Prava, no. 1(January 3, 1916), p. 22.

⁵Gessen, Istoriia russkoi advokatury, 1: pp. 434-6.

trial. Kerensky and Sokolov were ultimately sentenced to 8 months in prison for their support of the above resolution.⁶ Yet paradoxically, an air of optimism still surrounded the advokatura. In many ways, the mere act of survival - even in its multivariate form - was a significant triumph for the prisiazhnye poverennye. "We are still young," Karabchevskii proclaimed on the 50th anniversary of the St. Petersburg Bar. "All of our life, as a soslovie, is still in front of us. We can only say that [this 50th anniversary] is the end of the beginning of our activities."⁷

Alas, in reality, it was the beginning of the end, and 1917 would see the last tragic twist in the history of the prisiazhnye poverennye. After the February Revolution, the sworn advokatura not only realized most of its professional aspirations, its members also found themselves thrust into positions of responsibility as well - in the procuracy, the judiciary, and most notably in the Provisional Government. Draft legislation promised the creation of a single, unified Russian Bar, restrictions on Jews were lifted, and for the first time, women could apply to the prisiazhnye poverennye.⁸ Yet on the threshold of victory, the October Revolution intervened, and almost immediately, the Bolsheviks resumed the debate of how to adapt a liberal profession to a centralized, hierarchical social order, with the crucial difference that the Bolsheviks had no intention of introducing a liberal profession. Thus, fifty years of professional development, of an independent, self-governing soslovie of prisiazhnye poverennye, were swept away. Instead, the Bolsheviks chose to follow Russia's alternative soslovie tradition - state control of the advokatura - and although it would take some 22 years to implement, the Bolsheviks

⁶Kucherov, Courts, Lawyers, pp. 285-96.

⁷N. Karabchevskii, "Piatidesiatiletie petrogradskoi prisiazhnoi advokatury," Pravo, no. 19(May 15, 1916), pp. 1137-8.

⁸Huskey, Russian Lawyers, pp. 30-2.

grip over the advokatura would eventually exceed anything that the autocracy had been able to achieve.

Ironically, the most difficult legacy of the pre-revolutionary advokatura - the one branch, which would cause the most long-term problems for the Bolsheviks - was not the prisiazhnye poverennye but the inveterate podpol'naia advokatura.⁹ Many sworn attorneys, in fact, watched these developments in exile, scattered all over the world. In order to ease their isolation, former advocates set up emigre associations - in Paris, Berlin, Brussels, New York, Constantinople - dedicated to helping needy colleagues and preserving the memory of the advokatura's noble past. One by one, however, these organizations ceased to exist; the last meeting of the Union of Russian Advocates in France occurred in 1971. Current developments, of course, makes one hark back to 1864 and the possibility of legal reform, but the epitaph of the soslovie of prisiazhnye poverennye - as a living profession - has long been written; it was a prelude to a future that never came.

⁹Ibid., pp. 133, 155.

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