

# *Fordham International Law Journal*

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*Volume 42, Issue 2*

*Article 3*

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## The Reform of the Russian Legal Profession: Three Varying Perspectives

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## ARTICLE

### THE REFORM OF THE RUSSIAN LEGAL PROFESSION: THREE VARYING PERSPECTIVES

*Susan Carle, \* Gayane Davidyan, \*\* Thomas McDonald, \*\*\* &  
Delphine Nougayrède \*\*\*\**

#### ABSTRACT

*In this article, four authors with varying perspectives debate various approaches to reforming the legal profession in Russia. We start out with a short introduction to the legal profession in Russia today, set out the reform that is currently proposed by the Russian government and then present three perspectives on this reform. Two of us are retired partners at large law firms with substantial presence in Russia, and two of us are law professors teaching about the legal profession in two law schools, one in Russia and one in the United States. All of us have taught comparative legal ethics to top Russian law students in a one-week program jointly organized by the law firms of White & Case and DLA Piper, Moscow State University, and the Public Interest Law Network.<sup>1</sup> It is through this work that we know each other and have come to conceive of this article. All opinions are tentative and each author's own.*

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1. For a description and analysis of this program, see Phillip M. Genty, *Dichotomy No Longer? The Role of the Private Business Sector in Educating the Future Russian Legal Profession*, 40 *FORDHAM URB. L. J.* 283, 288-90 (2012).

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*I. A SHORT OVERVIEW OF THE LEGAL PROFESSION IN RUSSIA*

*A. Historical background*

Prior to the 1917 Revolution, the Russian legal profession first emerged from the 1864 Judicial Reform Act proclaimed by Alexander II, which for the first time created independent lawyers’ guilds consisting of local bars.<sup>2</sup> In the aftermath of the Revolution, the

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2. For a general history of the pre-Revolutionary and Soviet bars, see EUGENE HUSKEY, *RUSSIAN LAWYERS AND THE SOVIET STATE: THE ORIGINS AND DEVELOPMENT OF THE SOVIET BAR, 1917-1939* (1986); PAMELA A. JORDAN, *DEFENDING RIGHTS IN RUSSIA: LAWYERS, THE STATE, AND LEGAL REFORM IN THE POST-SOVIET ERA* (2005). *See also* Samuel Kucherov, *The Legal Profession in Pre-and Post-Revolutionary Russia*, 5 *AM. J. COMP. L.* 443, 444-53 (1956); *see also* INT’L COMM’N OF JURISTS, *TOWARDS A STRONGER LEGAL PROFESSION IN THE RUSSIAN FEDERATION*, ICJ MISSION REPORT (2015), *available at* <http://www.refworld.org/pdfid/57ee80784pdfid/57ee80784.pdf> [<https://perma.cc/LL93-ESDP>] [hereinafter ICJ REPORT].

profession was radically transformed and at various times in the ensuing decades, it entirely disappeared as an institution independent from the state.<sup>3</sup> In the late Soviet period, the profession comprised a large contingent of lawyers employed by the state, in the courts, law enforcement and economic organs, a small independent segment of defense lawyers organized as advocates (in the Russian Republic under a 1980 Law of the RSFSR on the Advokatura), and also, during the *perestroika* years of the late eighties, a growing number of independent practitioners practicing civil and commercial law under the form of economic “cooperatives.”<sup>4</sup>

This Article cannot accommodate a complete summary of the Soviet justice system; suffice it to say that for decades it suffered from profound systemic weaknesses. The main area of activity of advocates was criminal defense, but judges wielded great influence in determining trial outcomes, and were often wired to the will of Communist party officials through telephonic instruction, a system that commonly became known as “telephone justice.”<sup>5</sup> Economic disputes between enterprises were handled outside of the courts by the ‘gosarbitrazh’, a section of the state apparatus for economic planning. Corruption in the legal system was generally rife, including of lawyers who illegally accepted payment from clients on top of the strictly regulated fees paid to lawyer collectives.<sup>6</sup> The system was viewed by most as lacking independence and integrity, a problem that rule of law advocates are still working to overcome in the post-Soviet era.

In the first decade following the 1991 Soviet collapse, the Russian legal profession did not undergo any substantial reform. New colleges of advocates started to appear in parallel to those already existing under the legacy 1980 RSFSR Law on Advokatura; these “parallel” colleges operated under different rules of admission and self-regulation and

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3. See, e.g., HUSKEY *supra* note 2, on discussing the dismantling of the bar in November 1917 (42-47) and its collectivization in 1928-1930 (150-155).

4. JORDAN, *supra* note 2, at 66-68; ICJ REPORT, *supra* note 2, at 9. In this Article and in line with Russian practice, the expression “advokatura” designates the collective profession of advocates working under that specific status together with their professional organs.

5. John C. Coughenour, *Reflections on Russia's Revival of Trial by Jury: History Demands that We Ask Difficult Questions Regarding Terror Trials, Procedures to Combat Terrorism, and Our Federal Sentencing Regime*, 26 SEATTLE U. L. REV. 399, 406 (2003); see also Molly Warner Lien, *Red Star Trek: Seeking a Role for Constitutional Law in Soviet Disunion*, 30 STAN. J. INT'L L. 41, 64 (1994).

6. Kucherov, *supra* note 2, at 460-61.

were in competition and conflict with the traditional advocates.<sup>7</sup> The non-advocate civil and commercial practitioners that had begun to exist in the late eighties as cooperatives<sup>8</sup> continued from 1992 onwards as law firms practicing as ordinary commercial legal entities, with a focus on areas of law that were outside of the practice of the traditional *advokatura*, such as corporate law, commercial law and tax law (these practitioners are now commonly referred to as *iuristi* or *biznes-iuristi* i.e. “jurists” or “business jurists”). Within the *advokatura*, the institutional disarray between the competing colleges was resolved by the 2002 Law on *Advokatura*, which created a single profession into which the competing “parallel” colleges were directly merged.<sup>9</sup> The non-advocate practitioners, for their part, became subject to separate state licensing under a 1995 government regulation,<sup>10</sup> however this licensing regime was discontinued after 1998.<sup>11</sup>

## B. *The Advokatura Today*

### 1. Quantitative elements

Today, approximately 75,000 lawyers are members of the Russian *advokatura*.<sup>12</sup> There are two other categories of lawyers subject to specific state licensing: these are the notaries (*notaryusi*), who handle estate and property transactions, of which there are approximately 7,900, and intellectual property lawyers (*patentni poverenni*) of which

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7. Eugene Huskey, *The Bar's Triumph or Shame? The Founding of Chambers of Advocates in Putin's Russia*, in PUBLIC POLICY AND LAW IN RUSSIA: IN SEARCH OF A UNIFIED LEGAL AND POLITICAL SPACE 149 (Robert Sharlet & Ferdinand J.M. Feldbrugge eds., 2005). JORDAN, *supra* note 2, at 71-102 (referring to this period as “Chaos in the *Advokatura*.”). The traditional advocates “belonged to Soviet-era, traditional colleges” while the parallel colleges were registered separately by the Ministry of Justice. JORDAN, *supra* note 2, at 72. Jordan suggests that behind these two competing groups was the conflict between traditionalism and change that arguably still characterizes the profession to this day.

8. JORDAN, *supra* note 2, at 66-69.

9. See *infra* Part II.B.2 (discussing the 2002 Law on *Advokatura* (*infra* note 19)). The automatic admission of all existing advocates including those from former parallel colleges is at Article 40.1 of the Law on *Advokatura*.

10. See ICJ REPORT *supra* note 2, at 9; JORDAN, *supra* note 2, at 79 (discussing Governmental Regulation No. 344 of April 15, 1995).

11. JORDAN, *supra* note 2, at 79. It is unclear why the licensing was discontinued. A possible explanation is the institutional disarray that followed the 1998 financial crisis.

12. Only 72,000 lawyers are practicing. See *About the Russian Federal Chamber of Lawyers*, RUSSIAN FED. CHAMBER OF LAWYERS, [https://en.fparf.ru/FPA\\_RF/about\\_FPA/](https://en.fparf.ru/FPA_RF/about_FPA/) [<https://perma.cc/T9WS-XR89>] [hereinafter FEDERAL CHAMBER].

there are perhaps 2,000 or so.<sup>13</sup> The remaining population of lawyers in the private sector, i.e. civil and commercial lawyers practicing as legal consultants and in-house counsel, are not regulated. Their number is not known at present; overall, it is generally considered that they are very significantly more numerous than the advocates.<sup>14</sup>

At present, the *advokatura* represents the largest fully organized group of legal professionals in Russia, “with a distinct hierarchy, institutions, procedures and agreed standards of ethics”.<sup>15</sup> Only advocates have the right to appear in criminal courts on behalf of defendants and before the Russian Constitutional Court.<sup>16</sup> This grant creates only a very limited monopoly, however, because such specialties represent only a small part of what lawyers do for clients. The 2002 Law on *Advokatura* had attempted to introduce a full monopoly in favor of advocates on representation before all the courts, but these provisions were struck down in 2004 by the Constitutional Court, on the argument that they were contrary to constitutional provisions on liberty and equality before the law.<sup>17</sup>

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13. The total number of notaries is one of the quantitative indicators set forth in the government’s “National “Justice” Program” on which more will be said later, see *infra* note 78. Regarding the number of patent attorneys, sources identified by us are somewhat less official, see, e.g., Evgeniy Pen, *V Rossii ne khvatit patentnikov poverennikh* [There are not enough patent attorneys in Russia], (Apr. 4, 2018), <https://vc.ru/flood/35930-v-rossii-ne-hvataet-patentnyh-poverennyh> [<https://perma.cc/57PJ-XKPP>].

14. See ICJ REPORT, *supra* note 2, at 5 (noting that there are no precise statistics available for the number since the area is completely unregulated, but that most estimates are that eighty to ninety percent of all those practicing law are in this unregulated realm). One knowledgeable observer estimated conservatively that 430,000 unregulated lawyers were practicing in Russia in 2008; this number can only have grown in the ensuing decade. See Dmitry Shabelnikov, *The Legal Profession in the Russian Federation*, OSCE (Oct. 1, 2008), <https://www.osce.org/odihr/36312?download=true> [<https://perma.cc/THF7-UCNL>].

15. ICJ REPORT, *supra* note 2, at 11. This is of course excluding judges and lawyers within law enforcement.

16. ICJ REPORT, *supra* note 2, at 11. Non-advocates with degrees in law may also appear before the Constitutional Court.

17. PO DELU PROVERKE KONSTITUTIONNOSTI CHASTI 5 STAT’I 59 ARBITRAZHNOGO ARBITRAZHNOGO PROTSESSUAL’NOGO KODEKSA ROSSIĖSKOĖ FEDERATSIĖ II V SVYAZI S ZAPROSAMI GOSUDARSTVENNOGO SOBRANIYA KURULTA YA RESPUBLIKI BASHKORTOSTAN, GUBERNATORA YAROSLAVSKOĖ OBLASTI, ARBITRAZHNOGO ARBITRAZHNOGO SUDA KRASNODARSKOGO KRAIA ZHALOBAMI RAZNOORGANIZATSIY I GRAZHDAN [IN THE CASE ON THE VERIFICATION OF THE CONSTITUTIONALITY OF PART 5 OF ARTICLE 59 OF THE RUSSIAN FEDERATION CODE OF ARBITRAZHPROCEDURE IN CONNECTION WITH THE REQUESTS OF THE STATE ASSEMBLY OF THE KURULTAY OF THE REPUBLIC OF BASHKORTOSTAN, YAROSLAVL DISTRICT, ARBITRAZH COURT OF THE KRASNODAR KRAI AND

As a result, a great majority of Russian private practicing lawyers face no need to be licensed in order to carry out their work, be it in administrative law, the civil courts, commercial law, giving legal advice, or handling transactions.<sup>18</sup> Likewise, these lawyers operate under no uniform code of ethics, though they may have office policies or be bound by ethics rules of other national jurisdictions, as discussed further below.

## 2. 2002 Law on Advokatura

The 2002 Law on Advokatura, called “On Advocates’ Activity and Advokatura in the Russian Federation,” established the present licensing structure for advocates.<sup>19</sup> Advocates must graduate from a Russian law school and must pass a qualifying exam in order to be admitted to practice.<sup>20</sup> Once advocates obtain a practice license their active status continues indefinitely.<sup>21</sup> The 2002 Law and the Charter of the Federal Chamber of Advocates organize advocates into regional bar chambers and a Russian Federal Chamber of Advocates.<sup>22</sup> Advocates practice under a disciplinary code based on the Law and a 2003 Code of Ethics adopted under the Law.<sup>23</sup> Bar chambers review disciplinary

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COMPLAINTS OF ORGANIZATIONS OF CITIZENS], SOBRANIE ZAKONODATEL’STVA ROSSIISKIY FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2004, Nono. 15-p. The provisions struck down were Article four paragraph nine of the Law on Advokatura and the companion provisions of the Arbitrazh Procedural Code.

18. Property, estate transactions, and certain corporate transactions (like those involving limited liability companies) must, however, involve notaries (“notariusy”), who are subject to licensing. Intellectual property registrations and transactions must also involve licensed intellectual property attorneys (“patentny poverenny”).

19. OB ADBOKATSKOY DEYATEL’NOSTI I ADVOKATURE V ROSSIYSKOY FEDERATSII [On Advocates’ Activity and the Bar in the Russian Federation] SOBRANIE ZAKONODATEL’STVA ROSSIISKIY FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2002, No. 63, art. 8, art. 6, ¶ 4(5) [hereinafter the “Law on Advokatura”].

20. Law on Advokatura, art. 9, ¶ 1 (law degree); arts. 10, 11 (bar exam).

21. See Vadim Konyushkevich & Gleb Bazurin, *Regulation of the Legal Profession in the Russian Federation*, THOMSON REUTERS PRACTICAL LAW (Apr. 1, 2017), <https://uk.practicallaw.thomsonreuters.com/1-633-8957> (last visited Dec. 5, 2018). [https://perma.cc/Y9AK-XUC9].

22. Law on Advokatura, *supra* note 19, art. 29 (regional chambers) and art. 35 (Federal chamber). Individual advocates become members of the regional chambers based on their residency.

23. KODEKS PROFESSIONAL’NOY ETIKI ADVOKATA. KODEKS PROFESSIONAL’NOY ETIKI ADVOKATA [CODE OF PROFESSIONAL ETHICS OF RUSSIAN ADVOCATES], (amended 2017), (FIRST NAT’L CONG. OF RUSS. ADVOCATES 2003) [hereinafter



cases against advocates for breach of this ethics code or other law and may impose disciplinary sanctions ranging from reprimands and warnings to disbarment.<sup>24</sup> They also carry out professional training and advocacy for the interests of their members.<sup>25</sup>

The Law on Advokatura sets out the key principles of legal practice.<sup>26</sup> These include client confidentiality and legal privilege (*advokatskaya taina*),<sup>27</sup> the prohibition against conflicts of interest,<sup>28</sup> adherence to traditional lawyer principles of independence,<sup>29</sup> honesty, faithfulness, and competence,<sup>30</sup> and a prohibition against discontinuance of representation. While there is a provision in the law requiring insurance of professional responsibility, this provision has been suspended, and there is accordingly no obligation of advocates to obtain professional liability insurance.<sup>31</sup> The Law on Advokatura also sets forth the obligation of advocates to comply with the code of ethics (more on this code below).<sup>32</sup>

The Law on Advokatura involves strict limitations on the forms of practice that advocates may use. They may not be employed under any employment contracts<sup>33</sup> and must work independently within one of four types of law offices (“cabinets”, “colleges”, “bureaus” and “legal consultations”),<sup>34</sup> all of which are registered at the relevant regional chamber. Advocates are obligated to pay dues to their regional chamber<sup>35</sup> and may not temporarily suspend their membership from the

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ETHICS CODE]; The statutory basis for adoption of the Ethics Code is the Law on Advokatura. *See* Law on Advokatura, art. 4, ¶ 1; art. 7, ¶ 1(4); art. 36, ¶ 2(2).

24. ETHICS CODE, *supra* note 23, at art. 18(6). The statutory basis for disciplinary prerogatives of bar chambers is the Law on Advokatura. *Id.* at ETHICS CODE, art. 29, ¶ 4; art. 30, ¶ 2(10); art. 31, ¶ 3(9); art. 33, ¶ 1; *see also* Coughenhour, *supra* note 5, at 6.; ETHICS CODE, *supra* note 23, at arts. 19-27; ICJ REPORT, *supra* note 2, at 33-37.

25. Law on Advokatura, *supra* note 19, at art. 31, ¶ 3(8) (organization of professional training); art. 29, ¶ 4; art. 35 ¶ 2 (general representation of interests).

26. Law on Advokatura, art. 4, ¶ 1.

27. Law on Advokatura, art. 8; art. 6, ¶ 4(5)

28. Law on Advokatura, art. 6, ¶ 4(2).

29. Law on Advokatura, art. 2, ¶ 1; art. 18.

30. Law on Advokatura, art. 7, ¶ 1, 3.

31. The provision regarding mandatory insurance contained in Article 7 paragraph 1 section 6 of the Law on Advokatura has been suspended by Federal Law No. 320-FZ of December 3, 2007. Law on Advokatura, art. 7, ¶ 1(6).

32. Law on Advokatura, art. 7, ¶ 1(4).

33. Law on Advokatura, art. 2, ¶ 1.

34. Law on Advokatura, art. 20, ¶ 1.

35. Law on Advokatura, art. 7, ¶ 1(5).

profession (for example to conduct other activities). Advocates are also under the obligation at all times to provide free representation to certain categories of the population<sup>36</sup> and to accept court-designated criminal law cases (*advokat po naznachenyu*)<sup>37</sup> - activities that for many advocates represent a significant portion of their time. The proper remuneration of these activities by the state remains a problem unresolved to this day.

Importantly, the activity of advocates is defined as providing legal “assistance” (*pomosh*) and not “services” (*uslugi*).<sup>38</sup> The law expressly sets advocates apart from “participants and employees of organizations rendering legal services,” i.e. unregulated practitioners, which are specifically mentioned by the law as not belonging to the profession.<sup>39</sup> In line with other civil law systems, the activity is considered to be non-entrepreneurial.<sup>40</sup> Written contracts must be entered into, which are established directly between the individual advocate (and not the law office) and his or her client (called *doveritel'* i.e. “principal”),<sup>41</sup> and advocates are not able to delegate performance of their duties in court under these contracts to colleagues or junior associates.

### 3. 2003 Code of Ethics

The Law on Advokatura specifically delegates to the advokatura, acting in congress as the All-Russia Congress of Advocates, the power to elaborate the ethical rules of the profession based on the principles set out in the Law on Advokatura.<sup>42</sup> The 2003 Code of Ethics (the “Ethics Code”) is a detailed document that lays out a more comprehensive set of ethics rules for advocates.<sup>43</sup> These provisions expand on the regulation of conflicts of interest, including bans on advocates representing parties with conflicting interests in the same case,<sup>44</sup> requirements of client consent prior to joint representation

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36. Law on Advokatura, art. 26.

37. Law on Advokatura, art. 25, ¶ 8.

38. Law on Advokatura, art. 1, ¶ 1 (“legal assistance”); *contra* art. 1, ¶ 3 (“legal services”).

39. Law on Advokatura, art. 1, ¶ 3.

40. Law on Advokatura, art. 1, ¶ 2.

41. Law on Advokatura, art. 25.

42. Law on Advokatura, art. 36, ¶ 2.

43. ETHICS CODE.

44. ETHICS CODE, art. 11.

arrangements,<sup>45</sup> and adherence to traditional lawyer principles of independence and diligence, honesty, faithfulness and competence. It prohibits advocates from discontinuing legal services in criminal cases except as stipulated by law or for other good reasons<sup>46</sup> and requires them to pursue appeals from adverse judgments at the defendant's request.<sup>47</sup> The Ethics Code requires advocates to act with honesty, good faith and competence and to defend their clients' rights and interests vigorously.<sup>48</sup> Additional provisions prohibit advocates from cooperating with investigators in the course of providing legal services,<sup>49</sup> acting contrary to a client's lawful interests due to personal interests or outside pressure,<sup>50</sup> or exploiting personal ties with those working in the judiciary and law enforcement.<sup>51</sup> The Ethics Code contains extensive provisions defining advocates' duties of client confidentiality.<sup>52</sup> It requires advocates to ensure that all assistants and employees comply with its rules,<sup>53</sup> provides means for advocates to obtain ethics advice on complicated questions<sup>54</sup> and recognizes that advocates may also be guided by the Code of Conduct for European Lawyers where it does not conflict with the Ethics Code.<sup>55</sup> Incorporating Russian law on the matter, it requires advocates to participate in providing free legal services.<sup>56</sup>

The Code also provides for a body within the Federal Chamber called the Ethics Commission, which develops ethics standards, produces binding explanatory notes about them, summarizes the disciplinary practices of the Chambers and provides relevant recommendations subject to the approval of the Federal Chamber of Advocates.<sup>57</sup> These procedures allow for further ethical self-regulation and a process for amending the Ethics Code to adapt it to new challenges and conditions.

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45. ETHICS CODE, art. 11, ¶ 2.

46. ETHICS CODE, art. 13, ¶ 2.

47. ETHICS CODE, art. 13, ¶ 4.

48. ETHICS CODE, art. 8.

49. ETHICS CODE, art. 9, ¶ 3.1.

50. ETHICS CODE, art. 9, ¶ 1.1.

51. ETHICS CODE, art. 9, ¶ 1(6).

52. ETHICS CODE, art. 6.

53. ETHICS CODE, art. 3 ¶ 2.

54. ETHICS CODE, art. 4 ¶ 4.

55. ETHICS CODE, art. 1.

56. ETHICS CODE, art. 15.

57. ETHICS CODE, art. 18.2.

#### 4. Jurists Today: The Vast Unregulated Majority of the Profession

As noted above, it is not possible to establish the precise number of practicing jurists in Russia today, precisely because of the lack of any register or list of persons involved in the provision of these services or appearing on behalf of clients in civil or administrative courts.<sup>58</sup> Unregulated jurists today do not belong to any collective professional organization and they do not operate under any uniform ethical code. The absence of any ethical code or organizations to enforce it has a number of consequences that are *prima facie* detrimental.

First, the lack of professional regulation deprives the profession of any monopoly power to police barriers to entry into it.<sup>59</sup> Because any individual can hold himself out as a jurist, many individuals do so. Some jurists have had little or no legal training, and some engage in unscrupulous practices. The quality of services provided ranges greatly, and outside of standard contract, tort or criminal liability, there is no regulatory mechanism through which to police quality and ethical practices in the interests of safeguarding clients' welfare. This presence of unscrupulous practitioners deepens the problem of corruption within the Russian state apparatus.

Another downside of absence of regulation is the lack of legal protections legal practitioners enjoy in many jurisdictions. Jurists in Russia have no legal grounds to assert privilege to keep client secrets confidential or to protect attorney-client communications, documents reflecting such communications, or attorney work product.<sup>60</sup> Jurists are therefore vulnerable to "executive interference" with their work, including through searches and seizures, surveillance, and/or demands to provide information about clients to government officials.<sup>61</sup>

One of the complicating factors in the Russian context, however, is that many of the problems that exist within the unregulated profession also exist within the *advokatura*. This includes the problems of corruption and sub-standard practices, which persist in the *advokatura* despite the existence of institutions of self-policing.<sup>62</sup>

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58. *Supra* Part I.B.1.

59. On the importance of professional regulation to the creation and maintenance of professional monopoly in the context of legal professions, see generally RICHARD L. ABEL, *AMERICAN LAWYERS* (1984). *Infra* Part III.C.

60. ICJ REPORT, *supra* note 2, at 12-13.

61. ICJ REPORT, *supra* note 2, at 13, 65.

62. ICJ REPORT, *supra* note 2, at 38:

Another difficulty is that while advocates are theoretically entitled to legal privileges, including attorney-client privilege and confidentiality, observance of these privileges by law enforcement and the state apparatus remains on the whole problematic.<sup>63</sup> In short, this is not a black and white situation involving a high-quality regulated segment with legal protections coexisting alongside low-quality unregulated practitioners. Rather, the Russian profession is a multifaceted one, involving multiple sub-segments, and in which geographical distribution across a vast national territory also plays a role. The exponential growth of unregulated practitioners was the result of strong economic growth in the 2000s, robust demand for legal services<sup>64</sup> and a regulated segment (the *advokatura*) that was traditionally focused on criminal representation only. The unregulated segment includes countless individual practitioners, small, medium sized and large commercial law firms, as well as all the foreign law firms, which occupy a significant position in the high-end market in Moscow and Saint Petersburg. It also includes more unusual forms of practice: legal services are now offered to the public by the in-house departments of some of Russia's largest corporations.<sup>65</sup> With their significant headcount and the extensive resources and regional footprint of their

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The problem of corruption of lawyers, in particular lawyers appointed to provide State-funded legal aid to defendants in criminal cases, is widely recognized as one of the greatest challenges facing the legal profession in the Russian Federation. Such corruption facilitates violations of human rights of suspects and accused persons, including violations of the prohibition on torture or other ill-treatment, the right to liberty and the right to a fair trial. It is widely recognized, that certain lawyers appointed to provide legal aid in criminal cases fail to act in accordance with the standards imposed by the Code of Ethics and do not provide a competent or effective defence to their clients. Instead, they routinely serve the interests of the investigator or the prosecutor in the case, seeking to secure a conviction and ignoring violations of their clients' human rights.

The term "pocket lawyers" is often used to refer to lawyers who serve the interests of the prosecution or other powerful actors rather than those of their clients.

63. ICJ REPORT, *supra* note 2, at 53-58.

64. On the role of the legal profession in state-building, *see generally* Terence C. Halliday, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* (1987).

65. Reported examples are Sberbank (banking) and MegaFon (telephony). *MegaFon vykhodit na rynek pravovoykh uslug dlya biznesa* [*MegaFon enters the market of legal services for business*], MEGAFON, (Nov. 27, 2017), [https://corp.megafon.ru/press/news/federalnye\\_novosti/20171127-1222.html](https://corp.megafon.ru/press/news/federalnye_novosti/20171127-1222.html) [<https://perma.cc/F72A-9QC8>]; Victoria Arutunyan & Margarita Gaskarova, *Stanut li inkhaosi vnechnimi konsultantami?* [*Will in-house lawyers become outside counsel?*], 9 *LEGAL INSIGHT*, at 3-7 (2018), *available at* <http://legalinsight.ru/legal-insight-%E2%84%96-09-75-2018/> [<https://perma.cc/L3FJ-C37G>].

parent organizations, these new structures aim to compete with traditional “lawyer-owned” law firms throughout the Russian territory.<sup>66</sup> This extreme diversity has, for several decades now, impeded successive efforts at reform.

## II. THE NEED FOR REFORM OF THE RUSSIAN LEGAL PROFESSION

Few dispute the proposition that the Russian legal profession continues to be in need of further reform.<sup>67</sup> Conventional international practice would seem to militate for immediate regulation of the entire profession. There are important reasons for regulating the “practice of law” or “legal services,” in light of the significant consequences of the provision of such services to the interests of clients. Poor quality or unethical conduct in the legal profession has significant consequences both to clients and more generally to the legal system and the rule of law.

However, although an obvious need exists to ensure quality, restrictions on the quantity of legal services providers can also have the consequence of reducing access to such services overall, and/or increasing their cost.<sup>68</sup> This concern is particularly salient in light of the small number of Russian advocates at present (less than 75,000 individuals for a population of 144 million), uneven distribution of advocates throughout the territory, high number of cases handled by courts (approximately 15 million civil cases per year)<sup>69</sup> and existence

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66. Sberbank even created a dedicated subsidiary for this activity, called “Sber Legal,” to which it transferred one hundred or so in-house lawyers. *Sberbank sozdal kompaniyu dlya okozania yuridicheskikh uslug* [Sberbank created a company for the provision of legal services], VEDOMOSTI (Nov. 2, 2018), <https://www.vedomosti.ru/finance/news/2018/11/02/785553-sberbank> [<https://perma.cc/P3N5-3QTP>].2, 2018) Arutunyan & Gaskarova, *supra* note 65.

67. ICJ REPORT, *supra* note 2, at 59:

The ICJ mission noted an understanding from all relevant actors that there is a need for reform of the legal profession in the Russian Federation. At no meeting—be it with lawyers or independent experts or government officials—did any one assume that the current state of the legal profession was satisfactory. Lawyers from different parts of the profession held differing views on the nature of the problems and the solutions that should be adopted, but all considered that reforms of some kind were necessary to bring substantial change to the quality of the profession.

68. See Shabelnikov, *supra* note 14, at 11-22 (emphasizing the problem of access to justice).

69. *Pochemu advokatskaya monopoliya otkladaetsya?* [Why is advocate monopoly postponed?], PRAVO (Apr. 2, 2015), <https://pravo.ru/voting/199/> [<https://perma.cc/K53S-CGPR>].

of an express constitutional right to legal “assistance” under Article 48 of the Russian Constitution.<sup>70</sup> Thus, reform of the legal profession must be carried out such that the imperative of ensuring better quality does not lead to an unsustainable reduction of the overall supply of legal services and aid across the country. This is a conundrum that the Russian profession and government have been grappling with for many years.

### A. *The Movement for Reform*

#### 1. Previous attempts at Reform

The Russian government has long been aware of the need for reform and has attempted a number of initiatives over the years. The 2002 Law on Advokatura itself required many years of debate, including between competing colleges of the advokatura themselves.<sup>71</sup> The solution that was found at that time was that the “parallel” colleges would simply be merged into the traditional criminal-law centric advokatura of the late eighties, whose rules of operation were largely replicated in the 2002 Law (the “parallel” colleges, in contrast, operated in a manner that was closer to those of the commercial profession).<sup>72</sup>

A few years after the 2002 Law, the Russian government then produced a bill that proposed to replicate the approach that had been adopted in 2002 for the parallel colleges, i.e. aiming to incorporate most of the unregulated practitioners directly into the advokatura. This was a 2008 draft Federal Law “on the Provision of Qualified Legal Assistance in the Russian Federation”,<sup>73</sup> which conditioned admission of existing practitioners to certain minimum qualification requirements

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70. Point 1 of Article 48 states that “[e]veryone”Everyone is guaranteed the right to receive qualified legal assistance. In cases provided for by law, legal assistance is provided free of charge.” KONSTITUTSIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 48, point 1 (Russ.). In the Russian original: Каждому гарантируется право на получение квалифицированной юридической помощи. В случаях, предусмотренных законом, юридическая помощь оказывается бесплатно

71. Huskey, *supra* note 7.

72. Jordan, *supra* note 2, at 87-89.

73. See a copy of the proposed bill, together with an introductory parliamentary report, in *Vestnik Federal'noy Palaty Advokatov RF*, No. 3(21), 37-47 (2008), available at <https://fparf.ru/upload/iblock/54f/54f9957dc4d3772b44173b089d677c91.pdf>.

(i.e. a law degree) but did not require that they pass an exam.<sup>74</sup> The bill generated fierce opposition from the *advokatura*, however,<sup>75</sup> and ended up being abandoned.

## 2. 2014 Justice Program

In 2008, reform of the legal system was made into a policy priority by then President Dmitry Medvedev.<sup>76</sup> The effort accelerated in 2011 with the adoption of presidential “Principles for the development of legal awareness of citizens”<sup>77</sup> and then in 2014, by the adoption of a “National Justice Program” (“Justice Program”, or “Justice”), providing a framework for the development of new legislation to address reform of the legal profession.<sup>78</sup> The Program included a sub-program 1 requiring the Ministry of Justice to approve a “concept” for

74. *Id.* art. 4 of proposed bill.

75. See the proceedings of a March 2008 meeting between senior parliamentarians and representatives of the *advokatura* in which the latter expressed their opposition to the proposed bill. *Vestnik*, *supra* note 73, at 35-36. Paradoxically the Federal Chamber expert review report (by advocate G.K. Sharov) was more positive, even without an entrance examination for unregulated practitioners. *Vestnik*, *supra* note 73, at 49-64.

76. *Rossiya dolzhna preodolet pravovoi nihilizm – Prezident Medvedev* [Russia must overcome legal nihilism – President Medvedev], RIA NOVOSTI (May 7, 2008), <https://ria.ru/politics/20080507/106773965.html> [<https://perma.cc/B7M3-XGNJ>].

77. Ukaz Prezidenta Rossiyskoy Federatsii [Mentioned in the Decree of the President of the Russian Federation], SOBRANIE ZAKONODATEL'TVA ROSSIISKOI FEDERTSII [SZ RF] [Russian Federation Collection of Legislation] April 28, 2011, No. PR-1168 (Rus.). It would appear that the Justice Program was first conceived as part of the WTO accession process, as is suggested by a 2011 WTO-related draft document produced by the Russian government also called “Justice Program,” which sets out in large part what later became the 2014 program. *Gosudarstvennaya programma Rossiyskoy Federatsii «Yustitsiya»* [Ministry of Justice of the Russian Federation Justice, “Justice Program”, PRAVO,” (Nov. 9, 2011), <http://docs.pravo.ru/document/view/20787696/23642826> [<https://perma.cc/G5KJ-NX7A>].

78. Ob Utverzhdenii Gosudarstvennoy Programmy Rossiyskoy Federatsii “Yustitsiya” [Government Resolution on the National “Justice Program” of the Russian Federation], SOBRANIE ZAKONODATEL'TVA ROSSIISKOI FEDERTSII [SZ RF] [Russian Federation Collection of Legislation] 2014, No. 312, *available at* (Apr. 15, 2014), (replacing a prior Government Resolution on the same, No. 517-r, Apr. 4, 2013), ([http://minjust.ru/sites/default/files/postanolenie\\_pravitelstva\\_rossiyskoy\\_federacii\\_ot\\_15.04.2014\\_n\\_312\\_ob\\_utverzhdenii\\_gosudarstvennoy\\_programmy\\_rossiyskoy\\_federacii\\_yusticiya.pdf](http://minjust.ru/sites/default/files/postanolenie_pravitelstva_rossiyskoy_federacii_ot_15.04.2014_n_312_ob_utverzhdenii_gosudarstvennoy_programmy_rossiyskoy_federacii_yusticiya.pdf)) [<https://perma.cc/TEP7-JBQN>] [hereinafter Government Resolution No. 312] (replacing prior Government Resolution No. 517-R on the same issue), last amended by a Government Resolution SOBRANIE ZAKONODATEL'TVA ROSSIISKOI FEDERTSII [SZ RF] [Russian Federation CollectionNo 372 of Legislation]30 March 2018, No. 372, *available at* ([http://minjust.ru/sites/default/files/pp\\_372\\_ot\\_30\\_03\\_2018.pdf](http://minjust.ru/sites/default/files/pp_372_ot_30_03_2018.pdf)) [<https://perma.cc/HHW7-72FQ>].)



regulation of legal services, and specified that this concept should create “*a unified market of legal services accessible to all*” and “*ensuring the protection of the public interest and the realization of the rights of citizens and legal entities.*”<sup>79</sup>

The 2014 Program was important in highlighting the need for reform and defining a general direction and fundamental objectives for it, but it quickly became apparent that there were still significantly diverging views within the profession on how to proceed. Some argued that this was in essence a monopoly-building ploy by the *advokatura* (under the leadership of the Federal Chamber in Moscow), or that the *advokatura* wanted to bring all legal practitioners under its umbrella in order to win a competition it was losing, as most high-end commercial legal services were rendered by unregulated firms and the vast majority of law school graduates chose to remain outside the *advokatura*. This was countered by the argument on the opposite side that the objective was not to create monopoly protection for one of the segments, but to include all segments into one profession with the objective of raising professional standards across the board.

### 3. The Ministerial Working Group and consultations with representatives of the legal community

In light of the negative response by many practitioners, in April 2015 the Ministry of Justice created a working group of thirty members to assist the Ministry in the elaboration of the “concept” envisaged by the sub-program. The group was intended to be more inclusive and included representatives of the Federal Chamber of Advocates, the Association of Jurists of Russia, the Association of Corporate Lawyers (AKYur), the Presidential Council for Civil Society and Human Rights, the committee of the Duma for constitutional legislation and construction of the State, the regional chambers of advocates, the Supreme Court, other ministries, and, finally, members of the profession of advocate. The meetings of the Working Group were supplemented by meetings separately organized by the Ministry with representatives of all sectors in the legal community, including national and international firms in the unregulated sector as well as the Federal Chamber of Advocates. These consultations were taken into account in

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79. Government Resolution No. 312, *supra* note 78, at 7 (referencing paragraph entitled “Expected results from implementation of the sub-program”).

the gradual elaboration of the “concept” through three successive Concept Papers issued by the Ministry of Justice.

#### 4. The Concept Papers

The first, relatively succinct, Concept Paper was issued in late 2015, followed a year later by a more detailed second iteration,<sup>80</sup> and then in October 2017 by a third version (which is the current version at the time of writing).<sup>81</sup> All versions deemed unsatisfactory the current state of the legal services market and, in order to rectify the problem, proposed a unified profession, combining the *advokatura* and the unregulated part of the profession on the basis of a “reformed” *advokatura*, excluding in-house lawyers (consistent with the exclusion of in-house lawyers from the regulated professions in many European jurisdictions),<sup>82</sup> and extending the monopoly of unified profession to all court representations. As from the second Concept Paper in 2016, the Ministry proposed extending the monopoly to all legal services, including legal advice.<sup>83</sup>

The 2016 and 2017 Concept Papers placed special emphasis on international comparisons. The regulations of selected foreign jurisdictions<sup>84</sup> were analyzed with respect to the definition of and monopoly over the provision of legal services, the qualifications required to become part of the profession (including continuing legal educational requirements), the organization and governance of the profession, the legal structures allowed for the collective exercise of

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80. Regulation of the Market of Professional Legal Assistance Concept Paper, registered by the Ministry of Justice, CONCEPT PAPER ON REGULATION OF THE MARKET OF PROFESSIONAL LEGAL ASSISTANCE (2016) (Russ.) [hereinafter 2016 CONCEPT PAPER].

81. MINISTRY OF JUSTICE, CONCEPT PAPER ON Regulation of the Market of Professional Legal Assistance Concept Paper, registered by the Ministry of Justice, (2017 (Russ.)) [hereinafter 2017 CONCEPT PAPER].

82. See the decision of the Court of Justice of the European Union refusing to recognize legal professional privilege to in-house lawyers in the context of a competition law investigation on the basis that “. . . a considerable number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society and accordingly, do not recognize them as having the same status as lawyers established in private practice.” Case C-550/07P, *Akzo Nobel Chems. Ltd. v. European Comm’n*, 2010 E.C.R. I-08301, ¶¶ 72-76. See also the opinion of Advocate General Kokott in that case. *Id.* (A.G. Kokott, opinion), ECLI:EU:C:2010:229.

83. 2017 CONCEPT PAPER, *supra* note 81, at § 6.3.

84. The jurisdictions considered were Germany, France, the United Kingdom, Japan, India and the People’s Republic of China as well as some former Soviet states (Armenia, Belarus Estonia and Kazakhstan). 2017 CONCEPT PAPER, *supra* note 81, at § III; 2016 Concept Paper, *supra* note 80, at § III.

the profession, and ethical rules and discipline for breach thereof.<sup>85</sup> Both Papers concluded that, on the basis of foreign experience, the relevant points for the reform of the Russian profession are “. . . *the unity of the profession, the standardization and transparency of admission procedures . . . , the maintenance of the skills of lawyers, extending the possible corporate forms for organized practice and disciplinary procedures.*”<sup>86</sup>

As the 2017 Concept Paper was the current version at the time of finalizing this Article (November 2018), its main contents are set out in some detail in the paragraphs that follow. The main objective of the reform is stated in Section IV as the formation of a “*unified legal framework for the provision of legal services*”, in effect apparently including both the existing concepts of “legal assistance” and “legal services” (i.e. those currently rendered by unregulated practitioners).<sup>87</sup> The other objectives include increasing the protection of the recipients of legal services; improving the institution of *advokatura* by removing restrictions that impede the efficient practice of law; creation of standards for membership in the profession that exclude low-quality practitioners and dishonest consultants; and the provision of professional legal assistance meeting international standards.<sup>88</sup>

The 2017 Concept Paper specifies that while in-house lawyers are excluded from the reform, they will retain the right to advise and to represent their employer in the courts.<sup>89</sup> Another noteworthy exception to the proposed monopoly of the new profession is the right of providers under the government law on free legal aid,<sup>90</sup> who notwithstanding their exclusion from the new profession, will be able to continue to provide legal assistance and to represent clients in courts.<sup>91</sup> Similarly, non-profit organizations registered in accordance with the law and providing legal assistance (including court representation) on a *pro bono* basis would also be permitted to continue to do so.<sup>92</sup>

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85. 2017 CONCEPT PAPER, *supra* note 81; 2016 Concept Paper, *supra* note 80.

86. 2017 CONCEPT PAPER, *supra* note 81, at § 3.5.

87. 2017 CONCEPT PAPER, *supra* note 81, at § IV, § 1.

88. *Id.*

89. *Id.* § IV, ¶ 3.

90. Federal Law on Free Legal Aid in the Russian Federation, 2011, No. 324-FZ, ch. 4. (2011).

91. 2017 CONCEPT PAPER, *supra* note 81, at § IV.

92. *Id.*

The justification for the use of the *advokatura* as the basis for the reform, as opposed to the formation of a second, separate profession, is discussed at length. According to the Concept Paper, the creation of a separate regulated profession as a “Self-Regulating Organization” under the relevant law<sup>93</sup> would be undesirable due to the need to create dual professional and ethical standards, lack of comprehension by the public of the difference between the different parts of the profession, difficulties encountered by other self-regulating organizations,<sup>94</sup> and budgetary considerations related to the need to supervise the new self-regulating organization.<sup>95</sup> On the other hand, the Concept Paper argues that the existing *advokatura* already has the appropriate framework for the reformed profession due to its tradition of providing legal assistance, the existence of confidentiality and lawyer/client privilege, the right of an advocate to obtain information about a matter he is handling from the public authorities,<sup>96</sup> ethical rules and disciplinary procedures, a tradition of self-regulation, an appropriate infrastructure avoiding the need to create new institutions, appropriate legislative basis (notwithstanding the need for important modifications) and existing public and international recognition.<sup>97</sup>

There is also discussion of the need to reform the *advokatura* to permit lawyers to be employed by other lawyers, either through legal entities for the collective exercise of the profession called “lawyer formations” or directly by other lawyers.<sup>98</sup> The need to allow lawyers in the new profession to create lawyer formations using existing commercial forms is recognized, which the Concept Paper notes is not inconsistent with the non-entrepreneurial nature of the profession, as demonstrated by the foreign experience summarized earlier. The need to re-establish the requirement for compulsory insurance for legal services is endorsed,<sup>99</sup> as well as the need for continuing education

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93. Federal Law on Self-Regulating Organizations, 2007, No. 315-FZ. (2007).

94. The Concept Paper notes that Government decree No. 2776-r of December 30, 2015 envisages the reform of the law on Self-Regulating Organizations in light of the “ineffective performance” and “low efficiency” of Self-Regulating Organizations. 2017 CONCEPT PAPER, *supra* note 86, at part IV.

95. 2017 CONCEPT PAPER, *supra* note 81, at § V, ¶ 7.

96. Law on *Advokatura*, *supra* note 19, at art. 6.3.

97. 2017 CONCEPT PAPER, *supra* note 81, at § V.

98. 2017 CONCEPT PAPER, *supra* note 81, at § 5.2.

99. The Concept Paper notes that the obligation for professional liability insurance contained in the Law on *Advokatura* (art. 7, ¶ 6) was suspended by a 2007 Federal Law and

requirements, the recognition of specializations and the exclusion from the profession of lawyers convicted of serious crimes.<sup>100</sup> Finally, proposals to adjust the tax treatment of lawyers and lawyer formations (VAT and income tax) are put forward.<sup>101</sup>

The normative support for the reform will, according to the 2017 Concept Paper, require important modifications to the 2002 Law on Advokatura, as well as the Labor Code, the Civil Procedure Code and other laws, including new laws with respect to the unauthorized practice of law. The staged introduction of these changes is described in the last section of the Concept Paper, proposing a three stage implementation over at least five years. The first stage would involve elaboration and adoption of the required normative acts. The second stage would implement the admission of non-regulated lawyers into the regulated profession, by simplified procedures (testing only with respect to the Law on Advokatura) for practitioners with legal degrees and five years' experience, or by a complete examination for those who do not meet these criteria.<sup>102</sup> The third stage would involve monitoring and possible adjustments to the timing, but as published in 2017, the Concept envisaged that by January 1, 2023<sup>103</sup> only registered advocates would be entitled to provide legal services (court representation and advice), other than those enjoying specific exclusions from the law.<sup>104</sup> This deadline would be adjusted if the number of advocates or "other circumstances" impeded sufficient access to law by citizens and organizations.<sup>105</sup>

##### 5. The provisions of the 2017 Concept Paper regarding international firms

Unlike the previous Concept Papers, the 2017 Concept Paper introduced a section about the Russian offices of international firms:

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urges reconsideration of this in light of international practice requiring mandatory insurance. *See* 2017 CONCEPT PAPER, *supra* note 81, at § 5.4.

100. 2017 CONCEPT PAPER, *supra* note 81, at § 5.4.

101. 2017 CONCEPT PAPER, *supra* note 81, at § 5.5.

102. *See infra* Part VI.

103. The date for the imposition of the full monopoly was extended two years beyond the date proposed in the 2016 Concept Paper. 2017 CONCEPT PAPER, *supra* note 81, at § 6.2.

104. 2017 CONCEPT PAPER, *supra* note 81, at § 6.2.

105. 2017 CONCEPT PAPER, *supra* note 81, at § 6.2.

It should be noted that the provision of legal services on the territory of the Russian Federation is currently also being handled by international law firms, most of which operate in the territory of Russia through their branches. Some of these companies form their presence in the Russian market through the creation of subsidiary economic companies. At the same time, as a rule, a foreign company is the owner of 100 percent of shares in the authorized capital. This situation has led to the fact that in Russia, despite the new challenges and *threats to national security*, the dominance of foreign law firms continues.<sup>106</sup>

The Concept Paper recognizes the right of these international firms to advise as to foreign law, and the rights of foreigners to qualify as Russian lawyers if they have a Russian law degree or a recognized foreign law degree, subject to the principle of reciprocity.<sup>107</sup> But it goes on to state that:

It is also necessary to establish that from a certain point on, legal services on issues of Russian law (including judicial representation) on the territory of the Russian Federation will be able to be provided only by those organizations that are registered in accordance with Russian law as legal entities that are lawyer formations. At the same time, it is necessary to provide for a number of measures that exclude direct or indirect control over such lawyers' entities to foreign persons, in particular, by setting restrictions on the subject composition of members of lawyer formations, etc.<sup>108</sup>

Such a restriction would certainly require the offices of international firms to reorganize as Russian "lawyer formations" and to ensure that the entity so created is owned and controlled by Russian qualified lawyers. The issue is what is meant by "indirect" control: typically, when international firms are confronted by local legislation of this kind a local firm is created and some of the partners are also partners of an international structure. There could be questions about the contractual relations between the local and international firm regarding the use of the name and resources of the international firm and the presentation of the local office as part of an international network.

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106. 2017 CONCEPT PAPER, *supra* note 81, at § 5.6 (emphasis added).

107. 2017 CONCEPT PAPER, *supra* note 81, at § 5.

108. 2017 CONCEPT PAPER, *supra* note 81, at § 5.

As a result of these new provisions in the Concept Paper, representatives of the international law firms met informally on several occasions in November and December 2017 to formulate a common position to express concern about this aspect of the 2017 Concept Paper. A letter sent to the Ministry of Justice in early December on behalf of 18 international law firms expressed support for the goals and objectives of the Concept and underscored the leading role of international law firms in Russia in providing qualified legal assistance to Russian legal entities and individuals. The letter noted that the Russian offices of international law firms have been providing services for many years which have received recognition for the high quality by the most demanding Russian clients, including State owned and controlled entities. The letter also highlighted the contribution made by international law firms to the improvement of Russian legislation and the education of an entire generation of Russian lawyers in the best international legal practices. This role “... *raises the general professional level of Russian lawyers and ensures healthy competition, which best suits the interests of the consumers of these services – Russian clients.*”<sup>109</sup>

However, the letter raised concerns about the provisions of the Concept limiting the provision of Russian legal advice to Russian legal entities, excluding direct or indirect control over such entities by non-Russians.

It seems that the implementation of this part of the Concept leads to the actual exclusion of international law firms . . . . Even if the Russian offices of such firms are transformed into [Russian] legal entities, the requirement of ‘lack of control’ will prevent their further normal interaction with the international network of the relevant law firm (whether on sharing experience, using a single brand and other general assets of the firm, allocating financial resources, other internal issues, etc.).<sup>110</sup>

The result, according to the letter, would be the exclusion of international law firms from the Russian market, resulting in higher costs to the clients, decrease in the quality of legal services resulting in a lower level of legal support for Russian organizations and citizens, thus contradicting the goals of State policy as expressed in the Justice

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109. Letter on behalf of 30 international law firms’ with offices in Russia to the Ministry of Justice on Prime Minister Dmitry Medvedev (Dec. 7, 2017) (on file with the authors.).

110. *Id.*

Program and the Concept itself.<sup>111</sup> The international firms also solicited and obtained support for their concern from the bar authorities in the UK, France and the United States. The Law Society of England and Wales, the Paris Bar Council, the American Bar Association and the Association of the Bar of the City of New York wrote to the Ministry of Justice with respect to the treatment of foreign lawyers and law firms to emphasize the limited restrictions applicable to the practice of law by foreign lawyers and law firms in their respective jurisdictions.

These letters were followed by a more detailed commentary of the 2017 Concept Paper in the form of a revised version incorporating suggested modifications, sent on December 5, 2017 to the Ministry of Justice on behalf of over 30 international firms in Russia. Most of the proposed changes related to the regulation of foreign law firms, while maintaining support for the creation of a single regulated profession with common professional and ethical requirements. The comments included other suggested changes to the Concept and an expression of willingness to provide further comments and suggestions in cooperation with the Ministry. As a result of these letters, various meetings took place in the ensuing months between representatives of international firms and Denis Novak, the Deputy Minister of Justice responsible for the Concept.

## 6. Current Status

The status of the reform was unclear at the time of finalizing this Article (November 2018). General expressions of continued support were made throughout 2018 by top government officials,<sup>112</sup> and there were signals that a new version of the Concept Paper would be forthcoming. Many question marks remained, however. Shortly before the issuance of the 2017 Concept Paper an alternative draft law

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111. Letter on behalf of 30 international law firms' with offices in Russia to the Ministry of Justice on Prime Minister Dmitry Medvedev (Dec. 7, 2017) (on file with the authors.).

112. Support of the 2017 Concept Paper was expressed by Prime Minister Dmitry Medvedev in May 2018 at the Saint Petersburg International Legal Forum, a yearly professional gathering. In a subsequent forum later that year the vice-minister of Justice emphasized the government's ongoing efforts to introduce measures facilitating the conduct of economic activity by advocates. Marina Nagornaya, *Denis Novak razkazal pro budushye advokatskoe AO OOO* [Denis Novak spoke about the future of advocate joint-stock companies and LLCs], *NOVAYA ADVOKATSKAYA GAZETA* (Oct 10 2018), <https://www.advgazeta.ru/novostinovosti/denis-novak-nazval-odnim-iz-glavnykh-sobytiy-goda-aktivnoe-obsuzhdenie-proekta-kontseptsii/>.



was introduced in the Duma by deputy Pavel Krasheninnikov, Chairman of the State Duma Committee on State Building and Legislation and former Minister of Justice (1998 – 1999) under Boris Yeltsin. The draft law essentially proposed a much more modest reform, i.e. that representation in civil, administrative and arbitration courts would require only a Russian law degree (or a foreign law degree with passage of an examination by an association of jurists, the All-Russia Association of Lawyers).<sup>113</sup> This proposed law did not address the applicability to the unregulated sector of a code of ethics, discipline for ethical breaches or legal privilege. It too appeared to be languishing in the procedures of the Duma.<sup>114</sup>

### *B. Challenges to Reform*

All of these successive attempts at reform have highlighted the following central matters that must be addressed in any reform plan:

1. The definition of the parameters of the profession: extension of the monopoly, to court representation and/or all other legal services.
2. Modes of exercise, allowing the creation of limited liability structures equivalent to partnerships or limited liability companies, and related employment and taxation issues to allow the structures of exercise to be competitive with the commercial entities that jurists currently use.
3. Ensuring the provision of quality legal services on an affordable basis to all citizens, particularly in light of the constitutional right to legal assistance contained in Article 48 of the Russian Constitution, and setting appropriate levels of remuneration to be paid by the state to lawyers who provide legal aid.
4. Transitional issues, particularly with respect to admission of jurists with a certain number of years of experience.
5. The question of in-house lawyers.
6. The need for all segments and sub-segments of the profession, despite their extreme diversity, to “buy in” to the need for reform and to participate fully in the process. In this respect the

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113. See Draft law, *On the Representation of Parties in Courts and on Amending Certain Legislative Acts* (Sept. 27, 2017), <http://sozd.parlament.gov.ru/bill/273154-7> [<https://perma.cc/BQ3Z-R6J3>].

114. *Id.*

particular position of the offices of the international firms will need to be addressed.

With this background as a starting point, we now present three contrasting perspectives on the reform and its conduct.

### III. THREE CONTRASTING PERSPECTIVES ON THE REFORM

#### A. *Achieve Consensus First and in the Meantime Reform the State Apparatus (presented by Delphine Nougayrède)*

When looking at the long series of attempts at reforming the Russian legal profession, the first comment that comes to mind is that it does not conform with the traditional representation of a forceful Russian government imposing its will on a passive society. Rather, this long process reveals the growing complexity of Russian society, activism of certain circles within it and, uncharacteristically, a certain cautious restraint that seems to have been adopted in this matter by the government. While the objective of creating a well-regulated and expanded legal profession is altogether unimpeachable, the manner of achieving the desired result is just as important; the government's caution seems to show that it is aware of this fact and unwilling to force through its reform. The objections that were provoked by all of the successive Concept Papers in turn, by different groups within the legal profession and for different reasons each time, show the difficulty of introducing potentially exclusionary controls in segments of Russian society that have, for the last twenty-five years, developed organically outside of state intervention or control. The themes that I would emphasize pertain to overall timing and process, as well as the symmetrical reform that has emphatically *not* been embarked upon by the government, i.e. that of the *state-controlled* components of the justice system.

1. This reform is but a chapter in a wider systemic reform of the Russian legal system, which will require substantial time

The 2014 Justice Program produced by the government was not a novel initiative. It is a further iteration of the long-stated ambition of Russian governments to reform and if possible improve the country's legal institutions. If one were to identify a single key difficulty impeding this particular attempt at reform, it would be the perception that it is driven mainly in the interests of a small segment of the

profession, i.e. the *advokatura*, to the detriment of others. Generally, I would argue that this proposed reform should not be imposed by the government until it has been accepted by the majority of existing practitioners. Not to lose any more time with its wider ambition of improving the country's legal system, however, the government should devise an equally ambitious reform of the public justice and law enforcement apparatus, whose roles for the rule of law are arguably even more important and which, unlike the private professions, are placed under its direct control.

2. Opposition to the reform has been widespread in the past, for very different reasons that all had merit

Opposition to reform attempts over the years has included much of the unregulated practitioners, some parts of the *advokatura*,<sup>115</sup> and also, though for different reasons, NGOs and rights defenders.<sup>116</sup> The opposition has also at times included various judges,<sup>117</sup> and according to sources some parts of the government other than the Ministry of Justice.<sup>118</sup> As was illustrated by the alternative 2017 bill introduced in the Duma by one of the deputies from the ruling party, there is no consensus. This is not surprising: although it concerned only 35,000 professionals or so at the time,<sup>119</sup> the 2002 Law on the *Advokatura* was adopted after a full decade of discussion and confrontation. It

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115. Opposition to earlier reforms was mainly because of absence of an entrance exam (for example Mr. Reznik's views cited below). Some individual advocates expressed the view that the market was a good "tester" for unregulated practitioners. See interview of Nikolai Kipnis, a member of the qualification commission of the Moscow Chamber of Advocates. See Nikolai Kipnis, *Nam ne nuzhno Ministerstvo Advokaturi* [Nikolai Kipnis: We do not need a Ministry of the *Advokatura*] MKRU (June 11, 2014), available at <http://kavkaz.mk.ru/articles/2014/0606/11/nikolay-kipnis-nam-ne-nuzhno-ministerstvo-advokatury.html> [<https://perma.cc/Q9XS-9XP7>].

116. See *infra* notes 137-40.

117. Judges from the Supreme Court and Intellectual Property Court publicly supported a monopoly for advocates only at cassation or supervisory levels. *Pochemu advokatskaya monopoliya otkladaetsya?*, *supra* note 69.

118. Ekaterina Moiseeva & Timur Bocharov, *Plyusi i minusi advokatsloy monopoli*, *VEDOMOSTI* (Jan. 29, 2016), <https://www.vedomosti.ru/opinion/articles/2016/01/29/625981-plyusi-minusi-advokatskoi-monopolii> [<https://perma.cc/68V3-G3YB>]; Sofia Okun, *Reforma ne terpit sueti*, *KOMMERSANT* (May 15, 2016), <https://www.kommersant.ru/doc/2987967>. [<https://perma.cc/4STV-YGR3>].

119. The figures cited by Jordan are 20,000 members in the Federal Union of Advocates in 1997, representing the "historical" *advokatura*, and 13,000 in the Guild of Russian Advocates in 2000, representing the parallel colleges. See JORDAN, *supra* note 2, at 73.

eventually ended with a consensual merger of the competing groups without any entry barriers or group exclusions being imposed on any of their members.

Although the *advokatura* appears to unreservedly gain from the proposed reform, its position has not been monolithic. The current national leaders actively supported the reform from the outset, but there was opposition in some of the regional chambers.<sup>120</sup> Previous *advokatura* leaders and other advocates had been anxious to also preserve certain dominant concepts (of legal “assistance” rather than “services”) and existing forms of direct, un-intermediated practice of law within the *advokatura*. Commercial practitioners being much more numerous and operating along entirely different paradigms, some leaders of the *advokatura* saw a risk of institutional destabilization of their profession. To cite the views of Genry Reznik, a historical leader of the Moscow bar and widely respected public figure:

I must admit that we are not very happy to accept a large army of gentlemen, whose sense of belonging to the legal profession still needs to be understood. We can only accept lawyers having graduated [from law school] and only on the basis laid down in the Law on *Advokatura*. Undoubtedly, these formerly free lawyers newly joining the corporation of advocates will have their own ideas about the practice of law, they will demand their own piece of power in the bodies of legal self-governance. For us, it is a headache.”<sup>121</sup>

A second plank from the *advokatura* is that they did not support the idea of a second regulated profession as a matter of principle. One of the reasons for this, it would seem, is the (entirely legitimate) desire to better share the burden of mandatory legal representation in criminal matters, which is heavy, poorly remunerated and currently placed on their shoulders only. But at the same time, the notion of the *advokatura* becoming the basis for a single profession including all the commercial practitioners is what drives the pressure to change traditional forms of practice - thereby generating internal resistance.

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120. Ekaterina Trifonova, *Yuristi ssoryatsya iz-za zatyanyvsheysya reformi* [*Lawyers quarrel over delayed reform*], NEZAVISIMAYA GAZETA (Oct. 14, 2018), [http://www.ng.ru/politics/2018-10-14/3\\_7331\\_reform.html](http://www.ng.ru/politics/2018-10-14/3_7331_reform.html) [https://perma.cc/4BPN-NJ74] (reporting the fear in some regions that the reform will increase the powers of the Federal Chamber of Advocates).

121. *Advokatura ne ishet preferentsii*, NOVAYA ADVOKATSKAYA GAZETA (Mar. 18, 2010), <http://www.advgazeta.ru/rubrics/5/439>.

That the government too has rejected the option of a second regulated profession is peculiar. From the standpoint of process, a dual profession might, on the face of it, have been an easier solution in the Russian context. Dual regulated professions exist in a number of countries, including mature systems such as the United Kingdom, where solicitors and barristers co-exist and are regulated separately. A dual model was recently implemented in neighboring Kazakhstan, which like Russia had a large unregulated professional segment.<sup>122</sup> The Russian government's stated argument against a second profession is that it does not believe that "self-regulating organizations" are able to properly self-police themselves.<sup>123</sup> This reasoning was already present in the 2008 bill and repeated in the Concept Papers: the perceived risk is that "access to the [legal services] market [will be] given to participants that only formally satisfy the established criteria."<sup>124</sup> The main advantage that the government sees in the *advokatura* is that it already has its own rules of admission and professional conduct. Yet, it is widely accepted (not only by unregulated practitioners) that self-policing within the *advokatura* is not fully satisfactory.<sup>125</sup> An uncharitable view of the government's position would be that it has unquestioningly espoused the preferences of the national leaders of the *advokatura*. It seems more likely, however, that the government is just being pragmatic: the best can be the enemy of the good and it is simpler to start from existing institutions rather than create new ones from scratch. The failure of the unregulated profession to offer a structured alternative proposal has also reduced the number of options on the table.<sup>126</sup>

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122. *Law of the Republic of Kazakhstan on the Activities of Advocates and Legal Assistance* (July 5, 2018), [http://online.zakon.kz/Document/?doc\\_id=33024087](http://online.zakon.kz/Document/?doc_id=33024087) [<https://perma.cc/4DPY4DPY-BNRK>] (creating a new regulated profession of "legal consultants" alongside advocates).

123. See *supra* Part II.A.4; *supra* note 92.

124. 2016 CONCEPT PAPER *supra* note 80, at 42, § 4.1 (Rus.).

125. See ICJ Report, *supra* note 2, at 67 (examining 'pocket advocates' and other such phenomena) (cautioning that "these problems should not be confused with the issue of unification, which should not be seen as a magical solution to every problem").

126. Kazakhstan is an interesting point of comparison in this regard: the introduction there of a second regulated profession (of "legal consultants") was apparently facilitated by the fact that these practitioners already had a representative organization, the "*Kollegia Kommercheskikh Yuristov*" or "Kazakhstan Bar Association," with its own rules of admission and conduct. On the proposed formation of a voluntary organization by the unregulated professionals in Russia, see *infra* Part III.C.

There may be, in addition, a more hidden dimension to this reform touching on the role of the state in the legal profession. In 2010, Mr. Reznik's words were that "we are talking not about the interests of the *advokatura*, but about the interests of the state," and "This initiative does not come from us."<sup>127</sup> In the 2016 Concept Paper, the government counted as a positive the fact that "within the institutions of the *advokatura*," there is "equal representation of *state* and intra-professional governance."<sup>128</sup> Not surprisingly, the government is expressing preference for an institution in which the state apparatus is already embedded.<sup>129</sup> Seen from this angle, attempts to subordinate all the unregulated practitioners to these organs can be interpreted as expanding levers of executive or bureaucratic interference. Advocates are accustomed to routinely dealing with state officials, not only in the exercise of their principal mission of criminal defense but also in their organs of self-governance. This is not the case for unregulated practitioners, particularly in the commercial sector; these professionals face much less interaction with the state bureaucracy and might even be able to build entire careers avoiding it altogether. The desire of many unregulated practitioners to maintain as much distance as possible from the state apparatus surely explains some of the resistance, although for evident reasons this concern is not always articulated by those individuals who risk intervening in the public debate.<sup>130</sup>

Opposition by unregulated practitioners to the successive Concept Papers was expressed from the very onset. While a number of

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127. Trifonova, *supra* note 120. These comments were in connection with the 2008 bill. See *supra* Part II.A.1.

128. See 2016 CONCEPT PAPER, *supra* note 80; *supra* Part IV.1. This argument (of "equal" state representation) no longer appears in the 2017 Concept Paper.

129. The regional qualifications commissions controlling admission into the profession and disciplinary proceedings comprise (in addition to seven advocates) two representatives of the Ministry of Justice and two representatives of the regional legislature (as well as two judges). See Law on *Advokatura*, *supra* note 19, art. 33(1). For Jordan, see *supra* note 2, the presence of officials from outside the profession was a source of concern for its independence. See *id.* at 124.

130. For a provocative expression of this concern by a Russian lawyer practicing in London, see Dmitry Gololobov, *Advokatskaya Monopoliya 2.0 ot FPA i AYur: smertelnyi boy agntsev s kozlichami*, [Advocates' Monopoly from FPA and Association of Russian Lawyers: a Battle to the Death Between Lambs and Goats] (Oct. 30, 2017), <https://legal.report/author-20/advokatskaya-monopoliya-2.0-ot-fpa-i-ayur-smertelnyj-boj-agncev-s-kozlicshami> [<https://perma.cc/K6LQ-KTS2>].

individuals and organizations spoke out,<sup>131</sup> there has not been any unified organization or representation formulating a single collective response. Within the ministerial working group, representatives of the unregulated sector tended to come from in-house counsel, like the Association of Corporate Lawyers (AKYuR), rather than from unregulated law firms (and until the 2017 Paper, none of the foreign firms were represented<sup>132</sup>). The sheer diversity of the unregulated professionals meant that they were unable (or unwilling) to formulate a structured alternative proposition, for example involving the creation of a second regulated profession.

The views on the reform that were expressed by the NGO sector and rights-defenders were based on an altogether different priority: meeting the legal needs of under-privileged constituencies. One of the idiosyncrasies of Russian legal development since the fall of the Soviet Union is that non-criminal legal aid and public interest lawyering has generally been handled not by advocates or legal practitioners, but by the NGO sector.<sup>133</sup> This is in line with the historical Russian tradition of representation in court not by lawyers (whether or not regulated), but by trusted individuals. In many regions of the country, NGOs are often the only available alternative to self-representation and the work may

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131. See, e.g., Konstantin Dozhdev, *Zhaloba v FAS RF ot Chlenov Mezhregional'noj Obshestvennoj Organizacii "Palata Sudebnyh Poverennyh" na Protivopravnye Dejstvija MJu RF pri Realizacii Programmy "Justicija"*, ZAKON (Dec. 19, 2016, 5:31 PM), [https://zakon.ru/discussion/2016/12/19/zhaloba\\_v\\_fas\\_rf\\_ot\\_chlenov\\_mezhregionalnoj\\_obschestvennoj\\_organizacii\\_palata\\_sudebnyh\\_poverennyh\\_na](https://zakon.ru/discussion/2016/12/19/zhaloba_v_fas_rf_ot_chlenov_mezhregionalnoj_obschestvennoj_organizacii_palata_sudebnyh_poverennyh_na) [<https://perma.cc/BMQ2-A54M>] (persuading the legal community to support a draft complaint written by the Interregional Association of Court Representatives to protest the Ministry of Justice proposed reforms); Evgeny Shestyakov, *Konseptsia Izminilas'. T chast' L-aya, Povyevuyushaya o Tom, Kak Sovmestno Potrudnilis' Yurbiznes i Advokatura Nad Proektom Konseptsii Reformi Rinka Yurpomoshi i Shto iz Etogo Vishlo i Kakoi iz Etogo Sleduet Vivod*, ZAKON (Dec. 2, 2015, 4:08 PM), [https://zakon.ru/blog/2015/12/2/koncepciya\\_izmenilas\\_chastchast\\_lya\\_povestvuyushhay\\_a\\_o\\_tomtom\\_kak\\_sovmestno\\_potrudilsya\\_yurbiznes\\_i\\_advokatu](https://zakon.ru/blog/2015/12/2/koncepciya_izmenilas_chastchast_lya_povestvuyushhay_a_o_tomtom_kak_sovmestno_potrudilsya_yurbiznes_i_advokatu) [<https://perma.cc/N9JN-QAH6>] (writing from the perspective of a managing partner of the GPK Intellect-S, arguing that the reform proposed by the Ministry of Justice does not suit the Russian legal business); Evgeny Shestyakov, *Dolzhi-li Advokati Obladat' Monopolyey na Yuruslugi?*, PRAVO (Oct. 26, 2010), <https://pravo.ru/review/view/40979/> [<https://perma.cc/9E2W-NS8B>] (explaining that, when discussing reform of the Russian legal profession, one may only talk about prospects and consequences in an abstract way).

132. For the views of some of the foreign firms just before the 2017 Concept Paper, see Chris Johnson, *Is Reform Coming to the Russian Legal Market?*, AM. LAW. (Jul. 28, 2017, 08:33PM33 PM), <https://www.law.com/americanlawyer/almID/1202793478216/Is-Reform-Coming-to-the-Russian-Legal-Market/> [<https://perma.cc/Z7KT-YVNP>].

133. See ICJ REPORT, *supra* note 2, at 12.

involve NGO employees who never trained as lawyers. In 2015, the Presidential Council for Civil Society and Human Rights (one of the organizations in the ministerial working group) commented that whatever the reform of the *advokatura*, it would be necessary to introduce legislation to

ensure that non-advocate forms of free legal assistance in court provided by specialist rights defenders (*parvozashitnikh organizatsii*) not having the status of advocates and not having a higher legal education *be maintained* – on the condition that they were not previously dismissed from professional legal organizations (*advokatura*, notaries, employees of law enforcement and judicial bodies).<sup>134</sup>

Similar views were expressed by NGO representatives reacting to the 2015 Concept Paper, when they pointed out that it did not formulate any proposition to ensure access to non-criminal legal aid.<sup>135</sup> Human rights advocates likewise opposed legislation requiring that individuals appearing before the administrative courts should hold a law degree.<sup>136</sup> In short, Russian human rights and public interest groups consistently opposed all new restrictions on the right of non-lawyers to engage in legal aid or pro bono work as a matter of principle.

These views were eventually heard by the government, which excluded legal aid lawyering from the proposed monopoly in the 2017 Concept Paper. This exclusion is, of course, difficult to reconcile with the stated objective of raising quality across the board (quality in legal aid being no less important than in ‘paying’ legal services). Yet allowing specialized NGOs to practice law outside of the regulated

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134. SOVET PRI PREZIDENTE ROSSIYSKOY FEDERATSII PO RAZVITIYU GRAZHDANSKOGO OBSHCHESTVA I PRAVAM CHELOVEKA [COUNCIL UNDER THE PRESIDENT OF THE RUSS. FED’N FOR THE DEV. OF CIV. SOC’Y AND HUM. RTS.] (Aug. 18, 2015), <http://president-sovet.ru/documents/read/386/#table-of-contents> [<https://perma.cc/W85W-R6EE>] (emphasis added).

135. See, e.g., Dmitry Shabelnikov, *Professionalnie Razgovori v Polzy Bednikh*, VEDOMOSTI (Apr. 3, 2016, 9:56 PM), <https://www.vedomosti.ru/opinion/articles/2016/04/03/636218636218-razgovori-bednih> [<https://perma.cc/XB6T-DSD8>] (explaining that the existing legal infrastructure prevents lawyers from providing pro bono assistance to the poor).

136. See, e.g., Anastasia Kornia, *Grazhdane Dolzhni Imet’ Pravo Zashishat’ Sami, Schitaet Ella Pamfilova*, VEDOMOSTI (Apr. 3, 2016, 11:22 PM), <https://www.vedomosti.ru/politics/articles/2016politics/articles/2016/04/04/636257-grazhdane-zaschischat-sebya> [<https://perma.cc/KW35-LMAH>] (arguing that citizens should have the right to represent themselves).



profession correctly acknowledges the imperative of ensuring sufficient access to law. It also shows that compromise is possible in favor of those segments of the unregulated sector that are viewed as particularly valuable.

There are some constitutional matters that also need addressing. None of the successive Concept Papers have addressed the contrary jurisprudence of the Constitutional Court, which banned any advocate monopoly on court representation in 2004 and has not to date reversed its position.<sup>137</sup> In a reform whose stated aim is to improve the legal system, this will need to be resolved.<sup>138</sup> Many important details of the proposed reform also remain to be clarified, such the mode of passage of mandatory entrance exams by all practitioners. Although this is stated to be a simplified exam for the more experienced practitioners, there are no exemptions and leading individuals from the unregulated sector, some with twenty-five years of experience and very well respected, will have to sit an exam. This will be a sensitive phase of the reform. As a point of comparison, the 2002 Law on Advokatura did not impose any entrance exams for pre-existing practitioners in the parallel colleges.<sup>139</sup> Other countries having similarly merged pre-existing 'less regulated' segments of the legal profession into that of full advocate were only able to do so by foregoing potentially exclusionary entrance examinations (France being one example).<sup>140</sup>

### 3. The Real Priority is Elsewhere: To Reform the State Apparatus

In light of the conflicting views and interests (all of which have their own merit), there is at least one area in which the government could take useful action without delay, if indeed the goal is to improve

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137. See Russian Federation of Collection of Legislation, *supra* note 17.

138. See Kipnis, *supra* note 115 (commenting on this jurisprudence).

139. Law on Advokatura, *supra* note 19, art. 40.1.

140. All registered French *conseil juridiques* automatically became members of the new profession on the date of entry into force of the relevant law. Registration as a *conseil juridique* required three years of experience. Loi 71-1130 du 31 décembre portant réforme de certaines professions judiciaires et juridiques [Law 71-1130 of December 31, 1971 reforming certain judicial and legal professions], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE] (Jan. 5, 1972), p. 131, art. 1. (Fr.). Another relevant comparison may be that of Georgia (the former Soviet republic), where all practicing lawyers, including the advocates, were required to take a new entrance examination (judges were also entirely renewed by exam). See CHRISTOPHER P.M. WATERS, COUNSEL IN THE CAUCUSUS: PROFESSIONALIZATION AND LAW IN GEORGIA 91-115 (W.B. Simons ed., 2004) (discussing Georgian reform).

the legal system and rule of law. The list of sources and commentary on the systemic weaknesses of the Russian judiciary and law enforcement is long (and not one reserved to Western commentary alone).<sup>141</sup> Suffice to say that the Russian government itself proclaimed the fight against “legal nihilism” and increasing citizens’ trust in the legal system as main goals of reform since 2008. I would argue that the foremost factor creating these problems is the behavior not of private advocates, jurists, or legal practitioners, but of the state apparatus, e.g., the law enforcement agencies and in some cases the courts.

The *advokatura* is on the front line of these difficulties and has been so for several decades. Its main occupation is criminal defense, but in this mission, it is routinely thwarted. In fact, the argument can be made that the difficulties routinely faced by advocates go a long way to explain why unregulated professionals have never been interested in seeking out the formal status of advocate, despite the legal protections that it confers on paper. The most salient difficulty faced by advocates is the routine disregard of client-attorney privilege, including through the conduct of illegal searches. Another unfortunate practice is the summoning of defense advocates as witnesses in their clients’ own case. The sheer variety of violations of the formal rights of advocates is described in recurring reports of the Federal Chamber of Advocates, as for example the latest report for the period 2015-2016:

In the period between the [2015 and 2017] Congresses, 1592 violations of the professional rights of advocates were registered by the [regional RF] chambers. . . . During the reporting period, 6 advocates died in connection with their professional activities. 8 advocates suffered harm to their health. Infringements on advocate-client confidentiality increased by 60% (from 367 in the previous reporting period to 603 in this one). The most common

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141. For Russian commentary *see, e.g.*, Vadim Volkov and Aryna Dzmitriyeva, *Recruitment Patterns, Gender, and Professional Subcultures of the Judiciary in Russia*, 22 INT’L J. LEGAL PROF. 166, 173, 186 (2015) (determining that the largest supplier of judges is the support apparatus of courts, e.g., assistants, secretaries, and clerks, followed by the prosecution service and other law enforcement organizations, and concluding that the existing patterns of recruitment have affected the professional culture of the judiciary by strengthening conformity, legalism, and formal bureaucratic orientations); *see also* Vladimir Rimskii, *Bribery and the Judiciary*, 51 RUSS. L. & POL. 40 (2013) (discussing corruption in the judiciary and concluding that “judicial reform has made bribery more widespread in the Russian courts, with business people the main target of extortion.”). As regards Western commentary, the literature is voluminous. For a somewhat sanguine view on Russian courts and the rule of law, *see, e.g.*, Kathryn Hendley, “Telephone Law” and the “Rule of Law”: the Russian Case, 1 HAGUE J. ON THE RULE OF L. 241 (2009).

violations were the summons of advocates for questioning as witnesses in the criminal case of the defendant, and the conduct of illegal searches in the office (or residential) premises of advocates. These two types of unlawful actions vis-a-vis advocates amounted to 47.0% of the total number of violations of advocate-client confidentiality . . . . The number of illegal searches of office or residential premises of advocates was not reduced. There were 44 such cases before the previous Congress, and 42 in the last two years. Obstruction or interference in the activity of advocates continued by means of hiding the location of defendants or refusing access to defendants under various pretexts (obsolete form of the advocate certificate, lack of written permission of the investigator, lack of free premises for meetings with defendants, and other pretexts). The number of refusals received by advocates seeking meetings with defendants increased by 63% and amounted to 198 (in the previous reporting period there were 134 such violations). There was no significant reduction in illegal operative-investigative searches against advocates. In the previous reporting period, there were 37 illegal cases of such measures, in this period - 31 cases . . . . On 4 February 2015, a court illegally convicted advocate of the Chamber of Advocates of the Republic of Khakassia V.G. Dvoryak for divulging preliminary investigation data which had already been made public by other sources. . . .<sup>142</sup>

Similar reports have been issued by the Federal Chamber every two years since 2007.<sup>143</sup> The upshot is that if serious changes are indeed necessary within the justice system, it might be reasonable to focus on the state apparatus itself.<sup>144</sup> All of these problems are Soviet legacies that have yet to be overcome. They are one reason why the *advokatura* is organized the way it is, that is, in chambers of independent practitioners who provide not legal “services” but legal “assistance” to individuals as a constitutional right (Article 48 of the Constitution).

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142. *Otchet o Dejatel'nosti Soveta FPA RF za Period s Aprelja 2015 g. po April' 2017 g.*, FEDERAL'NAJA PALATA ADVOKATOV RF [*Otchet o Deyatel'nosti Sovyeta FPA RF za Period s Aprely*], FEDERALNAYA PALATA ADVOKATOV RF (Apr. 19, 2017), [http://fparf.ru/documents/council\\_documents/council\\_reports/37679/](http://fparf.ru/documents/council_documents/council_reports/37679/) [<https://perma.cc/5ZEX-H5PF>].

143. *Id.*

144. Another problem often cited by commentators like Mr. Reznik, is that of the very low rate of acquittals in the criminal court system. He attributes this fact to the mindset of criminal judges, many of whom are either junior judges or former employees of the law enforcement bodies. According to him, these individuals simply do not accept the principle of presumption of innocence. *See* Reznik, *supra* note 117.

The Concept Papers downplay the distinction between legal “services” and legal “assistance” and write that it is entirely possible to reconcile these legal categories. This is surely true in theory, but if nothing else, the historical *advokatura*’s defense of its preferred concept of non-entrepreneurial legal “assistance” rather than “services” shows that it deeply values its culture of rights-defense of citizens against the state. Given the historical legacy and institutional challenges in the country, this professional culture and sense of identity must surely be preserved and nurtured rather than denigrated or diluted.<sup>145</sup>

The *advokatura*’s self-image also explains why some advocates had difficulty accepting that advocates may in the future work within law firms in a position of subordination under employment agreements, and that retainer contracts be signed by law firms not individual advocates. As Mr. Reznik explained in the past,

responsibility towards clients at the end of the day must be borne by the advocate, because only the advocate, and not a legal structure, can perform the activity of an advocate. There is no legal firm present in a court, there is no legal firm in the relationship with a client. Even if the client signs an agreement with a firm, the work is performed by a concrete individual. And these concrete individuals are those who must bear individual responsibility vis-à-vis the clients.<sup>146</sup>

There is a simple human logic to this vision of a direct, un-intermediated advocate-client relationship in a criminal system where defendants face negligible chances of success against a far more powerful adversary. The culture and practices of the commercial profession are entirely different. It is an entrepreneurial profession that flourished during the high growth 2000s, has little in common with the traditional defense bar and spends most of its efforts facilitating transactions between legal entities rather than defending individuals against the state. Contrary to the criminal bar, the commercial law profession has not generated many outspoken individuals who risk

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145. On the relations between the *advokatura* and law enforcement, see Kazun Anton Pavlovich, *Polozhenia Rossiskikh Advokatov v Pravookhranitel'nikh Systemie: Mezhdru Kooperatsiei i Protivosostoyaniem*, in XVI APRILSKAYA MEZHDUNARODNAYA NAUCHNAYA KONFERENTSIYA PO PROBLEMAM RASZVITIYA EKONOMIKI I OBSHESTVA 793–802 (E.G. Yasin ed., 2016), <https://publications.hse.ru/chapters/180542779>. The author concludes that the *advokatura* community encourages those advocates who resist the law enforcement system, while it marginalizes those advocates who prefer to cooperate. This is surely a valuable feature of the current *advokatura*.

146. See *Advokatura ne ishet preferentsii*, *supra* note 121.

intervening in the public debate. Again, the existence of differing professional cultures would appear to have militated for a second regulated profession, which could have operated with its own rules of practice, meanwhile allowing the rights-defense culture of the current *advokatura* to continue unaffected. This second profession could have been placed under the firm obligation to contribute, *financially*, to the burden of mandatory criminal representation that is currently shouldered by the *advokatura* alone.

#### 4. To What Extent Were Foreign Analogies Fully Analyzed?

As was previously indicated, the Concept Papers include a comparative review of lawyer regulations in selected foreign jurisdictions, being Germany, France, the United Kingdom, Japan, Belarus, Armenia, Kazakhstan, Estonia, India and the People's Republic of China.<sup>147</sup> The analysis that is conducted is very cursory, however. It focuses mainly on the advocate (or barrister) segment of the domestic professions. Little attention is paid to the existence of dual professions and unregulated sectors of practice in many of these countries (e.g., the United Kingdom, Armenia, Kazakhstan, Estonia or the People's Republic of China).<sup>148</sup> The model ultimately favored by the Concept Papers (of a single *advokatura* profession with a full monopoly) seems to be closer to the German, Indian, French and Japanese models, which are those with the highest entry barriers. This may have been necessary to win over the advocates (or their national leadership), but it is unclear that the model is a desirable one for Russia in the short term in light of its current circumstances (weak rule of law, small number of advocates, high volume of court cases, divided practitioners with differing professional cultures).

The point is often made that Russia finds itself in a position that is unique. In fact, there appear to be other countries with large contingents of unregulated legal practitioners (Mexico for example).

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147. See generally Laurel S. Terry, *Putting the Legal Profession's Monopoly on the Practice of Law in a Global Context*, 82 *FORDHAM L. REV.* 2903 (2014) (concerning the perils of international comparisons).

148. While the ICJ report is favorable to the idea of unifying the Russian profession, it also points out that this is not a universal model, saying "[i]n a number of jurisdictions, members of the bar association have a monopoly on the provision of legal advice and/or legal representation in court. However, in other jurisdictions lawyers enjoy monopoly only over representation in courts, or there could be no monopoly at all." ICJ REPORT, *supra* note 2, at 60.

Situations such as these can be explained by the singular circumstances and history of each country. One might also note, with some academic scholars, that the existence of a monopoly is not necessarily equivalent to greater quality<sup>149</sup> and that in certain circumstances regulations can be used to protect not the general public but the interests of incumbents or groups able to influence their design.<sup>150</sup>

### 5. A Word on the Position of Foreign Lawyers

Both the 2008 draft law and 2014 Justice program were placed under the headline banner of fighting ‘legal nihilism’, reducing corruption and enhancing the quality of the legal system. These are unimpeachable motives. Already in the 2008 draft, however, there were signs that the government also had in mind controls over the activities of foreign lawyers and wished to reciprocate the practices of certain foreign countries. In the introductory report to the draft law,<sup>151</sup> it was written that

Current legislation does not include any qualification requirements for foreign lawyers, who are active in Russia and provide services on Russian law [ . . . ]. This not only does not correspond to the interests of society and the state, but it also places Russian lawyers in a difficult situation, for they are always subject to very strict standards in foreign countries.<sup>152</sup>

The authors pointed out, tellingly, that this “harmed the prestige of Russia in the international arena.”<sup>153</sup> The most recent version of the Concept Paper (2017) reiterates this concern on the position of foreign lawyers or law firms, indirectly linking them to “*threats to national security*.”<sup>154</sup> Not surprisingly, this language went on to trigger the somewhat fevered collective response of international law firms that was described above.

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149. See Terry, *supra* note 147 (pointing out that “[a]lthough there is some information available that links regulation to quality, there appears to be very little reliable empirical evidence that examines the relationship between the lawyer’s monopoly and issues of quality and access.”).

150. See *infra* Part III.C. and accompanying notes. See, e.g., Richard L. Abel, *Lawyer Self-Regulation and the Public Interest: A Reflection*, 20 LEGAL ETHICS 115 (2017)

151. *Vestnik*, *supra* note 73, at 42-47.

152. *Vestnik*, *supra* note 73, at 43.

153. *Vestnik*, *supra* note 73, at 47.

154. See *supra* Part II.A.5; Letter on behalf of 30 international law firms with offices in Russia to Prime Minister Dmitry Medvedev (Dec. 7, 2017) (on file with authors).

Several remarks seem appropriate here. First, this language does reveal objectives other than the concern for quality, and seem to have a political dimension. Yet at the same time, it seems entirely appropriate that the Russian government should wish to nurture its domestic legal profession, a policy that has after all been pursued for decades by countries such as China, India or Brazil. Restrictions over foreign practitioners and foreign law firms also exist in many Western countries. International law firms have generally been very adept at managing these kinds of regulations and there is no reason to believe that they could not achieve the same in Russia. The Russian offices of international law firms are now staffed mostly by Russian lawyers and partners; these firms will have the internal skills and resources to adapt (including through various forms of contractual arrangements in the event foreign shareholding is restricted). The foreign or international firms should not be the concern here, as it is unlikely that they will be helpless or most adversely affected by the reform. The priority should be to achieve consensus with the large number of Russian-originated domestic firms that currently practice in the unregulated sector, including in regions other than Moscow and Saint Petersburg where the international firms have never been present.

In conclusion, this is a highly ambitious reform, which aims to transform existing forms of private practice in the country, not only for the unregulated practitioners but also for the existing *advokatura*. Perhaps it is too ambitious. For it to succeed, the government should take care to ensure sufficient stakeholder consensus, and for this it may be necessary to water down some of the reform's exclusionary aspects (in particular the imposition of an exam on all existing unregulated practitioners including the most experienced). The need for stakeholder buy-in should be viewed not as a concession to vested interests or change-resistant groups, but because an independent and self-regulated legal profession is a core element not only of the legal system but of democratic society. The current unregulated sector of private practitioners grew organically over twenty-five years to become an integral part of the existing system. This may be unusual, but it is explained by Russia's specific circumstances. Throughout this period the Russian judiciary and law enforcement continued to manifest significant weaknesses, which arguably represent the greatest order of priority if the system is to improve. The Russian *advokatura*, for its part, has historically focused on rights-defense of citizens against the state and has organized itself in light of that mission. It continues to

face serious challenges when performing its core function; these challenges are a key area of professional concern for it and explain why many advocates value their traditional mode of organization. These same challenges explain why the unregulated law profession never sought to obtain any of the formal privileges theoretically afforded to advocates. None of this is likely to change if there is no improvement in the functioning of the state apparatus.

*B. Pursue the Proposals of the Ministry of Justice for a Unified Profession (Presented by Gayane Davidyan and Thomas McDonald)*

1. The 2017 Concept Paper is a Realistic First Step

We start from the proposition that the current situation of a fragmented and largely unregulated legal profession is untenable. Russia is currently in an unenviable, unique and retrograde position of having the majority of its lawyers unregulated, subject to no admission or continuing education requirements, no ethical rules, no discipline for misconduct, and not benefiting from legal (attorney-client) privilege. The 2017 Concept Paper outlines a proposal for a unified, reformed profession with an expanded monopoly on the provision of qualified legal services. It is a well argued, coherent and persuasive blueprint for the reform of the Russian legal profession which clearly identifies the abuses and dangers of the current system. Significant problems will need to be overcome before any reform based on the Concept is realized. As discussed below, we believe that some of these problems are resolvable but some are more difficult. And we have two overriding concerns about any proposal to reform the legal profession in Russia:

First, any proposal to regulate the legal profession should not unduly diminish access to justice by those least able to afford the services of a regulated profession where the monopoly effect will decrease numbers and increase costs. In this respect we are encouraged by the recognition in the 2017 Concept Paper of the right of human rights NGOs to continue to provide legal services (including court representation) without being part of the new profession. Moreover, there is special emphasis placed in the 2017 Concept Paper to the importance of improving the law on free legal aid and encouraging pro bono practice.<sup>155</sup>

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155. 2017 CONCEPT PAPER, *supra* note 81, art. IV, §§ 6.1–6.2.



Secondly, the importance of self-regulation of the new profession, particularly with respect to admission requirements, formulation of ethical rules and disciplinary sanctions cannot be too highly stressed. There is certainly language in the 2017 Concept Paper that indicates that the Ministry recognizes this concern.

It is however necessary to recognize what the reform proposed by the 2017 Concept Paper will not do. There are very real concerns, expressed by Delphine, with respect to challenges to the rule of law posed by the inadequacies of the law enforcement agencies and the court system in Russia today.<sup>156</sup> The systemic deficiencies of the state apparatus which she identifies are real, and the current proposals contained in the Concept paper indeed do not address those issues.

But shall we do nothing and expectantly hope for a better day when there is a genuine transformation of the law enforcement agencies and the courts, and in the meantime to allow the non-regulated legal services providers to find a way on their own to correct the serious problems of unqualified practitioners, unethical conduct and lack of legal privilege? It is illusory to think that this can be done without the direct involvement of the State, and unrealistic to put off the chance of a reform (however incremental) in the hope that one day there will be a more fundamental change to the state apparatus.

The legal system in Russia today is built on the ruins of the Soviet system and the chaos that followed its collapse. The total reformation of the normative legal rules that followed has resulted in modern and sophisticated legal codes covering all aspects of a new and coherent legal system. But these normative rules do not exist in a vacuum: the well-crafted rules are applied in the context of systematic state interference by and with the law enforcement agencies and the courts, compounded by corruption at all levels. This is a legacy not only of the Soviet system but a consistent problem throughout Russian history.

The first step to the rule of law is to have written rules that clearly state equitable principles. We should grasp the opportunity to establish the framework for an independent, self-regulating and inclusive legal profession as an incremental step, recognizing that the overall goal of the rule of law and access to justice will not itself be achieved by the adoption of this reform. But it is a first step.

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156. *See supra*, Part III.A; ICJ REPORT, *supra* note 2, at 5.

## 2. The Role of the Ministry of Justice and Opposition to the Reform

The 2017 Concept Paper is (as already noted) the latest in a series of efforts of the government to address the need for reform. It is nonetheless important to emphasize that the current efforts are based on the government Justice decree of 2014, which mandates the Ministry to propose legislation to reform the legal profession. While the Ministry established a working group composed of representatives of various sectors of the profession to comment and advise on the reform, it is clear that the primary impetus for the reform is at the ministerial level.

Moreover, there has been opposition to the reform from some members of the *advokatura*, the unregulated sector and the NGO/rights defenders. It is highly relevant to note that the basis for some of this opposition is self-interest. Some advocates seek to defend their own concepts of legal practice and traditions. The unregulated jurists have been conspicuous by their indifference (particularly notable among the international firms with offices in Russia) and occasional uncoordinated complaints. But the 2017 Concept Paper clearly excludes the in-house lawyers and the NGO/rights defenders from a reformed profession, permitting them to continue to provide legal services outside of the profession, so the in-house lawyers and the NGOs should no longer object to the reform.

It is in fact highly appropriate that the reform of the profession should be initiated by the Ministry of Justice, not only in light of the governmental decree requiring it to do so, but because any consensual reform in the context of the self-interest and indifference of some of the parties concerned is unlikely. Moreover, it is important to recognize that Russia, as a civil law jurisdiction, has much more in common with the European approach to the regulation of the profession than the United States or England. In civil law jurisdictions, the creation and regulation of the legal profession is primarily based on legislative acts and government decrees, and then by delegation to bar councils who have normative authority over membership of the profession, elaboration of ethical codes and discipline. One of the critical rights of a regulated profession is legal (attorney-client) privilege, and, unlike in the United States where the attorney-client privilege is a part of the law of evidence and has evolved out of the requirements of the adversarial system, such a right can only be established by legislative act in civil law jurisdictions. Accordingly, any voluntary bar association of elite

jurists in Russia (as suggested by Susan)<sup>157</sup> would necessarily lack one of the most important characteristics of a regulated profession.

### 3. The Importance of Self-Regulation and the Relevance of the Advokatura as the Basis for the Reform

As noted above one of the essential characteristics of a unified regulated profession is self-regulation. The United States has a long tradition of self-regulation, developed through state bar associations over several hundred years. In civil law jurisdictions, the regulation of the legal professions is generally the domain of the legislature and governmental decrees, but nonetheless the principle of self-regulation over admission, ethical codes and discipline is typically delegated to the bar itself. Indeed, one of the core principles of the European legal profession, elaborated by the Councils of Bars and Law Societies of Europe, is self-regulation.<sup>158</sup>

The advokatura is a well-established institution with clear legislative support for its independence and self-governance.<sup>159</sup> In particular, the 2003 Code of Ethics of Russian Advocates was formulated and is periodically modified by the National Congress of Russian Advocates. The regulation of admission qualifications and discipline for violation of the Code of Ethics is in the domain of the Federal and/or regional chambers of Advocates. As noted by the ICJ Mission Report, “Under the law, the powers of both the federal and regional chambers are comprehensive and in line with international standards of the independence of the legal profession.”<sup>160</sup>

There are of course serious concerns about how this self-regulation and independence work in practice, either due to violations of the rights of advocates by the state, or by the advokatura’s own laxity in enforcing its ethical rules. Without diminishing the importance of these concerns, it is nonetheless important to note that the principle of independence and self-governance of the advokatura is incorporated

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157. *See infra*, Part III.C.

158. *See* COUNCIL OF BARS & LAW SOC’YS OF EUR., CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION, COUNCIL OF BARS AND L. SOCIETIES OF EUR. & CODE OF CONDUCT FOR EUROPEAN LAWYERS (2018), available at [https://www.ccbe.eu/fileadmin/speciality\\_distributiondistribution/public/documents/DEONTOLOGY/DEONTOLOGY/DEON\\_CoC/EN\\_DEON\\_CoC.pdf](https://www.ccbe.eu/fileadmin/speciality_distributiondistribution/public/documents/DEONTOLOGY/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf) [<https://perma.cc/ZKE7-KXU3>] (listing one of the principles as “the self-regulation of the legal profession”).

159. *See* ICJ REPORT, *supra* note 2, at 24.

160. *See* ICJ REPORT, *supra* note 2, at 24.

into the 2017 Concept Paper as an essential base for the reformed profession. The 2017 Concept Paper considers the possibility of establishing a parallel self-regulating institution for the currently unregulated part of the profession, but instead opts for a single institution based on the *advokatura*, due to its established traditions of self-governance. Delphine expresses the concern that the Ministry's choice is based on a "*preference for an institution with which it is already familiar and in which the state apparatus is embedded*".<sup>161</sup> It is nonetheless relevant to note that any new self-regulating institution in Russia would be established under the Federal Law on Self-Regulating Organizations<sup>162</sup> pursuant to which the activities of any self-regulating organization is subject to state control through the relevant ministry. The establishment of a new self-regulating institution for the currently unregulated part of the profession would accordingly not diminish her concerns about state interference.

Regardless of whether there is a unitary profession based on the *advokatura* or a new parallel profession of jurists, the extension of the principle of self-governance to the entire profession is an essential goal. As noted by the ICJ Report, it is important to ensure that the reform process does not lead to a dilution of the independence of its institutions of governance. Although the ICJ's meetings with the Ministry of Justice and the Federal Chamber of Lawyers did not suggest any measures to erode the principle of self-governance were under consideration, it will be crucial that the reform measures are carefully scrutinized to ensure that they do not, whether by accident or design, restrict the independence of the profession.<sup>163</sup>

#### 4. The "Non-Entrepreneurial"/ "Commercial" Divide

Some critics of the Concept from the *advokatura* have expressed concern that the "non-entrepreneurial" nature of an advocate's activity<sup>164</sup> is incompatible with the perceived commercial nature of the

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161. See *supra* Part III.A.2 at note 129.

162. See Federal Law on Self-Regulatory Organizations, *supra* note 93, No. 315-F; see also *Rasporiazheniia Pravitel'stva Rossiiskoi Federatsii* [Decree of the Russian Federation on Improving Self-Regulatory Mechanisms], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation,] 2015, No. 2276-r (2015) (Russ.).

163. ICJ REPORT, *supra* note 2, at 65.

164. See Law on *Advokatura*, *supra* 19, art. 1, ¶ 2.

practice of jurists. The ICJ Report notes that this principle is “seen as a fundamental ethical principle which enables members of *advokatura* to serve the interests of justice and defines the collegial spirit and ideals of advocates,” while expressing difficulty in understanding how this principle is compatible with the fact that advocates, like non-regulated jurists, expect to make a profit from their activities.<sup>165</sup> This may be more a question of semantics than substance, as recognized by the 2017 Concept paper,<sup>166</sup> and the paper suggests that it can be solved by adapting existing commercial forms to “lawyer formations” specifically adapted to legal activity, to be elaborated when the relevant legislation is drafted.

In our view, a reformed and unified legal profession should clearly preserve the real value of the principle that its activities (whether in the criminal defense of individuals or in providing advice to commercial clients) are essentially non-entrepreneurial. In this respect an analogy with France may be helpful: in common with many European legal systems the legal profession in France is defined by law as “liberal and independent,”<sup>167</sup> specifically stating that the legal profession is incompatible with all activities of a commercial nature.<sup>168</sup> Although a French lawyer may practice law through various types of entities, including commercial corporations,<sup>169</sup> the practice of law is

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165. ICJ REPORT, *supra* note 2, at 11.

166. 2017 CONCEPT PAPER, *supra* note 81, at § 5.3.

167. Loi 71-1130, *supra* note 140, at art. 1. Loi 71-1130 du 31 décembre portant réforme de certaines professions judiciaires et juridiques [Law 71-1130 of December 31, 1971 reforming certain judicial and legal professions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 5, 1972, p. 131, art. 1 (Fr.).

168. Décret 91-1197 du 27 novembre 1991 organisant la profession d’avocat [Decree 91-1197 of Nov. 27, 1991 Organizing the Profession of Law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Nov. 28, 1991), art. 111 (Fr.).

169. Various professional corporations and associations are permitted by Loi 66-879 du 29 novembre 1966 relative aux sociétés civiles professionnelles [Law 66-879 of Nov. 29, 1966 on Professional Civil Societies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 30, 1966, art. 124; (Fr.); Loi 90-1258 du 31 décembre 1990 relative à l’exercice sous forme de sociétés des professions libérales soumises à un statut législatif ou réglementaire ou dont le titre est protégé et aux sociétés de participations financières de professions libérales [Law 90-1258 of Dec. 31, 1990 on the Exercise in the Form of Companies of Liberal Professions Subject to a Statutory or Regulatory Status or Whose Title is Protected and to Companies of Financial Participation of Liberal Professions], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE]; and, Jan. 5, 1991 (Fr.); Décret 91-1197, at du 27 novembre 1991 organisant la profession d’avocat [Decree 91-1197 of Nov. 27, 1991 organizing the Profession of Law], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 28, 1991, art. 124. (Fr.).

nonetheless considered to be “liberal” (i.e. professional) and non-commercial, notwithstanding the legal form chosen. This means that the lawyer, regardless of the structure of exercise, remains bound by the rules of ethics of the legal profession and remains personally liable for his own acts.

In the context of the proposal to reform the Russian profession, we believe that the non-entrepreneurial nature of the profession should be preserved and extended, understood to mean that all members of the profession will be bound by rules of ethics and that each individual lawyer remains liable for his own acts, regardless of the structure chosen for the collective exercise of the profession. In a unified profession, bound by rules of ethics and where personal liability for individual action is maintained, all professionals would be deemed to be providing qualified legal assistance (“*pomosh*”) rather than some commercial service (“*uslugi*”) devoid of ethical constraints. To achieve this, we believe that the reformed profession can permit lawyers to use commercial entities for the practice of law, but such entities must be adapted to provide for the liability of the lawyer for his own acts. Such structures would accordingly preserve the essential “non-entrepreneurial” aspect of the profession and respond clearly to the concern expressed by Genry Reznik referred to by Delphine that “concrete individuals are those who must bear individual responsibility vis a vis the clients.”<sup>170</sup> The cultural divide identified by Delphine based on the traditions of the *advokatura* and the current so called commercial profession is not as deep as all that. It simply requires that any structure approved for the practice of law conforms to the essential principle of the liability of a lawyer for his own acts, including ethical obligations. This should not be a particular difficulty for the large firms of jurists familiar with the widespread use of professional corporations and limited liability partnerships in other jurisdictions. In our view it is essential to preserve the essential wisdom of the incompatibility of the profession with commercial activity.

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Some commercial entities are permitted by Loi 2015-990 du 6 août 2015 pour la croissance, l’activité et l’égalité des chances économiques [Law 2015-990 of Aug. 6, 2015 for Growth, Activity and Equal Economic Opportunities, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], (Aug. 7, 2015), art. 63. (Fr.).

170. *Supra* Part III.A.1 at note 146.

## 5. Should “in House Lawyers” Be Excluded from the Reformed Profession?

The inclusion of “in-house” lawyers in a reformed profession raises difficulties that are not unique to Russia. As noted above, many European jurisdictions do not permit in house lawyers to be members of the regulated profession due to concerns about their lack of independence and the particular difficulties of extending to them the same legal professional privilege enjoyed by lawyers in private practice<sup>171</sup>. It is important to underscore that legal privilege, as understood in Europe, is significantly broader than the concepts of attorney-client privilege and the related protection of attorney work product in the United States. In the United States these rights are limited to specific documents or advice, objectively defined in the law of evidence and procedure as determined by the courts, and their application to in-house lawyers (who are members of the bar) is well defined and understood. In contrast, in Europe, legal privilege is generally defined as an all-encompassing right, co-extensive with the lawyer’s unlimited duty of confidentiality and accordingly significantly greater than the attorney-client privilege/work-product doctrine in the United States. It is a consequence of the emphasis placed on the independence of the European lawyer, in contrast to the role of the lawyer in a common law system.<sup>172</sup> Accordingly, many European jurisdictions struggle with the idea that such a broad definition of legal privilege should be extended to an in-house lawyer who is an employee and subordinate – by definition not independent. The existing profession of advocate in Russia has, like most European jurisdictions; a broadly defined concept of professional privilege, co-extensive with the duty of confidentiality, and it similarly places great emphasis on the independence of the advocate.<sup>173</sup>

The resolution of this issue (in Russia as elsewhere) could require a special and less-extensive definition of legal privilege to be created for in-house lawyers, as well as other significant adjustments to the ethical rules which are based on the principle of independence. These issues are difficult, and their resolution complicates any chances of reforming and unifying the external practitioners. For this reason, we

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171. 2017 CONCEPT PAPER, *supra* note 81.

172. See *Professional Legal Ethics: A Comparative Perspective*, in AM. BAR ASS’N: CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE 4–5, 10–11 (Maya Goldstein Bolocan ed. 2002).

173. See ETHICS CODE, *supra* note 23, at art. 5–6.

believe that the exclusion of in-house lawyers from the reform at this stage is a sensible and practical position.

## 6. The Relevance of Foreign Models

The 2017 Concept Paper gives an overview of the regulation of the legal systems in a few selected countries.<sup>174</sup> Rather than question the relevance of these comparisons due to the specificity of the Russian system, we take the view that it is entirely appropriate to seek inspiration from the regulation of the profession elsewhere, particularly in civil law jurisdictions. Russia has a legal system that is part of the civilian tradition, and the models for the excellent civil and commercial codes of Russia (among other normative acts) enacted since the collapse of the Soviet Union are essentially inspired adaptations of foreign law. Similarly, the 2002 Law on Advokatura and the 2003 Code of Ethics show clear inspiration from European models. In our view it makes great sense to see how other jurisdictions have addressed the problem of regulation of the profession, and to adapt the solutions reached to the particularities of Russia.<sup>175</sup>

### *C. Organize an Elite Voluntary Bar Association to Develop a Voluntary Ethics Code (Presented by Susan Carle)*

In debating the future of legal profession reform in Russia, some comparative historical perspective may be helpful. I thus offer some brief observations based on the history of the United States legal profession. Of course the situation in the Russian Federation is very different, and I certainly do not mean to suggest that Russia should follow in the footsteps of the United States. As Russian lawyers ponder where to go next, however, some comparative perspective may be relevant.

If the Concept proposals do not succeed in becoming law, or even if they are adopted, further steps toward deeper reform clearly will also be necessary, as Delphine points out above. I propose below that forming a voluntary association of elite jurists who wish to develop and

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174. See *supra* Part II.A.4.

175. We have written elsewhere about the relevance to the reform of the Russian legal profession of the French experience in the creation of a unified profession with an extensive monopoly for the provision of legal services. See generally Gayane Davidyan & Thomas McDonald, *Legal Consulting in Russia: On the Threshold of Reform*, ZAKON 82 (2017); Thomas McDonald, *La Réforme des Professions Judiciaires et Juridiques en Russie*, 135 GAZETTE DU PALAIS 2908, 2908–10 (2015).



agree to abide by a code of highest ethical practices, and also to advocate for and defend strong rule of law, could be a fruitful development that could contribute to promoting a strong and independent legal profession.

It is easy to forget today that, in the early stages of nation building in the United States, the legal profession was almost completely unregulated. The process of developing regulation happened gradually. At the early stages, developing ethical standards occurred largely outside the realm of government supervision. The first national bar association, the American Bar Association (ABA), was voluntary in nature. The ABA was founded in 1878, in a period of great flourishing of civil society.<sup>176</sup> This last quarter of the nineteenth century especially saw the formation of new voluntary national associations addressing a wide variety of concerns and interests.<sup>177</sup> The ABA was one of many such new organizations. In its first decades, the ABA sought to attract only the elite members of the bar. It sought to distinguish these “best” members of the bar from the “riff raff,” as its members saw them. Those it regarded as among this riff raff included lawyers of color, women, and recent immigrants, a shameful aspect of the ABA’s early history that should not be overlooked.<sup>178</sup> But some aspects of this history might bear on Russia’s situation in more helpful ways.

Like all voluntary associations, the ABA devoted itself to promoting the interests of its members. Chief among the interests it defined as priorities were such matters as raising the standards for bar admissions and legal education.<sup>179</sup> The ABA’s motives in taking on these issues were two-fold. On one level, as the ABA repeatedly expressed, it sought to protect clients from bad actors and thus to ensure the integrity of the legal profession. On another level, the ABA’s motives were less altruistic. Raising the standards for bar admission and legal education had the effect of raising what economists call “barriers to entry”—*i.e.*, “higher” standards meant fewer people could

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176. John A. Matzko, *The Early Years of the American Bar Association, 1878-1928*, at 1 (Aug. 1984) (unpublished Ph.D. dissertation, University of Virginia), *available at* [https://libraetd.lib.virginia.edu/public\\_view/rf55z782m](https://libraetd.lib.virginia.edu/public_view/rf55z782m) [<https://perma.cc/NJF7-337A>].

177. See CHRISTOPHER L. TOMLINS, *THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA* (Louis Galambos & Robert E. Gallman, eds. 1985).

178. See ABEL, *supra* note 59, at 100.

179. See MATZKO, *supra* note 176, at 297-98.

enter the profession.<sup>180</sup> Thus calling for higher standards amounted to a type of monopoly protecting activity.<sup>181</sup> As Rick Abel has emphasized in his important work on the legal profession, raising barriers to entry into the profession helped ensure that the elite bar did not face competition for business from less elite bar members. By keeping the numbers of lawyers small, the elite bar ensured their ability to charge high prices for legal services, thus preserving their privileged, protected status as a professional elite.<sup>182</sup>

The ABA sought to develop legal ethics standards for the practice of law as well.<sup>183</sup> Again, dual motives drove its energies in promulgating a first national legal ethics code in 1908, which it called the Canons of Professional Ethics. On the one hand, unethical charlatans most certainly did damage both the interests of clients and the integrity of the legal system. On the other hand, the matters focused on in the ABA's first ethics code tended to single out for condemnation such matters as the client-gathering practices of less elite lawyers. The bar committees that later applied these rules then tended to do so primarily against "lower-class" members of the bar, as others and I have written about elsewhere.<sup>184</sup>

The ABA's 1908 Canons were precatory; in other words, they admonished practitioners about what they "should" do.<sup>185</sup> There was nothing about a voluntary organization's drafting of an ethics code for its members that gave the Canons force of law. Courts looked to the ABA Canons as an authoritative expression of ethically sound practices. State bar associations began to adopt the ABA's rules, with some modifications (and, indeed, the ABA Canons had been based on

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180. See ABEL, *supra* note 59, at 40-73 (discussing regulation as a way of controlling the production of lawyers).

181. See *id.*

182. See *id.*

183. See Susan D. Carle, *Lawyers' Duty to Do Justice: A New Look at the History of the 1908 Canons*, 24 L. & SOC. INQUIRY 1 (1999) (examining the Canons' drafting process).

184. See Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910-1920)*, 20 L. & HIST. REV. 97 (2002); JERALD AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976).

185. See Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 NORTH CAROLINA L. REV. 411, 430 (2005) (noting that the canons were "explicitly horatory in nature").

earlier state rules).<sup>186</sup> These developments came through force of persuasion; the ABA did not have (and still does not have) legal power to force jurisdictions to adopt its rules. Thus, as Terence Halliday has argued, the activities of the ABA, as well as state and local voluntary bar associations, filled a void left by a lack of government regulatory and enforcement capacity in earlier stages of state and nation building.<sup>187</sup>

By the mid-twentieth century, in most states, bar associations had begun to serve as quasi-governmental bodies.<sup>188</sup> Volunteer committees organized through state or local bar associations assumed responsibility screening persons for admission into the bar, and also for recommending discipline for ethics violations in the first instance (with later court review).<sup>189</sup> Looking to the ABA's model rules as a template, state bar associations drafted their own legal ethics codes and then sent them to state legislatures and/or courts with recommendations for adoption as binding law applying to all licensed legal practitioners within their jurisdictions. Halliday's thesis is that voluntary bar associations in this way contributed to state building by performing functions the states could not afford to fund or staff.<sup>190</sup>

The development of *voluntary* ethics codes, which government entities only later adopted as law binding on lawyers practicing within their jurisdictions, had auxiliary benefits as well. First, and most importantly by analogy to the current Russian situation, the formation of a private, elitist professional organization at the national level helped protect the development of the legal profession in a manner that was independent of government control. The United States legal profession, like that in many Western democracies, has historically prided itself on this independence.<sup>191</sup> To a large extent, the legal profession in the United States continues to have considerable independence from the

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186. *See generally id.* at 426-30 (explaining the reciprocal influence of state and national legal ethics rules).

187. TERENCE C. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* 377-79 (1987).

188. Barton, *supra* note 185, at 430-34 (tracing the way in which ethics rules gradually become enforceable through the work of state and local bar associations).

189. *Id.*

190. *Id.* at 13-14.

191. *See generally* Robert W. Gordon, *The Independence of Lawyers*, 68 *BOSTON BOS. U. L. REV.* 1 (1988) (discussing in historical what lawyers in the U.S. have meant by professional independence and how they have pursued this goal).

state (though not so much from the business interests it typically represents). It has developed and exercised considerable political muscle that allows it to fight back, often but not always successfully, against attempts to imposed unwanted “external” (or government-imposed) regulation.<sup>192</sup>

In the Russian context, formation of a voluntary association of elite jurists could have similar benefits. A voluntary association of lawyers wishing to signal their adherence to the highest ethical standards could draft a voluntary code of ethics to which members would agree to adhere. Because complying with this code would be voluntary, such an approach could largely circumvent concerns about undue state domination of the legal profession through government regulation. In Russia, jurists and others have raised such concerns as reasons to oppose the Ministerial Working Group’s proposals, as already discussed,<sup>193</sup> but a voluntary code developed by jurists themselves would not be subject to these critiques.

If elite jurists were to come together in an organization through which they developed their own voluntary code of ethics, they could signal the quality of their work and ethical standards to clients and others. Through a process of deliberation, they could develop rules they found feasible and appropriate to the context in which they work. They could evaluate and then pick and choose from the many ethics codes already existing for legal practitioners around the world, adopting and adapting standards as best fitted to their circumstances and priorities. It is likely that not all jurists would want to subscribe to such rules, but this would serve the signaling function of distinguishing those holding the highest ethics standards from others.

A voluntary bar association could also enforce ethics rules against its members. Publishing complaints and resolutions of them in a public database accessible on the Internet would allow prospective clients to research the track record of jurists, thus providing some additional measure of client protection and quality control. These methods of encouraging high ethical standards might not be the end game for legal

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192. An example of an unsuccessful but very hard-fought fight is enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, which was codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C. the United States Code. It granted the Securities and Exchange Commission the power to regulate the disclosure obligations of lawyers representing publicly traded corporations in the United States. See Lawrence J. Fox, *Dan’s World: A Free Enterprise Dream; An Ethics Nightmare*, 55 BUS. LAW. 1533 (2000) (excoriating Congress for violating the professional independence and self-regulation of the U.S. legal profession).

193. See *supra* Part III.A.

profession reform but could provide an interim step that would move the reform project forward.

As another benefit, the coming together of elite jurists into a national organization might create the basis for unified, politically effective influence. Advokatura already have an organization that plays this role; if jurists created their own organization, they too could amplify their voice on matters involving protecting rule of law, recognizing and guarding legal privilege and client confidentiality, and speaking out in support of other fundamental principles that characterize independent and fair judicial systems and legal professions in other parts of the world. Of course, in the Russian context government entities are unlikely to grant civil society organizations the same latitude and freedom from government interference that the ABA enjoyed in its early, formative years. Admittedly, this is a crucial difference. The political conditions for the development of a powerful, unified legal profession with strong independence from the state do not appear to exist in Russia today. Nevertheless, the example of the Advokatura's Federal Bar Chambers shows that lawyers' associations can have a strong voice in Russian policy. The longer, pre-Soviet history of the Russian legal profession also reveals historical antecedents that provide models for a strong, self-regulating, and independent legal profession. Thus, regardless of what happens with other reform initiatives, collective voluntary action by Russia's elite jurists could present a lever for successful legal profession and legal system reform.

#### *IV. CONCLUSION*

At the date of writing, it is still too early to form a view on the fate of the on-going Russian reform of its legal profession. It does seem possible, however, to offer a few general remarks.

First, the Russian reform is an interesting example of the tension between international "best standards" in profession regulation, and the specific constraints that arise from discrete historical circumstances. Russia now finds itself in the unusual position of having a large majority of unregulated practitioners, which would seem to militate for a speedy introduction of norms. Yet Russia has also been undergoing an unprecedented transformation away from communism which has, at least in theory, sought to place itself under democratic auspices (unlike other transitional countries). Furthermore, when introduced by Russian governments in the past, international models and "best standards" did

not always contribute to healthy outcomes (for example, the widespread privatizations of the nineties). And yet, in the area of the drafting of normative legal acts such as the civil and commercial codes, the result has been more positive. Should international standards for the regulation of the legal profession be the inspiration? Or would the specific Russian circumstances justify a more idiosyncratic approach? The varying perspectives of our authors seem to be underpinned by different intuitive answers to this question.

Second, the Russian reform raises the question of the place of the legal profession in the wider development of the rule of law. The absence of regulation of the legal profession coexists with a wider legal system that suffers from a number of systemic weaknesses, connected to the functioning of the state itself. In such situations, what is the singular place or priority of professional regulation of the private profession? Some of us consider that it is necessary to press forward regardless of the wider systemic difficulties, while others question whether the private profession is really the priority.

Third, the Russian situation raises the question of the tension between government driven regulation of the profession and contribution of the legal profession itself to this process. A large segment of the Russian legal profession has developed free of state intervention, and now represents an integral segment of the system. This is a country where state intervention has not always historically been known to promote the general interest: should the current situation justify government regulation nevertheless, or is voluntary participation of the profession all the more necessary in such circumstances? Some of us draw on historical examples in the early days of nation-building, in the United States, to show how voluntary development of professional rules filled the void, in conjunction with other non-state actors such as universities, while others consider that in Russia, as in other civil law countries, state leadership is both beneficial and an unavoidable necessity.

Many questions remain to be answered. At this point, however, it seems possible for us to all agree that the current reform effort is being conducted with commendable levels of consultation, and that there is proper awareness of the complexity and diversity of interests at play.

